

Andhra High Court

Nav Bharat Corporation vs Nagarjuna Fertilizers And ... on 16 July, 1990

Equivalent citations: 1991 72 CompCas 518 AP

Bench: S Shah

JUDGMENT

1. In this case, the court is called upon to examine the question of availability of judicial review of the administrative action of a public company, limited by shares and registered under the Companies Act, in awarding a contract.

2. At the commencement of hearing of this case, Dr. Singhvi, learned counsel for the first respondent, raised a preliminary objection as to the maintainability of the writ petition. It would be appropriate to state briefly the factual context in which this question has arisen.

3. The first respondent, a company registered under the Companies Act, issued a tender notice inviting tenders for freight, forwarding, port clearance, over dimensional consignments (for short, "ODC") transportation and site handling. The petitioner, a partnership concern, and the second respondent, a private company registered under the Companies Act, are among the tenderers. The first respondent accepted the tender of the second respondent and awarded the contract to it. Complaining that the petitioner, in spite of being the lowest tenderer, was unjustly and arbitrarily excluded from consideration and discriminated against for awarding the contract in question, and the second respondent was favourably considered and awarded the contract, the petitioner sought a writ of mandamus declaring that the award of the contract by the first respondent in respect of the tender notice No. MPUR/WO/040 for freight forwarding the port clearance, ODC transportation and site handling to the second respondent as arbitrary, discriminatory and violative of article 14 of the Constitution, and for a further direction to award the said contract to the petitioner.

4. Dr. Singhvi contends that the first respondent-company is a public limited company registered under the Companies Act and so it is not amenable to the writ jurisdiction of the High Court under article 226 of the Constitution. Sri. P. Ramachandra Reddy, learned counsel for the petitioner, on the other hand, contends that having regard to the observation of the Supreme Court in *M.C. Mehta v. Union of India*, (hereinafter referred to as "Shriram's case"), the writ is maintainable against the first respondent.

5. As the question relates to exercise of jurisdiction by the High Court for issuance of prerogative writs under article 226(1) of the Constitution, it would be apposite to read it here :

" 226.(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

6. A plain reading of the article extracted above shows that it is couched in very wide language and empowers the High Court to issue directions, orders or writs including any of the prerogative writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, throughout the territories in relation to which it exercises jurisdiction, for enforcement of any of the rights conferred by Part III and for any other purposes to any authority including in appropriate cases any Government.

7. In *S.K.C.C. Bank Limited v. N. Seetharama Raju*, AIR 1990 AP 171 ; [1990] II ALT 1, a Full Bench of our High Court of which I am a member, observed in para 37 (at p. 189) :

"Similarly, it was pointed out in *Dwarka v. ITO*, that article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. A wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be used, was designedly used by the Constitution. But this does not mean that the High Court can function arbitrarily under this article. There are some limitations implicit in the articles, and the others may be evolved to direct the article through defined channels...' The object behind article 226 was to strengthen the then existing judicial system, to make it more effective and not to dispense with, duplicate, or replicate the existing system. It was not to supplant the existing judicial system, but to confer an additional power in the service of people and Constitution that this extraordinary power was created. It is for this reason that notwithstanding the wide language of article 226, courts have been observing certain self-imposed restrictions upon this power. One of the wellaccepted limitations upon the exercise of this power is that it is not available to enforce the terms of a contract, i.e., a contract which is not statutory in nature."

8. Here we are concerned with issuance of a writ of mandamus not for enforcement of terms of contract, but for declaring that not awarding of the contract in question is arbitrary and violative of article 14 of the Constitution and to award the contract in question.

9. In *Ramana Dayaram Shetty v. International Airport Authority of India*, , Bhagwati J. (as he then was) speaking for the Supreme Court, observed (at p. 1637) :

" It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with a standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences, etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

10. In *Kasturi Lal Lakshmi Reddy v. State of J & K*, the same principle is reiterated and it is laid down as follows (at p. 1999) :-

"The discretion of the Government has been held to be not unlimited in that the Government cannot give largess in its arbitrary discretion or at its sweet will or on such terms as it chooses in its absolute discretion. There are two limitations imposed by law which structure and control the discretion of the Government in this behalf. The first is in regard to the terms on which largess may be granted and the other, in regard to the persons who may be recipients of such largess."

11. We are concerned here with the second limitation-the recipient of largess. On this aspect, the Supreme Court held (at p. 2001) :

"The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well-settled as a result of the decision of this court in *Ramana Dayaram Shetty v. International Airport Authority of India*, (supra) that the Government is not free, like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The Governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the court as a rule of administrative law and it was also validated by the court as an emanation flowing directly from the doctrine of equality embodied in article 14. The court referred to the activist magnitude of article 14 as evolved in *E.P. Royappa v. State of Tamil Nadu*, (supra) and *Meneka Gandhi v. Union of India*, (supra) and observed that it must follow as a necessary corollary from the principle of equality enshrined in article 14 that though the State is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.' This decision has reaffirmed the principle of reasonableness and non-arbitrariness in Governmental action which lies at the core of our entire constitutional scheme and structure."

12. Thus it is clear that in awarding contracts the Government or other authority is not free like a private person to choose the recipient of a contract arbitrarily at its sweet will and pleasure, but has to conform to the principle of reasonableness and non-discrimination. Therefore, it became necessary to determine whether the first respondent is "other authority" within the meaning of "State" as defined in article 12 ; if it is, it is subjected to the aforesaid constitutional limitations and its action is open to judicial review. But if it is not, it has unfettered discretion to select the recipient of a contract without being answerable to the court in the matter of such selection.

13. Here, it will be appropriate to notice the definition of "State" contained in article 12 of the Constitution.

"12. In this part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

14. This is an inclusive definition, (i) the Government and Parliament of India ; (ii) the Government and Legislature of each of the States ; (iii) all local authorities ; (iv) or other authorities within the territory of India or under the control of the Government of India, are included in the definition of "State". The expression "or other authorities" has come up for interpretation by the courts on numerous occasions. With the development in modern times of the role of the welfare State, the activities of the State are not confined to the traditional functions. The State has to expand its activity in various fields. The executive of the State acts through the human agency normally, but at times having regard to the exigencies of the situation, the executive acts also through the corporate agency as well, either in the form of corporations (statutory corporations), or in the form of societies registered under the Societies Registration Act or sometimes even in the form of societies registered under the Co-op Societies Act. What is material is not whether the agency in action is a statutory corporation, or statutory board, but who is working behind the corporate veil. If the State action through the agency of the human beings can be subjected to the limitations imposed by the Constitution the same limitations should equally apply when the action is taken through corporate agencies, because in each case it is the State action that is called in question. The court would, therefore, in appropriate cases, pierce the veil of incorporation to find out whether the action complained of is a State action or a private action. If on lifting the veil of incorporation, the court finds that the Corporation is nothing but an "alter ego" of the State, it would subject the said action to the same constitutional limitation, as the State action is subjected to. For determining whether the Corporation is an agency or instrumentality of the State, the Supreme Court has laid down certain tests in *Ramana Dayaram Shetty v. International Airport Authority of India*, (supra) which were later affirmed in *Ajay Hasia v. Khalid Mujib*, . After considering these authorities, the Full Bench in *S.K.C.C. bank's case*, AIR 1990 AP 171 :[1990] II ALT 1 (supra), enumerated those tests as follows (at p. 184) :-

"1. One thing is clear that if the entire share capital of the Corporation is held by the Government it would go a long way towards indicating that the Corporation is an instrumentality or agency of the Government.

2. Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with the Governmental character.

3. It may also be a relevant factor to see whether the Corporation enjoys monopoly status which is State conferred or State protected.

4. Existence of 'deep and pervasive State control' may afford an indication that the Corporation is a State agency or instrumentality.

5. If the functions of the Corporation are of public importance and closely related to the Governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of the Government.

6. Specifically, if a Department of Government is transferred to a Corporation, it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of the Government...."

15. Before proceeding to examine whether the first respondent-company fulfils those tests, it would be appropriate to notice whether Shriram's case, (supra) on which great reliance is placed by Sri. Ramachandra Reddy had made a departure from the law laid down in the abovementioned cases. In Shriram's case, (supra) the Supreme Court noted the contentions of the parties and considered the question whether a private corporation such as Shriram comes within the ambit of article 12 so as to be amenable to the discipline of article 21. The Supreme Court examined the industrial policy of the Government contained in Appendix I to the Industrial Policy Resolution, 1948. In doing so, the Supreme Court also considered the policy resolutions and the Industries (Development and Regulation) Act, 1951, and observed that the activity of producing chemicals and fertilisers is deemed by the State to be an industry of vital public interest whose public import necessitates that the activity should be ultimately carried on by the State itself, though in the interim period with State support and under State control, private corporations may also be permitted to supplement the State effort. It also referred to the argument that in view of the declared industrial policy of the State, even private corporations manufacturing chemicals and fertilisers can be said to be engaged in activities which are so fundamental to the society as to be necessarily considered the Government functions. The observation of the Supreme Court that "this court has throughout the last few years expanded the horizons of article 12 primarily to inject respect for human rights and social conscience in our corporate structure" is also pressed into service in support of the contention that public companies such as the first respondent have been brought within the definition of "State" under article 12 of the Constitution. Inasmuch as their Lordships of the Supreme Court unequivocally observed therein at three places that they do not propose to decide finally at that stage whether a private corporation like Shriram would fall within the scope and ambit of article 12, it cannot be said that Shriram's case departs from the earlier decisions and expanded the scope of "other authority" in article 12 to include a public company limited by shares and registered under the Companies Act.

16. Dr. Singhvi relied upon P.S. Naidu v. Chittoor District Co-operative Bank Ltd.[1977] 2 APLJ 282 and V. Narasing Rao v. Prudential Co-operative Urban Bank [1989] 1 ALT 300 and S.K.C.C. Bank's case in support of his contention that the writ petition is not maintainable against the first respondent. As the Full Bench in S.K.C.C. Bank's case [1990] II ALT 1 considered the abovementioned two cases exhaustively and also the relevant judgments of the Supreme Court and reiterated the six tests laid by the Supreme Court, I do not propose to discuss all the cases here.

17. I shall now revert to the tests enumerated above.

18. The first test relates to share of the Corporation held by the Government. There is no dispute between the parties that the entire share capital of the first respondent is not held by the Government. Indeed the Government holds equity shares worth only Rs. 8.32 crores out of total paidup share capital of Rs. 46.79 crores which come to 17.78%. Equally the second test is not fulfilled. There is no financial assistance by the Government as such. The assistance is by financial corporations. Any assistance by financial corporation or other financial agency cannot come within the meaning of financial assistance by the Government. It is nobody's case that the third test is applicable. In so far as "deep and pervasive control" which is the fourth of the abovementioned tests, is concerned, nothing is placed on record to show that the Government has deep and pervasive control. The only control Government has is under relevant statutes and the provisions of the Companies Act. In S.K.C.C. Bank's case (supra), the Full Bench has observed that it is not possible to say that the control vested by the Act in the Government/Company Law Board and the Registrar is deep and pervasive control, within the meaning of the fourth test. In the board of 15 directors, only three directors are nominated by the Government. In so far as the fifth test is concerned, it must be observed that the industrial policy contained fertilisers as one of the industries which the Government should entertain. That by itself, in my view, does not make the functions of the company carrying out the business of manufacturing of fertilisers Governmental functions, and the company carrying on the said business an instrumentality or agency of the State.

19. Regarding the sixth test, there is some controversy. Whereas Sri. Ramachandra Reddy contends that the company was initially started by the Government but was later converted into a private company, Dr. Singhvi disputes the same. From a perusal of the record, it is clear that the company was promoted by Shaw Wallace and Co., another public company. The industrial licence dated June 3, 1978, was first issued to Nagarjuna Fertilisers Ltd., which was later amalgamated with the first respondent and not to the Government as contended as contended by the petitioner. It is only in 1978, that the Government of Andhra Pradesh came into the picture and held majority shares, but later from 1985, it ceased to be a Government company. The Government became only a minority shareholder and continues to be so at present. Now, as stated above, there are only three nominee directors on the board of directors of the company having 15 directors. Be that as it may, it is certainly not a case where a Government Department is transferred to the first respondent. Therefore, in my view, the sixth test also is not satisfied.

20. From the above discussion, it follows that the first respondent cannot be treated as an agency or instrumentality of the State.

21. From the above discussion, it follows that the first respondent cannot be treated as an agency or instrumentality of the State.

22. The question whether the first respondent is a "State" within the meaning of the article 12 of the Constitution and is amenable to the writ jurisdiction of the High Court under article 226 of the Constitution, cannot be divorced from the relief sought in the writ petition and decided in isolation. Indeed for purposes of invoking the jurisdiction under article 226 which is a public law remedy, it is

not necessary that the person against whom a writ is sought should be "State" within the meaning of article 12. For purpose of article 226, what is relevant is, what is the relief sought against the respondent. If it is in the realm of public law to enforce a constitutional or statutory right, a writ may be issued, in appropriate cases, against any Government or against an individual, provided the right is available to the petitioner against the respondent. But if what is sought to be enforced is a right arising under private law field, jurisdiction under article 226 cannot be invoked even against the State. The question whether the respondent against whom a writ is sought, in exercise of the powers under article 226, is "State" within the meaning of article 12, thus becomes germane when what is sought to be enforced is a fundamental right guaranteed against the State. Part III of the Constitution (articles 12 to 35) specifies fundamental rights ; some are available to the citizens of India and some are available against the State, e.g., articles 14,15,16,19,20,21,22, etc. There are certain other rights which are guaranteed, but the guarantee is not confined as against the State only. They are enshrined in articles 17, 18(2) and (3), 23 and 24. The right guaranteed under article 14 is available to every person irrespective of whether he is a citizen of India or not, but it is guaranteed against the State.

23. Now turning to the facts of the instant case, I shall examine the right which is sought to be enforced against the first respondent. The main grievance of the petitioner is that he has been discriminated against and excluded arbitrarily in violation of article 14 of the Constitution while inviting tenders, finalising the same and selecting the tenderer for purposes of awarding the contract by the first respondent. It has already been held that the first respondent is not "State" within the meaning of article 12 and so it follows that it has absolute discretion to select any person of its choice for awarding a contract and it cannot be subjected to the constitutional limitations for enforcing the right guaranteed under article 14 of the Constitution against the first respondent is not maintainable.

24. As the petitioner seeks a writ of mandamus which is a public law remedy and is available even against a private individual and a person not being "other authority " within the meaning of "State" under article 12 of the Constitution, the impugned action relates to enforcement of a public duty. There is no right in the petitioner to obtain the contract in question from the first respondent ; there is no public duty cast on the first respondent to consider the tender of the petitioner de hors article 14, which is not attracted as the first respondent is not "State". No statutory provision is placed before me which regulates awarding of contracts and imposes an obligation on the first respondent to consider all the tenders received by it fairly without discrimination. The first respondent is, therefore, free to select the recipient of its contract. For this reason also, the writ prayed for cannot be issued.

25. On the above findings, I could have disposed of the writ petition, but for the sake of completeness and because learned counsel for the parties addressed lengthy arguments as to whether the petitioner has been excluded arbitrarily, I propose to consider the contentions raised on merits on the assumption that the first respondent answers the description of "State" within the meaning of article 12 of the Constitution.

26. Sri. Ramachandra Reddy contended that the first respondent arbitrarily excluded the petitioner for the reckoning and preferred the second respondent in awarding the contract and as such the action of the first respondent is discriminatory and arbitrary and violative of article 14 of the Constitution and that the grounds on which the petitioner was excluded are irrelevant and extraneous.

27. Dr. Singhvi vehemently contended that though the petitioner was not fully qualified, at every stage the petitioner's case was considered fairly ; the grounds of exclusion of the petitioner are relevant ; an institutional decision was taken and at every stage eminent experts and highly qualified individuals evaluated and objectively considered the petitioner's tender, the action of the first respondent presents an example of an institutional decision par excellence ; that the High Court under article 226 of the Constitution does not sit in appeal over the decision of the first respondent in awarding the contract to the second respondent ; the petitioner was not the lowest tenderer but he so misrepresented to the court and obtained an ex parte interim order and as such the first respondent is entitled to exemplary costs.

28. Sri. V. Jagannadha Rao, learned counsel for the second respondent , adopted the arguments of Dr. Singhvi generally and added that the second respondent had commenced execution of work of the contract and it would not be just or proper to abruptly stop the same in midstream ; if by not awarding the contract in question the petitioner had suffered any damage, he could approach the civil court, but that would not afford a ground to him to invoke the writ jurisdiction of this court.

29. On the assumption that the first respondent is State within the meaning of article 12, the question that would arise for consideration, in view of the rival contentions of the parties, is whether the petitioner has been arbitrarily released.

30. At the outset I may observe that the scope of enquiry by the High Court in proceedings under article 226 of the Constitution is limited to satisfying itself that the procedure followed by the first respondent was fair; that the relevant factors were not excluded from consideration and that the decision reached was not based on irrelevant or extraneous considerations; in other words the jurisdiction is confined to examining the manner in which the decision is reached and not with the correctness of the decision. The High Court cannot reassess the material and substitute its views for the conclusions of the first respondent.

31. The foundation of the case of the petitioner is that it is the lowest tenderer. In response to the tender notice issued by the first respondent on August 7, 1987, five tenders were received by it. The material particulars (as mentioned at page 71 of the book of documents filed by the first respondent and marked as "R-1") are as follows :-

32. Freight forwarding, clearing and ODC transportation tender

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Tenders the first instance	Amount quoted in (Rs. Crores)	Amount finally agreed
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(Rs. Crores)

1. Urmila and Co. (Second respondent)	21.71	14.51
2. N. S. Guzder and Co.	16.85	15.16
3. Opt Overseas Project Transport GmbH	12.31	Commercial negotiations not held
as these parties were		
4. Nav Bhart Corpora- tion (petitioner)	10.58	Quotation not technically incomplete. Jetty competent. Apart from construction not technical incapability included. , the tender of the
5. A. B. C. limited to be ignored as it did not include an important item of work, viz., construction of a special jetty at Kakinada port without which the heavy cases cannot be unloaded.		petitioner was liable

33. From a persual of the above statement, it is evident that the petitioner is not the lowest tender. Therefore, the contention of the petitioner that he is the lowest tender but had been excluded arbitrarily is not born out by the record. What Sri Ramachandra Reddy says is that if A. B. C. Company the lowest tenderer is excluded from consideration on the ground of the mishap of drawing of the Buddha statue, the petitioner would be the lowest tenderer. I am unable to accept this contention. Whether the A. B. C. Company has to be excluded from consideration, and if so for what reason, is a matter for the first respondent-company to decide. The petitioner cannot assume that on a particular ground the lowest tender will have to be excluded and contend that he would consequently become the lowest tender.

34. The next submission of Sri Ramachandra Reddy is that the petitioner was not even taken into the reckoning for purposes of considering the tender, and, therefore, the exclusion is at the threshold without considering the tender of the petitioner. He relies on the conclusion and recommendations of what is termed as the in-house management of the first respondent when the matter was placed before the Project Management Committee ('PMC' for short) of the board of directors of the first respondent on March 25, 1990. IT reads as follows :

"Based on the information submitted by various bidders and the decisions held with their representatives, the company had to eliminate from the reckoning the following three parties :

1. Nav Bharat Corporation, 2. ABC India Limited, 3. OPT GmbH."

35. Reliance is also placed on the following averment in the counter- affidavit of the first respondent :-

"The respondent-company considers that the petitioner was not technically competent to undertake the contract job and hence there was no point in carrying on commercial negotiations with the petitioner."

36. At para 22 of the counter-affidavit, it is stated :

"There was no point in carrying on commercial negotiations with parties who were not technically competent and who could not meet the basic requirements of the tender notice."

37. Dr. Dinghvi relied on the "conclusions and recommendations" of the in-house management of the respondent and the minutes of the meeting of PMC of March 25, 1990, and April 1, 1990, and submitted that they establish that the case of the petitioner was considered at every stage and that the petitioner was not excluded at the threshold ; he stated that the petitioner was in fact given an interview, and as he was not selected, the question of carrying on commercial negotiations with it did not arise.

38. From the above averments in the counter -affidavit, it does not follow that the case of the petitioner was not considered. They only show that no commercial negotiations were carried on with the petitioner-company as it did not fulfill the basic requirements of the tender notice. It may be noticed here that in paragraph 23 of the counter-affidavit of the first respondent it is stated that all the bids including the bid made by the petitioner were evaluated strictly in accordance with the established procedure. These facts were briefly mentioned in the first respondent-company's telex dated April 5, 1990, which reads as follows :

"Subject : Tender notice for freight forwarding, port clearance, ODC transportation as site handling.

We refer to your undated telex received on April 1990, Please note that all facts mentioned by you regarding your technical and commercial capability during the meeting on March 30, 1990, and prior thereto, were already known to us from your bid documents and clarifications sought by us. All these facts have been duly taken into account whilst evaluating your bid. We may assure you that the final decision was taken only after careful consideration and evaluation of your bid in accordance with the procedure with the company has followed for availing all bids. The company is obliged to finalise each order by applying certain principles considered appropriate and necessary for the speedy and successful implementation of the project. In the result, the contract has been award to the most suitable party.

Without prejudice to the foregoing you may note that your bid was not, repeat not, the lowest and all your arguments based on this assumption are, therefore, not tenable. Please note that our decision on this contract will not in any way prejudice our considering on merits and with an open mind, offers, if any, you may make for rendering other services to the company in future. Nothing herein is to be considered as an admission of any of the allegations contained in your telex all of which are

hereby denied."

39. From a reading of the counter-affidavit of the first respondent and the grounds of elimination mentioned in the conclusions and recommendations placed by the in-house management of the first respondent before the PMC, it is evident that the case of the petitioner was considered on its merits. Further, the minutes of the PMC also support the conclusion that the petitioner's case was not excluded from consideration. Therefore, this contention is rejected.

40. It is further contended by Sri Ramachandra Reddy that the grounds on which the petitioner's tender was rejected are extraneous, ill-considered and arbitrary as the relevant material was not considered and also discriminatory since the same norms were not applied to the second respondent. Dr. Singhvi, on the other hand, contended that having set the norms and considered the same objectivity, on all the grounds, the committee found that the petitioner is not a fit person to the award the contract.

41. Both learned counsel referred to different documents exclusively in support of their contentions. As already above in proceedings under article 226 the court is not sitting as an appellate authority and that the ambit of the enquiry before me is very limited; so will examine only those which are relevant to the question whether the relevant considerations were excluded and irrelevant factors were taken into consideration while awarding the contract.

42. From the papers filed as "Conclusions and Recommendation", the objective considerations noted are as follows :

"Consistent with the company's objective of implementing the project in a record period, it was felt that the shipping, transportation, clearing, forwarding and handling of equipment with special reference to ODCs, must be entrusted to a reputed organization. At the outset, it was decided that it would be better to entrust all the jobs connected with this activity to one agency in order to ensure better quality of service. The consequences of poor performances in this area need hardly be overemphasises.

Having decided that the entire job must be handed over to one agency the company proceeded with setting out the criteria for prequalifying bidders. In doing so, considerable emphasis was laid on ---

(a) Past experience in handling similar jobs ; (b) Ownership of requisite equipment; and (c) Managerial and other infrastructure available directly with the bidder."

43. From the above, it is clear that the first respondent had the following objectives :(i) implementing the project in a record period, (ii) to entrust all the jobs connected with the activity to one agency to ensure better quality of service. (The activity comprises shipping, transportation, clearing, forwarding and handling of equipment with special reference to ODC).

44. The criteria for selecting the contractor were laid down as follows :

- (a) Past experience in handling similar jobs ;
- (b) Ownership of requisite equipment ; and
- (c) Managerial and/other infrastructure available directly with the bidder.

45. There cannot be any dispute with regard to the objectivity of the criteria laid down by the first respondent and it was also not suggested that they were extraneous or irrelevant. The objection was only with regard to the second criterion, viz., ownership of requisite equipment. I will advert to it presently. Having set this criterion, the petitioner was asked by the first respondent by its letter dated November 9, 1989, to clarify and confirm the following points :

"(1) Whether any collaboration agreement is entered into with Panalpina, West Germany for carrying out freight consolidation and freight forwarding jobs. If so, please send the photo copy of the collaboration agreement ;

(2) Whether any integrated jobs consisting of freight consolidation, freight forwarding customs clearance, ODC transportation and site handling jobs were out by you/by the consortium proposed by you. If so, please provide the performance certificates for such jobs ;

(3) Please forward photocopies of registration certificates for the self duty prime movers, hydraulic trailers, girder bridge, low bed carriers, bolsters, mechanical trailers having capacity above 50 mt. and hydraulic jacks being used. Also forward details of barges along with certificates ;

(4) Please confirm that your prices quoted will hold for providing additional equipment, if warranted, basing on the load of the work at any given points of time ;

(5) Please confirm that you will be providing a security deposit of Rs. 1 crore (rupee one crore only) either as a cash deposit or in the form of a bank guarantee ;

(6) Please let us know how many by-passes you have envisaged on the route from Visakhapatnam to Kakinada as well as Hyderabad to Kakinada. Also indicate against each culvert, bridge and cause-way whether any by-pass is required your proposal for reinforcement."

46. To this letter, the petitioner replied on November 22, 1989. Para 2 of the letter which answers point No. 2 in the observed letter reads :

(2) As you are aware our consortium consists of :

- (a) Nav Bharat Corporation (customs clearance) ;
- (b) Panalpina World Transport Ltd. (freight consolidation at foreign ports and freight forwarding) ;
- (c) Resham Singh and Co. Pvt. Ltd. (port handling, ODC transportation and site handling) ;

(d) material Handling and Transport Consultants (India) Pvt. Ltd. (Technical supervision and project co-ordination).

47. Each of these companies has extensive experience in their individual filed of work. It was decided at the outset, ie., prior to submission of the tender that the individual experience of each company would be pooled together to form a consortium capable of offering a total package as desired by NFCL.

48. Panalpina, acknowledge to be one of the three largest freight forwarders worldwide, has established offices in India. Regular consolidation services are undertaken by Panalpina from various ports worldwide to India, including freight forwarding. Panalpina's experience in India has, therefore, been quite extensive over the last many years. Recently, they have been awarded the foreign port consolidation and freight forwarding contract for Deepak Fertilizers and Petrochemicals Project at Taloja against stiff competition from various forewords including Hermann Ludeig. The clien, we understand, was far more satisfied with the project forwarding experience of Panalpina than of the other forwarders. A copy of the letter of intent from Deepak Fertilizers to Panalpina is enclosed for your records.

49. Nav Bharat Corporation has been active in the filed of customs clearance for many years. Their vast experience and close co- operation with the customs department at various ports has further enhanced their position as an acknowledge customs house agent in India.

50. Resham Singh and Co. Pvt. Ltd. are one of the earliest project transporters in the country. They have to their credit transportation of ODC's for various fertilizer plants (which is of consequence regard to this tender.) The ODC's transported have been for :

(a) IFFCO	--	Phulpur,
(b) NFL	--	Panipat,
(c) NFL	--	Bhatinda,
(d) NFL	--	Nangal,
(e) GSFC	--	Baroda,
(f) GNFC	--	Bharuch,
(g) Indo-Gulf	--	Jagdishpur.

51. Other than transports for fertilizer plants Resham Singh and Co. has undertaken tran

52. The most recent project transportation successfully executed by RSCC is for the Aura

53. Material Handling and Transport Consultants (India) Pvt. Ltd. has considerable exper

54. MHTC has successfully executed for N. S. Guzder/ Indo-Gulf Fertilizers the complete cargo from Bombay/Calcutta to Jagdishpur by road and river transport. The vice-president, operations, Mr.

Mario Kropf was previously responsible for execution of the complete heavy lifts and ODC transport for Rashtriya Chemicals and Fertilizers Ltd., Thal Vaishet Project on behalf of Urmila and Co. Pvt. Ltd. Reference with an unbiased view is permitted to Urmila and N. S. Guzder.

55. MHTC have recently completed the project transport management of the Auraiya Power Plant on behalf of Resham Singh and Co. Pvt. Ltd. for MHI/NTPC."

56. As seen from the above extract which deals with one of the important considerations for awarding the contract, the petitioner has not been able to give any instance of the petitioner or the members of the Consortium having together undertaken any project which comprises all the items of the project. The petitioner as given individual achievements of itself and members of its consortium but not a single instance of work jointly undertaken is quoted. Sri Ramachandra Reddy says that the testimonials given by the petitioner were not looked into and the decision that the petitioner has no experience and technical competence was taken ignoring necessary material. The above extract also shows that the certificates referred to therein relate to Resham Singh and Co. The copies of the certificates filed in Court in P-II were issued between March 23, 1990, and April 21, 1990. When the meetings of PMC were conducted many of these certificates were not available. The petitioner is no doubt a customs clearing agent but did not have any experience of all the works invoked in the project and failed to give any instance of having undertaken a similar project along with the members of the consortium. This justifies the first and the third grounds mentioned in the conclusions and recommendations, for elimination, which are inadequate relevant experience, and lack of previous experience of the members of the petitioner's consortium and the petitioner in similar projects.

57. The second ground relates to not having ownership of the requisite equipment and near total dependence on outside agencies. Sri Ramachandra Reddy submits that ownership of the requisite equipment is not mentioned as a condition in the tender notice, whereas Dr. Singhvi submits that ownership of the requisite equipment has been the most important factor for consideration of tenders, as, according to him, if the contractor does not own the required number of barges, hydraulic axles, etc., it would become difficult for him to complete the work in time and the first respondent company could not have taken any chance with respect to the completion of the work, where delay of one month results in loss of Rs. crores.

58. I shall now refer to the relevant clauses in the counter- affidavits asserting the requirement of the ownership of equipment and the tender notice. In paragraph 9 of the counter- affidavit of the first respondent, it is stated :

"In case of shipping and transport, apart from proven experience and expertise, the ownership of specialized transport and handling equipment like self-propelled sea-going barges, hydraulic axles and hydraulic jacks is very important to ensure that the work would be completed in time. It is necessary that the contractor should own highly specialised transport and handling equipment, especially considering the fact that there is a very limited number of such equipment available in the country. Besides, even the few available are deployed in other ongoing projects resulting in non-availability of these at the specific times when required and such non-availability would result

in huge delay in the completion of the entire fertilizer project. These specialised items of equipment like self- propelled sea-going barges and hydraulic axles are not easily available. At attempt at importing these will not succeed because of the present stringent import regulations and foreign exchange constraints. It would take anything from six to nine months to obtain an import licence.

In the case of the respondent-company, a large number of heavy over-dimensional consignments (ODC) are to be transported by sea to Kakinada from Vizag, the nearest major harbour. Adequate experience in sea-operations, sea-going self-propelled barges and transportation of heavy ODC equipment specially by sea, is very critical for the timely and safe completion of the contract job.

The respondent-company says that the tender notice was not issued to the petitioner in the instance as the respondent-company was fully aware that the petitioner did not own sea-going barges, hydraulic axles and other key equipment, the ownership of which as aforesaid is essential for any contractor to be able to successfully execute the contract job."

59. In reply to these averments in the counter, the petitioner in its reply affidavit states that it had set out details of the transport handling equipment owned and/or under the control of the petitioner proposed to be used in execution of the contract in question, in the annexure to the bid, that there is no stipulation in the tender notice that the contractor should own the equipment/and that the only requirement is that they should be available for use in the contract job, and that the contrary allegations are incorrect and misleading. It is denied that a very limited number of such equipment are available and even the few available are deployed in other on-going projects resulting in non-availability of the same at the specific time when required. It is asserted that the said equipment is available with the petitioner and Resham Singh Co. Pvt. Ltd., a member of the consortium of a petitioner and that there is no need to import the same. It is added that the second respondent also does not own all the equipment referred to therein. The petitioner relied on clauses C@-A.%, C2-A.11 and C2-A.12 of the tender notice.

60. It will be appropriate to read these clauses here :

Clause C2-A.5 :-

"The contractor shall have sufficient and appropriate handling equipment to handle the OCs for unloading at Kakinada port site arrived by sea from Vizag transport the same to designated erection site."

61. Clauses C2-A.11 :-

"The contractor shall have the following :

(a) Minimum 3 (three) Nos. sea-going barges/vessels with load line certificates issued by competent authorities/IRS/.BS/Lloyds/Veritas.

(b) minimum 2 (two) nos. or more powerful sea-going tugs totaling 1,000/1,500 h.p.

- (c) One heavy lift crane suitable for operation of this nature of cargoes.
- (d) minimum 24 (twenty-four) Nos. hydraulic axles with option for hiring additional 12 (twelve) Nos. or more as the case may be.
- (e) Minimum 2 (two) Nos. pullers of over 300 h.p.
- (f) Minimum numbers of ancillary equipment like heavy duty staging stools, step-jacks of 100 ton capacity, taking shoes, heavy jacking beam, fly over ramps, etc.
- (g) No down gradation of specifications will be allowed. However, contractor may give higher h.p. more number of equipment for timely completion of the project.
- (h) Contractor should have ownership documents of ,marine/surface equipment."

62. Clause C2-A.12 :-

"The contractor shall keep the equipment specifically for the subject job at the relevant ports of discharge for a period of 12 to 18 months."

63. It is no doubt true that cause C2 A.5 provides for possession of the appropriate handling equipments to handle ODCs unloading at Kakinada as one of the requirements. But while enumerating the equipments in clause C2 A.11, sub-clause (h) provides that the contractor should have ownership documents of marine/surface equipment. Sea-going barges and vessels, being of the marine equipment, the ownership of the same is one of the conditions of the tender notice.

64. Sri Ramachandra Reddy, however, stated that ownership of equipments by the contractor is to the condition of clause (h). I am afraid, I cannot read that sub-clause (h) as meaning that the contractor should have the ownership documents of some third party in this possession. A combined reading of clauses C2-A.5, C2-A.11 and C2-A.12 leaves no doubt in my mind that what is contemplated is that the contractor should not only hold but should also own the marine/surface equipments enumerated in C2- A.11. In view of this finding, the contention of the petitioner that it requested the Visakhapatnam Port. Trust for the barges and they were made available for its use is untenable. It is also stated that even the second respondent does not own any barges. This is disputed by both the respondents. It is stated that it owns six barges. From the fact that the bid of the second respondent also was sent to Nath and Associates for evaluation of marine equipment, I am inclined to accept that the second respondent owns barges. The fact that it also wrote to Visakhapatnam Port Trust for barges does not destroy its claim of ownership of barges.

65. In so far as the for the ground for rejection is concerned, i.e., over-commitment of Resham Singh and Co., it is stated that the first respondent has verified the same. In view of the memorandum of understanding said to have been signed by the said company and the petitioner and other members of the consortium on October 20, 1989, it is not possible to give much weight to the ex parte enquiry made by the first respondent that the company would not be in a position to take up the



responsibility of transportation and handling services from port to site by river, road, rail and sea modes as well as handling of cargo at site as per tender requirement.

66. Sri Ramachandra Reddy states that from the statement prepared by the first respondent and filed as material paper it is seen that the tender of the petitioner was rejected as being incomplete because the jetty construction was not included in the quotation; but as has been seen above this is not one of the grounds for rejection of the petitioner. Neither does the inhouse management report "Conclusion and Recommendation" contain that ground, nor was this aspect considered by the PMC in its meeting on March 25, 1990, and April 1, 1990. Dr. Singhavi says that having regard to the profile of the petitioner and the fact that the consortium was only an untested venture of rival groups and also having regard to the fact that the technical advice of MHTC, which is also the adviser of A.B.C. India Ltd. whose project of the Buddha statue resulted in a mishap, no reasonable management could have considered the case of the petitioner. As I have already considered the grounds on which the petitioner has not been awarded the contract, I do not want to discuss this aspect in any detail, as this does not figures in the grounds of rejection by the PMC. Further, as the question of fixing the responsibility for the sinking of the Buddha statue in Hussain Sagar lake is pending enquiry, it would not be desirable to express any opinion which involves culpability of any of the parties.

67. The conclusion and recommendation prepared by the inhouse management of the first respondent-company were placed before the Project Management Committee which consists of Sri Sushil kumar, I.A.S., Principle Secretary to the Government of Andhra Pradesh, Sri C.S. Pani, formerly Chief Technical Adviser and Executive Director of the Industrial Development bank of India, Sri F. J. I.A. S. (Retd.), formerly managing director of Mangalore Fertilizers and Chemicals Ltd. and expert in the fertilizer business, and Sri paul Pothan, formerly managing director of IFFCO. The minutes of the meeting dated March 25, 1990, show that the question of award of contract in question for freight forwarding, clearing and transportation was considered by the committee which called for the following additional information :

- (1) Quotation with item-wise break-up urmila and Co. ;
- (2) Documentary evidence to establish good track record of Urmila and Co. ;
- (3) Details of volume of work ;
- (4) Details of requirements stipulated in the ITB and the procedure adopted in evaluating the bids ;
- and (5) details of consignments already shipped/transported.

68. In its meeting dated April 1, 1990, the Committee having considered all the aspects chose to award the contract to Urmila and Co. It may also be noted here that before taking any decision with regard to the selection of the tenderer, the tenders submitted by different contractors including the petitioner were referred for evaluation and comments to an independent agency, viz., Development Consultation Ltd. Further the bodies of the independent agency, viz., Development Consultants ltd. Further the bids of the second respondent, N.S. Guzder were referred to nath and Associates and

Consultancy Services for evaluation of marine equipment, technical capability and adequacy of the equipment. As the petitioner never claimed to own equipment, its case could not be referred to this agency. on the basis of the report of the independent agencies, the inhouse management of the first respondent prepared "Conclusion and Recommendation" which, after due consideration and deliberation, decided to award the contract to the second respondent. The contention of Sri Ramachandra Reddy that the first respondent went through farce of holding discussions with the petitioner and its consortim members on march 30, 1990, is devoid of substance inasmuch as the meeting of PMC was adjourned on March 25, 1990, and the decision to award contract to the second respondent was taken not on March 25, 1990 but on April 1, 1990.

69. Having regard to the fact that in proceedings under article 226 of the constitution the court is concerned with how the impugned decision is reached rather than the decision itself and, in view of the above discussion, it cannot be said that there was no consideration of the case of the petitioner or that there has been any arbitrary action on the part of the first respondent, resulting in discrimination against the petitioner.

70. In view of the above conclusions, i so not propose to go into the other contentions raised by the first and the second respondents, viz., that the contract awarded to the second respondent by the first respondent cannot be cancelled in midstream and that no mandamus can be issued to award the contract to the petitioner.

71. Dr. Singhvi strenuously contended that in view of the fact that the petitioner is guilty of suppression very and suggestion false by misrepresenting that he is the tender, that the State of Andhra pradesh floated the company and obtained license, obtained ex parte status quo order, and has not shown "uberrima fides" and taken its role apropos the court in a casual and cavalier manner to stall the nationally important fertilizer project the first respondent should be awarded exemplary or actual costs.

72. It is true that the petitioner is not the low-cut tender, but its tender was lower than that of the second respondent. It is not shown that other pleas urged by the petitioner which are found to be incorrect are misrepresentations to the knowledge of the petitioner and the reason that the contentions raised by the petitioner are not vexatious, I am of the view that it is not a fit case for awarding exemplary costs.

73. For the aforesaid reasons, the writ petition fails and it is accordingly dismissed. having regard to all the circumstances of the case, I make no order as to costs.