



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.10.2016

CORAM :

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

WEB COPY

Writ Petition (MD) Nos.16871 and 16872 of 2016

and

W.M.P(MD)Nos.12235, 12236, 12237 and 12238 of 2016

M/s.Shapoorji Pallonji and Company Private
Ltd., represented by Authorized Signatory and
Additional General Manager,
Mr.Sankaralingam,
S.P.Info City, Module, 4-A, 2nd Floor,
A- Block, No.40, MGR Road, Perungudi,
Chennai 600 096

... Petitioner in both W.Ps.

Vs.

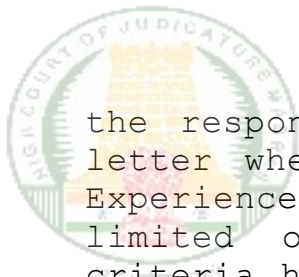
1.Nuclear Power Corporation Of India Ltd.,
Rep by Chairman and Managing Director,
Nabikiya Urja Bhavan,
Anushakti Nagar,
Mumbai 400 094. India.

2.Scientific Officer D(CTC),
Nuclear Power Corporation of India Ltd.,
Kudankulam P.O, Radhapuram Taluk,
Tirunelveli District 627 106,
Tamil Nadu.

... Respondents in both W.Ps

Prayer in W.P(MD)No.16871 of 2016: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to the impugned order of the 2nd Respondent in the Letter No. NPCIL/KKNPP/CTC/2016/S/936 dated 2.6.2016 wherein the Respondent have illegally and arbitrarily issued a corrigendum at clause 5 of the Annexure I barring the participation of Joint Venture Association (JVA) and quash the same and direct the Respondents to accept the bid of the Petitioner along with its Joint Venture Association (JVA) and quash the same and direct the respondents to accept the bid of the petitioner along with its Joint Venture Association in subsidiary company, Afcons Infrastructure Limited for award of contract of construction of building at Koodankulam Phase III and IV.

Prayer in W.P(MD)No.16872 of 2016: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to the impugned order of the 2nd Respondent in the Letter No. NPCIL/KKNPP/CTC/2016/S/1352 dated 29.07.2016 and quash



the respondent reply at serial No.9 of the annexure above said letter wherein the petitioner request to consider the Technical Experience of the subsidiary company, Afcons infrastructure limited of the petitioner's Holding company as eligibility criteria has been rejected and direct the respondents to consider and accept the bid of the petitioner's company based on the technical experience of the petitioner's subsidiary company Afcons Infrastructure limited for awarding the contract of construction of respondents building in Phase III and IV by the Notice Inviting Tender (NIT) dated 09.05.2016.

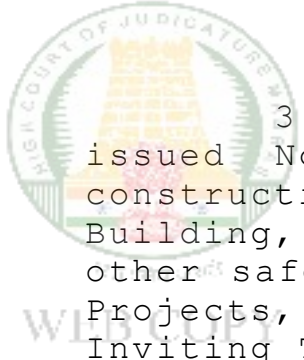
For Petitioner	: Mr.K.G.Raghavan, Senior Counsel for M/s.G.Vijay Anand Associates
For Respondents (In both W.Ps)	: Mr.Krishna Srinivasan for Mr.S.Ramasubramanian

COMMON ORDER

The case of the petitioner, in brief, is as follows:-

The petitioner namely, M/s.Shapporji Pallonji Company Pvt. Ltd., is one of the oldest existing Indian Companies and the petitioner company, being pioneer in the field of Infrastructure Development, is considered as flag ship company in the field of Infrastructure Development and Projects therein. The Petitioner Company, during the last 150 years of its business had constructed monumental structures such as Vidhan Soudha in Karnataka, Hotel Taj Mahal in Mumbai, Palace of King of Oman, Ghana's Parliament Building, International Cricket Stadium at Guyana, Mumbai etc., and also constructed, various Ports, Railway, Road, Bridge Projects at various part of the world.

2.It is further stated that the Petitioner's Company is a part of Shapporji Pallonji Group which is an Indian Business Conglomerate, having world wide interests in constructions, real estate Infrastructure Development, Textiles, Engineering goods, Power, Biotechnology, etc. It is further stated that the petitioner company had taken over majority shares in Afcons Infrastructure Limited which is registered with the Registrar of Companies, Mumbai, and the petitioner Company is the holding company of M/s.Afcons Infrastructure Limited and directly or indirectly holds 97.34 percent of its shares and the petitioner being the holding company, has direct control over the management and administration of the Subsidiary Company, namely, Afcons Infrastructure Limited.

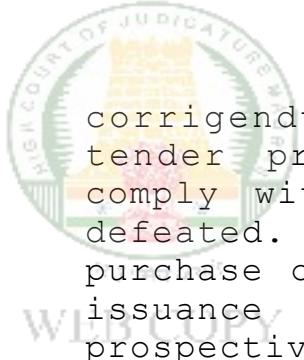


3. It is further submitted that the respondents herein issued Notice Inviting Tender (NIT) on 09.05.2016 for construction of Reactor Building, Reactor Auxiliary Building, Turbine Building, Diesel Generator Building and other safety related structure of Koodankulam Nuclear Power Projects, Phase III and IV. As per the above said Notice Inviting Tender (NIT), the total estimated cost of the work, excluding service tax was fixed at Rs.1904.60 Crores and the 1st pre-bid meeting was fixed on 06.06.2016 and the 2nd pre-bid meeting was to be held on 27.06.2016. The time for closing the online tender was on 25.07.2016, and opening the technical bid was fixed on 27.7.2016. It is further stated that as per Annexure-I of the Notice Inviting Tender (NIT), the qualification criteria for the bidders was stipulated in Clause 2.1, that the bidder must have experience of successful completion of similar works during the last 10 years. Further, clause 5 of the Annexure-I of NIT states that the bidder may be a natural person, private entity, Government owned entity and any combination of such entities supported by a letter of intent to enter into an agreement or an existing agreement in the form of Joint Venture Association (JVA) or consortium. According to the petitioner, the petitioner, being the holding company of Afcons Infrastructure Limited Company which was having relevant experience in the field of construction of similar work, as required in the Notice Inviting Tender (NIT) had purchased, tender document and intended to submit a bid, based on the Joint Venture Association with the subsidiary company, Afcons Infrastructure Limited.

4. According to the petitioner, the respondents, all of a sudden extended the time limit for purchase of tender forms upto 15.06.2016 which was to be closed on 24.05.2016. Subsequently, the second respondent issued a corrigendum in Letter No.NPCIL/KKNPP/CTC/2016/ S/936, dated 02.06.2016, which was published in the newspaper and also uploaded in the website wherein the respondents had amended clause 5 of the Annexure-I of NIT barring the submission of bid/tender by a Joint Venture Association (JVA). According to the petitioner, the petitioner had originally purchased tender form with a view to submit the tender form in Joint Venture Association (JVA) with its subsidiary company, Afcons Infrastructure Limited and also wanted to technically qualify based on the experience of the petitioner's subsidiary company but the arbitrary and unilateral act of the respondents in amending the qualification criteria in Annexure-I of the Notice Inviting Tender by not allowing Joint Venture Association of Companies in submitting tender forms, without any appropriate reasons or objects, had adversely affected the petitioner.

<https://hcservices.ecourts.gov.in/hcservices/>

5. It is further submitted that the act of the respondents in illegally issuing the above said



corrigendum on 02.06.2016 leads to unfair situation in the tender process and entire object of the tender process to comply with fairness in awarding the Government contract is defeated. The respondents failed to extend the time for purchase of tender document and submission of the tender after issuance of the corrigendum, thereby prevented many other prospective bidders, including the petitioner's subsidiary company, Afcons Infrastructure Limited, which had relevant experience and fulfilled the criteria as set out in the Notice Inviting Tender (NIT). Legally, the last date for purchase and submission of tender should have been extended to a date after the 1st Pre-bid meeting decision was announced.

6.It is further submitted that in the 1st pre-bid meeting held on 07.07.2016, the petitioner had requested the respondents that since there was abrupt removal of bid of Joint Venture Association (JVA) in the Notice Inviting Tender (NIT), similar work experience of the subsidiary company should be considered and accepted as that of the holding company wherein the holding company had more than 51 percent of shares of subsidiary holding company but the respondents rejected the request of the petitioner by their letter dated 12.07.2016 and by the time the reply to the petitioner's request was issued the time for purchase of tender was closed thereby many prospective bidders like, Afcons Infrastructure Limited were denied their legal right to submit their bid.

7.According to the petitioner, again in the 2nd pre-bid meeting, which was held on 26.07.2016, the petitioner once again requested the respondents to consider the experience of the subsidiary company in similar works while accepting the bid of the parent/holding company, such as the petitioner herein but once again the respondents, by their letter dated 29.07.2016 had rejected the request of the petitioner. Challenging the corrigendum issued by the second respondent, dated 02.06.2016 and the subsequent order passed by the second respondent, dated 29.07.2016 rejecting the request of the petitioner to consider the experience of the subsidiary company, namely, Afcons Infrastructure Limited, the present writ petitions have been filed.

8.The above two proceedings have been challenged by the petitioner on the ground that the petitioner being a holding company and its subsidiary company namely, Afcons Infrastructure Limited wherein the petitioner holding company had directly or indirectly 97.34 percent of shares, as such the petitioner's subsidiary company is entirely under the control and administration of the holding company and as such the experience of the subsidiary company in similar and related works should be considered as the experience of the



petitioner holding company and the qualification bid of the petitioner should be accepted as technically qualified.

9.It is further submitted that it is settled law that the holding company and the subsidiary company are to be treated as one concern with regard to various issues of business, contract, profit and liability. The experience of the subsidiary company should be taken into account for awarding contract in favour of the holding company. Hence, the respondents have erred in rejecting the experience of the subsidiary company as that of the petitioner holding company.

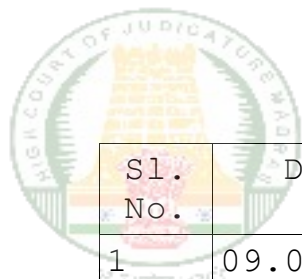
10.The petitioner further contended that originally, the respondents, while issuing Notice Inviting Tender permitted the Joint Venture Association of companies to participate in the bid, but subsequently, without any proper reasons, arbitrarily issued the corrigendum in Notice Inviting Tender by its communication dated 02.06.2016, stating that the Joint Venture Association will not be allowed to bid which is in violation of principles of fairness and in violation of Articles 14, 19 (1) (g) of the Constitution of India.

11.The respondents while issuing corrigendum on 02.06.2016, have removed the right of Joint Venture Association without giving or extending the time frame for submitting fresh tender based on revised Notice Inviting Tender and denied the petitioner and its subsidiary company as well as several other similarly placed entities to effectively take part in the tender process. As such, the entire tender process has been defeated. The respondents without giving an opportunity to the petitioner subsidiary company to submit its application has violated the settled principles of law in awarding the tender in fair and just manner. If sufficient time had been granted for the bidders to submit their tender, the petitioner's subsidiary company or any other entity who are all eligible would have taken part in the tender process, by submitting their bids. The act of the respondents in not giving sufficient time had denied the rightful bidders from taking part effectively in the tender. The object of the tender called for by the respondents, which is an instrumentality of the State is to provide equal opportunity to all the technically qualified bidders to take part in the tender process in compliance with the fairness rules in awarding tenders and in the present case, by the above said impugned orders dated 02.06.2016 and 29.07.2016, the respondents have clearly acted arbitrarily and defeated the purpose for which the tender have been called for. Therefore, the impugned orders are liable to be set aside.

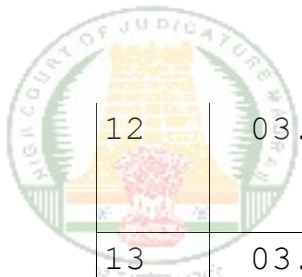


12.The respondents, earlier, filed a preliminary counter stating that the first respondent issued a Notice inviting Tender on 09.05.2016, which was initially opened for all bidders who may be a natural person, private entity, Government owned entity or any combination of such entities supported by a Joint Venture Agreement either existing or by way of a letter of intent to enter into such an agreement. Thereafter, at a high level internal meeting of the respondents, it was felt that having regard to the critical nature of the work involved viz., construction of Reactor building, Reactor Auxilliary Building, turbine Building, Diesel Generator building and other safety related structures of Kudankulam Nuclear Power Project 3 & 4, it was decided that Joint Ventures would not be allowed to participate in the bid. To that extent, the Notice Inviting Tender (NIT) was modified on 02.06.2016 by the first respondent after elaborate internal discussions on the issues involved. The main work of the subject tender is the construction of reactor building, which is a critical safety structure housing nuclear fuel and related systems. The reactor building is not a normal structure but is designed as one of the safety barriers in case of a very remote chance of an accident to ensure general public is not exposed to radioactivity. After construction of reactor building, it will be put through tests like air over pressure test and leak rate test to prove its structural integrity and leak tightness to ensure the requirement of non exposure of general public to radioactivity. The agency engaged for construction of such a critical structure shall have technical experience and competence to meet all technical requirements and to complete the works within the stipulated schedule. It is therefore important to have a contractor with single point responsibility to ensure all the above referred requirements, which have direct impact on safety of the plant and safety of general public which would be met for such a critical work. Hence a conscious decision was taken not to allow JVA for the subject work. In view thereof, the petitioner's request to consider the work experience of its subsidiary company as that of the holding company during the pre-bid meetings held on 07.07.2016 and 26.07.2016 were rejected.

13.It is further contended by the first respondent that no prejudice has been caused to the petitioner in any manner whatsoever in not permitting the JVA in the tender process and sufficient time has also been granted after issuing corrigendum for submitting tender which will be evident from the list of dates and events, as given under:



Sl. No.	Date	Activity
1	09.05.2016	NIT published in news papers & uploaded in websites www.tenderwizard.com/DAE & www.npcil.nic.in with following details: 1.Tender sale period - from 10.05.2016 to 24.05.2016 2.First pre bid meeting - 06.06.2016 3.Second pre bid meeting -27.06.2016 4.Submission of bids - 25.07.2016 5.Opening of technical bid - 27.07.2016
2	24.05.2016	Corrigendum -1 for extending Tender sale period up to 15.06.2016, uploaded in websites.
3	02.06.2016	Corrigendum- 2 published in news papers & uploaded in websites with following details. 1.PQ criteria revised removing II/ clause. 2.First pre-bid meeting date changed to 05.07.2016 3.Second pre bid meeting date changed to 18.07.2016 4.Submission date extended to 17.08.2016. 5.Technical bid opening date extended to 22.08.2016.
4	08.06.2016	Corrigendum uploaded in web site changing the first pre bid/meeting to 07.07.2016
5	07.07.2016	First pre bid meeting held at KKNPP site
6	12.07.2016	Corrigendum 3 uploaded in websites extending the date of second pre bid meeting to 26.07.2016
7	12.07.2016	Corrigendum 4, response to bidder's first prebid queries, uploaded in websites.
8	26.07.2016	Second pre bid meeting held at KKNPP site
9	29.07.2016	Corrigendum-5, Response to bidder's second pre bid queries, uploaded in websites.
10	29.07.2016	Corrigendum -6 uploaded in web sites extending the date of submission to 02.09.2016 & date of technical bid opening to 07.09.2016.
11	08.08.2016	Corrigendum-7 uploaded in web sites extending the date of submission to 07.09.2016 and opening of technical bid to 09.09.2016



12	03.09.2016	Corrigendum-8 uploaded in web sites with minor corrections in Schedule-C, BOQ item no. 1.3 & 1.4
13	03.09.2016	Corrigendum-9 uploaded in web sites extending the date of submission to 17.09.2016 and date of technical bid opening to 21.09.2016

14.The first respondent further contended that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Courts can interfere in such administrative decisions only if the same is arbitrary, discriminatory, mala fide or actuated by bias and the petitioner did not raise any such ground in its affidavit and simply stated that the modification as being arbitrary without substantiating the same, no allegations of mala fide have been made against any representative of the first respondent Corporation and also no bias also has been attributed against the respondents.

15.It is further contended that it was always open to the petitioner's subsidiary company to download the tender and submit their bid. The very fact that the petitioner has made a request to consider its eligibility to participate on the strength of the experience of his subsidiary company is a proof in itself that the petitioner himself is not convinced of his eligibility to participate unless a special concession is given to him. The last date for downloading the tender was extended upto 15.06.2016 and the petitioner's subsidiary company could have downloaded the tender within the said period. Hence, the contention that the first respondent had failed to extend the time for downloading of the tender after the corrigendum dated 02.06.2016 was issued, is incorrect as the time for downloading of the tender had been extended adequately. In any event, in the matter of awarding tender, experience is one of the most essential criteria and the experience of the subsidiary company cannot be taken as the experience of the holding company, this is more so when the tender requirements do not specify that the experience of the subsidiary company will be taken into consideration to decide the experience of the holding company. The subsidiary company and the holding company are two different entities and the experience of one cannot take the place of the other. Thus, the first respondent is well within its rights to modify the eligibility criteria and the rejection of the request to consider the experience of the subsidiary company as the holding company's experience is in accordance with the terms and conditions stipulated in the tender. The petitioner has failed to establish that the modification of the eligibility



criteria was contrary to public interest but, it is beyond the pale of discrimination or unreasonableness.

16. Subsequently, the respondents have filed a common counter affidavit contending that in contractual matters, there is a very limited scope for judicial review. There can be judicial interference only when the decision of the executive is arbitrary, irrelevant, unreasonable, biased and mala fide. Such a situation has not arisen in the present case. The respondents are not even aware of the prospective bidders. The petitioner has not even alleged public interest which is yet another ground for judicial interference in tender matters.

17. So far as the extension of time for tender, the respondents had already extended the time to purchase/download tender documents upto 15.06.2016 and hence there was no requirement to extend the time any further as the interested parties had more than 10 days to purchase/download the tender documents. Twelve days time is more than sufficient for interested parties to purchase/download bid forms and the respondents see no good reason to announce another extension of time for purchase/download of the tender documents. It is always open to the petitioner to participate either on its own or through its subsidiary on the basis of their own experience. Insistence to consider the experience of the subsidiary company seems to be illogical when the petitioner or its subsidiary company has the option to submit their individual bid and participate under the tender process. It is trite law that a subsidiary is a separate legal entity in the Companies Act of India and all over the world. Though the holding company may have more than 50 % of the subsidiary's share holding, in this case 97.34% but even then the subsidiary company can pursue its business as per its own Memorandum and Articles of Association and the holding company can pursue its business as per its Memorandum and Articles of Association. Applying the very same analogy, the work experience of the subsidiary cannot be considered as the working experience of the holding company.

18. So far as the issue of including JVAs to participate in the tender for construction of civil main plant was considered at length in a high level meeting of the respondents during which it was felt that having regard to the critical nature of work involved, it was necessary to have a single point responsibility to ensure that the standards of safety are duly met with. Since the petitioner does not make any allegation of mala fide or bias against the respondents or the terms of invitation to tender were tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process, the



petitioner cannot maintain the present writ petitions.

19.Mr.K.G.Raghavan, learned Senior Counsel appearing for the petitioner would contend that the act of the respondents in barring JVCs from participating in the tender is highly arbitrary and violative of Articles 14 and 19(1)(G) of the Constitution and the removal of JVC from participating in the tender process which has no nexus with the object of calling tender which only to encourage competition and there is no reason for excluding JVCs from participating in the tender process and stopping JVCs at the threshold of filing tender application. The learned Senior Counsel would further contend that by issuing corrigendum on 02.06.2016, the respondents without giving sufficient time to submit the tender application have denied the legal right of the petitioner and its subsidiary company to submit their bid.

20.Apart from that it is the contention of the learned Senior Counsel that the respondents had rejected the petitioner's request to consider the work experience of its subsidiary company and accept it as that of the holding company while considering the eligibility criteria of the petitioner herein. But the respondents ought to have considered the holding company and subsidiary company as one concern with regard to various issues of business contract, profit and liability and the respondents ought not to have rejected the request of the petitioner holding company. The respondents hastily issued corrigendum dated 02.06.2016 and did not provide sufficient time to the petitioner to submit its application. If sufficient time had been provided, the petitioner subsidiary company could have submitted its tender. But the respondents without providing sufficient time, arbitrarily closed the tender denying of their right to participate in the tender process.

21.Learned Senior Counsel for the petitioner would further submit that the respondents ought to have lifted the corporate veil and seen that the petitioner is a holding company having almost all the share holding of the subsidiary company and ought to have accepted the experience of the subsidiary company as that of the petitioner company.

22.Learned Senior Counsel for the petitioner relied upon a number of judgments of this Court as well as the Hon'ble Supreme Court in support of his contentions.



23. In Novartis Agand Another Vs. Adarsh Pharma and another reported in (2004) 3 CTC 95 this Court has held as follows:

"Therefore, it is clear that the concept of a single economic unit is an accepted position in law and whether a group of companies constitute a single economic unit, depends on the facts of each case. The Court can investigate the relationship between the parent company and the subsidiary in this regard. On facts, I find, as already stated, that the affidavit sworn to on 30.4.2004 and filed before this Court show that the second plaintiff was incorporated in India as the subsidiary of the first plaintiff, to meet the requirements of law in India. The affidavit also shows that the second plaintiff is under the control of the first plaintiff and it only imports the drugs manufactured by the first plaintiff and distributes the same in India. The second plaintiff is not shown to be carrying on any other business activities of its own. I have already noted that in the second plaintiff company, the first plaintiff has 50.93% shares and the remaining, with the Indian public. I am not, for a minute, saying that the first plaintiff holding major shares in the second plaintiff company would not put an end to the corporate character of the second plaintiff (See Spencer & Company Limited Case, AIR 1965 Mad. 359). As already stated, whether the companies in a group can be characterised as the single economic unit or not, depends on the facts of each case. In Gower's Principles of Modern Company Law, it is found stated as follows:

"As we have seen, it has become a habit to create a pyramid to interrelated companies, each of which is theoretically a separate entity but in reality, part of one concern represented by the group as a whole. The separation of the group into distinct companies is not necessarily in any way improper. It may well be the most economical and most convenient arrangement when the concern carries on a number of separate business or when it is desirable to distinguish between the manufacturing and the marketing part of enterprise or between trade in its various products."

"It is still possible and indeed usual, for a public company to carry on business through subsidiary operating private companies."

From the above passage, it is seen that the practice of creating an apex company with a number of subsidiary companies is held to be not impermissible and in fact, such an organisational set up for the purpose of business related activities is found to be permissible.



24. In New Horizons Ltd., Vs. Union of India reported in (1995) 1 SCC 478, the Hon'ble Supreme Court has held as follows:

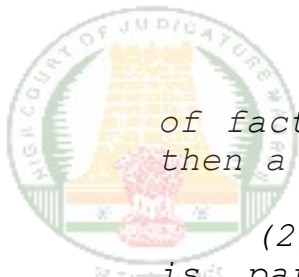
"17. At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of [Article 14](#) of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, 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 the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere.

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19. "Wednesbury principle of reasonableness" to which reference has been made in principle (5) aforementioned is contained in Associated Provincial Picture Houses Ltd. v. Wednesbury Corp⁷. In that case Lord Greene, M.R. has held that a decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably 4 (1989) 1 SCC 89 : 1988 Supp (3) SCR 282 5 (1993) 3 SCC 499 6 (1994) 6 SCC 651 7 (1948) 1 KB 223 : (1947) 2 All ER 680 could have reached it. In Tata Cellular⁶ this Court, has mentioned two other facets of irrationality :

(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight



of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld.

(2) A decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes

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34. *In State of U.P v. Renusagar Power Co.*¹⁴, (1988) 4 SCC 59, this Court lifted the veil to hold that Hindalco, the holding company, and Renusagar Power Co., its subsidiary, should be treated as one concern and the power plant of Renusagar must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis. It was observed: (SCC p. 94, para 66) "It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. ... The horizon of the doctrine of lifting of corporate veil is expanding."

25. *In State of U.P Vs. Renusagar Power Co.*, AIR 1988 SC 1737, the Supreme Court has held as follows:

"63. It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly-owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order of the profits of Renusagar have been treated as the profits of Hindalco".



26. In *Michigan Rubber (India) Ltd., Vs. State of Karnataka* (2012) 8 SCC 216, the Supreme Court has held as follows:

"23) From the above decisions, the following principles emerge:

(a) the basic requirement of [Article 14](#) is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24) Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected.



If the answers to the above questions are in negative, then there should be no interference under [Article 226](#).

27. In Union of India Vs. International Trading Co., (2003) 5 SCC 437, the Hon'ble Supreme Court has held as follows:-

"15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of [Article 14](#) is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily on by any ulterior criteria. The wide sweep of [Article 14](#) and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of [Article 14](#) is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

16. Where a particular mode is prescribed for doing an act and there is not impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.

28. In Jespar I Slong Vs. State of Meghalaya reported in (2004) 11 SCC 485, the Hon'ble Supreme Court has held as follows:

"19. It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. [See para 7 of Hindustan Development case

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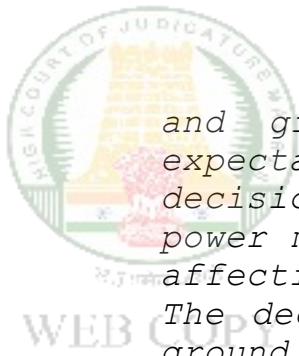
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and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review."

31. In *Ramana Dayaram Shetty Vs. The International Airport Authority of India* reported in AIR 1979 SC 1628, the Supreme Court has held as follows:-

".....It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods." It must, therefore, 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 any one, 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."

32. In *M/s. GJ Fernandez Vs. State of Karnataka* reported in AIR 1990 SC 958, the Supreme Court has held as follows:-

".....But, we are inclined to agree with the respondent's contention that while the rule in *Ramana's* case (supra) will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition."

33. In *Union of India Vs. Rizwan International* reported in (1993) 1 MLJ 569, the Hon'ble Supreme Court has held as follows:

"...In the above circumstances, we have no hesitation in accepting the contention of the learned Counsel for the respondent that the new policy in so far as it prohibits export of finished goods which are ready for export is Unreasonable and arbitrary and it has no nexus



whatever with the proclaimed object of the new policy."

34. In *M/s. Esteco Coal Services Ltd., Vs. Karnataka Power Corporation Ltd.*, reported in AIR 1997 Kar 220, the Supreme Court has held as follows:

"23. It is also relevant to point out that if the conditions impugned are unreasonable and arbitrary, it would deny the rights to many eligible and competent persons, who are in a position to execute the work efficiently, from submitting their tender. This would result in discrimination and violation of the rights guaranteed to them under [Article 14](#) of the Constitution of India, apart from the fact that the scope of selection would be narrowed down."

35. Per contra, Mr. Krishna Srinivasan, learned Counsel appearing for the respondents, would submit that the work involved in the tender process relates to the construction of a Reactor building, Reactor Auxiliary building, Turbine building, Diesel Generator building and other safety related structures of Kudankulam Nuclear Power Project 3 & 4. Having regard to the critical nature of work involved in the tender namely, the construction of the Reactor building and housing nuclear fuel and related systems, the Reactor building is not one of the usual buildings and it has to be designed as a safety barrier and in the event of there being even a remote chance of accident, the general public should not be exposed to radioactivity. Apart from that the Reactor building, after construction, will put through several tests to ensure its structural integrity, such as air over pressure test, leak rate test and also leak tightness to ensure that the general public is not exposed to radiation in the event of any accident in the reactor. Therefore, it is important to have a contractor with single point responsibility to ensure all the above referred requirements.

36. He would further contend that if JVA is allowed to be participated in the tender process it will lead to complication in fixing the responsibility and therefore in a high level internal committee meeting, it was decided not to allow JVA to participate in the tender process. He would further contend that it is a settled law that the terms of notice inviting tender cannot be subjected to judicial scrutiny since it is in the realm of contract.

37. He would further contend that even though the petitioner company is a holding company, the experience of the subsidiary company cannot be treated as the experience of the petitioner company, as subsidiary company, is a completely different entity and its experience cannot be considered as the experience of the petitioner company. He would further contend that even though the last date for



submission of tender forms was extended upto 15.06.2016, neither the petitioner company nor the subsidiary company applied for tender and despite sufficient time was provided for submitting tender forms, the petitioner deliberately kept quiet and after expiry of the last date for submitting tender, they approached the respondents and made a request to consider the experience of the subsidiary company as that of the petitioner company and as the claim of the petitioner was not bona fide, it was rightly rejected. Concluding his arguments, learned Senior Counsel would further submit that in a critical nature of work involved in the tender, it is very difficult to manage two or more companies as JVA and in the absence of any allegation of mala fide or bias, or any such allegation that the condition was modified or altered to suit any other person, the petitioner cannot maintain these writ petitions.

38. In support of his contentions, learned Senior counsel relied upon a Division Bench decision of the Delhi High Court, in Rohde and Schwarz GmbH and Co., K.G, Vs. Airport Authority of India, reported in (2014) 207 DLT 1 wherein the Delhi High Court has held as follows:

"25. In order to fall within the test as laid down in the case of New Horizons (supra) it would be necessary for a bidder to show that it has the relevant experience, however, the same may not be recorded in its name. It is not open for a bidder to claim experience of another entity as its own experience. The instances given by the Supreme Court are cases where the bid is submitted by a partnership firm in which case the entities submitting the bid are essentially the partners and therefore the experience of partners becomes relevant. Joint venture companies formed for a specific purpose are also akin to partnerships although in an incorporated form. In cases of mergers or amalgamations the resources of the companies are pooled although the amalgamating company loses its corporate name and identity which merges with the identity of the amalgamated company. In such cases, in essence, the bidder continues to be an erstwhile company although the experience may not be in the name of the amalgamated company. In all the examples given in the decision of New Horizon (supra) the vital test which has to be met is that the bidder must in fact have the requisite experience although for some reason it may not be available in his name. In the present case the bidder is the petitioner and the benefit of experience which is being claimed is that of a completely different entity. Although the petitioner may have acquired a majority stake in that entity, the same does not automatically translate the experience of R&S



Topex as that of the petitioner."

39.I have considered the submissions made on either side and perused the entire materials available on record.

40.The first and the foremost contention of the learned Senior Counsel for the petitioner is that altering the tender condition thereby not permitting JVA from participating in the tender process is highly arbitrary and also violative of Articles 14 and 19(1) (g) of the Constitution of India. The above contention cannot be countenanced for the reason that the work involved in the above tender is very critical in nature relating to construction of structure housing nuclear fuel and related systems and it involves public safety. Considering the construction for such a critical structure, it is natural that the respondents would expect high technical experience and competence, to carry out the work promptly within the stipulated schedule. Therefore, as rightly contended by the learned Counsel for the respondents, it is important to have a contractor with a single point responsibility. In the above circumstances, a high level committee of the respondent corporation has taken a decision not to allow JVA, which will lead to complication in execution of such work, since the responsibility of JVA is not with one contractor as several companies were involved in the JVA. Hence, the above decision of the respondent Corporation, barring JVA, cannot be held as arbitrary or unreasonable.

41.Apart from that, the petitioner did not allege any mala fide or bias on the part of the respondent in imposing new condition barring JVC from participating in the tender process. It is settled law that the terms of NIT are not open to judicial scrutiny because it is in the realm of contract. Reasonableness of restriction has to be considered in an objective manner and from the standpoint of interests of general public and not from the standpoint of interested person upon whom the restrictions have been imposed. When the nature of work involved in this tender invitation is high security and safety of public, the greater latitude required to be conceded by the respondents. In the above circumstances, in the absence of any allegation of mala fide or misuse of statutory powers, the Court cannot interfere with the terms of the tender (NIT).



42. Even in the judgments relied on by the learned Senior Counsel for the petitioner, the underlined principle is that so far as formulating conditions of tender documents, the Court cannot interfere, unless the action of the tendering authority is found to be malicious or against public interest. In the judgment referred to by the learned Senior Counsel for the petitioner reported in 2012 8 SCC 216, (Michigan Rubber India Ltd's case) (supra), the Supreme Court has held as follows:-

"24) Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

43. From the perusal of the proceedings of the high level committee of the respondent corporation, dated 26.05.2016, it could be seen that the original notification including the JVC, is a part of the standard e-tender notification form and it has been inadvertently included in the original notification. Hence, after considering the critical nature of work involved in the project, the above clause has been deleted and the above decision has been taken by the respondent corporation only in the public interest to ensure the safety of the nuclear plant, because even if any small accident happens in the plant, it will have a cascading effect. In those circumstances, to have a single point responsibility on a contractor, the respondents have taken a decision not to allow JVC, at any rate, it cannot be construed as an arbitrary decision since the decision has been taken only in the public interest. As stated earlier, in the absence of any allegation of mala fide or bias or the tender condition has been altered to suit a particular person, the arguments advanced by the learned Senior Counsel for the petitioner cannot be countenanced. So far as the judgments referred to by the learned Senior Counsel for the petitioner is concerned, the judgments are not applicable to



the present case as the petitioner has failed to establish that the action of the respondents is arbitrary or malice and misuse of their statutory power.

44. So far as the next contention of the learned Senior Counsel for the petitioner is concerned, the petitioner being the holding company and the experience of its subsidiary company namely, AFCON Infrastructure Limited should be considered as the experience of the petitioner company also cannot be accepted for the following reasons; As rightly contended by the learned counsel for the respondents the original notification was issued on 09.05.2016 and the tender sale period commenced from 10.05.2016 to 24.05.2016. The first pre bid meeting was to be held on 06.06.2016, the second pre bid meeting was to be held on 27.06.2016 and the last date for submission of bid was scheduled on 25.07.2016. The technical bid was to be opened on 27.07.2016. Subsequently, the first corrigendum was issued on 24.05.2016 extending the tender sale period up to 15.06.2016. Then the next corrigendum was issued on 02.06.2016 removing JVC and the date of pre bid meeting was changed to 05.07.2016, second pre bid meeting date was changed to 18.07.2016 and the date for submission of bid was extended to 17.08.2016 and the opening date of technical bid was rescheduled to 22.08.2016. On 08.06.2016, a corrigendum was issued and uploaded in the web site, changing the date of first pre bid meeting as 07.07.2016. Second pre-bid meeting was postponed to 26.07.2016 by issuing corrigendum 3 on 26.07.2016. Second pre-bid meeting was held as scheduled and the last date for submitting bid was changed to 02.09.2016 and the date of opening of technical bid was changed to 07.09.2016, by issuing corrigendum 6. Once again, the last date for the submission of tender was extended to 07.09.2016 and opening of technical bid was extended upto 09.09.2016. Finally, on 03.09.2016 the last date for submission of tender was extended upto 17.09.2016 and technical bid was to be opened on 21.09.2016.

45. From the above, it is clear that the respondents have given sufficient time for submission of tender and therefore, the contention of the learned Senior Counsel for the petitioner that no sufficient time was granted for submitting the tender forms cannot be accepted. In spite of several extensions of time neither the petitioner company nor its subsidiary company namely, AFCON Infrastructure Limited did submit any tender form. Without even filing any tender, the petitioner company cannot now contend that the experience of the subsidiary company was not considered as that of the experience of the petitioner company.



46. Apart from that, it was also not made clear why subsidiary company namely, AFCON Infrastructure Limited which alleged to have all the required infrastructure did not participate in the tender process and why the petitioner company is insisting to consider the experience of the subsidiary company as that of the petitioner company. If the subsidiary company has sufficient experience, it could have very well filed tender and participated in the tender process without the aid of the holding company namely, the petitioner company. By making such a request, the petitioner company only wants to utilise the subsidiary company in executing the work which the respondents want to avoid for the reasons stated above. What cannot be achieved directly cannot be achieved indirectly. In the above circumstances, this Court is of the opinion that it is not necessary to go into the question as to whether the experience of the subsidiary company can be considered as the experience of the holding company, the petitioner company.

47. For reasons discussed above, the writ petitions are liable to be dismissed and accordingly, they are dismissed. No costs. Consequently, W.M.P(MD)Nos.12235, 12236, 12237 and 12238 of 2016 are closed.

Sd/-

Assistant Registrar

/True Copy/

Sub Assistant Registrar

sms

+4cc to Mr.G.VIJAY ANAND, Advocate
FOR M/S G.VIJAY ANAND ASSOCIATES Sr.Nos.62753,62754

+2cc to Mr.S.RAMASUBRAMANIAN ASSOCIATES, Sr.Nos.62578&62579

JAM-KM-SAR.3/4.11.2016/ 23P:7C

Order made in
Writ Petition (MD) Nos.16871 and 16872 of 2016
and
W.M.P(MD)Nos.12235, 12236, 12237 and 12238 of 2016
21.10.2016