A M/S NEW HORIZONS LTD. AND ANOTHER

v.

UNION OF INDIA AND OTHERS

NOVEMBER 9, 1994

B [S.C. AGRAWAL AND M.K. MUKHERJEE, JJ.]

Constitution of India—Article 14—Tender for compiling, printing and supplying telephone directories—Tenderer a joint venture with one of its constituents having the requisite experience—Tenderer offering royalty with large margin of difference—Tender Evaluation Committee not C *considering tender on technical considerations, that tenderer did not have experience in their own name and had not substantiated their capacity to execute the work—Whether arbitrary—Held, a certain measure of 'free play in the joints' is necessary for an administrative body functioning in an admistrative sphere—In commercial transaction, requirement of experience* D *must be construed from standpoint of prudent businessman—It is not the name of the company, but the background, persons in control and their capacity to execute the work which is relevant—On facts, held that tenderer is joint venture with one of its constituents possessing requisite experience—Further, on facts, only successful tenderer to establish experience—Also, having regard to large margin of royalty offered by* E *tenderer, Tender Evaluation Committee's refusal to consider the tender, held, arbitrary and irrational*

Company Law—Lifting the corporate veil—On facts, as stated in the tender, appellant-company, held, is joint venture.

F **The Department of Telecommunications, Hyderabad, invited sealed tenders for printing, binding and supply of directories in English for the years 1993, 1994 and 1995. The tenderer was required, inter alia, to specify the royalty amount for each issue offered by him and to substantiate his experience with documentary proof. Five tenders were received and considered by the Tender Evaluation Committee, and the** G **contract was awarded to respondent 4. The appellant challenged the award of contract, and contended that it was eligible, and met the criteria laid down and was competent to compile, print and supply telephone directories as per the invitation of tender. The experience of its foreign collaborator/equity holder was relied upon by the appellant in support of its claim. It was submitted that the contract was awarded** H **to respondent 4 on extraneous considerations and was violative of**

Article 14 of the Constitution. It was further contended that since the matter involved public revenue, the tender of the appellant containing the highest offer could not be rejected on the hypertechnical plea that the appellant itself had no experience. In countering the challenge, it was contended for the respondents that the offer of the appellant had not been considered because it had not submitted evidence to demonstrate its experience. A B

The High Court negatived the challenge holding that the experience of shareholders was entirely different from the experience of the company itself; that the principle of lifting the corporate veil could not be invoked by the company; that, in this case, there was no joint venture as such but only a certain amount of equity participation by a foreign company in the appellant's company; that the non-communication of the reasons was not fatal; the bid of the appellants having been rejected at the threshold, the authorities could not consider the question of a higher amount of royalty. C

Allowing the appeal, this Court D

HELD: 1. The refusal of the Tender Evaluation Committee to consider the tender of the appellant-company on the ground that the condition regarding experience as laid down in the tender notice was not fulfilled is not sustainable in law or on the facts, and is arbitrary and irrational. (325-B) E

2. In the matter of entering into a contract, the State does not stand on the same footing as a private person. The action of the State in the matter of award of contract has to satisfy the criterion of Article 14. Moreover a contract would either involve expenditure from the state exchequer or augmentation of public revenues, and consequently the discretion in the matter of selection of a person for award of a contract has to be exercised keeping in view the public interest involved in such selection. The government must act in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is recognized that a certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere. (323-B-D) F G

Cellular, If the weight of facts pointing to one course of action is overwhelming, then a decision the other way cannot be upheld, and a decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes. (324-H, 325-A) H

A *Ramana Dayaram Shetty* v. *International Airports Authority of India,* [1979] 3 SCR 1014, *Kasturi Lakshmi Reddy* v. *State of J and K,* [1980] 3 SCR 1338, *Fasih Choudhary* v. *Director General, Doordarshan,* [1988] Supp. 3 SCR 282, *Sterling Computers Ltd.* v. *M and N Publications Ltd.,* [1993] 1 SCC 445, *Union of India* v. *Hindustan Development Corporation,* [1983] 3 SCC 499, *Tata Cellular* v. *Union of India,* [1994] Suppl. 2 SCR.
B 122, *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation,* [1948] 1 KB 223, relied on.

3. The requirement with regard to experience was differently worded in the advertisement inviting tenders dated 22.4.93 and the notice attached to the tender documents dated 26.4.93. The latter used
C the expression "successful tenderer" indicating that the matter of past ression experience has to be considered after the tender has otherwise been found to be suitable for acceptance, and was not liable to be rejected at the threshold. The decision of the Tender Evaluation Committee to exclude the tender of the appellant was, therefore, not
D warranted. (325-E, G, 326-D)

4. In any event, the requirement regarding experience cannot be construed to mean that the said experience should be of the tendered in his name only. Where the requirement of experience is contained in a document inviting offers for a commercial transaction, the terms and
E conditions of such a document have to be construed from the standpoint of a prudent businessman. That is, it is not the name of the company, but the background of the company, the persons in control, and their capacity to execute the work that would be relevant. The advertisement inviting tenders when read with the notice attached to the tender documents does not preclude this course of action. In this
F perspective, the appellant, being a joint venture with 60% of the share capital being owned by an Indian group of companies and 40% by a wholly owned subsidiary of Singapore Telecom which has long experience in this field, and which, the tender specified, would be providing its expertise and its managers to the project, would have been found to have the requisite resources and experience. (326-E, 327-
G B-H)

Tata Cellular v. *Union of India* [1994] Suppl. 2 SCR 122.

5. The finding of the High Court that the appellant is not a joint venture, and that there is only a certain amount of equity participation
H in it, is not correct. (328-G)

Black's Law Dictionary 6th edn., pp. 839, 342; *Words and Phrases* Permanent Edition, Volume 23, p. 117; Jacques Buhart, *Joint Ventures in East Asia - Legal Issues* (1991), referred to A

From the statements of the appellant in its tender it would appear that the appellant is an association of companies, including the Indian group of companies and the Singapore based Company (IIPL), jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest. The appellant has, therefore, been constituted as a joint venture, and it would not be correct to say that IIPL which has a substantial stake in the success of the venture is a mere shareholder in the appellant-company. (329-C-D) B C

Once it is held that the appellant - company is a joint venture, as claimed by it in the tender, the experience of its various constituents had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman. (329-E) D

6. The conclusion would not be any different even from the legal standpoint. In law, a company is a legal entity distinct from its members. But there have been inroads in the doctrine of corporate personality by statutory provisions as well as by judicial pronouncements. By 'lifting the veil' the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of Corporate personality is too flagrantly opposed to justice, convenience or the interests of the revenue. (329-F-G) E F

Salomon v. *Salomon and Co.*, (1897) AC 22, Gower's Principles of Modern Company Law 4th edn., p.112 and 136, *U.S.* v. *Milwaukee Refrigerator Transit Co.*, [1905] 142 Fed. 247, *Scottish Corporation Wholesale Society Ltd.*, v. *Meyer*, [1959] AC 324, *Harold Holdworth and Co. (Wakefield) Ltd.*, v. *Caddies*, (1955) 1 All ER 725, *DHN Food Distributors Ltd.* v. *London Borough of Tower Hamlets*, (1976) 3 All ER 462, *Juggilal Kamlapat* v. *CIT*, [1969] 1 SCR 988, *State of U.P.* v. *Renusagar Power Co.*, [1988] Supp 1 SCR 627, *De Beers Consolidated Mines Ltd.* v. *Howe*, (1906) AC 455, *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. Ltd.*, (1916) 2 AC 307, S. Ottolenghi, "From Peeping Behind the Corporate Veil, to Ignoring it Completely" (1990) 53 Mod. G H

A **L. Rev. 338 and *Central Inland Water Transport Corporation Ltd.* v. *Brojonath Ganguly,* [1986] 2 SCR 278, referred to.**

***Paharpur Cooling Towers Ltd.* v. *Banbaigon Refinery and Petrochemicals Ltd.,* (1994) 28 DRJ 425, distinguished**

B **Seeing through the corporate veil, it will be found that as a result of reorganisation in 1992 the appellant-company is functioning as a joint venture wherein the Indian group holds 60% shares and the Singapore based company holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The company is in the**
C **nature of a partnership, where the constituents have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risks. In respect of such a joint venture company, the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of companies and the Singapore based company. (332-G, H, 333-A)**

D **7. The non-consideration of the tender submitted by the appellant-company has resulted in acceptance of the tender submitted of the tender offered by respondent 4. The total amount of royalty offered by respondent 4 for three years was Rs. 95 lakhs whereas the appellant-company had offered Rs. 459.90 lakhs, i.e., nearly five times the**
E **amount offered by respondent 4. Having regard to this large margin in the amount of royalty, it must be held that decision of the Tender Evaluation Committee to refuse to consider the tender of the appellant-company and to accept the tender of respondent 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed. (333-H, 334-A)**

F **8. In view of the fact that the telephone directory for the year 1993 has been printed and supplied to the Department by respondent 4 in terms of the contract, and the process of preparation of the telephone directory for the year 1994 has already commenced, the contract with respondent 4 may be set aside insofar as it relates to the directory for the year 1995. Fresh tenders may be invited for award of the contract**
G **for the directory for the year 1995. (334-C-D)**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7230-31 of 1994.

From the Judgment and Order dated 15.10.93 of the Delhi High Court
H in C.W.P.No. 3837 and C.M. No. 6120 of 1993.

Soli J. Sorabjee, Manmohan Sarin and Pramod Dayal for the Appellants. A

P. Chidabaram and C.S. Vaidyanathan and P.P. Singh for the Respondent No.3

K.K. Venugopal, Atishi Dipanker and Parag Tripathi for the Respondent No.4 B

N.N. Goswami, Anil Katiyar and T.C. Sharma for the Respondents Nos. 1 and 2

The Judgment of the Court was delivered by C

S.C. AGRAWAL, J. Leave granted.

In the past the telephone directory used to be printed by the Department at its own cost for the purpose of supplying the same to the telephone subscribers. It was an item of expenditure. Today, the telephone D directory has become a source of revenue for the State. This has become possible by making it a medium for advertising by industrial and commercial concerns. A section in distinct 'Yellow Pages' devoted exclusively to advertisements is contained in the directory. The person who undertakes the printing of the directory procures the advertisements from E private parties and collects the charges for the same. In return, he supplies a prescribed number of directories free of cost to the department and also pays to the department a certain amount by way of royalty. The contract for printing and publishing the telephone directory is normally awarded by inviting tenders and selecting the best offer from among the tenders which are so received. This practice has been in vogue for some time. In *Sterling* F *Computers Limited* v. *M/s M&N Publications Limited and Anr.*, [1993] 1 SCC 445, this court has dealt with the award of such a contract for printing and publishing of the telephone directories for Delhi and Bombay. The instant case relates to the telephone directory for Hyderabad.

By an advertisement published in various newspapers on April 22, G 1993 the Department of Telecommunications, Telecom District, Hyderabad invited sealed tenders from competent agencies for printing, binding and supply of specified number of telephone directories in English for three annual issues commencing from 1993. The tenderer was required to supply, free of cost, the telephone directories to General Manager, Hyderabad H

A Telecommunications at the specified distribution points. The tenderer was also required to specify the royalty amount for each issue offered by him. It was mentioned that the successful tenderer will be permitted to procure on his own classified advertisements and cover page advertisement. In the said advertisement it was stated:

B

> "The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephone systems with the capacity of more than 50,000 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in this field."

C

The tenderer was required to remit a sum of Rs. 5,00,000 by way of non-refundable earnest money deposit. The terms and conditions and specifications etc., for the total job were contained in the tender document which was required to be obtained for the purpose of submitting the tender. D The last date for submission of tender was May 14, 1993.

In the notice containing the requirements to be fulfilled which was attached to the tender documents, it was stated :

E "The successful tenderer will also submit copies of telephone directories printed and supplied by them to the telephone systems of capacity more than 50,000 lines as credentials of his past experience." (para 12)

> F "The tenderer should intimate while submitting the tender the equipment and list of machines etc. alongwith the locations available with him which he would employ for carrying out this work, if selected. The tenderer also should forward a memorandum furnishing details of out-turn that can be given daily and the actual time required for the completion of the job after the input material is handed over to him." (Para 14)

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Five persons, including appellant no.1, M/s New Horizons Ltd. (for short 'NHL'), and M/s MandN Publications Limited (respondent No. 4 herein) submitted their tenders. The tenders were opened on May 14, 1993 H at 3.30 p.m. The royalty amount offered by the five tenderer was as under :

Name of Tenderer	Agreed amount offered (in lakhs) 1993 issue	1994 issue	1995 issue
SESA SEAT INFORMATION SYSTEMS LTD., Pune-1	41	121	151
M & N PUBLICATIONS LTD., Bangalore-52 (respondent No-4 herein)	20	30	45
NEW HORIZONS LTD., NEW DELHI-1. (appellant No-1 herein)	39	129.30	291.60
HYPER MEDIA INFORMATION Services Pvt. Ltd., Banglore-10	6	45	72
Kaljothi Process Pvt. Ltd., Hyderabad-20	102	138	160

The offers were considered by the Tender Evaluation Committee. The offer of respondent No. 4 was accepted. The Assistant General Manager (OP), Department of Telecommunications, Telecom District, Hyderabad, by his latter dated August 3, 1993, informed NHL that its offer could not be considered. The said letter did not indicate the reason for non-consideration of the offer of the NHL. The appellants filed a writ petition in the Delhi High Court under Articles 226 and 227 of the Constitution of India seeking a writ, order or direction in the nature of certiorari for quashing the award of contract by respondent No.3 to respondent No.4 for the printing, binding and supply of telephone directories for Hyderabad and also a writ, order or direction in the nature of *mandamus* directing respondent No. 3 to accept the tender offer of the appellants. In the counter affidavit filed in reply to the said Writ Petition filed on behalf of respondents Nos. 1 to 3 the reason for non-consideration of the offer of NHL was disclosed. It was stated that the offer of NHL was not considered because the applicants did submit any

A evidence to show that they have in their name undertaken compiling, printing and supply of telephone directories for large telephone systems with the capacity of more than 50,000 lines. In this regard, it may be mentioned that in their tender offer NHL had mentioned that:

(i) NHL is a joint venture company established by Thomson Press
B (India) Limited (TPI), Living Media (India) Limited (LMI),World Media Limited (WML) and Integrated Information Pvt. Ltd. (IIPL), a wholly owned subsidiary of Singapore Telecom wherein 60% of shares are held by Mr. Aroon Purie, TPI, LMI, WML and other companies in the same Groups and 40% of shares are held by IIPL:

C (ii) the joint venture has received approval of the Government of India and is currently in operation;

(iii) NHL has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information; and
D

(iv) in addition to its projected strength, NHL has access to the benefit of the complete resources and strength of its parent/owning companies, each of which is a recognized market leader.

An overview of each of the parent companies, namely, TPI, LMI,
E WML and IIPL also given in the tender offer.

Regarding the expertise of TPI was stated that it has been established as a joint venture with Thomson International Canada in 1964 and is located at Faridabad, Haryana and has units at Okhla, Noida Export Zone and also has sales/co-ordination offices in Metropolitan towns in India, and
F in London and New York. It was stated that with over 125 Managers and 1255 skilled technicians/workers the press is equipped to handle the most exacting printing jobs and working with state of art technology, TPI produces both quality and volume and a detailed list of machines installed for printing, folding, cutting and binding and other equipment was enclosed
G and it was stated that the said equipment and skill would be available/utilized for all directory production work. It was stated that among the many diverse jobs that have been executed by TPI are printing of editions of India Today (Two languages and a total of 1.2 million copies per month), Computers Today, Business Today, Readers Digest, Span Magazine, Scientific Journals, Books (both hard and soft bound) for export
H and Telephone Directories for UDI, Sterling Computers, Sesa Seat, etc.

With regard to LMI it was stated that as India Today Group it was first set up in 1962 and became LMI in 1988. LMI employs approximately 500 people in various disciplines viz., editorial, pre-press, production, sales and marketing. Its current activities include publishing (India Today, Business Today, Computer Today, Target, Journal of Applied Medicine, etc.), distribution (both in house magazines, Diaries and Time International), Music Today (producing and marketing a wide selection of India's best music) Newstrack (the leading Video news magazine in Hindi and English) and Printing (four regional language editions with a print order of one million copies per month). A list of machines and equipment installed at its units at Delhi and at Maraimalai Nagar in Tamilnadu was also enclosed.

As regards WML it was stated that it was established in 1944 in Lahore and moved its registered office to New Delhi in 1969. Its major activity was film financing, finance, marketing and publishing and now it also distributes LMI products and commissions articles/features for Business Today.

With regard to IIPL it was mentioned that it is a wholly owned subsidiary of Singapore Telecom established in 1967 to publish the Singapore Telephone Directory with Yellow Pages and a brochure which described the strength and developments achieved by Singapore Telecom and IIPL's position within the group was attached with tender offer. It was further stated that IIPL serves Singapore which has a tele-network offering subscribers up-to-date and efficient Telecom services and that IIPL has experience in international operations with special focus on the Asian regions and that IIPL experience and expertise would contribute actively to the systems and professional skills of the new joint venture. It was also mentioned that for the past 25 years the directory operation has evolved a continuously updated and responsive system specifically for quality directory management/publishing and many of the Managers involved with the joint venture company have been a part of IIPL since inception. With specific reference to the Indian venture, it was stated that IIPL will be providing its unique integrated directory management system alongwith the expertise of its Managers and that the Managers will be actively involved in the project both out of Singapore and resident in India. The particulars of various IIPL publications, namely, Singapore Phone Book and Yellow Pages, Singapore Telex and Fax directory and other publications and particulars of the Integrated Directory System for publishing Software for medium to large directories operating in a VAX environment were mentioned.

Referring to itself (NHL) it was stated in the tender:

A "As a joint venture in the true sense of the phrase, the Company will have access to expertise in database management, sales and publishing of its parent group companies. In addition, the equipment, manpower and expertise are available to NHL. Perhaps even more significant, at this point in the directory/ yellow page cycle, B is the unique reputation of its parent companies as market leaders. This will lend a unique credibility and public recognition to the joint venture, as well as its products.

A modern extremely powerful, Computer system is being purchased to install the integrated directory system C developed over the past 25 years by IIPL. The IDS will ensure efficiency and accuracy of operations. Training of all personnel is being and will continue to be conducted by experienced Managers from IIPL."

D Alongwith the tender the appellants submitted the directories of Delhi and Bombay 1992 which were printed and bound by Living Media Press in Madras.

In the counter affidavit filed on behalf of respondents Nos. 1 to 3 in the High Court it was stated that as per the averments in the writ petition TPI E and LMI had printed and bound the telephone directories for respective parties who had been awarded the contract for Delhi and Bombay and that the appellants did not produce any evidence to show that they have in their name undertaken compiling, printing, binding and supply of Telephone Directories of large telephone systems with a capacity of more than 50,000 lines and further that telephone directory of Delhi 1992 issue was published F by Sterling Computers Limited on behalf of United Data Base (India) Pvt Ltd., and it was printed and bound at Navneet Publications (India) Ltd., Gandhinagar, and the telephone directory of Bombay 1992 issue does not indicate any publisher's or printer's name. It was also stated that NHL was converted in to a joint venture company in 1992 and have no experience whatsoever in their own name for compiling, printing, binding and supply G of telephone directories of Telephone Systems of more than 50,000 lines capacity. It was further stated that the appellants had submitted the Directories of Delhi and Bombay only to show the capability of printing facilities of TPI and LMI and it does not substantiate their experience of a full job of compiling, printing and supply of telephone directories as stipulated in the tender notice/document. In the counter affidavit it was also H stated that the royalty and other aspects of the tender were not considered

since the appellants did not meet the primary requirement of experience as above. A

Before the High Court it was urged on behalf of the appellants that NHL was fully eligible and met the criteria as laid down and was competent to compile, print and supply telephone directories as per the invitation of tender and in this connection reliance was placed on the experience of the forieng collaborator/equity holder and the experience of the major Indian equity shareholders viz., TPI and LMI who owned the most well equipped modern printing and binding facilities and had executed the work for the parties who had been awarded contract earlier for telephone directories for metropolitan cities of Delhi and Bombay. It was also submitted that these facilities were available to NHL to execute the contract in question and that all these facts were clearly brought out in the tender document submitted by it and that the contract was awarded to respondent No. 4 on extraneous considerations which is violative of Article 14 of the Constitution. It was further submitted that since the matter involved public revenue the tender of the appellants containing the highest offer could not be rejected on the hypertechnical plea that the NHL itself has no experience. B C D

The said contentions have been negatived by the Division Bench of the Delhi High Court in its judgment dated October 15, 1993 whereby the writ petition filed by the appellants was dismissed. The High Court was proceeded on the assumption that the shareholders of NHL have all the experience in compiling and printing the telephone directories but has observed that, that it is not at all job requirement. According to the High Court it is one thing to say that shareholders of a company have vast experience in the publication of telephone directories with Yellow Pages and it is entirely another thing if the company itself has that experience. The approach to the High Court is that a company is an independent person distinct from its members and that NHL is carrying on its business independently from that of the shareholders. The High Court has held that the experience of a shareholder cannot be the experience of the company nor is NHL the agent of its shareholders. Referring to the principle of listing of corporate veil in modern company law the High Court has observed that so far as NHL is concerned, it cannot invoke the said principle either as a ground of attack or as a ground of defence. In the view of the High Court it could not be said that the authorities had failed in their duty to look behind the facade of corporateness of NHL and that it was none of their duty and they rightly examined the experience, etc. of NHL and came to the conclusion that it did not satisfy the eligibility conditions and that there was no error in the said approach of the authorities. Dealing with the connection E F G H

A that NHL is a joint venture the High Court has observed that a joint venture is a one-time grouping of two or more persons in a business undertaking and unlike a partnership, a joint venture does not entail a continuing relationship among the parties and on that view the High Court has held that there is no joint venture as such and there is only a certain amount of equity participation by a foreign company in NHL.The High Court rejected B the contention urged on behalf of the appellants regarding the absence of reasons for rejecting the tender of NHL on the ground that the non-communication of reasons is not fatal in all circumstances and that in the present case the reasons existed on the record of the authorities that the tender submitted by NHL was not in conformity with the condition of the tender and NHL was found ineligible for award of the tender and its offer C could not have been accepted. The High Court further held that since the bid of the appellants was rejected at the threshold the authorities could not consider the question of higher amount of royalty offered by NHL and that higher bid could not be a substitute for eligibility conditions.

Shri Soli Sorabji, the learned counsel appearing for the appellants, has D submitted that the High Court was in error in considering whether NHL fulfilled the condition regarding experience contained in the tender notice and that the authorities should have taken into consideration the experience of the constituents of NHL which is a joint venture company duly approved by the Government of India in which 40% equity is owned by IIPL (a wholly owned subsidiary of Singapore Telecom) and the remaining 60% E equity is held by Indian group of companies consisting of TPI, LMI, WML and Mr. Aroon Purie, and that the constituents of NHL had expertise and experience in publishing yellow page directories as well as telephone directories and had necessary resources for that purpose. Shri Sorabji has also submitted that it is a fit case in which the authorities should have lifted F the corporate veil and if they had done so they would have seen the reality. Shri Sorabji has emphasised that there is a difference of more than 3 and a half crore rupees between the amount of royalty offered by NHL and that offered by respondent No. 4 to whom the contract has been awarded.

Shri K.K. Venugopal, the learned counsel appearing for respondent G No. 4, has, however, supported the judgment of the High Court and has submitted that the authorities were justified in not considering the tender submitted by NHL on the basis that it did not fulfill the conditions regarding experience contained in the tender notice. Shri Venugopal has submitted that there is nothing to show that the constituents of NHL had the necessary experience of supplying telephone directories to large telephone H systems of the capacity of more than 50,000 lines and that no document to

prove that NHL had necessary experience was submitted by NHL alongwith the tender. A

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 B 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 C the public interest involved in such selection. The decision 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 lincences 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, D but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognized that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere See : *Ramanna Dayaram Shetty* v. *The International Airport Authority of India*, [1979] 3 SCR 1014, at p. 1034; *Kasturi Lal Lakshmi Reddy* v. *State of J&K*, [1980] 3 SCR 1338, at p. E 1355; *Fasih Chaudhary* v. *Director General, Dooradarshan*, [1988] Suppl. 3 SCR 282 at p. 286; *Sterling Computers Ltd.* v. *M/s M&N Publications Ltd. & Anr.* (supra); *Union of India* v. *Hindustan Development Corporation*, 1983 (3) SCC 499, at p. 513.

In the recent decision in *Tata Cellular* v. *Union of India* Civil Appeals F Nos. 4947-50 of 1994 and connected appeals decided on July 26, 1994 this Court has examined the scope of judicial review in the field of exercise of contractual powers by Government bodies and, after noticing the current mood of judicial restraint in England, the court has laid down the following principles : G

> "(1) The modern trend points to judicial restraint in administrative action .
>
> (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. H

A (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

B (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

C (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the D application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

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

"Wednesbury Principle of reasonableness" to which reference has been made in principle (5) aforementioned is contained in *Associated Provincial Pricture Houses Ltd.* v. *Wednesbury Corporation,* [1948] 1 KB 223. In that F 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 apporiate order in judicial review proceedings where the Court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. In *Tata Cellular* (supra) this Court, has mentioned two other facets of irrationality:

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(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 H 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. A

The validity of the action of the Tender Evaluation Committee in not considering the tender submitted by NHL has to be considered in the light of the aforementioned principle No. 5 as laid down in *Tata Cellular*. In other words, what has to be seen is whether the refusal by the Tender Evaluation Committee to consider the tender of NHL on the ground that the condition regarding experience as laid down in the tender notice was not fulfilled can be regarded as arbitrary and unreasonable. B

The requirement with regard to experience, as stated in the advertisement dated April 22, 1993 for inviting tenders, as noticed earlier was in the following terms: C

> "The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephones systems with the capacity of more than 50,000 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in this field." D

The requirement of experience was, however, differently worded in the notice for inviting sealed tenders dated April 26, 1993 which was attached to the tender documents which prescribes the conditions to be fulfilled for submission of tenders and wherein it was stated as under: E

> "The successful tenderer will also submit copies of telephone directories printed and supplied by them to the telephone systems of capacity more than 50,000 lines as credentials of his past experience." (Para 12) F

In the said notice the expressions "tenderer" and "successful tenderer" have been used. While the expression "tenderer" has been used in paragraphs 5,7,11 and 14, the expression "successful tenderer" is used in paragraphs 7, 9 (a), 10 and 12. Since paragraph 10 provides for execution of the agreement by the successful tenderer, the said expression is intended to mean the tenderer whose tender has been found suitable for acceptance. The use of the expression "successful tenderer" instead of the expression "tenderer" in paragraph 12, therefore, indicates that the documentary proof, by way of credentials of the past experience, has to be submitted after the tender has been considered and is found suitable for acceptance by the concerned authorities. This would mean that the past experience is a matter G H

which is to be considered after the tender has been examined and evaluated and the tenderer whose tender is found acceptable is required to submit documentary proof regarding his past experience. In other words, a tender is not liable to be excluded from consideration on the ground of non-eligibility on account of lack of past experience. This inference is strengthened by paragraph 8 and 11 of the notice dated April 26, 1993. In paragraph 8 it is provided that a tender is liable for summary rejection if it is submitted without the Demand Draft of Rs. 5,00,000. Similarly in paragraph 11 it is provided that tender is liable to be excluded from consideration if the income tax clearance certificate is not furnished with the tender. There is no similar provision for excluding from consideration a tender on the ground of failure to furnish with the tender the required material by way of credentials of past experience. It means that the matter of past experience has to be considered after the tender has otherwise been found to be suitable for acceptance and a tender is not liable to be rejected at the threshold without consideration on the ground that the tenderer lacks experience. The decision of the Tender Evaluation Committee to exclude the tender of NHL from consideration was, therefore, not warranted by the terms and conditions for submission of tender as contained in the notice for inviting sealed tenders dated April 26, 1993.

Even if it be assumed that the requirement regarding experience as set out in the advertisement dated April 22, 1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualize a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganized company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though

having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract where under some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response of the advertisement issued on April 22, 1993. This would require that the first terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated April 22, 1993 when read with the notice for inviting tenders dated April 26, 1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the company in 1992 60% of the share capital of NHL is owned by indian group of companies namely, TPI, LMI, WML, etc. and Mr. Aroon Purie and 40% of the share capital is owned by IIPL a wholly owned subsidiary of Singapore Telecom which was established in 1967 and is having long

A B C D E F G H

A experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.

B

The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a C community of interest in the performance of the subject matter, a right to direct and groven the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. [Black's Law Dictionary; Sixth Edition, p. 839]. According to Words and Phrases, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit [P.117, Vol. 23]. A joint D venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. [Black's Law Directory; Sixth Edition, p. 342] joint venture companies are now being increasingly E formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See: Jacques Buhart: Joint Ventures in East Asia - Legal Issues (1991)]. There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counter F parts and contribute towards capital and technical knowhow for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.

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As noticed earlier, in its tender NHL had stated that it is a joint venture company established by TPI, LMI and WML and IIPL wherein TPI, LMI and WML and other companies in the same group as well as Mr. Aroon Purie own 60% shares and IIPL owns 40% shares. It was also stated that the joint venture has received approval of the Government of India and is H currently in operation and that the Promoter will increase their

capital/contribution to commensurate with the project need and that the company has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information. In the tender it is also stated that as a joint venture in the true sense of the phrase, the company will have access to expertise in database management, sales and publishing of its parent group companies. It would thus appear that the Indian group of companies (TPI, LMI and WML) and the Singapore based company (IIPL) have pooled together their resources in the sense that TPI, LMI and WML have made available their equipment and organisation at various places in the country while IIPL has made available its wide experience in the field as well as the expertise of its managerial staff. All the constituents of NHL have thus contributed to the resources of the company (NHL). This shows that NHL is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest. We are, therefore, of the view that NHL has been constituted as a joint venture by the group of Indian companies and IIPL, the Singapore based company and it would not be correct to say that IIPL which has a substantial stake in the success of the venture, having 40% of share holding, is a mere shareholder in NHL.

Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents namely, TPI, LMI and WML as well as IIPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman.

The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of *Salomon* v. *Salomon & Co.*, (1897) A.C. 22. Ever since this decision has been followed by the Courts in England as well as in this country. But there have been in-roads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncement. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too fragrantly opposed to justice, convenience or the interest of the revenue. [See : Gower's Principles of Modern Company Law, 4th Edn., p.112]. This concept, which is described as "piercing the veil" in the United States, has been thus put by

A Sanborn J. in *U.S.* v. *Milwaukee Refrigerator Transit Co.*, (1905) 142 Fed. 247. at p.255 : "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons".

In a number of decisions, departing from the narrow legalistic view,
B courts have taken note of the realities of the situation.

In *Scottish Corporation Wholesale Society Ltd.* v. *Meyer,* (1959) A.C. 324, a case under Section 210 of the Companies Act, 1948, Viscount Simonds has quoted with approval the following observations of Lord President Cooper :

C

> "In my view, the Section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view" (p. 343)

Similarly in *Harold Holdworth & Co. (Wakefield) Ltd.* v. *Caddies,*
D (1955) 1 All.E.R. 725, it was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. The argument was rejected by Lord Reid
E with the observation "this is too technical an argument". The learned law Lord went to the hold : "This is an argument in *re mercotaria,* and it must be construed in the light of the facts and realities of the situation" (pp.737-38).

In *DHN Food Distributors Ltd. & Ors.* v. *London Borough of Tower*
F *Hamlets*, (1976) 3 All.E.R. 462, the Court of Appeal was dealing with three companies, out of which one was the holding company and the other two were its subsidiaries. After quoting the views of Prof. Gower that "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic
G entity of the whole group" Lord Denning M.R. has observed : "This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point". (p. 467) In the same case, Goff LJ has said : "....this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil". (p.468) The observations of Shaw LJ were to the
H following effect:

> "Why then should this relationship be ignored in a situation in which to do so does not prevent abuse but would on the contrary result in what appears to be a denial of justice?" (p.473)

In this case the holding company was held entitled to compensation for disturbance from premises in its occupation on account of compulsory purchase of the property which belonged to one of the subsidiaries and in which the holding company had no interest. This was a case in which the court lifted the corporate veil so as to confer a benefit on the company.

It may, however, be stated that the existing state of the law in England in this field is not very satisfactory. According to Professor Gower the development "has been essentially haphazard and irrational" (See: Gower's Principles of Modern Company Law, 4th Edn. p. 138).

This court in *Juggilal Kamlapat* v. *Commissioner of Income Tax,* [1969] 1 SCR 988, has laid down that "in certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade" (p.995).

In *State of U.P.* v. *Renusagar Power Co.*, [1988] Supp. 1 SCR 627 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:

> "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". (p. 667)

There are cases where the court has looked behind the facade of the company and its place of registration in order to determine its residence and for this purpose the test laid down is the place of the central management and control. (See: *De Beers Consolidated Mines Ltd.* v. *Howe,* (1906) A.C. 455. Similarly the court has looked at the corporators in order to determine the character of the corporation as a enemy alien or as a British resident (See: *Daimler Company Ltd.* v. *Continental Tyre & Rubber Company Ltd.*, (1916) 2 A.C. 307. According to Professor Gower this does not involve

A breach of the principle laid down in *Salomeon's* case (supra). (See : *Gower's Principles of Modern Company Law, 4th Edn. p.136*).

After making a special study of this branch of the law, a learned scholar has discerned four different attitudes towards the company in judicial pronouncements. According to him these categories, in progressive
B order, are (i) peeping behind the veil; and (ii) Penetrating the veil; (iii) Extending the veil; and (iv) Ignoring the veil. The decisions relating to determination of residence or enemy status of a company have been placed by him in the category of "Peeping behind the veil" where the court peeps behind the veil and concludes from the shareholders or from the people in control of the company, something about the nature of the company. (See :
C *S. Ottolenghi, From Peeping Behind the Corporate Veil, to Ignoring it Completely, (1990) 53 Mod. L.Rev. 338 at p. 340*).

This Court has adopted a similar approach and in some cases it has seen through the corporate veil. In *Central Inland Water Transport Corporation Ltd.*, v. *Brojonath Ganguly,* [1986] 2 SCR 278 the court was
D considering the question whether the appellant company was an agency or instrumentality of the State for the purpose of Article 12 of the Constitution. It was said :

> "For the purpose of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that
E veil is the face of an instrumentality or agency of the State." (p. 349)

So also in *State of U.P.* v. *Renusagar Power Co.,* (supra) it has been observed:

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> "The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence" (p. 668)

Seeing through the veil covering the face of NHL it will be found that as a result of reorganisation in 1992 the company is functioning as a joint
G venture wherein the Indian Group (TPI, LMI and WML) and Mr. Aroon Purie hold 60% shares and the Singapore based company (IIPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The company is in the nature of a partnership between the Indian group of companies and the Singapore based company who have jointly undertaken
H this commercial enterprise wherein they will contribute to the assets and

share the risks. In respect of such a joint venture company the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of Companies (TPI, LMI and WML) and the Singapore based company (IIPL).

On behalf of the respondents reliance has been placed on the decision of the Delhi High Court in *Paharpur Cooling Towers Ltd.*, v. *Banbaiqon Refinery and Petrochemicals Ltd.*, (1994) 28 DRJ 425, wherein it has been held that the expression "tenderer should possess such experience" would mean the experience of the tenderer itself and not that of its collaborator. It has been pointed out that SLP (C) No. 1484 of 1994 filed against the said judgment has been dismissed by this Court by order dated January 28, 1994. It has been urged that on the same logic the experience of a shareholder would not be included within the expression "experience of the tenderer". We fail to appreciate the relevance of this judgment. There can be no comparison between a collaborator who has no stake in the business of the company and a constituent of a company, such as NHL, constituted as a joint venture, wherein the constituents in the joint venture have a substantial stake in the success of the venture.

Thus the approach from the legal standpoint also leads to the conclusion that for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated April 22, 1993, the experience of the constituents of NHL, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore based company, (IIPL) has to be taken into consideration. As per the tender of NHL, one of its Indian constituents (LMI) had printed and bound the telephone directories of Delhi and Bombay for the years 1992 and its Singapore based constituent (IIPL) has 25 years experience in printing the telephone directories with 'yellow pages' in Singapore. The said experience has been ignored by the Tender Evaluation Committee on an erroneous view that the said experience was not in the name of NHL and that NHL did not fulfil the conditions about eligibility for the award of the contract. In proceeding on that basis the Tender Evaluation Committee has misguided itself about the true legal position as well as the terms and conditions prescribed for submission of tenders contained in the notice for inviting tenders dated April 26, 1993. The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of respondent No. 4. The total amount of royalty offered by respondent No. 4 for three years was Rs. 95 lakhs whereas NHL had offered Rs. 459.90 lakhs, i.e., nearly five times the amount offered by respondent No. 4. Having regard to

this large margin in the amount of royalty offered by NHL and that offered by respondent No. 4, it must be held that decision of the Tender Evaluation Committee to refuse to consider the tender of NHL and to accept the tender of respondent No. 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed.

We have been informed that while the matter was pending in the High Court and in this Court the telephone directory for the year 1993 has been printed and supplied to the Department by respondent No. 4 as per terms of the contract. Insofar as the directory for the year 1994 is concerned we find that, as per the terms of the contract, the process for preparation of the telephone directory has already commenced. We cannot loose sight of the fact that as a result of quashing of the contract in respect of the directory for 1994 fresh steps will have to be taken award a fresh contract and the said process would take some time and thereafter the contractor will require time to print and publish the telephone directory. It would therefore, not to feasible to bring out the directory for 1994 before the close of the year. As a result, the Department would suffer loss of revenue which it would otherwise earn by way of royalty from respondent No. 4 for the directory for the year 1994. Insofar as the contract in respect of the year 1995 is concerned there is sufficient time for the Department to award a fresh contract if the contract awarded to respondent No.4 is cancelled and the new contractor will have sufficient time at his disposal to print and deliver the directory as per the time schedule. Moreover, in respect of the directory for the year 1995 the amount of royalty that is payable by respondent No. 4 is Rs. 45 lakhs and the amount of royalty offered by NHL for directory for the said year was Rs. 291.6 lakhs. Keeping in view the circumstances referred to above, the course that commands us is that, while maintaing the contract awarded to respondent No. 4 in respect of the directories for the year 1993 and 1994, the said contract may be set aside insofar as it relates to the directory for the year 1995 and fresh tenders may be invited for award of the contract for the directory for the year 1995. The appeal filed against the judgment and order of the Delhi High Court dismissing the writ petition of the appellants must therefore, be allowed in the above terms. The other appeal has been filed by the appellants against the order of Delhi High Court dismissing C.M.No. 6120 of 1993 which was an application for an interim relief during the pendency of the writ petition in the High Court. In view of the final order that is being passed in the writ petition the application for interim relief has become infructuous and the appeal against the order dismissing C.M.No.6120 of 1993 must, therefore, be dismissed as infructuous.

In the result, the appeal against the judgment and order of the Delhi High Court dated October 15,1993 in C.W.P.No. 3837 of 1993 is allowed, the said judgment is set aside and writ petition No. 3837 of 1993 filed by the appellants is disposed of with the direction that the award of the contract for printing and publishing the telephone directories for Hydrabad for the years 1993, 1994 and 1995 is set aside to the extent it relates to the directory for the year 1995. The appeal filed against the order of the Delhi High Court dated October 15, 1993 dismissing C.M.No. 6120 of 1993 for interim relief is dismissed as infructuous. No order as to costs.

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U.R. Appeal allowed.