

IN THE HIGH COURT OF DELHI AT NEW DELHI
EXTRAORDINARY CIVIL JURISDICTION
CIVIL WRIT PETITION NO 180 OF 2002.

MEMO OF PARTIES

M/s MODI CORP LTD.

A company incorporated under the Companies Act 1956 having its registered office at 13th Floor, Modicorp Tower, 98, Nehru Place, New Delhi- 110019

Through its Company Secretary Ms. Preeti Malhotra

VERSUS

1. The Union of India
Through the Secretary,
Department of Disinvestment,
Block No. 11,
CGO Complex, New Delhi- 110003 â!â!RESPONDENT NO. 1

2. M/s Videsh Sanchar Nigam Limited,
A Government Company incorporated under
The Companies Act, 1956 having its registered office
At Videsh Sanchar Bhawan, M.G. Road,
Mumbai- 400001 â!â!..RESPONDENT NO.2

New Delhi

Dated: 08.01.2002

(Manoj Kumar)
Hammurabi & Solomon
Advocates for the Petitioner
A-333,2nd Floor, Defence Colony
New Delhi 110024.

IN THE HIGH COURT OF DEHI AT NEW DELHI
CW.No.189.2002 & C.M.335/2002
Date of decision : January 31st 2002.

M/s MODI Corp LTD.

â€¦. Through Dr. Abhishek Manu Singhvi and Mr. Rajiv Nayyar, Sr. Advocates with Mr. Manoj Kumar and Mr. Abhimanyu Bhandari Advocates.

Versus

Union of India & Another.

â€¦. though Mr. Soli J. Sorabjee. Attorney General of India with mr. Sanjay Jain for UOI and Mr. R.N. Trivedi. A.S.G. with Mr. Mahesh Agarwal for respondent No. 2. VSNL.

QUORAM:

Honâ€¦ble Mr. Justice Manmohan Sarin.

- (1) Whether reporters of local papers may be allowed to see the judgment?
- (2) To be referred to the reporter or not?

MANMOHAN SARIN. J.

1. The petitioner, Modi Corp Ltd., by this writ petition seeks a direction to the union of India to permit the petitioner along with 3 consortium members to participate in the disinvestment process of respondent No. 2, Videsh Sanchar Nigam Limited (hereinafter referred to as VSNL). Petitioner also seeks that it be given 15 days time for conducting its due diligence on respondent No. 2 for the purpose. An interim application C.M. No. 335/2002 seeking the same prayer as in the writ petition is made.

2. Notice to show cause was issued in the case on January 10, 2002, returnable on January 28,2002. Learned counsel at the time of issuance of notice also made submissions that the petitioner be permitted to carry out due diligence of VSNL respondent No.2 so as not to delay the processing of the financial bid, if the Court comes to the conclusion that the petitioner should be permitted to participate. It was observed that the Court would consider further directions being given regarding processing of the bid, depending upon the conclusion it reaches with regard to the merits of the petitionerâ€¦s case.

3. Petitioner has also filed rejoinders thereto. Learned Senior counsel Dr. Abhishek Manu Singhvi and Mr. Rajiv Nayyar were heard in support of the petition. Counter affidavits by respondent Union of India and VSNL have been filed. Mr. Soli J. Sorabjee, Attorney General for Union of India and Mr. R. N. Trivedi, Additional Solicitor General for respondent NO. 2 VSNL were heard in opposition to the writ petition on 28.01.02.

4. Before coming to the respective submissions of the parties, the relevant and admitted facts on which there is no controversy may noted :-

(i) Respondent Union of India vide a public notice/advertisement dated February 20, 2001, published in newspapers, as well as on the internet, issued â€¦Expression of Interestâ€¦ under the hand of the Director (Finance) of respondent No.2, announcing its intention to disinvest 25% of the equity of VSNL to a strategic partner. The notice stated the VSNL was the exclusive provider of public

international telecommunications services in India to about 240 territories world wide. Besides being the largest ISP (internet services provider) in the country with a subscriber base of over 5 lacs. Bids were invited by April 10, 2001. Interested parties were advised to visit the website, particulars of which were given.

(ii) The document "Expression of Interest" also disclosed that Government of India hold 52.97 per cent of the equity capital of VSNL. It was also stated that VSNL's monopoly over all international telecom services had been assured by the Government of India upto March 31,2002. The company(ies)/Joint Venture(s)/Consortium(s) incorporated or to be incorporated, who were interested in participating in disinvestment were required to submit their "Expression of Interest" called EOI by 10th April, 2001.

(iii) The promoters of the applicant company were required to have a net worth of a minimum of Rs. 2,500 Crores. The net worth of only those promoters was to be reckoned who had at least 10% equity stake in the total equity of the company. The net worth was defined to mean the sum total of paid up capital and free reserves. The "expression of Interest" was to be submitted along with the Request for qualification (RFQ) together with a statement of legal capacity in the formats specified in preliminary information Memorandum.

5. The petitioner did not apply or submit either the "Expression of Interest" or the Request for Qualification by April 10,2001 or subsequently. The petitioner, for the first time, wrote a letter dated October 8, 2001, to the respondents showing its interest for inter alia acquiring the 25 per cent equity of VSNL and requested for further information to enable the petitioner to participate in the bid for the purchase of the said shares.

6. The petitioner's case is that it has conducted its preliminary enquiries and has found that the net worth of VSNL as on 31.3.2000, was Rs. 6,174.22 Crores which comprised free reserves and surplus/cash reserves to the tune of Rs.4628.22 Crores. The market capitalization of VSNL was approximately Rs. 10,000 Crores in February, 2001. 25% of the capitalization came to around 2,500 Crores which the petitioner contends logically could be the basis for bid to acquire 25% equity share capital of VSNL. Based on these figures, the petitioner contends that it was not in a position to give a proper bid and hence did not submit the bid in terms of the "Expression of Interest".

7. Learned Senior Counsel Dr. A.M. Singhvi submits that as a result of conscious decisions and actions of the respondents, there has been a sea change in the financial position and parameters of VSNL as projected at the time of inviting "Expression of Interest" and as now prevailing at the time of financial bid to be given by the short listed bidders. By payment of dividends itself the cash and surplus reserves of VSNL had been depleted.

VSNL paid 100 per cent normal dividend and an unprecedented special dividend of 400 per cent totaling 500 per cent to its existing share holders as of 15.9.2001, pursuant to the approval by the share holders at the Annual General Meeting of VSNL held on 27.9.2001. Petitioner, therefore, wrote a letter on 8.10.2001, to the Joint Secretary, Department of Dis-investment, expression its interest to evaluate the opportunity of acquiring shares in VSNL, Hotel Corporation of India, ITDC, Indo-Burma petroleum, Indian Petro Chemicals and MTNL and requested for being short-listed. Again in December, 2001, VSNL obtained approval of the Department of Company Affairs under Section 205 of the Companies Act. 1956, for distribution of the further dividend of 750 per cent. Thus, a substantial amount of Rs. 3918 crores, being 1250 per cent dividend has been distributed by respondent No. 2 to its share holders, the majority shares of 52.97% being held by the Government. Dr. Singhvi submitted that thus cash and surplus reserves of Rs. 3918 crores have been utilized for this purpose, reducing the net worth as well as the market capitalization of VSNL. Additionally, respondent Nos.1 and 2, have come up with proposal of

demerger of 1400 acres of surplus land of VSNL value at Rs. 2400 crores, into another company. This has further reduced the net worth as well as market capitalization of VSNL. Dr. Singhvi submits that market capitalization of VSNL, which was earlier assessed at Rs.10,000 crores has come down substantially by over Rs. 6400 crores, thus, making acquisition of 25 per cent of VSNL shares, affordable and capital efficient to the petitioner.

8. Learned counsel submits that as per newspaper reports. Revenue tax authorities have taken a decision to appeal against the judgment of the Income Tax Appellate Tribunal, which had gone in favour of VSNL, involving tax demand of Rs. 1500 crores. This could further erode the net worth and market capitalization of VSNL. Learned counsel, therefore, submits that the market capitalization of VSNL had fallen approx from Rs. 10,000 crores in February, 2001 to approx. Rs. 6000 crores, based on the share price of Rs. 204 per shares cum dividend. The net of dividend would even be lower at Rs. 129, reducing the actual share price and the market capitalization to Rs. 3700 crores.

9. Learned counsel for the petitioner submits that it was in these circumstances that petitioner again on 28.12.2001, referring to its earlier letter of 8.10.2001, expressed and requested to the given an equal opportunity to participate in the bidding process of dis-investment of VSNL. In brief, the submission of the petitioner is that with a fall of market capitalization of VSNL from Rs. 10,000 crores to Rs. 6,000 crores coupled with re-structuring of assets by de-merger of 1400 acres of land into another company, had made the acquisition of VSNL more capital efficient and affordable. Dr. Singhvi submitted that considering the petitioner's track record and its relationship with major international players in tele communication and I.T. arena, petitioner should be permitted to carry out due diligence and give a bidding offer for acquisition of VSNL shares.

10. Learned counsel submitted that petitioner was not assailing the dis-investment process or challenging the eligibility criteria, rather its endeavour and effort was to introduce more competitiveness. It would also be in the interest of the Government to get the maximum valuation for VSNL dis-investment, especially in view of the change in the business environment, including the end of ILD monopoly of the respondent/VSNL by March, 2002. Petitioner, therefore, ought to be permitted to bid for the dis-investment process, which would be in the larger public interest. Dr. Singhvi, by way of illustration, stated that the present case was akin to the advertised sale of a fully loaded car with accessories, such as Refrigerator, Video, T.V. Air conditioner etc. However, before the sale, the owner strips it of all the accessories and leaving it with the engine, steering with hub and bare essentials. In view of this changed situation an interested buyer who was not in the fray earlier should be permitted to make an offer.

11. Learned counsel also submitted that delay and laches, if any, should be counted only from 8.10.2001, as it was in late September, 2001 only that the dis-bursement of dividends came to be known. Learned counsel also submitted that participation of the petitioner in the bid would not prejudice any third party as no interest or equity has come into being in their favour as yet. Petitioner was not assailing the bidding process and there would be no question of re-bidding. It is only the petitioner, who had expressed its interest and filed the writ petition who could be permitted to participate in the bid. Learned counsel also referred to the reduction in the earnest money deposit from Rs. 500 crores to Rs. 100 crores. The reduction in earnest money deposit was of course a post "Expression of Interest" development. It was nevertheless a factor, which made in this case bidding more attractive and feasible. Learned counsel submits that even in the case of Balco Employees Union (Regd.) Vs. Union of India & Ors reported at 2001 (8) Scale 542, the Court noted that the public interest was the paramount consideration. The judgment in para 51 itself recognizes that the policy of the Government ought not to remain static. With the change in economic climate the wisdom and the manner for the Government to run commercial ventures may require re-consideration. What may have been in the public interest at a point of time may no longer be so.

Learned counsel, therefore, submitted that in view of the change in the financial parameters, as noted above, the public interest was best served in having the best realization for the assets of VSNL and, therefore, permitting the petitioner to participate.

12. Learned senior counsel Dr. Singhvi also urged that respondent No. 2 had not disclosed its intention or plans to distribute the case reserves of respondent No. 2, VSNL as dividend, or to restructure VSNL by demerging the immovable properties, which were not related to business of respondent No. 2 into a separate entity as also to reduce the earnest money deposit from Rs. 500 crores to Rs. 100 crores. It was in public interest that the petitioner be participate in the bid to make the same more competitive. He submitted that it was not a case where the market capitalization of VSNL has come down as a result of capital recession or the market crashing. It has happened as a result of deliberate conscious acts of payment of unprecedented dividends, thereby reducing market capitalization and net worth of VSNL. He submitted that acquisition of VSNL has become more capital efficient and affordable. He reemphasized that petitioner was not assailing the eligibility conditions or for that matter the reduction in the earnest money deposit rather its prayer was only to be permitted to participate in the bid to make it more competitive and ensure the best realization of value for the assets and share of VSNL.

13. Learned counsel also submitted that the petitioner was eligible to bid and met the eligibility criteria. In this connection, he submitted that the net worth of the promoters of the petitioner company was Rs. 2836.31 crores i.e. more than Rs. 2,500 crores. He placed reliance on a certificate appearing at page 269 of the paper book, wherein the details of the various shareholders of the petitioners company, namely, Modi Holdings Ltd., Wellvest Investments Ltd. S. T. Communications Ltd. and the extent of their shareholding is given. The net worth of these companies totals Rs. 2564.23 crores together with the net worth of Modi Corp Ltd. i.e. Rs. 272.08, make up to Rs. 2836.31. Learned counsel submitted that though the description of the companies in the certificate is as shareholders and extent of their shareholding is given, they are the promoters as mentioned in the rejoinder. Learned counsel also submitted that keeping in view the terms of the "Preliminary Information Memorandum" appearing at page 246 of the paper book, companies, joint ventures or consortia incorporate or to be incorporate were eligible to bid. The promoters of the said companies, joint ventures or consortia were to have a net worth of minimum of 2500 crores. The petitioner would thus meet the eligibility criteria.

14. Respondents Union of India and VSNL in the counter affidavits filed opposed the writ petition as not a bona fide one and filed in order to derail, delay and jeopardize the disinvestment by respondent No. 1 in VSNL.

15. The VSNL in its affidavit has described the basic telephone services and the value added services provided by it. VSNL apart from monopoly in international telephony, has been providing television uplinking facilities. VSNL operated more than 10,000 satellite voice circuits and nearly 1300 satellite data circuits through 14 Earth stations and eight main gateways. It claims to have positioned itself significantly in the telecom sector providing the interlinking facilities, gateways and TV uplinking. It claims that its primary and most valuable asset is its goodwill, arising out of existing operations. Considering that since the Government had decided to pull out ultimately, it was of critical importance for VSNL sustained growth and future development that its privatization should not be delayed. It would otherwise lose the advantage, which a strategic partner of VSNL would enjoy and look forward to. It is claimed that neither while inviting the "Expression of Interest" nor in the Preliminary Information Memorandum, there was any representation that there would be a freeze on the financial and operational position of the enterprise. It is claimed that it was petitioner's own decision or estimation of not participating in the "Expression of Interest" on finding the project large beyond its capacity. The petitioner took a business decision if the same did not turn out right, it could not blame others.

It is claimed that the petitioner is overstating the impact of the events. Petitioner was only a company with a net worth of less than Rs. 300 crores, it could not be a possible contender or strategic partner in a business whose net worth, if the petitioner's arguments were to be accepted, still was 10 times i.e. of 3000 crores. It is claimed that the petitioner having net worth of less than Rs. 300 crores was not eligible to participate in the bidding process. Petitioner had failed to give any details of the member of the so-called consortium or promoters. As regards the reduction in EMD (Earnest money deposit), it was post Expression of Interest development and fixed after discussion on finalization of the share purchase agreements and other documentation with shortlisted bidders. Subsequent changes during negotiations in the process of disinvestment are irrelevant as far as petitioner is concerned as he had not even participated in the Expression of Interest. It is claimed that VSNL being one of public sector undertakings, the Government has to be very careful in selecting the strategic partner, who should have the necessary financial and managerial strength to sustain the company in the highly competitive field of telecommunication. The petition is said to be vitiated by delay and laches. The petitioner who had failed to submit the Expression of Interest by 10th April, 2001 cannot be permitted to come in when the process was due to be completed.

Regarding disbursement of the dividends, it is stated that dividend of 500 per cent was approved by the shareholders in the General Meeting of VSNL held on 27.9.2001. Apart from the Government of India's shareholding of approximately 52.97% there were a large number of public shareholders and institutional shareholders who have received the dividend. Therefore, it would not be correct to state that the Union of India has taken out money from one pocket and put in another. The letter of 8.10.2001, cannot also be said to be prompted by declaration of dividends. The letter was a general one. It is claimed that payment of dividend, demerger of surplus land etc. was in the course of various business decisions lawfully taken by the company. The technological, economical and financial environment was continuously changing. The disinvestment process could not be derailed nor disinvestment be changed on account of these decisions. It is claimed that the commercial value, goodwill and net worth of VSNL would go down with the entry of the private sector in the ILD segment. Any delay in the disinvestment process would reduce the bidding price.

16. The Union of India in its affidavit reiterated that the petitioner failed to submit its Expression of Interest despite knowledge of the last date. The petitioner's bona fides in filing the belated petition are questioned inasmuch as the petitioner was fully aware that the financial bidding date was 1st February, 2002. The conduct of the petitioner lacks equity and the aim was to stall the disinvestment process. The petitioner, it is stated, does not qualify the pre-condition for bidding, in the Expression of Interest not having net worth of 2500 crores. The petitioner not meeting the preliminary criteria, had itself not submitted his Expression of Interest. It is claimed that the argument of the petitioner that change in the net worth of VSNL, assuming it to be true, should logically provide an opportunity afresh to the petitioner to bid was misconceived as the eligibility criteria of 2500 crores is not linked to the net worth of VSNL. The disinvestment process formally started in February, 2001. If petitioner's argument was to be accepted then not only petitioner, but others should also be given an opportunity to participate, which would result in denovo commencement of disinvestment process. The petitioner cannot have any grievance with regard to reduction in earnest money deposit, as the same was not pre-condition for submission of Expression of Interest, which the petitioner failed to do. The removal of monopoly of VSNL in international telephony by 31st March, 2002, was also known and there has been no change in that. The decision to demerge assets into a new company with similar shareholding pattern as that of VSNL cannot again be questioned as it was in public interest. The affidavit then goes on to describe the process of disinvestment, rationale thereof as well gives the overview of the process of disinvestment. It is not necessary for the purpose of disposal of this writ petition either to reproduce or recapitulate the same here.

17. I have heard learned counsel for the petitioner, Attorney General of India for Union of India and Additional Solicitor General on behalf of VSNL. Having noted the facts, respective contentions and submissions, I proceed to decide the various issues arising for disposal of this writ petition.

18. The First factor to be considered is the effect of the petitioner failing to apply in response to the notice/advertisement dated 20.2.2001. The petitioner having failed to submit its Expression of Interest, which was required to be done by the 10th April, 2001 which was the last date, could not, in my view, claim any legal or vested right to participate in the future bidding process. The last date 10.4.2001 was not extendable. The petitioner, for the first time, admittedly, wrote only a letter dated 8.10.2001 expressing his general interest in the matter of disinvestment of various public sector undertakings.

19. The petitioner, no-doubt, claims in the petition that the letter was addressed after the declaration of the unprecedented dividend of 500 per cent by the VSNL on 27.9.2001, which, therefore, made the petitioner feel that the project had become affordable and it could participate. The letter dated 8.10.2001, however, belies this contention. It would be worthwhile to reproduce the body of letter which reads as under:-

â□□We would like to thank you for giving us time to meet you and discuss the opportunities that could be available to Modicorp for acquiring some of the businesses which the Department of Disinvestment, Govt. of India is in the process of privatising.

As we highlighted to you during the course of our discussions, Modicorp is a Holding Company which was successfully created and developed business in the Office Automation, I.T. and Telecom Sectors in partnership with world renowned Corporations viz. Xerox, Alcael, Olivetti, Telstra, Motorola etc.

In the recent past as a part of our focused strategy, we have divested from some businesses and are today having cash resources of over Rs. 180 cr. We would also like to highlight that currently Modicorp has negligible debt on its books. We are, therefore, uniquely qualified both in terms of Financial, Technological and Managerial resources to participate effectively in the privatisation program of Govt, of India.

Our immediate interest is to evaluate the opportunity of acquiring shares in the following Companies :

Videsh Sanchar Nigam Limited.
Hotel Corporation of India
Indian Tourism Development Corporation (ITDC)
Indo Burma Petroleum (IBP)
Indian Petrochemicals (IPCL)
Mahanagar Telephone Nigam Limited.

We would request you to shortlist us and advise us on the next steps including obtaining the information memorandum for these to enable us participate effectively and in time.

We are also extremely interested in the opportunity of acquiring the majority shareholding in CMC Limited. We do appreciate that we are making known our interest in CMC to you at this late juncture. However, given the fact that there is only one bidder currently in the process, we believe our offer would enable the Govt. of India to get the best valuation.

We would, therefore, like to request you to kindly help and make available to us the relevant information memorandum and provide us with a limited due diligence option of 10 working days

to make a binding offer for acquisition of CMC shares. We would also request you to provide us with the draft share purchase and shareholder Agreement, if any, for the same purpose.ââ

20. From the letter as reproduced above, it would be seen that it was a general letter, which expressed the interest of the petitioner to evaluate the opportunity of acquiring shares in a number of companies. The emphasis was on acquiring the majority shareholding of CMC Limited. The letter was completely silent as regards the payment of any dividend by VSNL or the said factor having enlivened the petitionerâs interest. The learned Attorney General rightly pointed out that even the interest sought to be expressed in acquisition of CMC was a belated one inasmuch as on the said date the disinvestment decision with regard to sale of CMC shares had also been taken. This letter itself had been written nearly 6 months after the last date on which the petitioner was required to submit his âExpress of Interestâ. Thereafter again, there was silence for a period of two months and the petitioner again wrote on 28.12.2001. It is in this letter that the petitioner mentioned the fall in the market capitalization of the VSNL from Rs. 10000 to 6000 crores and the cabinet committee for divestment having cleared the decks Shortlisting parties post finalization of shareholders and share purchase agreement. This was again followed with some alacrity by the petitioner by his letter dated 1.1.2002.

I find merit in the submissions of learned Attorney General that the petitioner who had chosen not to bid in April, 2002, having found the project and the financial requirements therefor, not affordable is belatedly and as an after thought seeking to enter the bidding process. The disinvestment process has been going in for a period of nearly 8 months. A bidder who does not submit his bid in accordance with the terms cannot be later heard to complain that he should be permitted to join at a belated stage, when considerable progress has been made with the shortlisted bidders and drafts of the shareholders and the share purchase agreements having been finalized and the stage is ripe for financial bid. Petitioner cannot belatedly be permitted to bring in uncertainty in the financial bid which is due to be opened on 1.2.2002.

21. Learned Additional Solicitor General appearing for VSNL also submitted that it was a last ditch attempt by the petitioner to simply stall and derail the disinvestment process and to create some uncertainty so that the shortlisted bidders lose interest in the acquisition of VSNL. He submitted that any delay in the disinvestment process would severally prejudice the VSNL that was currently positioned at a very critical juncture wherein the private bidders would also be joining the field after the end of the monopoly of the VSNL in international Link Dialing and Telephony. Any uncertainty about future delay would be detrimental to VSNL interest. I find merit in the above submission.

22. Let me now consider whether the petitioner was duly qualified and eligible to bid. The question here is whether the petitioner meets the eligibility criteria or not? The eligibility criteria required the bidder to have a net worth of 2500 crores. The net worth of the petitioner company, admittedly, is in the range of 272 crores or so as per the petitioner itself. The preliminary information memorandum gives the eligibility criteria as under :

âCompanies/Joint Ventures/or Consortia (incorporated or to be incorporated) interested in participating in the proposed disinvestment(âInterested Partiesâ) should have a combined net worth of a minimum of Rs. 2500 crore. The net worth of only those promoters shall be counted who have at least 10% equity stake in the total equity of the company. Here net worth shall mean as the sum total in Indian rupees, of paid up equity capital and free reserves. While counting net worth the foreign currency shall be converted into Indian Rupees at the prevalent rate indicated by the Reserve bank of India on the date of the application.â

The aforesaid criteria, no-doubt, is couched in wide terms and permits companies/Joint Ventures or Consortia to apply. It also provides that the interested parties in the proposed investment should have a joint net worth of Rs. 2500 crores with each promoter having a minimum of 10% equity stake.

23. In the instant case what is significant is firstly, the petitioner never bid in the "Expression of Interest". The first communication from petitioner is of 8.10.2001. It does not contain any statement or averment with regard to any other company apart from the petitioner, jointing in the bid or there being any joint venture or consortium. It only refers to the petitioner company having created and developed businesses in various fields with other renowned world corporations. Even in the subsequent letters of 28.12.2001 and 1.1.2002, there was no mention of any of the promoters or other partners of the joint venture or of the consortium. It is only in the rejoinder filed together with a certificate from the Auditors, which gives the net worth of the various shareholders of the petitioner.

24. Learned Attorney General in this connection submitted that it was not the net worth of the shareholders which was to be reckoned but that of the promoters, partners in joint venture and members of the consortia. Counsel for the petitioner Dr. Singhvi attempted to explain the same by saying that the rejoinder mentions the net worth of the promoters, which are described as shareholders in the certificate. I am afraid this would not suffice at all. A bidder who wants to bid for disinvestment as a strategic partner is required to clearly spell out and give particulars of its joint ventures partners or member of the consortium. The financial details, expertise and role in the joint venture, consortium of the partners/members is to be disclosed. The mentioning of mere shareholding in Auditor certificate cannot be a substitute for the requirement of clearly specifying the role of the joint ventures partners or that of the consortium. In these circumstances, I am of the view that even at this belated stage the interest expressed or the so-called attempt to bid is by petitioner alone and not by any joint venture or consortium or promoters as claimed by the petitioner. The petitioner itself admittedly has a net worth of only Rs.272 crores as against the eligibility requirement of 2500 crores. Hence it is held that petitioner was not eligible to bid.

25. Let us now consider the next submission of learned senior counsel for the petitioner Dr. Singhvi that as a result of unprecedented declaration of the dividends, the net worth of VSNL was diminished and eroded. The detailed submissions in this regard have already been noticed. The submission is that with a declaration of 500 per cent dividend in September, 2001 and 750 per cent as well as by demerging of the surplus land assets the market capitalization and net worth of VSNL, had been eroded from Rs. 10000 to Rs. 3000 crores. In view of this changed financial scenario, petitioner should be permitted to bid. Firstly, as held earlier, there has been no change in the eligibility criteria and petitioner does not qualify for the same and hence there would be no question for the petitioner being permitted to bid. It is significant to notice that the petitioner did not challenge the eligibility criteria but only claimed that he qualified the same. The submission of the learned counsel for the petitioner for being permitted to participate in the bid is based on the assumption that the eligibility criteria of 2500 crores, which was prescribed was directly linked up with the net worth of the company being disinvested namely VSNL. Learned Attorney General submitted that this was a misconception inasmuch as the eligibility criteria depended and was fixed on a variety of factors, such as, the financial strength of the participating bidders, capacity to manage the company after privatization. The requirement for revival of a sick company being taken over would entail a strategic partner with available cash reserves to infuse the requisite capital. In some cases, the technological expertise would be required of strategic partner while in others it could depend on issues, such as, absorption and adjustment of the working force or labour. I find merit in this submission as the focus has to be on the capacity of the strategic partner to successfully manage the new venture. Learned Attorney General cited examples wherein the net worth of the company which was sought to be taken over was negative, yet the bidder's net worth which had been prescribed was very high. Some of these cases of way of illustration are noted below :

Swipe to view

high court vsnl

	Name of Company	Net worth as on 31.3.2000	Whether advertised for disinvestment	Bidder's turnover requirement	Bidder's Net Worth requirement
1.	NEPA LTD.	(-) 18.80	Yes	50	25
2.	Hindustan Cables Ltd.	(-) 93.03	Yes	100	100
3.	Bharat Pumps & Compressors Ltd.	(-) 50.16	Yes	75	25
4.	Paradeep Phosphates Ltd.	(-) 78.53	Yes	600	200
5.	Praga Tools Ltd.	(-) 148.88	Yes	40	16

26. The eligibility criteria is fixed to ensure that only serious and genuine bidders come forward. As regards erosion of the market capitalization or net worth of VSNL, it may be noted that there was no representation made either in the Expression of Interest or in the preliminary memorandum of information that the respondents would not be conducting their business during the process of disinvestment. The respondents, as noted earlier, have set out details in the affidavit. The privatization process commenced with the Cabinet Committee on Disinvestment approving in principle the PSU's of which disinvestment is to be done, by global competitive bidding process, advisors are selected and Expression of Interest from prospective strategic partners is invited. After the receipt of the Expression of Interest prospective bidders are shortlisted. The due diligence of the PSU is gone through and the information memorandum is drafted and given to the prospective bidders after entering into a Confidentiality agreement. The draft share purchase agreement and shareholder agreements, are prepared by the advisors. The evaluation of the PSU is done and it is at this stage, the technical and financial bids are invited from the shortlisted bidders. After this entire process has been gone through and stage of financial bid had arrived, it would be idle for the petitioner to contend that during this entire period, no decisions should be taken with regard to the conduct of business of the PSU which is the subject matter of disinvestment. It is not in issue that the dividends have been duly approved by the Annual General Body Meetings and approval of the Department of company Affairs has also been taken for the same. It cannot be claimed that the declaration of dividends would adversely affect the financial bids. The financial position including the cash reserves of respondent No. 2 were already published and known to the bidders; the payment of dividend is to the all shareholders including the Government which is major shareholder of 52.97%. The major portion of the dividend has been received back by the Government only. Learned Additional Solicitor General in this context rather stated that declaration of dividends would normally give boost to the share price in comparative terms. Similarly, as regards the demerger of the known assets i.e. the surplus land into a separate company, it cannot be said that the same is not in public interest. Learned Attorney General rather submitted that demerger of the surplus land into a different company was in public interest and had it not been done, it could have been made a subject of criticism that surplus valuable land assets, which were not required the business had been transferred and given to a strategic partner. In any case, all these decisions have been taken before the financial bids and it would be for the shortlisted bidders to take these factors into account.

It is not disputed before me that the three shortlisted bidders, namely, M/s Reliance, Tata & Sterling are reputed enterprises, with financial strength. There is no allegation of there being any cartel or lack of competitiveness among the bidders. The concern of the Government of India that any uncertainty or delay with regard to the financial bid any finalization of the processing of the financial bid and disinvestment, would impede and thwart the process of economic reforms is fully justifiable.

The petitioner has simply missed the bus and cannot now claim to join in at the fag end of the journey. There is also merit in the contention of the respondents that the petition is highly belated and the delay is not explainable.

27. As observed by the Supreme Court in Balco Employees Union (Regd.) V. Union of India and others 2001 (8) SCALE page 541 the process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies is demonstrated to be so violative of constitutional or legal limits on power of so abhorrent to reason, that the courts would decision, right to trial and error as long as both trial and error are bona fide and within limits of authority. Applying the aforesaid principles, it cannot be said that any action of the respondents either lacked bona fides or was arbitrary, illegal or unformed.

In view of the foregoing discussion, the writ petition has no merit and is dismissed, but with no order as to costs.

January 31st, 2002

Vkm

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Man Mohan Sarin
Judge
True copy
Examiner