REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1353-1354 OF 2017
(@ S.L.P. (CIVIL) NOS. 35104-35105 OF 2016)

Consortium of Titagarh Firema Adler S.P.A. – Titagarh Wagons Ltd. through Authorized Signatory, Titagarh Towers, 756, Anandapur, E.M. Bypass, Kolkata - 700 107, West Bengal ... Appellant(s)

Versus

Nagpur Metro Rail Corporation Ltd. (NMRCL) having its Head Office at Metro House, Bungalow No. 28/2, Anand Nagar, C.K. Naidu Road, Civil Lines, Nagpur through its General Manager (Procurement) & Anr. ... Respondent(s)

WITH

CIVIL APPEAL NO. 1355 OF 2017
(@ S.L.P. (CIVIL) NO. 36308 OF 2016)

J U D G M E N T

Dipak Misra, J.

Nagpur Metro Rail Corporation Ltd., the 1st respondent herein, issued a Notice Inviting Tender (NIT) on 25.01.2016 for the work of design, manufacture, supply, testing, commissioning of 69 passenger rolling stock (Electrical Multiple Units) and training of personnel at Nagpur Metro Rail Project. The said project is being funded by KfW Development Bank, Germany. As per the clause ITS 35.8 at all stages of bid evaluation and contract, award would have to be subject to no-objection from KfW Development Bank.

2. In response to the said NIT, three bidders submitted their bids. One was found technically disqualified and thus, only the appellant and the respondent No. 2 remained in contest. Upon opening of financial bid on 29.09.2016, it was found that the appellant had given a bid of Rs. 852 crores whereas the bid of the respondent No. 2 was Rs. 851 crores. The

Director Level Tender Committee of the 1st respondent agreed with the report of the tender evaluation committee and recommended to accept the lowest offer of respondent No. 2 and the work order was to be issued after compliance of certain technical requirements. Before issue of work order, the appellant filed Writ Petition No. 5818 of 2016 before the High Court contending that respondent No. 2 was not technically qualified and, therefore, its financial bid could not have been opened.

3. It was contended by the appellant herein before the High Court that Clause 26 of the tender document prevented a person from getting any information about the technical qualification of the competitor, till the contract is awarded, which is arbitrary, unreasonable and violative of Article 14 of the Constitution; that the respondent No. 2 is not having the requisite experience as required under the NIT, for it does not meet the eligibility criteria on its own, but was relying on the experience of its subsidiary.

4. The Division Bench rejected the contention to go into the legality or otherwise of clause 26 observing that the appellant had participated in the tender bid knowing very well that such a clause existed and it was not open to it to contend that the said clause is onerous and lacks transparency and, therefore, violative of Article 14 of the Constitution; and it had challenged the same only after it is found that its financial bid was higher than that of respondent No. 2. It further observed that the matter would have been different had the appellant, immediately after the tender notice was published, challenged the said condition after NIT was issued. The High Court placing reliance upon the decisions in ***New Horizons Ltd. v. Union of India***[1], ***Tata Cellular v. Union of India***[2], ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)***[3] and ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.***[4] dismissed the writ petition. Be it noted, though the High Court felt that it could have non-suited the

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[1] (1995) 1 SCC 478
[2] (1994) 6 SCC 651
[3] 2016 (8) SCALE 99 : (2016) 8 SCC 622
[4] 2016 (8) SCALE 765

writ petitioner only on the ground that it had participated in the tender process knowing fully well that stipulation in nature of the clause 26.1 existed, yet proceeded to address the controversy and directed the owner to produce the record solely for the further purpose of being satisfied as to whether the decision making process by the employer/owner is legally valid or not and further to examine as to whether the decision arrived at by the owner that the respondent No. 2, the lowest bidder, possessed requisite experience. After perusing the entire documents on record, the High Court came to hold that:-

> "15. It is to be noted that the tender evaluation committee consists of Chief Project Manager/RS, General Manager/Procurement, Chief Project Manager/Signaling and the General Manager /Finance. The said Committee has evaluated the documents with regard to the technical qualification of the petitioner as well as respondent no.2. The Committee has noted that respondent no.2 was formed in June 2015 by merger of CRC Corporation and CNR Corporation limited. The documents relating to the merger has been submitted along with the bid. The Evaluation Committee has also noted that after the incorporation of the respondent no.2, upon the merger of CSR Corporation and CNR Corporation, respondent no.2 was awarded contract for supply of 76 cars for Noida Metro Project by

Delhi Metro Rail Corporation Ltd. The Committee found that insofar as Clause No.12 is concerned, though the minimum requirement was that the bidder must have an experience of total 60 metro cars and out of which 30 cars should be either stainless steel or aluminium, respondent no.2 was having an experience of total 594 metro cars and all the cars were of stainless steel. Insofar as clause 12.1 is concerned, which requires that out of the number of cars manufactured, there has to be completed satisfactory revenue operation at least in one country outside country of origin/manufacturer or in India or at least one in G8 country of 30 metro cars, respondent no.2 was having an experience of 432 outside country of origin. It could thus be seen that the perusal of the document placed on record would reveal that the decision making process of the technical evaluation committee has been guided by the relevant factors and it cannot be said that they have not taken into consideration any of the relevant factors. We are, therefore, of the considered view that the decision of the technical evaluation committee would fall within the ambit of 'rationality'.

16. It is further to be noted that the minutes of the tender evaluation committee was further placed for approval before the Director Level Tender Committee consisting of Director (Rolling Stock and Systems), Director (Projects) and Director (Finance). It could thus be seen that the matter has not been examined at only one level of expert committee, but has gone through examination at two levels of experts."

5. Thereafter, the High Court referred to the authorities mentioned hereinbefore and appreciated the principles stated therein and eventually dismissed the Writ Petition.

6. It is pertinent to mention that in the course of hearing of the matter before the High Court, learned counsel for the writ petitioner sought permission to withdraw the Writ Petition with further liberty to approach the High Court after award of the contract. The Court, though expressed its willingness to grant permission to withdraw the Writ Petition, it was not inclined to grant liberty as sought by the learned counsel for the petitioner. Simpliciter withdrawing was not accepted and grant of liberty was insisted upon. Dealing with the said fact, the Division Bench referred to a passage from ***Central Coalfields Ltd.*** (supra) and expressed thus:-

> "24. We find that if we accept the prayer as made by the petitioner, it will be giving leverage to the petitioner to again approach this Court and delay the project further. Taking into consideration the public interest, we have ourselves scrutinised the entire minutes of the Tender Evaluation Committee and Director Level Committee to find out as to whether the decision making process, answers the test as laid down by Their Lordships of the Apex Court. We have found that the decision making

> process cannot be termed to be vitiated on the ground of arbitrariness, irrationality or mala fides. Accepting the request of the learned senior counsel for the petitioner would further permit the project to be delayed. Needless to state that the project is an important project for the city of Nagpur. In that view of the matter, though the prayer which on first impression appears to be innocuous, is liable to be rejected."

7. After dismissal of the Writ Petition, an application for review (M.C.A. [Review] No. 1087 of 2016) was filed. The High Court, while dealing with the application for review, noted the two grounds on which the review was sought. It is worth reproducing:-

> "i. While exercising the principle of Wednesbury reasonableness, the order in review failed to take into account relevant omission in the process of scrutiny, like (a) how rate discount cannot be granted and (b) improper calculation of service tax which renders the applicant bid lowest.
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> ii. that there was suppression of relevant facts by respondent No. 2 before the authorities."

8. Dealing with the said aspect, the Division Bench held:-

> "13. Shri S.G. Aney, learned senior counsel appearing on behalf of the petitioner, submitted that when an action would fall in the ambit of malice in law, it may not be necessary to implead the persons against whom malafides are attributed as a party respondent. We find that by no stretch of

imagination the present case would fall in the ambit of malice in law. If it is a case of applicant that the tender processing authorities in order to favour the respondent No. 2 have deliberately made some omissions or have committed some malafide act in order to help the respondent No. 2 to get the contract, then in that event such of the officers of the respondent No. 1 who are attributed with such an act or omission, were necessary parties. So also it was necessary for the petitioner to make specific averments against those individuals. As already discussed hereinabove, though a specific query was made in that regard, the learned Senior Counsel appearing on behalf of the petitioners, as that stage, fairly stated that no such malafides are attributed in the memo of petition. In the light of this factual position, seeking review on the ground that there was a wrong deliberate evaluation of price bids by respondent No. 1 and the same act was malafide in order to favour the respondent No. 2 and to illegally oust the petitioner, in our view, is an imagination of a fertile brain of the draftsman.

14. We further find that the Review Application depicts total non-application of mind. In paragraph No. 6.8 of the application, the draftsman of the Review Application, has averred that the respondent No. 2 has not formed any JV/Consortium and as such, it was not eligible to bid in the tender process. We do hope that the draftsman of the Review Application understands the basic distinction between a Joint Venture/Consortium and an incorporation of a new company after merger of two companies into one.

15. It is further to be noted that though the memo of petition runs into 22 pages, the review application runs into 39 pages. We have no

> hesitation to say that the Review Application has been drafted without application of mind. The rules require that while filing a Review Application, a lawyer should certify that good grounds exist for seeking review of the order. We are at pains to say that in the present case the said certification has been done in the most casual manner, only to show compliance with the requirements of the rules."

9. On the basis of the aforesaid analysis, the High Court dismissed the application for review with costs of Rs. 1 lakh (Rupees One Lakh).

10. We have heard Dr. Abhishek Manu Singhvi, learned senior counsel with Ms. Anannya Ghosh, learned counsel for the appellant in Civil Appeal Nos. 1353-1354 of 2017 and Mr. Raju Ramachandran, learned senior counsel with Mr. Ramendra Mohan Patnaik, learned counsel for the appellant in Civil Appeal No. 1355 of 2017, Mr. Mukul Rohatgi, learned Attorney General for India, Mr. Gopal Subramaniam, learned senior counsel with Mr. R.P. Gupta, learned counsel appearing for the 1st respondent, Mr. Shyam Divan, learned senior counsel with Mr. S.S. Jauhar, learned counsel for the respondent No. 2.

11. Assailing the defensibility of the order passed by the High Court, learned senior counsel for the appellant submitted that the bid of the respondent No. 2 is not that of a 'single entity' and it had relied on the experience of its subsidiaries; that it has not submitted the bid on the basis of its own experience but on the strength of the experience of the subsidiaries of the erstwhile parent/original companies, upon the merger of which respondent No. 2 came into existence, which is not only contrary to the eligibility and qualification criteria but also to the settled position of law which provide that unless the subsidiaries are constituents of the Joint Venture (JV), their experience cannot be taken into consideration for the purpose of considering the experience of the holding company; that the respondent No. 2, on a standalone basis, does not possess the requisite experience as provided under the tender conditions; that the respondent No. 2 should have given its bid either as a JV or as a consortium together with its subsidiaries to avail the benefit of the experience of its subsidiaries; that there is a specific restriction on the bidder to take the experience of its

subsidiaries, which are separate legal entities, without forming a consortium or JV; that the subsidiaries of respondent No. 2 are separate and independent legal entities and the supplies in respect of which experience is claimed by respondent No. 2 were supplies not made by respondent No. 2 but by other independent legal entities; that respondent No. 2 does not have requisite facilities for manufacture of the car body on its own and it shall have to sub-contract the same to its subsidiary companies, which is violative of Clause 4.4 of the tender conditions of contract. In support of his submissions, learned senior counsel for the appellant has placed reliance on ***Balwant Rai Saluja and another v. Air India Ltd. and others***[5], ***Rohde and Schwarz Gmbh and Co. K.G. v. Airport Authority of India***[6] and ***Core Projects and Technologies Ltd. v. State of Bihar and another***[7].

12. Mr. Gopal Subramaniam, learned senior counsel for the 1st respondent, before placing his submissions, put forth the facts and canvassed that the project was funded by KfW

[5] (2014) 9 SCC 407
[6] (2014) 207 DLT 1
[7] 2011 (59) BLJR 183

Development Bank, Germany and as per clause IB 35.8, all stages of bid evaluation and contract award would have to be subject to a No Objection from KfW; that the appellant wrote to the 1st respondent seeking amendment to clause 12.1 of Annexure III-A (PQ-Initial filter) i.e. “Operation Performance” clause according to which, as it then was, the bidder had to have satisfactorily delivered at least 30 metro cars outside the country of manufacture or delivered in India and sought inclusion of the condition that delivery to any of the G8 countries should also be treated as acceptable; that the request of the appellant was accepted and it became eligible to bid; that the 1st respondent extended the date of submission of tender from 14th June to 24th June at the request of the appellant; that all the bid documents were given to the independent General Consultant of the 1st respondent consisting of M/s. Systra, M/s. RITES, M/s. AECOM and M/s. Egis for Pre-qualification (PQ) and Technical approval which held respondent No. 2 as qualified and Appraisal and Tender Committee of the 1st respondent also gave their reports which

were forwarded on 29.8.2016 to KfW Germany for its no-objection; that the bids, which were made on e-portal which is managed by the Government of Maharashtra, were opened on 29.9.2016 and the bid of respondent No. 2 was found to be the lowest at Rs.851 crores, whereas the bid of the appellant was Rs.852 crores; that on 29.9.2016 and 3.10.2016, the appellant made representations to the 1st respondent stating that respondent No. 2 was not qualified as a holding company and could not have claimed benefit of experience of a subsidiary and sought documents relating to eligibility of respondent No. 2 vis-à-vis its experience; and that on 4.10.2016 the appellant filed the Writ Petition before the High Court contending, *inter alia*, that the appellant was not allowed to check the technical documents of respondent No. 2, clauses 25.1 and 25.3 were not followed, bid –price being so close to the appellant's should have been re-evaluated and evaluation process and grant of tender in favour of respondent No. 2 was mala fide, which was dismissed by the High Court vide order dated 05.10.2016 holding that the evaluation of the bid was proper and

appellant could not challenge clause 26, which mandated confidentiality of technical bids till grant of contract.

13. Learned senior counsel would further contend that the respondent No. 2, being a company owned by Government of People's Republic of China, it clearly came within the ambit of clause 4.1 of the bid-document as a 'government-owned entity'. Learned senior counsel would urge that a single entity can bid for itself and it can consist of its constituents which are wholly owned subsidiaries and they may have experience in relation to the project and all the subsidiaries form a homogenous pool under its immediate control in respect of rights, liabilities, assets and obligations, that in view of Article 164 of the Articles of Association of respondent No. 2, its Board of Directors have been entrusted with the authority and responsibility to discharge all necessary and essential decisions and functions for the subsidiaries and, therefore, the experience of respondent No. 2's 100% wholly owned subsidiaries ought to be considered as part of the parent company's experience; and that the term 'government owned

entity' includes no bar against a government owned entity and its subsidiaries. Learned senior counsel referred to the history of doctrine of lifting the corporate veil and submitted that this Court has relaxed the principles governing lifting of corporate veil and relied on the authorities in ***State of U.P. v. Renusagar Power Co.***[8] and ***New Horizons Ltd.*** (supra). Mr. Gopal Subramanium would further contend that the bid documents have been thoroughly examined by the 1st respondent and it satisfied itself of the capability, experience and expertise of the successful bidder, i.e., respondent No. 2, and the thorough analysis of the technical qualification of respondent No. 2 is clear from the report of the independent General Consultant; that the experience of respondent No. 2 in supplying metro trains across the world exceeds the appellant's experience by a huge margin; that treating respondent No. 2 along with its 100% subsidiaries as one entity is supported by the fact that Delhi Metro Rail Corporation Ltd., which has on a similarly, if not same, worded bid-document granted the tender to respondent No. 2,

[8] (1988) 4 SCC 59

who had also bid there as a parent company claiming experience of and execution through 100% wholly owned subsidiaries; that there is no bar whatsoever, express or implied, in the tender document to treat the parent company along with its 100% wholly owned subsidiaries as one entity; that the scheme of the bid document is such that which itself provides that parent company would have to perform the works under the agreement in case the subsidiary failed and in view of this, the objections raised by the appellant are hyper-technical. Learned senior counsel would further submit that this Court has consistently held that interference by the courts is required only when the decision taken by the owner is irrational or arbitrary, or is vitiated by bias, favouritism or malafide. He has placed reliance upon on the authorities in ***Montecarlo Ltd. v. NTPC Ltd.***[9], ***Michigan Rubber (India) Ltd. v. State of Karnataka***[10], ***Jagdish Mandal v. State of Orissa & Ors.***[11] and ***Afcons Infrastructure Ltd.*** (supra).

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[9] 2016 (10) SCALE 50
[10] (2012) 8 SCC 216
[11] (2007) 14 SCC 517

14. Mr. Shyam Divan, learned senior counsel for the respondent No. 2, submitted that the respondent No.2, being a government entity, participated in the tender and gave all the details, which were duly accepted by the respondent No.1 and after examining the entire details of supplies and commissioning of various contracts executed by the respondent No. 2 and its 100% wholly owned subsidiaries issued Letter of Acceptance dated 5.10.2016 in its favour to execute the contract. Learned senior counsel further submitted that for the purposes of their experience in the present tender, respondent No. 2 had provided the details in Form 4.4 Attachment-1 to the effect that it had supplied 606 metro cars in the last 10 years which is much higher than the appellant's experience which would be beneficial for the project and would further public interest. Mr. Divan, strongly relied on Article 164 of the Articles of Association of respondent No. 2, which was submitted along with the bid, and argued that the Board of Directors of respondent No. 2 has been entrusted with the complete right to make decisions

for the company including subsidiaries and, therefore, as long as the entity is a government owned entity, it should include both the parent and its wholly owned subsidiaries.

15. In reply to the submissions advanced by the respondent No.1, Dr. Singhvi, learned senior counsel appearing for the appellant in Civil Appeal Nos. 1353-1354 of 2017 would submit that Clause 4.1 treats a government owned entity like any other bidder and does not give any concession or preferential treatment to it and if a company cannot include its subsidiaries and count their experience as its own experience for the purpose of submitting a bid (without forming a consortium/JV), the same criteria applies to the government owned entity. He further referred to Clause ITB 43, 43.1 to 43.4, 39.3, 42.1, 42.2 and Clause 1.14 of the General Conditions of contract and submitted that in case of award of work, the joint and several responsibility and liability on all the members of the proposed JV/consortium in the event of default has to be fixed and such purpose would be defeated in the event if it is found that respondent No. 2,

having placed its bid as a single entity, is entitled to rely upon and surreptitiously include the experience of its subsidiary companies and it would be impossible to place responsibility and liability on the subsidiaries in the event the respondent No. 2 or its subsidiaries default in their obligations under the tender documents. Criticizing the letter dated 22.6.2016 written by respondent No. 2, it is submitted by learned counsel for the appellant that the letter is a unilateral communication to the 1st respondent and does not legally constitute a binding agreement and in the absence of adherence to prescribed formats under the tender documents, such a letter has no sanctity and cannot be treated as a substitute to be a legally valid and binding agreement between the respondent No. 2 and its subsidiary companies inasmuch as the letter wrongly states that the experience of its subsidiaries is the experience of the parent as the holding company owns only shares in its subsidiary and being the owner of shares does not mean that the holding company owns the assets, liabilities and experience of the subsidiary

and placed reliance on ***Mrs. Bacha F. Guzdar, Bombay v. Commissioner of Income Tax, Bombay***[12].

16. Learned senior counsel would further contend that the respondent No. 2 has tried to couch within its own ambit, the experience of six of its subsidiaries and the entity designated by respondent No. 2 as the entity responsible for completion of work under the present tender i.e. M/s. CRRC Dalian Co. Ltd. does not have any prior experience at all, while the remaining five entities/subsidiaries may have had prior experience; that there is gross and manifest arithmetical error in service tax payable which results in the appellant's bid being lower than Rs.32.82 crores; that there is suppression of serious material facts by respondent No. 2 regarding supply of defective metro cars by their subsidiaries in Singapore and Hong Kong which had to be recalled and allegation of payment of kickbacks in Phillipines and these disclosures were required to be made in terms of Annexure III of the tender documents, which would have required the 1st respondent to disqualify respondent No. 2 from the tender process.

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[12] AIR 1955 SC 74

17. To appreciate the rival submissions raised at the Bar certain relevant conditions from the NIT are required to be appreciated. Clause 4.1 deals with the eligibility criteria. It reads as follows:-

> "4.1 A bidder may be a firm that is a private entity, a government-owned entity – subject to ITB 4.3 – or any combination of such entities in the form of a joint venture (JV) under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. In the case of a joint venture, all members shall be jointly and severally liable for the execution of the contract in accordance with the contract terms. The JV shall nominate a representative who shall have the authority to conduct all business for and on behalf of any and all the members of the JV during the bidding process and, in the event the JV is awarded the contract, during contract execution. Unless specified in the BDS, there is no limit on the number of members in a JV."
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> .....
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> 4.3 The Agency's eligibility criteria to bid are described in Section V – Eligibility criteria and social and environmental responsibility."

18. Placing reliance upon Clause 4.1, it is contended by the learned senior counsel for the appellant that conditions embodied in the said clause clearly stipulate the conditions

precedent to fulfil to earn the status of a consortium or a Joint Venture and the said postulates provide the distinctions, as regards the obligations, responsibilities, etc. to be fulfilled by a bidder who is a "single entity" and a bidder who is a consortium or a Joint Venture. For the aforesaid purpose, our attention has been drawn to Clauses 4.7. 4.8 and 4.11. We have also been invited to peruse the Clauses 11.3.1.3, 11.3.1.4, 11.3.1.9, 12.2 and 43.3.

19. Clauses 12 and 12.1 being relevant are reproduced below:-

> "**12. Delivery Record**
> Has the bidder/consortium/joint venture of its members, individually or jointly as a member of other consortia/joint venture have experience of and carried out vehicle design, interface (with other designated contractors such as signaling, track, traction, etc.) assembly & supply, testing and commissioning of minimum of total 60 metro (i.e. MRT, LRT, Suburban Railways or High Speed Railways) cars out of which minimum 30 cars shall be either stainless steel or aluminium in the last ten (10) years.
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> **12.1. Operation Performance**
> Out of 60 or more cars commissioned in accordance with SN 12 above, have minimum of total 30 metro (i.e. MRT, LRT, Suburban Railways

or High Speed Railways) cars completed satisfactory revenue operation.

* At least in one country outside the country of origin/manufacture.

* Or in India

* Or at least in one G8 country viz. Canada, France, Germany, Italy, Japan, United Kingdom and United States in the last three (3) years".

20. Relevant portion of Section V – Eligibility criteria and social and environmental responsibility is extracted below:-

"Bidders that are government-owned enterprises or institutions may participate only if they can establish that they (i) are legally and financially autonomous (ii) operate under commercial law. To be eligible, a government-owned enterprise or institution shall establish to the Agency's satisfaction, through all relevant documents, including its Charter and other information the Agency may request, that it: (i) is a legal entity separate from their government (ii) does not currently receive substantial subsidies or budget support; (iii) operates like any commercial enterprise, and, inter alia, is not obliged to pass on its surplus to their government, can acquire rights and liabilities, borrow funds and be liable for repayment of its debts, and can be declared bankrupt."

21. Clause 27 that deals with clarification of bids and Clause 29 that deals with determination of responsiveness, being relevant, are reproduced below:-

27. Clarification of Bids

27.1 To assist in the examination, evaluation, and comparison of the bids, and qualification of the Bidders, the Employer may, at its discretion, ask any Bidder for a clarification of its bid, given a reasonable time for a response. Any clarification submitted by a Bidder that is not in response to a request by the Employer shall not be considered. The Employer's request for clarification and the response shall be in writing. No change, including any voluntary increase or decrease, in the prices or substance of the bid shall be sought, offered, or permitted, except to confirm the correction of arithmetic errors discovered by the Employer in the evaluation of the bids, in accordance with ITB 31.

27.2 If a Bidder does not provide clarifications of its bid by the date and time set in the Employer's request for clarification, its bid may be rejected.

29. Determination of Responsiveness

29.1 The Employer's determination of a bid's responsiveness is to be based on the contents of the bid itself, as defined in ITB 11.

29.1.1 General Evaluation: Prior to the detailed evaluation of Bids, the Employer will determine whether each Bid:

- has been properly signed; and

- has been accompanied by a valid Bid Security; and

- meets the Qualification (Initial Filter) Evaluation Criteria – The Employer will evaluate the eligibility and acceptability based on Initial Filter criteria indicated in these documents. The technical proposals of only those Bidders, who qualify in the Initial Filter evaluation, will be evaluated.

- Signed copy of Statement of Integrity, Eligibility and Social and Environmental Responsibility

A 'NO' answer to any of the above items will disqualify the Bid/ Bidder.

29.1.2 Evaluation of Technical Package: The Employer will evaluate the technical proposal to determine the technical suitability and acceptability as per Works Requirements - General Specifications and Technical Specifications of only such Bidders who qualify based on BDS ITB 29.1.1 above.

The Technical Proposal as submitted in accordance with BDS ITB Para 11.3.1 (including its relevant sub-paras) shall be evaluated for its conformity with the general and technical requirements as per Par 2, Sections VII-A and VII-B, as well as against the back of the parameters provided in Part1, Annexure IV-C. Furthermore, the adequacy and appropriateness of the Bidder's responses to the related requirements in Part 1 shall be evaluated.

29.2 A substantially responsive bid is one that meets the requirements of the bidding documents without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that,

(a) if accepted, would:

(i) Affect in any substantial way, the scope, quality, or performance of the Works specified in the contract; or

(ii) Limit in any substantial way, inconsistent with the bidding documents, the employer's rights or the bidder's obligations under the proposed contract; or

(b) if rectified, would unfairly affect the competitive position of other bidders presenting substantially responsive bids.

29.2.1 Evaluation of qualifying conditions: Bids that include qualifications which:

1. seek to shift to the Employer, another government agency or another contractor all or part of the risk and/or liability allocated to the Contractor in the Bidding Documents; or

2. which includes a deviation from the Bidding Documents which would render the Works, or any part thereof, unfit for their intended purpose; or

3. fails to fulfill the eligibility criteria as mentioned in SN 12, 12.1 and 13 of "(A) FILTER OF APPLICANTS – CHECKLIST of INITITAL FILTER EVALUATION CRITERIA"; or

4. which fails to commit to the date specified for the completion of the Works as specified under Key Dates 6 and 9 under Section IX. Particular Conditions (PC) Part A – Contract Data 'Table: Summary of Sections'

will be deemed non-conforming and shall be rejected.

29.3 The Employer shall examine the technical aspects of the bid submitted in accordance with ITB 16, in particular, to confirm that all requirements of Section VII, Works Requirements have been met without any material deviation, reservation or omission.

29.4 Bids which are:

- not fulfilling the General Evaluation Criteria as per ITB 29.1.1 above,
- not substantially responsive as per ITB 29.2 above
- having material deviation or reservation as per ITB 29.2 above
- not fulfilling the qualifying conditions as per ITB 29.2.1 above, and
- not fulfilling the Employer's Requirements – General Specification and Technical Specification as per ITB 29.1.2 above will be deemed non-conforming and shall be rejected by the Employer, and shall not be allowed subsequently to be made responsive by correction or withdrawal of the nonconforming deviation or reservation.

29.5 If any Bid is rejected, pursuant to ITB 29.4 above, the Financial Package of such Bidder shall be returned unopened.

29.6 Bidders may note that pursuant to their qualification in the 'Initial Filter Evaluation Criteria' and 'Technical Evaluation' as per ITB 29.4 above, in case the Bidder (applies to each individual member in case of a Joint Venture/Consortium) is debarred/blacklisted by Government of India/State Government/Government undertaking after the due date of submission of Bid but before opening of financial package by NMRCL, they shall inform the same to NMRCL in writing within 5 working days of issue of such debarment, failing which it will be considered that the Bidder has willfully concealed the information and the Bidder shall be solely responsible for all implications that may arise in accordance with the conditions of this Bid. Any such debarment will result in disqualification of the Bidder and the Financial Package of such Bidder shall be returned unopened."

22. As the learned senior counsel has also stressed upon Clause 4.11 of the Technical Proposal, we think it apt to extract the relevant part of the said clause:-

"1. A notarized copy of Consortium Agreement relating to the composition of the bidder shall be submitted, if a bidder is a consortium. Should the bidder be an entity established or to be established to bid for this contract, details of the shareholders' agreement or proposed shareholders' agreement shall be supplied together with the percentage

participation and percentage equity in the agreements.

2. The contractual arrangements and copies of agreements in relation thereto must, as a minimum, provide information on all members or participants involved, their respective participation in the Bid, the management structure, ownership and control of the members or participants comprising the bidder and the name of the lead member who would have overall lead management responsibility for the Works, the registered addresses of all parties and the names of their respective senior partners, chairmen or managing directors as appropriate. Such agreements should also reflect the joint and several liabilities of the members to the Employer in the vent that the contract is awarded to them and provide "deadlock" provisions in the event that decisions of the Consortium cannot be reached by unanimous agreement."

23. As the uncurtained facts would reveal, on 17.02.2016 the appellant wrote to the 1st respondent seeking amendment to the "operation performance clause", i.e., Clause 12.1 of the Annexure III-A (PQ-Initial Filter). According to the said Clause, the bidder is required to have satisfactorily delivered at least 30 metro cars outside the country of manufacture or delivered in India. The amendment that was sought related to inclusion of the condition that delivery to any of the G8 countries should also be treated as acceptable. Such an amendment was for

the appellant's merged entity, which gave it the requisite experience, had manufactured and delivered metro cars only in G8 countries. The request of the appellant was accepted by the employer and supply to any of the G8 countries was included as permissible. That apart, the appellant's request seeking extension of time to bid was also acceded to and accordingly time was extended and final date of submission was declared to be 08.07.2016. The time that was fixed at 4 p.m. was extended till 7 p.m. at the request made by the appellant. The purpose of narrating these aspects is only to highlight that the allegations of mala fide are farther from the truth.

24. The core issue, as we perceive, pertains to acceptance of the technical bid of the respondent No. 2 by the 1st respondent and we are required to address the same solely on the touchstone of eligibility criteria regard being had to the essential conditions. The decision on other technical aspects, as we are advised at present, is best left to the experts. We do

not intend to enter into the said domain though a feeble attempt has been made on the said count.

25. The anchored submission by the learned senior counsel for the appellant is that the respondent No. 2 does not really fulfil the eligibility criteria but the 1st respondent, for some unfathomable reason, has deliberately closed its eyes to the fact that has been projected and adroitly conferred the status of single entity on the 2nd respondent.

26. What is urged before this Court is that the respondent No. 2 could not have been regarded as a single entity and, in any case, it could not have claimed the experience of its subsidiaries because no consortium or joint venture with its subsidiaries was formed. With regard to relationship of holding and subsidiary companies, we have been commended to the authorities in ***Balwant Rai Saluja*** (supra) and also the judgment of the Delhi High Court in ***Rohde and Schwarz Gmbh and Co. K.G.*** (supra). The essential submission is that respondent No. 2 as the owner of the subsidiary companies including their assets and liabilities, cannot claim their

experience and there is necessity to apply the principle of "lifting the corporate veil", as has been laid down in ***Renusagar Power Co.*** (supra) and ***Life Insurance Corporation of India v. Escorts Ltd. and others***[13]. It is also argued that the Government owned entity cannot be treated differently, for a Government owned entity is distinct from the Government and, for the said purpose, inspiration has been drawn from the authority in ***Western Coalfields Limited v. Special Area Development Authority, Korba and another***[14]. It has also been urged that when the tender has required a particular thing to be done, it has to be done in that specific manner, for the law envisages that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. For the aforesaid purpose, inspiration has been drawn from the authority in ***Central Coalfields Ltd.*** (supra) wherein reliance has been placed on ***Nazir Ahmad v. King Emperor***[15].

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[13] (1986) 1 SCC 264
[14] (1982) 1 SCC 125
[15] AIR 1936 PC 253

27. Before we proceed to deal with the concept of single entity and the discretion used by the 1st respondent, we intend to deal with role of the Court when the eligibility criteria is required to be scanned and perceived by the Court. In ***Montecarlo Ltd.*** (supra), the Court referred to ***TATA Cellular*** (supra) wherein certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the decision has been taken; the lack of expertise on the part of the court to correct the administrative decision; the conferment of freedom of contract on the Government which recognizes a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere, were laid down. It was also stated in the said case that the administrative decision must not only be tested by the application of Wednesbury principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. The two-Judge Bench took note of the fact that in ***Jagdish Mandal*** (supra) it

has been held that, if the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The decisions in ***Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another***[16], ***B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others***[17] and ***Michigan Rubber (India) Ltd.*** (supra) have been referred to. The Court quoted a passage from ***Afcons Infrastructure Ltd.*** (supra) wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional Courts should not interfere. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for

[16] (2005) 6 SCC 138
[17] (2006) 11 SCC 548

interfering with the interpretation given. After referring to the said authority, it has been ruled thus:

> "24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance

> with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

28. In ***Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) rep. by its Chairman & Managing Director and another v. CSEPDI-Trishe Consortium, rep. by its Managing Director and another***[18], the Court, after referring to ***Jagdish Mandal*** (supra) and taking note of the complex fiscal evaluation and other aspects, held:

> "36. … At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of

[18] 2016 (10) SCALE 69

> completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd."

29. In ***Reliance Telecom Ltd. and another v. Union of India and another***[19], the Court referred to the authority in ***Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and others***[20] wherein it has been observed that though the principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. Thereafter, the Court in ***Reliance Telecom Ltd.*** (supra) proceeded to state thus:

> "75. ... In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise

[19] 2017 (1) SCALE 453
[20] (1997) 1 SCC 738

> of power for any collateral purpose in the NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service."

And again:

> "76. It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the Courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is perceivable."

30. The learned counsel for the appellants invited our attention to the authority in ***W.B. Electricity Board v. Patel Engineering Co. Ltd.***[21] wherein it has been ruled:

> "24. … The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid,

[21] (2001) 2 SCC 451

adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.

x x x x x

31. ... Thae Project undertaken by the appellant is undoubtedly for the benefit of the public. The mode of execution of the work of the Project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the Project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the

> competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favouritism and discrimination in awarding public works to contractors. ... Merely because a bid is the lowest the requirements of compliance with the rules and conditions. ..."

31. Having stated this, we have to see, how the 1st respondent has perceived the offer of the respondent No. 2 in the backdrop of the tender conditions. It is not in dispute that the project in question has been funded by KfW Development Bank, Germany and as per Clause ITB 35.8, it is necessary at all stages of bid evaluation and contract award has to be subject to no-objection from KfW Development Bank. Emphasis has been laid on the approach of the High Court which has taken note of the fact that the respondent No. 2 had been awarded the tender by the Delhi Metro Rail Corporation. It has also been highlighted that the papers relating to the financial bid along with report were forwarded to KfW which gave its no-objection. Be it noted, the appellants have been quite critical about the acceptance of the offer and the 1st respondent has given a number of reasons to justify the same.

As indicated earlier, we are only concerned with the eligibility criteria and not with the fiscal aspect.

32. Respondent No. 2, as is evident, is a company owned by the People's Republic of China and, therefore, it comes within the ambit of Clause 4.1 of the bid document as a Government owned entity. We have already reproduced the said clause in earlier part of the judgment. As perceived by the 1st respondent, a single entity can bid for itself and it can consist of its constituents which are wholly owned subsidiaries and they may have experience in relation to the project. That apart, as is understood by the said respondent, where the singular or unified entity claims that as a consequence of merger, all the subsidiaries form a homogenous pool under its immediate control in respect of rights, liabilities, assets and obligations, the integrity of the singular entity as owning such rights, assets and liabilities cannot be ignored and must be given effect. While judging the eligibility criteria of the second respondent, the 1st respondent has scanned Article164 of the Articles of Association of the respondent No. 2 which are

submitted along with the bid from which it is evincible that the Board of Directors of the respondent No. 2 has been entrusted with the authority and responsibility to discharge all necessary and essential decisions and functions for the subsidiaries as well. According to the 1st respondent, the term "Government owned entity" would include a government owned entity and its subsidiaries and there can be no matter of doubt that the identity of the entities as belonging to the Government when established can be treated as a Government owned entity and the experience claimed by the parent of the subsidiaries can be taken into consideration. Learned senior counsel for the 1st respondent has drawn our attention to the "lifting of corporate veil" principle or doctrine of "piercing the veil" and in that context, reliance has been placed on ***Littlewoods Mail Order Stores, Ltd. v. McGregor***[22], ***DHN Food Distributors Ltd. and others v. London Borough of Tower Hamlets***[23] and ***Harold Holdsworth & Co. (Wakefield) Ld. v. Caddies***[24]. Learned senior counsel has also placed reliance upon the principles

[22] (1969) 3 All ER 855
[23] (1976) 3 All ER 462
[24] (1955) 1 WLR 352

stated in ***Renusagar Power Co.*** (supra) that have been reiterated in ***New Horizons Ltd.*** (supra). In the written submission filed on behalf of the 1st respondent, the relevant paragraphs from ***Renusagar Power Co.*** (supra) have been copiously quoted. It is also urged that in the current global economic regime the multinational corporations conduct their business through their subsidiaries and, therefore, there cannot be a hyper-technical approach that eligibility of the principal cannot be taken cognizance of when it speaks of the experience of the subsidiaries. It is also contended by Mr. Subramaniam that in the context of fraud or evasion of legal obligations, the doctrine of "piercing the veil" or "lifting of the corporate veil" can be applied but the said principle cannot be taken recourse to in a matter of the present nature.

33. With regard to the satisfaction of the 1st respondent, it has been highlighted before us that the said respondent had thoroughly examined the bid documents and satisfied itself about of the capability, experience and expertise of the respondent No. 2 and there has been a thorough analysis of

the technical qualification of the respondent No. 2 by the independent General Consultant and the reports of the Appraisal and Tender Committee of the 1st respondent and also the no-objection has been received from KfW Development Bank, Germany which is funding the entire project. Narrating the experience of the respondent No.2, it has been stated in the written submission filed on behalf of the 1st respondent:

> "36. That it is further clear from the record that besides being the lowest bidder, the experience of R 2 in supplying Metro Trains across the world exceeds the Petitioner's experience by a huge margin. Where for clause 12, R 2 has shown a figure of 594 Metro Cars, Petitioner has shown only 72 Cars; and for clause 12.1 where R 2 has shown 432 Cars, Petitioner has again shown only 72 Cars. This vast experience of R 2 would be beneficial for the project and would further public interest.
>
> 37. That R 1 without any malice, or malafide has treated R 2 along with its 100% subsidiaries as one entity. This understanding of the clause has been at the ends of both parties viz. R 1 and R 2, who were *ad idem vis-à-vis* the eligibility of the parent company to bid using the experience and executing the contract through its various 100% wholly owned subsidiaries.
>
> 38. That the above understanding of R 1 of treating R 2 along with its 100% subsidiaries is supported by the understanding of the Delhi Metro Rail Corporation Ltd., which has on a similarly, if

not same, worded bid-document granted the tender/agreement to R 2, which had even there bid as a parent company claiming experience of and execution through 100% wholly owned subsidiaries.

39. That moreover, there is no bar, whatsoever, express or implied, in the tender document to treat the parent company along with its 100% wholly owned subsidiaries as one entity. Therefore, the scope of judicial review should be limited in adjudging the decision taken by R 1 in the best interest of the project, and thereby, the public.

40. That arguendo, no project, whatsoever, has been caused to the project or to other bidders including the Petitioner by the above understanding of the tender conditions by R 1. It is humbly submitted that R 2 fulfilled all the technical requirements. The bid-document itself provided for bidding as a consortium, and did not require in such a case fulfilment of any material condition, which if not fulfilled would prejudice any parties or the project. Moreover, the scheme of the bid-document is such that it itself provides for a Parent Company Guarantee. According to this Parent Company Guarantee Form, a parent company would have to perform the works under the agreement in case the subsidiary failed. Therefore, the objections raised by the Petitioner are hyper-technical and have been raised only to stall the project once it was found to be unsuccessful."

34. As is noticeable, there is material on record that the respondent No. 2, a Government company, is the owner of the subsidiary companies and subsidiary companies have

experience. The 1st respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the concerned Committee and the financing bank. We are disposed to think that the concept of "Government owned entity" cannot be conferred a narrow construction. It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a consortium. In the obtaining fact situation, the interpretation placed by the 1st respondent in the absence of any kind of perversity, bias or mala fide should not be interfered with in exercise of power of judicial review. Decision taken by the 1st respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court.

35. Resultantly, the appeals, being devoid of merit, are dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Amitava Roy]

New Delhi;
May 09, 2017