REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 12065 OF 2016

M/S. CRRC CORPORATION LTD. ...APPELLANT

VERSUS

METRO LINK EXPRESS FOR GANDHINAGAR & AHMEDABAD (MEGA) COMPANY LTD. ...RESPONDENT

J U D G M E N T

AMITAVA ROY, J.

The dissension centers around the exposition of an eligibility norm engrafted in the tender conditions qua a prestigious project with global participation. The appellant stands disqualified by the respondent on the touchstone of its perception of the relevant qualifying criterion as endorsed by the High Court vide judgment and order dated 18.11.2016 rendered in Special Civil

Application No.18439 of 2016, thus propelling it to this Court for redress.

2. We have heard Mr. C.A. Sundaram, learned senior counsel for the appellant and Mr. Mukul Rohatgi, learned senior counsel for the respondent.

3. The pleaded facts though encompass various facets, those having a direct bearing on the issue raised, only would be alluded to.

4. The appellant-corporation has introduced itself to be an amalgam of M/s. CSR Corporation Ltd. and M/s. CNR Corporation Ltd., both claimed to be the world's largest and oldest suppliers of rail transport equipments with most complete product lines and leading technologies with their business activities enfolding R&D design, manufacture, repair, sale, lease and technical services for railway rolling stock, EMUs, metro coaches, urban rail transit vehicles, engineering machinery, consulting services etc. along with several subsidiaries under their full control. On 09.03.2015, these two

entities namely; M/s. CSR Corporation Ltd. and M/s. CNR Corporation Ltd. got merged after securing the approval of the concerned state authorities, as a result whereof, all assets of these two integrant corporations, together with liabilities, businesses, qualifications, staff, contracts along with all rights and obligations stood transferred to the appellant-corporation w.e.f. 01.06.2015. Following such assimilation, the appellant-corporation was, as a joint stock limited company incorporated in the Peoples Republic of China with limited liability and owned and controlled by the Chinese Central Government. As a consequence of such merger, the subsidiaries of M/s CSR. Corporation Ltd. and M/s CNR. Corporation Ltd., became the subsidiaries of the appellant-corporation and their names were changed as well. According to the appellant, thereafter it successfully participated and was awarded various international contracts, based on the experience of its subsidiary companies.

5. On 15.01.2016, the respondent company (hereinafter to be referred to also as "MEGA") invited tenders/bids for the project "Design, manufacture, supply, installation, testing, commissioning of 96 nos. of standard gauge cars and training of personnel" and organized a pre-bid meeting, amongst others on 12.03.2016 inviting all prospective bidders. The last date for submission of the bids was eventually fixed on 25.05.2016.

6. As per the tender conditions, the offer was to be made in three envelopes, to be submitted simultaneously, as hereunder:

(i) First Envelope called – "Initial Filter–cum-Qualification Requirement Bid".

(ii) Second Envelope - "Technical Bid"

(iii) Third Envelope - "Price Bid"

7. In response to the notice inviting tender, the appellant and three others namely; (i) Consortium of

Bombardier Transportation India Pvt. Ltd. & Bombardier Transportation GmbH; (ii) M/s. Hyundai Rotem Company (HRC) and (iii) Consortium of Alstom Transport India Ltd., & A1stom Transport SA, offered their bids by the date fixed.

8. As per the tender prescriptions, an affirmative determination of the eligibility and qualification criteria, on the basis of the particulars furnished in the first envelope was to be the pre-requisite for the opening of the envelopes containing the "technical bids" and the "price bids" in that order applying the same test. Prior thereto, pre-bid meetings were held, as referred to hereinabove, in which representatives of various participating bidders attended and submitted their queries for clarifications as per clause No.7 of Instructions to Bidders, which were accordingly deliberated upon. Clarifications, as sought for, were furnished accordingly. The appellant has averred that it did submit the envelopes, as required, containing all essential documents/certificates, as

mandated fulfilling, amongst others, the requirements of the General/Specific Experiences. On 25.05.2016, as scheduled, the envelopes containing the "Initial Filter-cum-Qualification Requirement Bid" of the four bidders were opened and thereafter on 09.06.2016, the respondent raised 16 queries and required the appellant to submit its response thereto.

9. The queries, amongst others, related to the norm of experience as contained in clause 2.4 of Section III of the Tender Documents. It is inessential to detail the queries and the replies offered by the appellant, having regard to the focused contentions raised before us, as would be referred to shortly hereinafter. Suffice it to state, as claimed by the appellant, it did adequately and completely answer the queries and supplemented the same with contemporaneous records.

10. It was thereafter that the appellant came to learn that the respondent on 15.10.2016 had rejected its "Initial Filter-cum-Qualification Requirement Bid" and

thus had disqualified it for further participation in the tender process. The appellant thereafter unsuccessfully pleaded with the respondent corporation by filing various representations and requests and the same having failed to evoke any affirmative response, sought refuge of the legal process. Prior thereto, it was served as well with a caveat application filed by the respondent in the High Court mentioning about its disqualification following the rejection of its "Initial Filter-cum-Qualification Requirement Bid" .

11. The respondent-corporation, apart from raising preliminary objection to the maintainability of the writ petition filed by the appellant, pleading non-joinder of necessary parties, i.e. the surviving tenderers in the fray, asserted that the project was financed through budgetary resources of State of Gujarat, Government of India and Japan International Co-operation Agency (for short hereinafter to be referred to as "JICA"). It also mentioned that through international competitive Bidding, the

General Engineering Consultant, which is a consortium of four renowned companies, had been appointed to provide independent expert professional advice regarding the preparation of tender documents, evaluation of tender offers etc. for works related to the Ahmadabad Metro Rail Project - Phase I, i.e. the project in hand. While generally admitting the facts pertaining to the issuance of the notice inviting tender on 15.01.2016 and the participation of the four bidders including the appellant, MEGA, however, categorically asserted that in course of the pre-bid meetings, it was clarified in response to a pointed query, that the experience of subsidiary companies/group companies will not be taken into account in any case and that if the parties are desirous of such experience being counted, the subsidiary companies/group companies would have to form a Joint Venture (hereafter referred to also as "JV") or a Consortium.

12. According to it, the first envelope containing the "Initial Filter-cum-Qualification Requirement Bid" of the participating bidders were opened in presence of their representatives and on the next date, those were forwarded to the General Engineering Consultant (for short, hereinafter referred to as "GEC") for evaluation thereof and submission of report in connection therewith. The GEC, in turn, vide its letter dated 09.06.2016 submitted its interim report recommending that further clarifications be sought for from the respective bidders, on the points as outlined therein. It was thereafter that the respondent forwarded 16 queries to the appellant *inter alia* on the aspect of experience, as contemplated in clause 2.4 of the Evaluation and Qualification Criteria of the tender documents.

13. It is the stand of the MEGA that the appellant, instead of furnishing the clarifications as sought for, submitted additional details, thereby virtually revising its original offer and further endeavoured to make up the

deficiency in its experience, as prescribed, by falling back on the experience of its so called subsidiary companies. According to MEGA, as the subsidiary companies of the appellant, retained their independent existence as separate legal entities, their experience, in terms of the relevant tender norms, could not be counted to be that of the appellant as it (appellant) did submit its offer as a single entity and neither as a joint venture nor as a consortium with its subsidiary companies. Though in its reply, the MEGA also expressed its reservation with regard to the appellant's stand alone financial credentials, it is unnecessary to refer thereto, as the same did not figure in course of the rival exchanges in the appeal.

14. The GEC, according to the MEGA, after scrutinizing the bid documents together with the clarifications re-laid before it, opined that the appellant was found to be non-responsive to the requirements of clauses 2.3 and 2.4 of Section III relating to “Evaluation and Qualification Criteria” of the “Tender Document”. It would be sufficient

for the present purpose to extract the relevant excerpt of the findings of the GEC vis-à-vis clauses 2.4.1 and 2.4.2 for immediate reference:

Clauses	Relevant Eligibility and Qualification Criterion of Tender Document in question	Gist of Finding arrived at by GEC
.....	.....	.....
2.4.1	**General Experience** Experience in the role of prime contractor (single entity or JV' member), Subcontractor, or management contractor for at least last ten (10) years starting 1st January, 2006.	CRRC does not meet this criterion. Since the Parent Company cannot claim experience of its Subsidiary Company even if it has 100% ownership as long as a company is a separate legal entity. CRRC has submitted its offer as a sole Bidder. It has also not submitted any intent of forming a joint venture/consortium with its Subsidiary Company, supported by a letter of intent in terms of ITB para 4.1. As per pre-bid meeting clarification issued to all bidders 'The subsidiary

		company/group company may bid together with the parent company as a DV/consortium member for parents/group company experience to be taken into account.
2.4.2	**Specific Experience**	
(a)	A minimum number of two (2) similar contracts that have been satisfactorily and substantially completed as a prime contractor considered in favour considered of CRRC (single entity or JV member) between 1st January, 2006 and the Bid submission deadline.	CRRC does not meet this criterion, since the execution/completion of any contract by its Subsidiary companies cannot be considered in favour of CRRC.

15. This report dated 28.07.2016 of the GEC was thereafter forwarded to JICA for its concurrence and the latter gave its "no objection" and instructed MEGA to

proceed with the technical evaluation of the bids of the remaining bidders and to finalize the process early.

16. Accordingly, the remaining three bidders were declared to be qualified at the stage of "Initial Filter-cum-Qualification Requirement Bid" by discarding the appellant, as it failed to fulfill the requirements contemplated in clause 2.3 "Financial Situation" and clause 2.4 "Experience" of Section III of the "Evaluation and Qualification Criteria" of the "Tender Document".

17. According to MEGA, the appellant was intimated of its disqualification by letter dated 02.11.2016. It has maintained that the impugned action is strictly in accordance with the tender norms and being objective and transparent, is unassailable.

18. Referring to clause 4.1 of Section I of the "Tender Document", the appellant, in reiteration, pleaded that the clarification referred to by MEGA excluding the experience of the subsidiary/group companies from being accounted for in absence of a joint venture or

consortium was in respect of a query in a totally different context and was wholly inapplicable to its bid. According to the appellant, the query was raised by a subsidiary company before the respondent as to whether it could avail the experience of its parent/group company and in response thereto, it was explained that if a subsidiary company did wish to use the experience of the parent company, the parent company or the group company should form with it a Consortium or a JV, as the case may be. The appellant thus insisted that it having submitted its bid, as a single entity being the holding company of its subsidiaries and had claimed the experience of its fully owned subsidiaries, the clarification relied upon by the GEC and acted upon by MEGA to oust it (appellant) from the process as disqualified, was patently flawed. It further stood by its responses to the queries made, contending that those adequately did answer the same and demonstrate that its bid was fully compliant of the essential tender conditions.

19. The High Court on an analysis of clause 2.4 of the "Evaluation and Qualification Criteria" contained in Section III of the "Tender Documents", in the backdrop of the rival orientations founded on the pleaded facts and the documents in support thereof, held that while a holding company may control its subsidiary companies, which may have the requisite experience, as the subsidiary companies would not be required to execute the work, the holding company cannot avail the benefit of their experience. It was of the view that since the subsidiaries have an identity separate from the holding company, they *ipso facto,* by virtue of they being subsidiaries of the holding company, do not become a party to the contract and are in no manner liable to the employer for the execution thereof. It distinguished the contingency, where a J.V. or a Consortium of different companies/ persons is formed, each constituent whereof would be liable for execution of the contract. It was of the estimate that in such a formation of a J.V. or a Consortium, the benefit of experience of the constituent

companies would be available to the J.V. or a Consortium and not otherwise. In essence, it thus held that the appellant-corporation on a stand alone basis, did not possess the requisite experience, as laid down in the tender conditions and that it was not permissible for it to avail the experience of its subsidiaries to make up such deficiency. As a community of interest in the performance of the work between the appellant and its subsidiary companies, was absent, the impugned action of disqualifying it for lack of experience in terms of clause 2.4 of the "Evaluation and Qualification of Criteria" could not thus be faulted.

20. To reiterate, the parties before us are at issue only on the aspect as to whether the appellant-corporation, to meet the experience norm, as prescribed by clause 2.4 of the "Evaluation and Qualification of Criteria", can utilize the experience of its subsidiary companies to qualify in the "Initial Filter-cum-Qualification Requirement Bid".

No other contention has been raised. The present scrutiny thus would be limited only to this facet of the *lis*.

21. It has been insistently urged on behalf of the appellant that the exposition of clause 2.4 of the "Evaluation and Qualification of Criteria" furnished on behalf of MEGA and endorsed by the High Court is patently erroneous and is wholly incompatible with the letter and spirit of clause 4.1 and disregardful of the materials on record pertaining to the constitution of the appellant and the functional mechanism qua its subsidiary companies and is thus liable to be dismissed as absurd, arbitrary and in defiance of logic.

22. Mr. Sundaram has argued that it being apparent on the face of the records that the query in response to which, the clarification provided by the appellant-corporation was that a subsidiary company/group company may bid together with the parent company as a J.V./Consortium member, for parent/group company experience to be taken into

account, had been raised by a subsidiary company with a request to allow the experience of the parent company/group company to be taken into account for meeting the qualification requirement of experience of a subsidiary company. The learned senior counsel has thus maintained that this clarification had no application whatsoever to the appellant-corporation who had offered its bid as the single entity, as permissible under clause 4.1 and in view of its formational and functional configuration, it was legally entitled to avail the experience of its subsidiaries to meet the tender conditions. According to Mr. Sundaram, the disqualification of the appellant-corporation, in this overwhelming legal and factual premise, is grossly arbitrary, unreasonable and unjust calling for the intervention of this Court. The learned senior counsel principally relied in endorsement of his assertions on the decision of this Court in ***New Horizons Ltd. and another*** *Vs.* ***Union of India and others*** – (1995) 1SCC 478.

23. In persuasive refutation, learned senior counsel for the respondent has maintained that as the appellant squarely failed to meet the technical eligibility, predicated in clauses 2.4.1 and 2.4.2(a),(b) and (c) on a correct interpretation of the scope and ambit of clause 4.1, in conjunction with the clarifications provided, no interference with the view taken by the High Court is warranted. As admittedly the appellant's experience sans that of its subsidiaries falls short of the one mandated by the tender conditions, the impugned action of MEGA is unimpeachable, he urged. Mr. Rohatgi argued that merely because the subsidiary companies of the appellant, which by themselves are separate legal entities, are eligible in terms of experience, it does not *ipso facto* confer eligibility to it (appellant), the parent holding company. According to him, the appellant having applied as a single entity in the contract if awarded would be *inter se*, the appellant and the MEGA and the subsidiary companies would not figure in the deal, so much so that it would be impossible to secure their

performance or to hold the subsidiary companies responsible in case of an eventuality necessitating such an initiative. The learned senior counsel argued that as was demonstrable from clause 4.1 as well as 2.4 of the tender conditions in question, the experience of a subsidiary company was permissible to be availed only if it was a member of a J.V. or a Consortium. The appellant, having offered its bid as a single entity, as a holding company, it was not entitled to utilize the experience of its subsidiary companies to make up the short fall in its experience, as prescribed by the tender conditions. While contending that the dictum in ***New Horizons Ltd.*** (supra) was of no avail to the appellant in the facts of the case, the learned senior counsel sought to draw sustenance principally from the following decision of this Court:

(1) **Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.** – 2016 (8) SCALE 765

(2) **Tamil Nadu Generation and Distribution Corporation Ltd. Vs. CSEPDI – Trishe Consortium** – 2016 (10) SCALE 69

(3) **Montecarlo Ltd. Vs. NTPC Ltd.** – 2016 (10) SCALE 50

(4) **Core Projects and Technologies Ltd. Vs. The State of Bihar** – 2011 (59) BLJR 183

(5) **Rohde and Schwarz Gmbh and Co. Kg. Vs. Airport Authority of India and Anr.** – (2014) 207 DLT 1

24. The contentious pleadings and the assertions based thereon have been duly evaluated. The issue that confronts the present adjudicative pursuit, did fall for the scrutiny of this Court, albeit in the context of another project, in which the appellant (respondent No. 2 therein) had been awarded the contract, a decision that stood upheld in C.A. Nos. 1353-1354 of 2017 - ***Consortium of Titagarh Firema Adler SPA -Titagarh Wagons Ltd. vs. Nagpur Metro Rail Corporation Limited*** (decided on 9.5.2017). Clause 4.1 dealing with eligibility criteria of the prospective tenders, as involved in that decision, deserves extraction to facilitate an immediate comparison

of the text thereof with that of clause 4.1 as involved herein.

> "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."

25. Section V of the "Tender Documents" of that contract dwelling on "eligibility criteria and social and environmental responsibility" further mandated that bidders that are government owned enterprises or institutions may participate, only if they can establish that they are (i) legally and financial autonomous (ii) Operate under commercial law.

26. The award of the contract for "design, manufacture, supply, testing, commissioning of 69 passenger rolling stock (Electrical Multiple Units)" and training of personnel at Nagpur Metro Rail Project, which was funded by KfW Development Bank, Germany in favour of the appellant was unsuccessfully assailed before the High Court, a verdict that was upheld by this Court, as referred to hereinabove.

27. One of the principle limbs of challenge against the eligibility of the appellant was its lack of experience as a single entity and that it having submitted its bid on the strength of the experience of the subsidiaries of its erstwhile parent/original companies, following the merger whereof it had come into existence, it was not eligible as per the qualification norms. It was urged there as well that unless the subsidiaries are the constituents of a J.V. or a Consortium, their experience cannot be taken into consideration to gauge the experience of the holding company and that as it on a standalone basis, was not

possessed of the requisite experience as prescribed, it ought to have been disqualified on that count alone.

28. Following an exhaustive analysis of the facts, the relevant tender conditions as well as the law adumbrated by the pronouncements of this Court, this plea against the eligibility of the appellant-corporation was negated.

29. It would be advantageous, in view of the striking analogy of the overall perspectives, to recount the relevant observations recorded therein and having a decisive bearing on the issue under scrutiny.

> "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.
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> ... ...
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> 26. <u>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</u>

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***[1]. 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***[2]. 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***[3].

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1 (1986) 1 SCC 264

2 (1982) 1 SCC 125

3 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***[4], ***B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others***[5] and ***Michigan Rubber (India) Ltd.*** (supra) have been referred to. The Court quoted a

4 (2005) 6 SCC 138
5 (2006) 11 SCC 548

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 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 sub-serves 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."

... ...

29. In ***Reliance Telecom Ltd. and another v. Union of India and another***, the Court referred to the authority in ***Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and others*** 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 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."

... ...

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***[6], ***DHN Food Distributors Ltd. and others v. London Borough of Tower Hamlets***[7] and ***Harold Holdsworth & Co.***

6 (1969) 3 All ER 855
7 (1976) 3 All ER 462

(Wakefield) Ld. v. Caddies[8]. Learned senior counsel has also placed reliance upon the principles 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

8 (1955) 1 WLR 352

funding the entire project. Narrating the experience of the respondent No. 1, 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.
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> 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.
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> 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 prejudice, 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 subsidiaries companies and subsidiaries 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."

30. Be that as it may, it would notwithstanding the above, be indispensable to examine and decipher the import of the relevant clauses pertinent to the question to

be addressed. Clause 4.1 of Section 1 of the Instructions to Bidders which defines "eligible bidders" is in following terms:

> "**Eligible Bidders**:-
>
> 4.1. A Bidder may be a firm that is a single entity 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 JV:
>
> Consortium formation is acceptable.
>
> Tender condition Prevails.
>
> (a) All members shall be jointly and severally liable for the execution of the Contract in accordance with the Contract terms, and
>
> (b) 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."

31. A relevant extract of Clause 7.1 of the same Section, which provides for clarification of bidding documents, site visit pre-bid meeting, is furnished hereinbelow:

> "A Bidder requiring any clarification of the Bidding Documents shall contact the Employer is writing at the Employer's address specified in the BDS or raise his enquiries during the pre-bid meeting if provided for in accordance with ITB.7.4."

32. Clauses 2.4.1 and 2.4.2 (a) & (b) of the "Evaluation and Qualification of Criteria", Section III are also extracted as hereunder:

> "**General Experience (Clause 2.4.1)**
> Experience in the role of prime contractor (single entity or JV member), Subcontractor or management contractor for at least last ten (10) years starting 1st January, 2006.
>
> **Specific Experience Clause 2.4.2(a)**
> A minimum number of two (2) similar contracts that have been satisfactorily and substantially completed as a prime contractor (single entity or JV member) between 1st January, 2006 and the Bid submission deadline.
>
> **Specific Experience (2.4.2(b)**
> Experience under contracts in the role of prime contractor (single entity or JV member) for Vehicle Design, Interface (with other designated Contractors such as signaling, Track Traction, etc.), Assembly & Supply, Testing and Commissioning of minimum of total 150 metro (i.e. MRT, LRT, Sub-urban Railways or high speed railways) cars made of

either Stainless Steel or Aluminum with similar features including three phase traction propulsion system ATP/ ATO systems, etc. between 1st January, 2006 and the Bid submission deadline.

AND

Out of 150 or more cars supplied and commissioned as above have minimum of total 75 metro (i.e. MRT, LRT, Sub-urban Railways or high speed railways) cars supplied and **in satisfactory revenue operation continuously for at least five years:**

EITHER in at least 1 (one) country outside the country of origin OR in India."

33. It is a matter of record that between 16.03.2016 and 30.04.2016, in course of the pre-bid meetings with the bidders, certain queries were raised by them to which clarifications had been furnished by MEGA. The following queries and clarifications as available from the records being pre-eminently relevant are quoted hereinbelow:

Query raised	**Clarification issued**
Serial No. 50: Existing requirement that the consortium members experience shall only be	The subsidiary company./group company may bid together with the parent

counted for qualification Kindly allow Parent companies/Group companies experience to be taken into account for meeting the qualification requirement as this will simplify the Contract structure. The same has been allowed in several large tenders in India recently.	company as a JV/consortium member, for parents/group company experience to be taken in to account. **Tender Condition prevails.**
Serial No.52: Kindly accept letter of credit facility issued by the bank in favor of JV/Consortium or companies belong to same global group of companies rather than individual cap in case the applicant is JV/Consortium.	Each member of JV/Consortium is a separate entity with a distinct role assigned as per MOU and, therefore, the requirement are specified **Tender Condition prevails.**
Serial No. 54. For a proper local management, we suggest you to kindly allow a fully owned Indian subsidiary can use the date and references of the parent company and participate in tender on/its own and	The subsidiary company/group company may bid together with the parent company as a JV/consortium member, for Parents/group company experience to be taken in to account. Each member must meet

or as consortium with parent company borrowing the technical & financial credentials or the parent company	the requirement.
Serial No.56: For a proper local management, we suggest you to kindly allow a fully owned/Indian subsidiary can part of consortium/JV with their parents company, even 100% subsidiary doesn't have 10 years experience and doesn't meet other eligibility conditions mentioned in Clause No.2 of Section-III of Evaluation and Qualification Criteria.	The subsidiary company/group company may bid together with the parent company as a JV/consortium member, for Parents/group company experience to be taken in to account.

34. A plain reading of clause 4.1 reveals that a bidder can be a single entity or a combination of such entities in the form of a J.V. or a Consortium under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. Thus a single

entity has been construed to be a valid bidder for all intents and purposes.

35. Having regard to the magnitude of the project as well as the experience and expertise essential for the quality execution thereof, there seems to be no justification to infer, at the first place, to exclude a government owned entity with its 100% wholly owned subsidiaries to be ineligible to participate in the process. A single entity, in our comprehension, would assuredly include such a government owned entity along with its 100% wholly owned subsidiaries. This is more so on the touchstone of otherwise imperative facilitation of a broad based participation of entities with competing worth and capabilities, in the overall interest of the timely and quality execution of a public project.

36. As recorded in ***Consortium of Titagarh Firema Adler SPA (supra)***, the appellant-corporation is a government owned entity with 100% wholly owned subsidiaries as a composite unit, so much so that the

experience of any one of its constituent 100% wholly owned subsidiaries would be construable as its experience. It was proclaimed that the petitioner (respondent no.2 therein) was a Government Company and the owner of its subsidiary companies and that the concept of "government own entity" could not be given a narrow construction so as to exclude its subsidiaries with their experience and that there was no necessity for the formation of a joint venture and consortium for the Government own entity to avail the benefit of the experience of its subsidiary companies. That the acceptance of the petitioner (respondent no.2) therein in the context of the work awarded to it was in accord with public interest, having regard to the overall commercial concept and the demand of expertise, was underlined as well. Noticeably, the process of merger of M/s. CNR Corporation and M/s. CSR Corporation and the integration thereof along with their subsidiaries to metamorphosise into the appellant-corporation is borne out by the coeval records.

37 In that view of the matter, the status and the entitlements of the appellant-corporation, as already adjudicated in ***Consortium of Titagarh Firema Adler SPA (supra)***, as a single entity bidder in the present tender process would also by the yardstick of simple logic and analogy be available to it. Absence of the words "government owned entity" in clause 4.1, presently under consideration, is of no consequence. The plea of the respondent that the tender conditions involved demand a different perspective in the overall conceptual framework thereof, lacks persuasion. Significantly, in clause 4.1 involved in ***Consortium of Titagarh Firema Adler SPA (supra),*** "government owned entity" had been contemplated as one of the bidders in contradistinction to "private entity" and "any combination of such entities" in the form of a joint venture (J.V)..... The expression used in the present clause being "single entity", understandably, it is inclusive of a private as well as a

government owned entity. The unit envisaged as a single entity is thus independent of any combination or formation in the form of a J.V. or a Consortium and thus is visualised to be one integral and composite whole. In such a logical premise, a government owned company with its 100% wholly owned subsidiaries has to be comprehended as a single entity, eligible to bid in terms of clause 4.1 of the tender conditions and is to be regarded as single, coherent and homogeneous existence and not a disjointed formation.

38. The queries and the clarifications, relatable to the discord, as presented, also in our discernment, do not substantiate the plea of MEGA in any manner whatsoever. The foundation of its rejection of the appellant's bid is the clarification to the query mainly at serial No. 50. It is patent therefrom that it was in response to a query made by a subsidiary company to allow for its benefit, the experience of the parent company/group companies to meet the qualification

requirement with regard thereto. It was in that context that the clarification furnished was that the subsidiary company/group companies may bid together with the parent company as J.V./Consortium member, for parent/group company's experience to be taken into account. This clarification was extended and applied vis-a-vis the appellant qua clauses Nos. 2.4.1, 2.4.2(a), 2.4.2(b) and 2.4.2.(c) to disqualify it on the ground that on stand alone basis, it was deficient in the experience prescribed and that it could not have availed of the experience of its subsidiaries companies. As rightly contended on behalf of the appellant, we are of the view that this clarification has no application to its case and, therefore, the decision to disqualify it on this ground is apparently arbitrary, discriminatory, unreasonable, illogical and non-transparent, thus rendering the same irreversibly illegal, unjust and unfair. The improvement endeavoured by the respondent in its reply affidavit is belied by the records and is unacceptable. No other view or elucidation of the relevant clauses of the tender

conditions is at all possible. The interpretation offered by the respondent and endorsed by the High Court in the contextual framework is thus patently impermissible and absurd.

39. Not only the appellant as the record testifies had offered its responses to the clarifications sought for, its status as a government owned corporation, by no means, has been disputed by MEGA. Further, in the face of its demonstrated structural integrity and functional unity qua its subsidiaries with all consequential legal implications, the apprehension of MEGA that the subsidiary companies of the appellant, if necessity so arises, would not be available for the execution of the project, not being a party to the contract, to say the least, is speculative, unfounded, farfetched and wanting in reason and rationale. Whether the subsidiary companies of the appellant would be responsible for the execution of the work is evinced by the formational specifics and functional dynamics of the appellant and its wholly

owned subsidiary companies, as noticed in ***Consortium of Titagarh Firema Adler SPA (supra)*** in the affirmative and does not call for further dilation. In the face of a forensic analysis of the decisions cited at the Bar in the above adjudication, it is inessential as well to retraverse the same.

40. In the wake up of above determination, the impugned disqualification of the appellant on the ground of deficiency, in experience in terms of clause 2.4, is unsustainable in law and on facts being grossly illegal, arbitrary and perverse. As a corollary, the judgment and order of the High Court in challenge is also set-aside. The tender process in view of the above conclusion, would be furthered hereinafter as per the terms and conditions thereof and in accordance with law and taken to its logical end as expeditiously as possible. We make it clear that the present adjudication is confined only to the issue of disqualification of the appellant on the ground of experience on the touchstone of clause 2.4 of

the "Eligibility and Qualification Criteria" of "Tender Document" and no other aspect. The appeal is allowed. 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 15, 2017

ITEM NO.1A COURT NO.2 SECTION IX

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 12065/2016

M/S CRRC CORPORATION LTD. Appellant(s)

VERSUS

M Link Express for Gandhinagar Ahmedabad
(MEGA) Company Ltd. Respondent(s)

Date : 15/05/2017 This appeals was called on for judgment today.

For Appellant(s) Mr. Prabhjit Jauhar, Adv.
Mr. S.S. Jauhar, AOR

For Respondent(s) Mr. Mahesh Agrawal, Adv.
Mr. Abhinav Agrawal, Adv.
Mr. M. Bhatt, Adv.
Mr. Rishabh Parikh, Adv.
Mr. E.C. Agrawala, AOR

Hon'ble Mr. Justice Amitava Roy pronounced the judgment of the Bench consisting of Hon'ble Mr. Justice Dipak Misra and His Lordship.

The appeal is allowed in terms of the signed reportable judgment. In the facts and circumstances of the case, there shall no order as to costs.

(Gulshan Kumar Arora)
Court Master

(H.S. Parasher)
Court Master

(Signed reportable judgment is placed on the file)