Before Ravi Shanker Jha, CJ & Arun Palli, J.

M/s A.G. CONSTRUCTION CO. *—Petitioner*

versus

FOOD CORPORATION OF INDIA AND OTHERS *—Respondents*

CWP No.20130 of 2020

February 10, 2021

Constitution of India, 1950—Art.226—Petitioner company sought quashing of order rejecting its technical bids with a further prayer for issuance of a writ in the nature of mandamus for a direction to reckon the experience of its sole proprietor while being a partner in M/s B. G. Construction Co. on the strength of his 50% shareholding in the latter company—Question before the Court was whether the experience of a partner in a firm/company of which he was a part earlier can be considered as experience of the petitioner firm of which he is the sole proprietor now—Rejecting the argument of the petitioner, the High Court held that different partners may have different skill sets and the experience cannot be rateably bifurcated on the basis of shareholding—The Court further held that its jurisdiction over a judicial review of a decision taken by the tender issuing authority is somewhat limited, as the authority, who is the author of the tender document is best suited to judge the technical capability of a bidder—Courts would only interfere where the action of the authority is arbitrary, perverse or a decision is taken to favour one party overriding public interest—Writ petition dismissed.

Held that, similarly, even in the instant case, the petitioner sole proprietorship concern having applied for the tender independently, sought to rely on an experience certificate (P-13) issued to a third party (i.e., M/s B.G. Constructions Co.). Further, the relationship/linkage of Ajay Kumar Garg (proprietor of the petitioner concern) with such third party (erstwhile firm) does not engender any benefit to the petitioner concern for reasons already recorded in the preceding paragraphs. Therefore, the petitioner herein having applied independently without any partners, consortium or joint venture, cannot rely upon the technical qualifications of a third party (erstwhile firm) to claim eligibility. In this respect, the position of law emerging from Municipal Corporation, Ujjain (supra) is that as long as a person or entity cannot in law, validly claim experience that exists in the name of a third-party, that third-party remains a stranger to the subject tender. (Para 34)

Further held that, there cannot be any quarrel with the proposition of law either that the interpretation, construction and as to how a provision, clause or a condition of a tender document has to be construed is primarily the domain of the author of such document (in this case, the authority framing the NIT). For none else is better positioned and equipped than such authority itself in understanding the tender document's requirements, as also the purport and intent of its terms and conditions. Therefore, a reference, in this regard, to a few decisions of the Supreme Court, shall be inevitable.

(Para 35)

Further held that, thus, in the wake of the position as sketched out above, and in light of the pronouncements (*ibid*) of the Supreme Court, on the interpretive latitude of the tender inviting authority and the scope of judicial review, we do not find any taint of unfairness, arbitrariness, irrationality or *mala fides*, either in the respondent authority's rejection of the experience certificate in the name of M/s B.G. Constructions Co. on its interpretation of the tender document, or in the decision making process which preceded the respondent authority's rejection of the petitioner's technical bid being non-responsive.

(Para 44)

Puneet Gupta, Advocate
for the petitioner.

K.K. Gupta, Advocate
for the respondent-FCI.

ARUN PALLI, J.

(1) The petitioner-M/s A.G. Construction Co., is a proprietorship concern. And vide this petition, prays for a writ of Certiorari to quash the orders dated 02.11.2020 (P-6), whereby the bid submitted by the petitioner, upon technical evaluation by the duly constituted committee, was rejected being non-responsive, and also dated 20.11.2020 (P-12), vide which even the representation against rejection of its bid has since been declined. A Mandamus is also prayed for, commanding the respondent-authorities to reckon the experience the sole proprietor (Ajay Kumar Garg) of the petitioner concern had acquired, while being a partner in M/s B.G. Constructions Co. Bathinda (partnership firm) and accordingly, he be held to be technically compliant, and the bidding process be initiated afresh from that stage.

(2) In brief, the case set out in the petition is that petitioner is an enlisted contractor in Class I category of building works of the Punjab Mandi Board and the Punjab Roads and Bridges Development Board. And as would be necessary to point out, earlier the petitioner was a partner in **M/s B.G. Constructions Co**. (erstwhile partnership firm), and held 50% share, whereas, Tarun Bansal and Varun Bansal were the other two partners who had 25% share each in the firm. For, the firm was dissolved on 25.6.2019, in terms of the Memorandum of Understanding dated 25.6.2019, executed between the partners, it was agreed that they were free to set up their new ventures and could also use the technical and financial credentials of the firm corresponding to their respective shares. The respondent authorities, in August, 2020, vide tender notice No.06/2020, invited E-tenders under Two Bid System for construction of District Office Building at Bathinda, from appropriate class of approved contractors of CPWD, State PWDs, MES, Railways and Public Sector Undertakings/Enterprises of the Central Government and State Government. To be eligible to bid, the tenderers required to have satisfactorily completed, during the last five years, at least, Three Multi Storey RCC Framed Structure Government Office Building/Institute Building works costing not less than the amount equal to 40% of the estimated cost (Rs.3,95,47,577/-) of the tender; or Two Multi Storey RCC Framed Structure Government Office Building/Institute Building works costing not less than the amount equal to 60% of the estimated cost of the tender; or One Multi Storey RCC Framed Structure Government Office Building/Institute Building work of aggregate cost not less than the amount equal to 80% of the estimated cost put to tender. As stipulated in the tender conditions, copies of experience/work completion certificates of requisite amount were required to be uploaded, along with the technical bid. The last date for submission of technical and price bid was 14.9.2020. The petitioner being fully compliant, in terms of the tender document, submitted his technical and price bid in time, along with the requisite fee. However, as posted on the Government eProcurement System Portal, on 02.11.2020, the tender submitted by the petitioner was rejected during technical evaluation, for the documents appended with the bid were not as per MTF. For neither any opportunity was afforded to the petitioner before rejection of his technical bid, nor any explicit reasons were assigned, in support of the rejection, the petitioner approached the respondent authorities on 5.11.2020. But, was orally informed, for the work experience of M/s B.G. Constructions Co., Bathinda (erstwhile partnership firm), could not be counted or reckoned as his experience,

his bid was found to be non- responsive. And, this was despite the fact that petitioner, along with its bid document, had submitted a representation dated 14.9.2020, wherein it was clarified that in terms of the settled law, the experience gained by the proprietor of the petitioner-concern, as partner in M/s B.G. Constructions Co., was required to be computed in proportion to his 50% share, and the judgments of Delhi and Madhya Pradesh High Court were also appended therewith. For, even though the petitioner required the respondent authorities to furnish reasons and provide technical summary of rejection of its bid, but there was no response, the petitioner approached this Court vide CWP No.18987 of 2020. However, as counsel for the respondent authorities, who appeared upon an advance notice, submitted, for the representation submitted by the petitioner was pending consideration and shall be disposed of, by passing a detailed order, the petition was disposed of by the Division Bench on 10.11.2020. But, eventually, the said representation was rejected by the respondent authorities, vide order dated 20.11.2020, on the grounds:-

> "Now coming to the experience documents submitted by the bidder with tender criteria, it has been concluded that M/s A.G. Construction Co. has submitted only one document under 60% work experience head and rest of the experience documents uploaded is in the name of M/s B.G. Construction Co., which cannot be considered as per the experience criteria. Needless to say that M/s A.G. Construction Co. is claiming the experience as gained in partnership in deed in M/s B.G. Construction Co. only to the extent of the ratio of share as named by Ajay Kumar Garg as 50% which does not fulfill the experience criteria as laid down in terms and conditions discussed above.
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> Furthermore, the judgments relied upon by M/s A.G. Construction Co. in his representation was examined by the technical evaluation committee and operating division in consultation with empanelled advocate of FCI and it was found that said judgment of Hon'ble High Court of Delhi passed in case of PK Delicacies Pvt. Ltd. Vs. UOI and the judgment of Hon'ble High Court of Indore, Madhya Pradesh, passed in case of Samrudha Buildcon Pvt. Lt. Vs. Indore Development Authority are judgments in personam and not judgment in rem.
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> It is not out of place to mention that the Hon'ble High Court

of Punjab and Haryana in CA-CWP-5 of 2017 (O&M) titled FCI Vs. M/s Daniel Masih Satprit Singh Bedi wherein the challenge was to the validity of the amendment incorporated by the FCI in MTF of contract division to the effect that in case of Partnership only the experience of the Firm will be reckoned and for the purpose the experience of individual partners will not be counted has upheld the said view point of the FCI and same has also been upheld by the Hon'ble Supreme Court of India. Needless to say that the said legal position established by the Hon'ble High Court of Punjab and Haryana and the Apex Court in the ibid judgment applies to present case also."

(3) Thus, this petition.

(4) Learned counsel for the petitioner submits that respondent authorities seriously erred in declining to consider the experience gained and acquired by M/s B.G. Constructions Co. (erstwhile partnership firm), in which Ajay Kumar Garg (sole proprietor of the petitioner concern) happened to be one of the partners, as his experience or the experience of the petitioner concern. Further, as per the tender conditions, the requisite experience, in terms of the qualifying criteria, was required to be possessed by the appropriate class of approved **contractors** and not by or in the name of the petitioner (M/s A.G. Construction Co.), and for the proprietor of the petitioner concern possessed the requisite experience, he was eligible to compete in the tender process. In any case, he asserts, for concededly, Ajay Kumar Garg held 50% share in M/s B.G. Constructions Co. (erstwhile partnership firm), he was entitled to claim proportionate experience, in terms of his share, out of the experience acquired by the firm. He, therefore, in reference to the performance/experience certificate (P-13), which was issued to M/s B.G. Constructions Co. (erstwhile partnership firm), upon construction of administrative block in BISA Headquarters, at Ladhowal, submits, for the value of the work/project executed by the firm was Rs.852 lakhs, the petitioner, in terms of his share, would be deemed to have executed one work valuing Rs. 426 lakhs (852/2), and that being more than the cost of the subject tender (Rs. 3.95 crores), he was eligible to bid in terms of the eligibility criteria. Further, it is urged that the approach and understanding of the respondent authorities to term the decisions rendered by the Division Bench of Madhya Pradesh High Court in ***Samruddha Buildcon Pvt. Ltd.*** versus ***Indore Development Authority and others,*** (CWP No. 4448 of 2015) and of

Delhi High Court in ***P.K. Delicacies Pvt. Ltd.*** versus ***Union of India and others***[1]**,** as judgments in *personam* and not in *rem*, is apparently perverse. For, in both the cases, the Court had actually relied upon the decision of the Supreme Court in ***M/s New Horizons Limited and another*** versus ***Union of India and others***[2] wherein it was held that in the absence of any exclusionary clause in the tender document, it could not be said that past experience of a partner of the firm could not be considered. Rather, he submits that in terms of the law laid down in those decisions, experience of the firm ought to have been considered. And, in reference to the impugned order, he asserts that reliance placed by the authorities upon the decision of the Division Bench of this Court in ***FCI*** versus ***Daniel Masih Satprit Singh Bedi***[3]**,** to reject the representation of the petitioner is apparently ill- founded, for the said decision has no bearing on the matter in issue. For, unlike in ***Daniel Masih*** (supra), in the matter at hand, there was no exclusionary clause which stipulates that experience of the partner would not be reckoned and experience in the name of the firm alone shall be counted. He submits that the Division Bench in the said decision had rather observed that judgment of the Supreme Court in ***M/s New Horizons Limited*** (supra), was confined to the cases, where the qualification was stipulated in respect of the firm without excluding qualifications of the partner thereof. Thus, the respondent authorities apparently failed to apply its mind and consider the claim of the petitioner in the right perspective. No other argument was advanced.

(5) *Per contra*, Mr. K.K.Gupta, learned counsel for the respondent authorities, supports the rejection of the technical bid submitted by the petitioner, by the duly constituted committee, being non-responsive, as also the impugned order dated 20.11.2020 (P-12), whereby, upon due and comprehensive consideration of the claim of the petitioner, even its representation was rejected. He asserts, for apparently the petitioner did not possess the requisite experience, in terms of the qualifying criteria, rejection of its technical bid was inevitable. Thus, he submits that the petition deserves to be dismissed.

(6) We have heard learned counsel for the parties and perused the records.

(7) In context of the matter in issue and to proceed further, we

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[1] 2005 (13) RCR (Civil) 491
[2] 1995 (1) SCC 478
[3] 2017 SCC OnLine P&H 417

consider it expedient to set out the eligibility criteria stipulated at page 4 of the MTF, which reads thus:-

> "Online Item rates Tenders under Two Bid System are invited on behalf of the Food Corporation of India for the following works from the appropriate class of approved Contractors of CPWD, State P.W.Ds, M.E.S, Railways and Public Sector Undertakings/Enterprises of the Central Government and State Government who have satisfactorily completed during the last five years, ending last date of the month previous to the one in which the Tenders are invited at least three Multi Storey RCC framed Structure Government Office Building/Institute Building works of costing not less than the amount equal to 40% of the estimated cost put to Tender(or) two Multi Storey RCC framed Structure Government Office Building/Institute Building works costing not less than the amount equal to 60% of the estimated cost put to Tender (or) One Multi Storey RCC framed Structure Government Office Building/Institute Building work of aggregate cost not less than the amount equal to 80% of the estimated cost put to Tender, in any of the Organisation listed above for registration in NIT."

(8) Explicitly, for a tenderer to be eligible to bid, he ought to have satisfactorily executed, during the last five years, either **three of the specified works:** costing not less than the amount equal to 40% of the estimated cost put to tender (40% of Rs.3,95,47,577.00) =Rs.1,58,19,031.00 or **Two works** costing not less than the amount equal to 60% of the estimated cost of the tender (60% of Rs.3,95,47,577. 00)=Rs.2,37,28,546.00 or **One work** costing not less than the amount equal to 80% of the estimated cost put to tender (80% of Rs.3,95,47,577.00)=Rs.3,16,38,062.00. And, as indicated earlier, in terms of the tender conditions, copies of experience/work completion certificates of requisite amount were required to be submitted with the technical bid. Concededly, the petitioner did not possess the required experience either in his name or in his independent capacity. But, for he happened to be one of the partners in M/s B.G. Construction Co. (erstwhile partnership firm), he appended the experience/performance certificate (P-13), dated 9.3.2020, that was issued in the name of the firm. And, as indicated earlier, his claim is, for the partnership firm is not a separate legal entity but only a compendious mode of describing

its partners, therefore, the experience of the firm is indeed the experience of its partners, and thus, ought to have been reckoned, while evaluating the eligibility of the petitioner. Also, in any case, for Ajay Kumar Garg (the sole proprietor of the petitioner), held half share in the erstwhile firm, he was entitled to claim work experience, at least, equal to half the value of the project/work (852/2 lakhs=Rs. 4.26 crores), executed by the firm. And thus, by necessary implication, he possessed the requisite experience and eligibility to bid in his independent capacity.

(9) In this backdrop, therefore, the question that arises for consideration is, **whether the experience (P-13) gained/acquired by M/s** B.G. Constructions Co. (erstwhile partnership firm), could be construed as experience of Ajay Kumar Garg, who happened to be one of the three partners in the firm, in his individual/independent capacity; or could he claim the work experience of the firm even in proportion to the share he held?

(10) To appreciate its true essence and even the nature of project/work that was assigned to and executed by M/s B.G. Constructions Co. (erstwhile partnership firm), it would be apposite to refer to the experience/performance certificate (P-13), which forms basis of the claim of the petitioner:-

CLIENT'S CERTIFICATE REG. PERFORMANCE OF CONTRACTOR

No. 2753
dt 09.03.2020 (hand written)

No. **Date**

Name & Address of the Contractor	**M/s B.G. Constructions Company, St. No.9, House No. 922, Ganesha Basti, Bathinda**
Name of Work with brief particulars	Construction of Administrative Block, including GIS Lab Informatics and Statistical unit Agronomy Lab, Genomic Selection Lab and Multipurpose Hall etc, in BISA Headquarter at Ladhowal, Distt. Ludhiana as per approved DNIT.
Agreement No. and date	7 of 2017-18
Agreement amount	Rs. 770.33 Lacs

Date of commencement of work	21.08.2017
Stipulated date of completion	20.08.2018
Actual date of completion	22.01.2020
Details of compensation levied for delay (indicate amount) if any	N.A.
Gross amount	Rs. 852.00 Lacs Final Bill under process
Name and address of the authority under whom work executed	Executive Engineer, Construction Division No.1, PWD, B&R Br. Ludhiana
Whether the contractor employed qualified Engineer/Overseas during execution of work	Yes
i) Quality of work (indicate grading)	√ Outstanding/Very Good/Good/Poor
ii) Amount of work paid on reduced rate work?	No.
i) Did the contractor go for arbitration?	No.
ii) If yes, total amount claim	No.
iii) Total amount awarded	No.
Comments on the capabilities of the Contractor	
a) Technical Proficiency	√ Outstanding/VeryGood
b) Financial soundness	√

	Outstanding/VeryGood
c) Mobilization adequate T&P	√ Outstanding/VeryGood
d) Mobilization manpower	√ Outstanding/VeryGood
e) General behavior	√ Outstanding/VeryGood

(11) *Ex facie*, the experience gained by M/s B.G. Constructions Co. (erstwhile partnership firm), upon execution of the project/work (*ibid*), was acquired by the combined, collective and integrated labour of its partners, who, apart from their individual investments, had pooled in their respective resources, skill, knowledge, experience, ideas and information. And, were, thus, supplemental to each other. Quite naturally, the experience certificate (*ibid*) certifies the performance, capacity and capabilities of the firm **(M/s B.G. Constructions Co.),** that had executed the project and not of any partner individually. It is true that from the same subject of experience, more than one can gain experience, however, that must not by itself evince the conclusion that each person gaining 'experience' (limited to their contribution) in the output jointly created by them, is entitled to the benefit of the output in its entirety. Though, the so called experience of a firm, in reality, is nothing but the experience of the partners who compose it, such experience of a firm is not in its entirety attributable to each individual partner, but attributable only to the collective effort of all partners concerned. The benefit of the experience of a firm understood as an inextricably synthesised synergism of the individual efforts of all partners cannot therefore, be extended to a single partner in his individual capacity merely because he might have been actively involved in producing the jointly created final output. Therefore, given the nature of experience, it could have been identifiable, and could be quantified (quantitatively and/or qualitatively) only if it was claimed by the firm itself or its partners jointly. But, we must pause for a moment to point out that we are not unmindful of a situation, which, perhaps, could be viewed differently subject, of course, to its circumstantial landscape and the specific terms/conditions of the tender enquiry, where a partner is able to conclusively show by producing tangible material that he was the one tasked in his individual/independent capacity with looking after the project he claims experience for and that in doing so, he acquired/gained that experience which is germane to the tender's

requirement.

(12) This could be examined from yet another perspective. Ordinarily, in the case of a partnership, the arrangements of the partners *inter se*, related to running the business/affairs of the firm, division of work, assignment of specific operations to a particular partner, skill, knowledge and experience possessed by the other and extent of its usage and benefit to the firm are opaque to an outsider looking inwards. Similarly, it is not unusual that every partner does not necessarily attend to the day to day business of the firm. Even a partner who possesses the requisite experience might not have ever participated in the management or affairs of the firm, for he may only be an investment partner. Now, from here, another factor that needs to be kept in view is that matters related to tenders or award of contract in essence are commercial in nature. As such, the tender inviting authority is certainly entitled to evaluate and satisfy itself as regards the capability and competence of the tenderer in completing the tasks of the kind and magnitude involved in the NIT. Undeniably so, the technical evaluation stage is an extremely sensitive phase in reaching that satisfaction. Additionally, in the context of State projects, an element even of public interest is involved. For the characteristic features herein are opacity and uncertainty as to the innards of the firm's workings, coercing a tender inviting authority to blindly treat experience in the name of an erstwhile partnership firm as the experience of the partner in his individual capacity, in our view, would militate against every judicious consideration that animates an NIT.

(13) At this juncture, we consider it expedient to even refer to the observations recorded by the Supreme Court in ***New Horizons Limited and others*** (supra), that when a businessman enters into a contract, pursuant whereto some work is to be performed, he is entitled to assure himself about the credentials of the person who is to be entrusted with the performance of the work:

> "…..While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such

> credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work….."

(14) We are also reminded of the observations recorded by the Supreme Court in ***Raunaq International Limited*** versus ***I.V.R. Construction Limited***[4] where the Supreme Court held that:

> 9. " In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be:
>
> (1) xx xx xx
>
> (2) xx xx xx
>
> (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
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> (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
>
> (5) past experience of the tenderer and whether he has successfully completed similar work earlier;
>
> xx xx xx xx"

(15) Therefore, in a situation where the tender inviting authority is not equipped with any material on record to judge and be sure of whether the tenderer in his individual capacity has the requisite experience or not, we don't consider it rational to coerce the authority to accept the experience certificate of an erstwhile partnership firm regardless, and ask it to resign the fate of its project to the mercurial vicissitudes of chance.

(16) This brings us to a decision rendered by a Division Bench of the Uttarakhand High Court in ***Kunwar Construction*** versus ***State of Uttarakhand and others***[5], where in similar circumstances, an identical

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[4] (1999) 1 SCC 492

[5] 2019 SCC OnLine UTT 1210

question arose for consideration. The petitioner **(Kunwar Construction)** therein was a sole proprietorship concern. In terms of the tender conditions, a tenderer was required to have undertaken works of at least 50% of the cost of project, i.e. Rs.427.78 lakhs. Kunwar Construction hitherto was a constituent of joint venture: **M/s Kunwar Constructions and M/s Balvinder Singh and Co.** and had contributed 25% of the investment. The experience certificate submitted by the petitioner included the works executed by the joint venture. The experience acquired by the joint venture was claimed as experience of the petitioner. However, the authorities added only 25% of the experience of the joint venture as experience of the petitioner **(sole proprietorship concern)** and rejected its bid upon technical evaluation, for it had not executed works above Rs.427.78 lakhs. However, claim of the petitioner was that notwithstanding its investment (25%), the entire experience acquired by the joint venture ought to have been reckoned in computing the required experience and in that situation, the petitioner fulfills the minimum prescribed experience. Whereas, the case of the authorities was, for the petitioner had submitted its technical bid as a sole proprietorship concern and not as a joint venture, the experience of the joint venture could not be considered as experience of the sole proprietorship concern. And, in any event, for the petitioner merely held 25% share in the joint venture, at best, only 25% of the said experience could be claimed by the petitioner. And, the Division Bench, in reference to the decision rendered by the Bombay High Court in ***Atasha Ashirwad Builders (J.V.) Nagpur*** versus ***State of Mahrashtra & Ors.***[6], relied upon by the petitioner and also the judgment of the Supreme Court in ***New Horizons Limited*** (supra), concluded that in those cases, the **bidder was a joint venture** and had claimed the experience of all its constituents. Thus, rejection of the bid by the authorities, drawing a distinction between the joint venture itself and its constituent members, was set aside both by the Bombay High Court in ***Atasha Ashirwad Builders*** (supra) and by the Supreme Court in ***New Horizons Limited*** (supra). Whereas, in the matter the Court was seized of, though undoubtedly, the petitioner was a member holding 25% share in a joint venture, however, the bid submitted by the petitioner was not as a joint venture, but as a sole proprietorship concern. Thus, unlike a situation where a bid submitted by a joint venture in which the experience of all its constituent members is required to be taken into consideration in computing experience of the

[6] (2010) 15 RCR (Civil) 377

joint venture itself, the converse may not be possible**.** Resultantly, the sole proprietorship concern could not claim the experience of the joint venture and all its constituents, as its individual experience.

> "19. Just as in Atasha Ashirwad Builders, the bidder in New Horizons Limited was also a Joint Venture, and had claimed the experience of all its constituents. Rejection of the bid, drawing a distinction between the Joint Venture itself and that of its constituent members, was set aside both by the Bombay High Court in Atasha Ashirwad Builders and by the Supreme Court in New Horizons Limited.
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> 20. In the present case, while the appellant-writ petitioner was no doubt a member holding 25% share in a Joint Venture, the bid submitted by them was not as a Joint Venture, but as a sole proprietary concern. Unlike in cases where a bid is submitted by a Joint Venture, in which case the experience of all its constituent members may be required to be taken into consideration in computing the experience of the Joint Venture itself, the converse may not be true. The appellant-writ petitioner herein, having submitted their bid as a sole proprietary concern and not as a Joint Venture, cannot claim the experience of the Joint Venture, and all its constituents, to be reckoned as his individual experience as a sole proprietary concern."

(17) Though, we shall be analysing this position in required depth in the subsequent paragraphs, but we may hasten to clarify, at this stage itself, that observations recorded by the Division Bench in ***Kunwar Construction*** (supra), in paragraph 21 of its judgment, "**since the Joint Venture did not participate in the bidding process, the appellant-writ petitioner can, at best, claim the experience of the Joint Venture only to the extent of his 25% share therein,"** would not advance the cause of the petitioner either. For, on a proposition of law, it was concluded that if a bid is submitted by the joint venture itself, it can legitimately claim the experience of its constituent members. Whereas, the converse may not be true. Rather, before recording those observations, emphasised by us, it was clarified, "**while it** was unnecessary for the respondents to have included even a part of the **experience of the Joint Venture, in determining the experience of the appellant-writ petitioner as a sole proprietary concern."** Thus, it was only because the authorities themselves had reckoned 25% of the experience in the name of the joint venture, as experience of the

petitioner **(sole proprietorship concern)**, the court, in the given situation, observed that the petitioner, at best, could claim the experience of the joint venture corresponding to its share.

(18) Having said that, we may now advert to the argument that because the sole proprietor of the petitioner concern happened to be a partner and held 50% share in M/s B.G. Construction Co.(erstwhile partnership firm), he was entitled to claim proportionate work experience, equal to half the value of the project. We hold that it lacks conviction and cannot be countenanced either.

(19) As defined in Black's Law Dictionary (sixth edition), 'experience', means, "A state, extent, or duration of being engaged in a particular study or work; the real life as contrasted with the ideal or imaginary. A word implying skill, facility, or practical wisdom gained by personal knowledge, feeling, and action, and also the course or process by which one attains knowledge or wisdom."

(20) That general understanding of the term however changes semantic shades with reference to the specific disciplinary or factual context it is employed in. In the fields of trade & commerce, business & contracts, applied technology and the like, experience would mean a special skill or knowledge possessed by a person in a particular discipline of science, technology, profession or business by reason of distinctive study, practical acquaintance and involvement relevant to the disciplinary or factual context in question. For instance, in case of a notification inviting tenders aimed at screening experience for a construction project, a capital investor, though experienced for his professional fief may not be deemed to have the experience of previously constructing a building merely because he bankrolled the venture. An identical anomaly could have arisen even in respect of the partners of M/s **B.G. Constructions Co.**, since its partnership deed in clause 10 (P-4) mentions only Ajay Kumar Garg and Varun Bansal as 'working partners'. The Memorandum of Understanding (P-5) whereby partners of M/s **B.G. Constructions Co.** agreed to go their separate ways, stipulated that the partners were free to start new firms and participate in any tender by taking their separate shares technically as well as financially. One could very well imagine a situation where Tarun Bansal (third partner of M/s **B.G. Constructions Co.),** merely being an investment partner, approached this Court claiming the benefit of experience in the name of the erstwhile firm. Evidently, the financial stakes or share held by a partner *per se* has no nexus with the experience he is required to possess in terms of the tender conditions. In

other words, experience is not a commodity that could be acquired for consideration. As for this, we may also refer to the observations recorded by the Division Bench of the Bombay High Court in ***Atasha Ashirwad Builders*** (supra):-

> "7. Having considered the matter, we do not find any justification on the part of the respondent-VIDC in assessing the experience of Joint Venture by reducing the actual experience of constituents of the Joint Venture to the ratio of their investment and profit sharing. There is no correlation between the extent of investment of a partner in a Joint Venture and his experience. The two are entirely different things. It cannot be said that a partner's experience is affected in any way because he invests in the Joint Venture only to a certain extent. The attempt to correlate the two seems wholly unjustified and absurd.
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> 8. Joint Ventures are commonly formed by two or more individuals with a view to pool their resources, skill, experience etc. in order to inter alia meet the eligibility criteria of tenders of specific projects. The fact that participation of the constituents of the Joint Venture is in a particular ratio cannot become a reason to whittle down and reduce the experience of the constituents. The partners, who constitute the Joint Venture, may agree to limit investment and profit sharing to a certain percentage. This does not mean that they have thereby agreed to have a limited experience. If, in fact, a partner has certain amount of experience, that experience remains as a part of experience of a Joint Venture when the Joint Venture makes a bid and the ratio of investment and profit sharing are the factors, which have nothing to do with such experience."

(21) Further, in anatomising the issues that have reared their head in the instant case, this Court is mindful of the myriad stages and processes that a proposal passes through before coalescing into an NIT. Conscious of the acute necessity of a specific proposal, the tender inviting authority first conceives the project; then, it evaluates its logistical viability, and further enriched by the assistance of financial consultants and technical experts, the authority finally confects terms & conditions suitable for achieving the purpose of the project's initiation and for taking it to its logical end. It is after that painstaking odyssey of continual application of mind that the tender inviting authority arrives at

its conception of the nature of the project, expectations from the party that would ultimately be awarded the contract etc., commensurate to the project and the authority's requirement. From that vantage point, the authority examines the tenderers' bids, and takes a decision on which tenderer, on a relative basis, most appositely meets the requirements of the tender inviting authority. To adulterate that stream of decision making by interpolative interpretations (like the petitioner's argument of apportionment with reference to extent of shareholding) on the suggestion of a bidder, would in this Court's opinion be a constitutionally ill-suited coercive exercise.

(22) Even otherwise, the argument that is sought to be advanced not only defies logic, but is also self defeating. For, if that is accepted and cost of the project executed by the firm, is reduced in proportion to his share (50%), then, as a necessary consequence, not only the work/project but even the experience that stems from its execution loses its character and conclusivity, for that too would be reduced proportionately. Whereas, in terms of the eligibility criteria, the tenderer ought to have satisfactorily executed **one specified work** valuing not less than 80% of the estimated cost of the subject tender. Moreover, as indicated earlier, the experience gained by the erstwhile firm was acquired owing to combined, collective and integrated labour and resources of its partners, and hence, was so inseparably interwoven that it was neither divisible nor could it be apportioned amongst its partners. Unlike a joint holding where a co-sharer has a right to seek partition of his **defined** share.

(23) We have also examined the decisions that have been relied upon by the learned counsel for the petitioner, and before we even refer to each of those, we may observe that none, in our opinion, applies to the facts of the present case. In ***New Horizons Limited*** (supra), the department of telecommunications invited tenders for printing telephone directories. The tenderers were required to possess experience in compiling, printing and supplying telephone directories to the large telephone systems with the capacity of more than 50,000 lines and to substantiate this with documentary proof and by furnishing its credentials in the field. NHL (appellant) and respondent No.4 were amongst the 5 bidders. NHL (appellant) had mentioned in its bid that it was a joint venture company comprising of 5 entities incorporated both in India and abroad. The High Court had held, *albeit* each of the members of the joint venture had more than the requisite experience, but, NHL (appellant) itself did not possess the same. However, the

Supreme Court in its decision concluded:

> "25. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a

prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22- 4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other

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

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

29. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of Salomon v. Salomon & Co. [1897 AC 22 : (1895-9) All ER Rep 33] Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. (See : Gower's Principles of Modern Company Law, 4th Edn., p. 112.) This concept, which is described as "piercing the veil" in the United States, has been thus put by Sanborn, J. in JJ.S. v. Milwaukee Refrigerator Transit Co. [(1905) 142 Fed 247, at p 255]:

"When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or

defend crime, the law will regard the corporation as an association of persons."

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

In Scottish Coop. Wholesale Society Ltd. v. Meyer [1959 AC 324, a case under Section 210 of the Companies Act, 1948, Viscount Simonds has quoted with approval the following observations of Lord President Cooper:

"In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view."

xx xx xx xx xx xx xx xx

42. Thus the approach from the legal standpoint also leads to the conclusion that for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated 22-4-1993, the experience of the constituents of NHL, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company, (IIPL) has to be taken into consideration. As per the tender of NHL, one of its Indian constituents (LMI) had printed and bound the telephone directories of Delhi and Bombay for the years 1992 and its Singapore-based constituent (IIPL) has 25 years' experience in printing the telephone directories with "yellow pages" in Singapore. The said experience has been ignored by the Tender Evaluation Committee on an erroneous view that the said experience was not in the name of NHL and that NHL did not fulfil the conditions about eligibility for the award of the contract. In proceeding on that basis the Tender Evaluation Committee has misguided itself about the true legal position as well as the terms and conditions prescribed for submission of tenders contained in the notice for inviting tenders dated 26-4- 1993.

The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of Respondent 4. The total amount of royalty offered by Respondent 4 for three years was Rs 95 lakhs whereas

> **NHL had offered Rs 459.90 lakhs, i.e., nearly five times the amount offered by Respondent 4. Having regard to this large margin in the amount of royalty offered by NHL and that offered by Respondent 4, it must be held that decision of the Tender Evaluation Committee to refuse to consider the tender of NHL and to accept the tender of** Respondent 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed."

(24) Apparently, the appellant (NHL) was a joint venture comprised of 5 entities and each of those was an accomplished business leader and possessed the requisite experience. Thus, NHL had access to the benefit of the resources and strength of its parent/owning companies**.** Moreover, in the tender, it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India. It was in these circumstances, that it was concluded that NHL, being a joint venture, the experience of its constituents had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of the prudent businessman. Further, non-consideration of the tender submitted by NHL had resulted in acceptance of the tender of respondent No.4 who had offered only Rs.95 lakhs as royalty for three years whereas NHL had offered Rs.459 lakhs which were nearly 5 times the amount offered by respondent No.4. Thus, the decision of the Tender Evaluation Committee suffered from the vice of arbitrariness and irrationality. Whereas, the issue in the matter at hand is distinctly different: for in the present case, concededly, neither the petitioner nor its sole proprietor had the necessary experience in its/his own name. Further, in the instant case, the petitioner's sole proprietor as an erstwhile partner of M/s **B.G. Constructions Co.** cannot validly claim the benefit of experience in the name of such erstwhile firm for reasons already recorded. Hence, the question herein is not whether Ajay Kumar Garg's experience acquired in his individual capacity can enure to the benefit of the petitioner sole proprietorship concern; instead, the point at issue is whether Ajay Kumar Garg (and by implication the petitioner sole proprietorship concern) can claim experience in the name of his erstwhile firm, i.e., M/s **B.G. Constructions Co.** in the first place. In other words, if Ajay Kumar Garg undoubtedly possessed requisite experience in his independent capacity in terms of the eligibility criteria, needless to say, the authorities would've been bound to reckon it as the experience of the petitioner sole proprietorship

concern, but, as highlighted hitherto, that is not the matter in issue presently. Therefore, there is nothing materially analogical in **New Horizons Limited** (supra) that could effectively undergird the petitioner's claim.

(25) In fact, upon an analysis of the decision in ***New Horizons Limited*** (supra)**,** we are rather of the opinion that our view finds resonance and support in few of the observations emphasized by us, while extracting relevant paragraphs of the judgment. For instance, in each of the illustrations described by the Supreme Court, an individual or an entity possessed the requisite tangible experience in its individual capacity, which was quantifiable (qualitatively and/or quantitatively), and with which it could merge itself in another company or enter into a partnership with a firm which lacked the necessary experience. Since the fact that such individual or entity actually had the experience was incontrovertible in these illustrations, the Supreme Court remarked on how absurd it was to discount such experience just because the re-organized company or the firm which had submitted the bid did not have that experience in its name.

(26) Likewise, even the decision by the Division Bench in ***P.K. Delicacies Private Limited*** (supra), has no bearing and is clearly distinguishable. For, in the said case, Indian Railway Catering and Tourism Corporation had invited tenders for providing catering services in certain trains that were being plied by the Corporation. The technical bid of the petitioner, i.e. P.K. Delicacies Private Limited, was rejected, for, it failed to meet the eligibility criteria of at least 5 years past experience in catering/hospitality industries. The tenders by way of publication were invited in the months of March and April 2005. Whereas, the company itself was incorporated on 07.04.2005, but with the object and purpose to take over the business of a partnership firm M/s Pee Kay Associates along with its assets and liabilities. Concededly, both the partners of the firm, namely Mr. Prem Taneja and Mr. Ashu Taneja, were the only directors of the petitioner-company. And, in these circumstances, the past experience of 20 years of M/s Pee Kay Associates was being claimed as experience of the petitioner company. Therefore, in reference to the decision in ***New Horizons Limited*** (supra), the High Court held that requirement regarding past experience had to be considered from the standpoint of the prudent businessman and commercial point of view. Thus, the corporate veil was required to be lifted to find out the persons who were in actual control and behind the company. Again, what we wish to lay emphasis

upon is that there was a complete takeover of the firm (M/S Pee Kay Associates) along with its assets and liabilities; no portion or remnants of the experiential contribution that created the experience of the erstwhile firm was lost or left behind on its transition from being a firm to becoming a company insofar as the conglomerate of individuals behind the veil remained the same.

(27) Similarly, the decision rendered by the Division Bench of Madhya Pradesh High Court in ***Samruddha Buildcon Pvt. Ltd.*** (supra), is distinguishable on facts. Indore Development Authority had invited tenders for construction of swimming pool complex of International standard. The petitioner-Samruddha Buildcon Pvt. Ltd. **(**private limited company) was aggrieved, for its technical bid was rejected by the authority. Shri Mahesh Hassanandani, who was one of the directors of the company, also happened to be a partner in M/s Jethanand Arjundas & Sons. However, owing to a family settlement, he retired from the partnership of the firm and formed the petitioner Co. Post split from the partnership firm, he applied for Class-A Contractor Registration Certificate, in terms of Government circular dated 29.03.2011, from the Government of M.P. Significantly, as per clause 3 of the said circular, the petitioner was entitled to use the financial and experience credentials equal to his proportionate share (33.33%) in the firm. Accordingly, the petitioner company was granted Class-A certificate w.e.f. 06.02.2013. The petitioner, along with its bid, submitted the experience certificate issued by the principal contractor in the year 2013, as per which the partnership firm M/s Jethanand Arjundas & sons had executed the civil construction work valuing Rs.45.40 crores. Therefore, Mahesh Hassanandani, who held 33.33% share in the firm, claimed 1/3rd of the said work experience, which would come to Rs.15.13 crores. Whereas, the qualifying work experience had to be equal to the value of tender i.e. Rs.11.87 crores. Vide declaration appended with the bid, it was notified that pursuant to the order of the Government dated 29.03.2011, the petitioner was entitled to use financial and experience credentials proportionate to his share in the erstwhile firm. Further, the case of the petitioner was that in the response submitted by the department, it was nowhere stated that circular dated 29.03.2011, issued by the Government, was not being followed. And, in terms of clause 4 of NIT, the Committee of IDA was competent to take a decision to accept or reject the technical bid, whereas a novel method was adopted by the authority by referring the matter to a Chartered Accountant for financial appraisal report for PQBD and on the basis of the said report, the technical bid of the

petitioner was rejected. In these circumstances, it was concluded that decision making process by which the petitioner was excluded was not reasonable and rational under Article 14 of the Constitution of India. But, we are afraid such is not the position in the matter at hand.

(28) In ***Comptroller and Auditor General*** versus ***Kamlesh Vadilal Mehta***[7], the respondent was a sole proprietorship firm of Chartered Accountant. One of the statutory functions assigned to the appellant was to get the accounts of Public Sector Undertakings and Government Concerns audited by the Chartered Accountants. The audit work of the Government and Public Sector Undertaking was assigned to only those Chartered Accountants who were enrolled on the panel maintained by the appellant. Vide advertisement issued in May, 1981, applications from the firms of Chartered Accountants for empanelment for audit of the Government companies were invited. Except a few states, only the partnership firms of the Chartered Accountants were eligible for enrolment on the panel and the proprietor firms of the Chartered Accountants were made ineligible. Upon an analysis of the matter, it was concluded that appellant itself erroneously assumed that the partnership firms were more efficient than the proprietor concern in the matter of audit of accounts of the Public Sector Undertakings or of the Government concerns. In any event, it would not follow as a categorical imperative that a partnership is better placed for auditing simply because "two minds are better than one". Further, if the proprietary concern of Chartered Accountants were really inefficient, there is no reason why they were made eligible to conduct audits in few of the specified states, such as Orissa, Jammu & Kashmir, Assam, Manipur, Meghalaya, Nagaland and Tripura. Therefore, the classification between proprietary and partnership firm was held to be arbitrary and unfair on the anvil of Article 14 of the Constitution. Thus, we cannot fathom, as to how this decision would apply to the present case.

(29) But, yes the argument advanced by the learned counsel for the petitioner that decision of a Division Bench of this Court in ***Daniel Masih*** (supra), has wrongly been relied upon by the respondent authority is valid, as the said judgment does not *stricto sensu* apply to the facts of this case. For the said judgment answers a question distinctly different from the one presently under consideration, the question in ***Daniel Masih*** (supra) was about the constitutionality of

[7] 2003(2) SCC 349

tender prescriptions which stipulate that the experience in the name of the firm only would be considered and that the experience in the name of individual partners would not be counted as that of the firm, whereas that is not the case here. However, that would not by itself automatically lead to the conclusion that every case featuring the absence of an exclusionary clause ought to be one where the authority would be impelled into regarding experience in the name of an erstwhile partnership firm as the experience of the partner in his individual capacity. Despite the apparent difference between the issues answered in ***Daniel Masih*** (supra) and the questions before this Court, the ratiocination behind the Respondent authority's reliance on ***Daniel Masih*** (supra) is indubitably obvious. This Court's discernment in that respect was further fortified during arguments, when the learned counsel for the respondents specifically drew the attention of the Court to the following paragraph of ***Daniel Masih*** (supra):

> "13. Every partner does not necessarily attend to the day to day business of the firm or even participate in its management or in the work performed by the firm. Even a partner of a firm who possesses the requisite qualification stipulated in the notice inviting tenders may not have participated in any of the affairs of the firm. He may not even intend participating in any of the affairs of the firm. He may only be an investment partner. Such a partner would not bring to bear his experience in the performance of the work for which the tenders are required. In such a case the fact that he possesses the qualifications stipulated in the notice inviting tenders would be entirely meaningless. The party inviting tenders would, therefore, be entitled to insist upon the firm itself having executed such contracts of the stipulated kind and value."

(30) A bare perusal of the observations, extracted above, reveals that the Division Bench's logical imagination of the issues surrounding a partnership firm and its experience is in sync with the concerns already expressed by us in the preceding paragraphs on the reasons why the jointly created experience of a partnership firm cannot be claimed by one of its partners in his independent capacity. Therefore, in the factual matrix of the instant case, the Respondent authority upon due consideration of the Petitioner's bid concluded that experience in the name of the erstwhile firm (i.e., **M/s B.G. Constructions Co.**) which Ajay Kumar Garg was a part of, could not be considered, not even

proportionately so with reference to the extent of his shareholding in the firm, in his individual capacity.

(31) There is yet another dimension to the matter. As specified in the tender notice, tenders were invited from the appropriate class of approved **contractors**. The expression, '**Contractor**', is defined under Clause 2(c) of conditions of contract, at page 21 of the tender document, which reveals that '**Contractor**' shall mean the individual or firm or company, whether incorporated or not, **undertaking the work**.

(32) As indicated earlier, under the caption '**Technical Bid',** (page 6 of the tender document), clause (iv) required the **'Contractor'** to submit copies of experience/work completion certificates, in terms of the conditions of tender notice. The tender acceptance letter (Annexure-B), page 15 of the tender document, required the bidder to submit an undertaking that he unconditionally accepts the tender conditions in their totality/entirety. And, the prescribed pro forma (page 112 of tender document), in sync with which the experience/work completion documents were required to be furnished by the bidders/tenderers, and the petitioner, in response whereto, submitted its experience certificate (P-13), reads thus:

CLIENT'S CERTIFICATE REG. PERFORMANCE OF CONTRACTOR

Name & addfess of the Client ……...
Details of Works executed by Shri/M/s…….....

1.	**Name of Work with brief particulars**	
2.	**Agreement No. and date**	
3.	**Agreement amount**	
4.	**Date of commencement of work**	
5.	**Stipulated date of completion**	
6.	**Actual date of completion**	

7.	**Details of compensation levied for delay**	
	(indicate amount) if any	
8.	**Gross amount of thework completed and paid**	
9.	**Name and address of the authority under whom works executed**	
10.	**Whether the contractor employed qualified Engineer/Overseer during execution of work**	
11.	**i) Quality of work (indicate grading)** **ii) Amount of work paid on reduced rates, if any**	Outstanding/Very Good/Good/Poor
12.	**i) Did the contractor go for arbitration?** **ii) If yes, total amount claim** **iii) Total amount awarded**	
13.	**Comments on the capabilities of the Contractor**	
	a) Technical Proficiency	Outstanding/verygood/good/poor
	b) Financial soundness	Outstanding/verygood/good/poor
	c) Mobilization of adequate T&P	Outstanding/verygood/good/poor
	d) Mobilization of manpower	Outstanding/verygood/good/poor
	e) General behaviour	Outstanding/verygood/good/poor

(33) Clearly, in terms of the tender conditions, the entity or an individual, who bids for a contract, is the **Contractor**. The experience/performance certificate (*ibid)* shows that information sought under its different heads is in relation to none other than the contractor alone. And, the authority's assessment of contractor's competence/capacity/capability is predicated on the information so furnished by the contractor. In the instant case therefore, experience of both the tenderer-in-name (i.e., M/s A.G. Construction Co.) and the tenderer-in-substance (i.e., Ajay Kumar Garg, being the sole proprietor), was relevant for the authority's consideration. Had any of the two possessed the necessary experience, the authorities were bound to consider and reckon the same. However, concededly, neither of the two had the requisite experience in their names. Additionally, for reasons recorded in the preceding paragraphs, Ajay Kumar Garg's experience as a partner of an erstwhile firm (i.e., **M/s B.G. Constructions Co.**) cannot be construed as his individual/independent experience. In the milieu of this factual position, the scope of the term '**tenderer/contractor'** cannot be stretched to encompass even **M/s B.G. Constructions Co.** within its sweep. Thus, in the given situation, notwithstanding that Ajay Kumar Garg happened to be a partner in **M/s B.G. Constructions Co. (**erstwhile partnership firm), the firm would be a third party to the tender process. In ***Municipal Corporation, Ujjain*** versus ***BVG India Ltd.***[8]**,** the Hon'ble Supreme Court similarly held:

> **"5. The questions involved in these appeals are:**
>
> **a) xx xx xx xx**
>
> **b) Whether a bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture can rely upon the technical qualifications of any third party for its qualification;**
>
> **c) xx xx xx xx**
>
> **40. It is necessary to note that in Annexure 1 to the NIT at serial no. 11, the bidder was required to set out details of any other company/firm involved as a consortium member to which respondent no.1 - BVG India Limited**

[8] (2018) 5 SCC 462

replied in the negative, which means no other company/firm was involved as a consortium member with BVG India Limited in the process in question. In other words, BVG India Limited submitted the bid on its own unaccompanied by any of the consortium member. Despite the same, BVG India Limited (respondent no.1) furnished the experience certificate of BVG Kshitij Waste Management Services Private Limited. No information whatsoever was given of the relationship/linkage of BVG Kshitij and respondent no.1 - BVG India Limited. Therefore, reliance placed by the respondent no.1 on the purported experience certificate issued in the name of BVG Kshitij Waste Management Services Pvt. Limited would not come to the help of the respondent no.1 to show its work experience. The Pimpri Chinchwad Municipal Corporation (PCMC) Certificate dated 24.10.2013 is in Marathi and the same discloses that the work order was issued on 2.3.2012. The PCMC Certificate thus neither shows three years' experience of BVG India Limited nor that BVG India Limited was carrying out garbage/waste collection of more than 300 MT per day. Since respondent no.1 has categorically mentioned in its bid under the column "basic information about tenderer" that no other company (either joint venture or consortium) is involved with BVG India Limited, respondent no.1 - BVG India Limited could not have relied upon the purported experience certificate issued in the name of BVG Kshitij Waste Management Services Pvt. Ltd. Other certificates submitted by the respondent no.1 also did not satisfy the eligibility requirement.

…

57. Thus, the questions to be decided in this appeal are answered as follows:

(a) **xx xx xx xx**

(b) **A bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any 3rd Party for its qualification.**

(c) **xx xx xx xx "**

(34) Similarly, even in the instant case, the petitioner sole proprietorship concern having applied for the tender independently, sought to rely on an experience certificate (P-13) issued to a third party (i.e., **M/s B.G. Constructions Co.**). Further, the relationship/linkage of Ajay Kumar Garg (proprietor of the petitioner concern) with such third party (erstwhile firm) does not engender any benefit to the petitioner concern for reasons already recorded in the preceding paragraphs. Therefore, the petitioner herein having applied independently without any partners, consortium or joint venture, cannot rely upon the technical qualifications of a third party (erstwhile firm) to claim eligibility. In this respect, the position of law emerging from ***Municipal Corporation, Ujjain*** (supra) is that as long as a person or entity cannot in law, validly claim experience that exists in the name of a third-party, that third-party remains a stranger to the subject tender.

(35) There cannot be any quarrel with the proposition of law either that the interpretation, construction and as to how a provision, clause or a condition of a tender document has to be construed is primarily the domain of the author of such document (in this case, the authority framing the NIT). For none else is better positioned and equipped than such authority itself in understanding the tender document's requirements, as also the purport and intent of its terms and conditions. Therefore, a reference, in this regard, to a few decisions of the Supreme Court, shall be inevitable.

(36) In ***Ramana Dayaram Shetty*** versus ***International Airport Authority of India***[9], the Supreme Court opined that:

> "7. It is a well settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to

[9] (1979) 3 SCC 489

silence any part of the document and make it altogether inapplicaple."

(37) In ***Central Coalfields Ltd.*** versus ***SLL-SML (Joint Venture Consortium)***[10]**,** it was observed as follows:

> **"38. In G.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] both the principles laid down in Ramana Dayaram Shetty (1979) 3 SCC 489 were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so.."**

(38) In ***Afcons Infrastructure Ltd.*** versus ***Nagpur Metro Rail Corporation Ltd.***[11], the Supreme Court held that:

> "15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. 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."

(39) Similarly, in ***Montecarlo Ltd.*** versus ***NTPC Ltd.***[12], the Supreme Court held as under:

> "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

[10] (2016) 8 SCC 622
[11] (2016) 16 SCC 818
[12] 2016 (15) SCC 272

commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third party assistance from those unconnected with the owner's organisation 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 mala fide 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."

(40) Recently, in ***State of Madhya Pradesh and another*** versus ***U.P. State Bridge Corporation Ltd. And another***[13], after referring to judgments mentioned above, the Supreme Court reiterated:

[13] 2020 (13) SCALE 774

> "**18. Judged by these parameters, it is clear that this Court must defer to the** understanding **of clauses in tender documents by the author thereof unless, pithily put, there is perversity in the author's construction of the documents or mala fides…"**

(41) Likewise in ***M/s Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers*** versus ***M/s New J.K. Roadways, Fleet Owners and Transport Contractors and others*** [Civil Appeal No. 4107 of 2020 (Special Leave Petition (Civil) No. 12766 of 2020), dated 18.12.2020], the Supreme Court categorically held:

> "14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings".

(42) And, before we record our conclusion, we may even briefly touch upon the scope and extent of interference by this Court in exercise of the power of judicial review in administrative decisions. The Supreme Court, in ***Master Marine Services (P) Ltd.*** versus ***Metcalfe & Hodgkinson (P) Ltd. and Anr***.[14] held:

> "9. after an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere."

(43) In ***Jagdish Mandal*** versus ***State of Orissa***[15], the Supreme Court observed as:

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[14] (2005) 6 SCC 138

[15] (2007) 14 SCC 517

> "19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. 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 power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold….."

(44) Thus, in the wake of the position as sketched out above, and in light of the pronouncements (*ibid*) of the Supreme Court, on the interpretive latitude of the tender inviting authority and the scope of judicial review, we do not find any taint of unfairness, arbitrariness, irrationality or *mala fides*, either in the respondent authority's rejection of the experience certificate in the name of M/s **B.G. Constructions Co.** on its interpretation of the tender document, or in the decision making process which preceded the respondent authority's rejection of the petitioner's technical bid being non-responsive.

(45) Thus, in the given situation, the only and the inevitable conclusion that could be reached: the petition being bereft of merit is required to be dismissed. And, it is so ordered.

P.S. Bajwa