M/S Pt Bara Daya Energi India Private ... vs The State Of Karnataka on 29 January, 2024

Author: M.Nagaprasanna

Bench: M.Nagaprasanna

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NC: 2024:KHC:3759
WP No. 28714 of 2023

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF JANUARY, 2024 R

BEFORE

THE HON'BLE MR JUSTICE M.NAGAPRASANNA

WRIT PETITION NO. 28714 OF 2023 (GM-TEN)

BETWEEN:

M/S. PT. BARA DAYA ENERGI INDIA
PRIVATE LIMITED
COMPANY REGISTERED UNDER
THE COMPANIES ACT, 2013
HAVING ITS OFFICE AT NO. 106-A/9
COAL GRAND COMPLEX
ETTAYAPURAM ROAD, TUTICORIN
TAMIL NADU - 628 002
REP. BY ITS AUTHORISED SIGNATORY
MR. SHIVALINGAIAH

...PETITIONER

(BY SRI. S.BASAVARAJA, SENIOR ADVOCATE FOR
SRI. KANISHK RAVINDRAN, ADVOCATE)

AND:

1. THE STATE OF KARNATAKA
DEPARTMENT OF ENERGY
VIDHANA SOUDHA
BENGALURU - 560 001.
REPRESENTED BY ITS
ADDITIONAL CHIEF SECRETARY.

2. KARNATAKA POWER CORPORATION LIMITED
REPRESENTED BY ITS
EXECUTIVE ENGINEER RO(EM)
NO. 82, SHAKTI BHAVAN, III FLOOR

RACE COURSE ROAD
BENGALURU - 560 001.

...RESPONDENTS

(BY SRI. SPOORTHY HEGDE, HCGP FOR R1
SRI. AJAY J.NANDALIKE, ADVOCATE FOR C/R-2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE REASONS SUPPLIED BY THE R2 KPTCL AS PRODUCED IN ANNEXURE-F DATED 08/12/2023 IN NO. AIR5A(RIN)486 FOR HOLDING THE PETITIONERS BID TO BE NON-RESPONSIVE IS ILLEGAL, ARBITRARY AND IN CLEAR VIOLATION OF THE LAW AND ARTICLE 14 OF THE CONSTITUTION OF INDIA.

THIS WRIT PETITION, COMING ON FOR PRELIMINARY HEARING, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The petitioner-M/s PT Bara Daya Energi India Private Limited is before this Court calling in question a communication dated 08-12-2023 issued by the 2nd respondent / Karnataka Power Corporation Limited ('the Corporation' for short) conveying the reasons for holding the bid of the petitioner to be non-responsive.

2. Heard Sri S.Basavaraja, learned senior counsel appearing for the petitioner, Sri Spoorthy Hegde, learned High Court Government Pleader appearing for respondent No.1 and NC: 2024:KHC:3759 Sri Ajay J.Nandalike, learned counsel appearing for respondent No.2.

3. Facts adumbrated, are as follows:-

> The petitioner is a company engaged in the business of import, trade and supply of coal and is a subsidiary company of M/s PT Bara Daya Energi, Indonesia (hereinafter referred to as 'the parent company'). The 2nd respondent/Corporation issues a notice inviting tender for import and supply of 2.50 lakh MT of coal for Yemarus Thermal Power Station of Raichur Thermal Power Corporation Limited and Bellary Thermal Power Station & Raichur Power Station of the Corporation in No.A1M1B3/Imported Coal/Sep 2023 dated 19-09-2023. The petitioner participates in the tender by submitting its bid. It is the claim of the petitioner that it met all the stipulated conditions and pre-qualification requirement as necessary in terms of the tender notification and also remitted necessary Earnest Money Deposit ('EMD') and fulfilled every other condition to partake consideration in the tender. The averment in the

petition is that, the petitioner on verification of the status of the bid on the online Karnataka Public Procurement portal, it NC: 2024:KHC:3759 came to know that its bid has been rejected. No reason was furnished in the portal for rejection of the bid of the petitioner.

The petitioner then submits an application on 25.11.2023 to the Finance Director of the Corporation under the Right to Information Act, seeking the grounds of rejection of the bid of the petitioner. The said application did not merit any consideration. Therefore, another representation was made on

04.12.2023 seeking the reasons for rejection. On 08-12-2023, in response to the query raised under the Right to Information Act, the reason for rejection of the bid of the petitioner was divulged. The reason so rendered for rejection of the bid of the petitioner is what has driven the petitioner to this Court in the subject petition calling in question the aforesaid communication dated 08.12.2023 through which reasons are communicated.

4. The learned senior counsel Sri S. Basavaraja would vehemently contend that the petitioner had fulfilled all the conditions that were necessary for a merited consideration at the hands of the 2nd respondent/Corporation qua the bid. The bid is rejected for the reason that the petitioner did not meet necessary criteria in the tender document. The reason for rejection is for non-furnishing of bidders name at the pre-

NC: 2024:KHC:3759 qualification stage and the petitioner was found to be in contradiction of one particular clause - Clause 1.2 of the tender document. The learned senior counsel would submit that the reasons so rendered are contrary to law as every subsidiary company is entitled to take the experience of the parent company and merely because the parent company has suffered an order of termination, it cannot mean that the subsidiary company also should be ousted on such termination. He would seek quashment of the said communication and awarding of contract to the petitioner.

5. The learned counsel Sri Ajay J. Nandalike appearing for the 2nd respondent/Corporation would make an effort to refute the submissions of the learned senior counsel for the petitioner in defending the action of the Corporation and contend that it is open to the Corporation to choose its path in the tender. It can deny the experience that the company to which the petitioner is subsidiary to be taken off and also attach the company when it comes to the order of termination. This process cannot be termed to be arbitrary at all. He would seek dismissal of the petition.

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6. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

7. The afore-narrated facts are not in dispute. The only issue that falls for consideration is, whether the reasons so rendered in the communication dated 08-12-2023 is tenable in law?

8. The floating of tender by the Corporation and participation of the petitioner thereto is not in dispute.

Rejection of the bid of the petitioner being notified in the portal is a matter of record. No reasons are communicated at the time of rejection of the bid, which led the petitioner to submit two applications under the Right to Information Act seeking divulgence of reasons for rejection. This results in the impugned communication. Therefore, it becomes germane to notice the impugned communication. It reads as follows:

> "Reply to RTI application dated 4-12-2023 by Sri Shivalingaiah.
>
> After evaluation/scrutiny of documents uploaded/physical documents furnished and relevant documentation, the tender furnished by M/s PT Bara Daya Energi India Private Limited was found to be non responsive to the terms and conditions NC: 2024:KHC:3759 set out in the tender document due to the following reasons and hence found not qualified for opening the price bid.
>
> 1. Pre-qualification requirement credentials furnished are not in the name of the bidder, hence rejected for not meeting the criteria as per Cl.No.1(d) of PQR criteria at Section-VII.
>
> The bidder M/s PT Bara Daya Energi India Private Limited, has furnished the Pre-qualification requirement portion of documents in the name of M/s PT Bara Daya Energi Indonesia.
>
> Whereas, the bidder M/s PT Bara Daya Energi India Private Limited, has furnished the remaining portion of the technical bid documents in the name of M/s PT Bara Daya Energi India Private Limited., viz., Applicant details, Notarized affidavit signed by the bidder, Tender form which also included commitment of validity of tender, Notarized affidavit on border sharing company, etc. The bidder M/s PT Bara Daya Energi India Private Limited has furnished credentials of both M/s PT Bara Daya Energi Indonesia, and M/s PT Bara Daya Energi India Private Limited. Cl.No.1(d) of PQR criteria at Section-VII of the tender document states that the tenderer shall have pre-qualification requirement in his/its name. Here, the bidder M/s PT Bara Daya Energi India Private Limited has not furnished PQR in its name and hence his bid was not considered.
>
> The Cl.No.1(d) of PQR criteria at Section VII states that the tenderer shall have pre-qualification requirement in his/its name. Here, the bidder M/s PT Bara Daya Energi India Private Limited has not furnished PQR in its name and hence his bid was not considered.
>
> The TSC also expressed that there is ambiguity about who the correct and responsible bidder is, and which also would lead to contractual, implementation/ commercial

issues later, which cannot be accepted.

2. For not meeting the criteria as per ITT Clause No.1.2 and Section XIX of the tender document.

NC: 2024:KHC:3759 The mail dated 21-09-2023 (Annexure-1) received from MD, KPCL was discussed with the TSC members who advised the TIA to obtain clarification from GSECL (Gujarat) to confirm that if M/s PT Bara Daya Energi India Private Limited or PT Bara Daya Energi, Jakarta, Indonesia has been subjected to any of the conditions in GSECL as per the conditions of KPCL at any of the Sl.Nos.1a, 1b, 1c and 2 of KPCL's format at Section XIX.

Accoridngly, the TIA had contacted Chief Engineer (Fuels), GSECL and enquired whether GSECL has blacklisted or terminated the agency PT Bara Daya Energi Indonesia in their imported coal contract. In response, it was informed that GSECL has terminated their imported coal contract with PT Bara Daya Energi, Indonesia, but not blacklisted it.

The TIA communicated to the TSC members that CE (Fuels), GSECL has informed that GSECL has terminated the contract. The TSC advised that since the PQR credentials furnished by the bidder is of PT Bara Daya Energi, Indonesia who has been terminated by GSECL would have to be rejected now in KPCL's tender as per the ITT Cl.No.1.2 and Section XIX of the tender document.

Note:The Screenshot of the Evaluator(s) Remarks on reasons for rejections given in KPP Portal is enclosed herewith as Annexure-2 for reference i.e., while rejecting the technical bid of M/s PT Bara Daya Energi India Private Limited."

The reason so rendered would indicate that the tender of the petitioner was non-responsive. The reason is the petitioner is a subsidiary of M/s PT Bara Daya Energi, Indonesia and has submitted the experience credentials attached to M/s PT Bara Daya Energi Private Limited, Indonesia to be taken note of as the experience of the petitioner as well. It is indicated that at NC: 2024:KHC:3759 the pre-qualification stage, it is necessary that the tenderer must have the requirement in its name. Since it was not found, it is rejected in terms of Clause 1(d) of the tender.

9. The other reason is, not meeting Clause 1.2 and Section XIX of the tender document. The reason is that, M/s PT Bara Daya Energi, Jakarta, Indonesia had not been blacklisted but terminated by Gujarat State Electricity Corporation Limited ('GSECL' for short) and on such termination, the petitioner also would suffer disqualification. Therefore, the clauses that the communication invokes become germane to be noticed. The first reason for rejection is invoking Clause 1(d) at Section VII of the Tender document. It reads as follows:

"SECTION VII: QUALIFICATION CRITERIA (PRE- QUALIFYING REQUIREMENT - PQR)

1. PRE-QUALIFYING REQUIREMENTS (PQR) The tenderer shall:

a.(i) possess experience in its name of importing coal/ coke from outside India OR have exported coal/coke to India and shall have imported into India/exported from outside India into India at least 2 lakh MT (Two lakh MT) of coal/coke (single or multiple orders) during any one financial year in the last three years, i.e., 2020-21, 2021-22 and 2022-23 and shall furnish relevant authenticated documents to establish proof of fulfillment as per format at Section XII - Schedule of Experience, duly filled, signed with seal of the Company.

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(ii) in its name should have during the last three preceding years, i.e., 2020-21, 2021-22 and 2022-23 achieved an average annual financial turnover of not less than Rs.314 Crores (Rupees Three hundred and Fourteen Crores) and shall furnish a copy of Audited Balance Sheets and Profit & Loss Account Statements duly certified by the chartered accountant along with a Certificate as per format in Section - XV.

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            ...                   ...                 ...

      d.    have pre-qualification requirement in his / its name."
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Clause (1) supra deals with pre-qualifying requirements. It demands that the tenderer shall possess experience in its name of importing coal from outside India for the preceding three years and should have achieved certain financial turnover for which purpose a document shall be furnished. The second reason for rejection is invoking Clause 1.2. It reads as follows:

"1. Eligible Tenderers ... ...

1.2 The tender shall be rejected, if the tender:

i) a. is not in the prescribed form b. is not accompanied by the requisite EMD c. is not properly signed by the tenderer d. is not from any blacklisted tenderer.

e. is received after the expiry of the due date and time. f. is from a bidder, who is directly or indirectly connected with Government Service or in KPCL/RPCL or of a local authority.

g. is not in conformity with KPCL's requirement as per the terms and conditions of the tender.

h. whose validity period is less than that specified in the tender document.

i. is incomplete and/or incorrectly submitted j. is conditional

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NC: 2024:KHC:3759 k. is from any firm or agency debarred in terms of Rules 26A, 26B & 26C of KTPP as Amended vide Finance Department Notification No.FD 884 Exp-12/2019, Bangalore dated 7th May 2020 will be followed as per debarment of tender as defined under GCC Cl.No.1.61. The tender shall be rejected on any other ground/s or reason/s not covered above but detrimental to the interest of KPCL and comes to the knowledge/notice of KPCL at any stage during tender process without assigning any reasons for the same to the tenderer.

... ..."

Clause 1.2 (d) mandates whether the tenderer was not black-

listed or the bidder had earlier been blacklisted. The format prescribed is as follows:

> "SECTION XIX - NOTARIZED AFFIDAVIT FORMAT (`100 Stamp Paper) The Superintending Engineer (Mines) Karnataka Power Corporation Limited, 82, Shakthi Bhavan, III Floor, Race Course Road, Bangalore-560 001.
>
> Dear Sir, Sub: Tender notification No.A1M1B3/Imported clal/Sep 2023 dated 19-09-2023 for import and supply of 2.50 lakh MT of coal.
>
> 1. I/We hereby declare that, as required under ITT Cl.No. 1.12 (ii) of the above cited tender in respect of Tender/Contract with KPCL/RPCL/Government or other utility in INDIA during the past five years, i.e., 2018-19, 2019-20, 2020-21, 2021-22 and 2022-23 and up to the date of submission of bid, a. Our EMD has not been forfeited.
>
> b. None of our contracts have been terminated/ foreclosed on account of our default in KPCL/ RPCL or elsewhere.
>
> c. We have not been anytime blacklisted/subject to procedure initiated for blacklisting for
>
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>
> NC: 2024:KHC:3759 participating in the tenders issued by KPCL or Government or Central/State PSUs or any other utility in India.
>
> 2. As on the date of submission of bid, we have not been debarred/subject to procedure initiated for debarment for participating in the tenders issued by KPCL or State/Central Governments or State/Central PSUs or any other utility in India (refer ITT Cl.No.1.12 (iii).

Signature & Seal of the bidder."

The format requires the tenderer to indicate that none of its contracts have been terminated/foreclosed on account of default in the Corporation or elsewhere. If the tender conditions that are invoked to render the bid of the petitioner as non-responsive are considered on the reasons so rendered, they would on their face become illegal. There is a dichotomy in the reasons so rendered by the Corporation.

10. The Corporation would indicate that in the pre-

qualification stage, it is necessary for the tenderer to have the experience of its own and cannot carry or piggyback itself to the experience of any other company to which it is subsidiary.

If this is the reason to deny the tender of the petitioner, the other reason runs contrary to this. The petitioner has not been blacklisted in any company. The company to which the

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NC: 2024:KHC:3759 petitioner is subsidiary is blacklisted by the GSECL and the contract of theirs is terminated. In one breath, the Corporation says that the experience of the parent company to which the present petitioner is subsidiary cannot be taken and in the other breath it says if the parent company to which the petitioner is subsidiary has suffered a termination or blacklisting, the tender would be held non-responsive. It is this reason that cannot be accepted as it projects a highhanded approach which would churn the legal stomach.

11. It is too well settled principle of law that experience gained by the company to which any company is subsidiary can be taken into consideration for the purpose of experience or eligibility of a tenderer, be it the company or its subsidiary.

Insofar as the penal provisions are concerned, the subsidiary has nothing to do with the termination or blacklisting of any company as the penal provisions are invoked qua the said company and not every of its subsidiary. Therefore, if M/s PT Bara Daya Energi, Indonesia to which the Indian component is a subsidiary has suffered termination or blacklisting as the case would be, that cannot be projected as the reason for disqualification of the present tenderer who is a subsidiary of

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NC: 2024:KHC:3759 the said company. Therefore, the very reason so rendered in the communication runs contrary to law. The view of mine in this regard as to whether the experience gained by the parent company can be taken advantage of by the subsidiary company is fortified by several judgments rendered by the Apex Court and other High Courts from time to time.

12. The Apex Court in the case of CONSORTIUM OF TITAGARH FIREMA ADLER S.P.A. v. NAGPUR METRO RAIL CORPORATION LIMITED1 has held as follows:

"30. 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. [Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272], the Court referred to Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] 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 recognises 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 [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] 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 (2017) 7 SCC 486

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NC: 2024:KHC:3759 Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] it has been held that, (SCC p. 531, para 22) 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. [Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138] , B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] and Michigan Rubber (India) Ltd. [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216] have been referred to. The Court quoted a passage from Afcons Infrastructure Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] 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: (Montecarlo Ltd. case [Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272], SCC p. 288, para 26) "26. 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 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;

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NC: 2024:KHC:3759 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."

... ...

35. Respondent 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 Article 164

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NC: 2024:KHC:3759 of the Articles of Association of Respondent 2 which are submitted along with the bid from which it is evincible that the Board of Directors of Respondent 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.
>
> ... ...
>
> 38. As is noticeable, there is material on record that Respondent 2, a government company, is the owner of the subsidiary companies and subsidiary companies have experience. The 1st respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the Committee concerned 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 in no way against the public interest. Therefore, we concur with the view expressed by the High Court."

(Emphasis supplied) Long before the Apex Court rendering the aforementioned judgment, the High Court of Hyderabad (now Telangana), in the case of PRASAD SUSHEE JOINT VENTURE VS. THE

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NC: 2024:KHC:3759 SINGARENI COLLIERIES COMPANY LIMITED2 considering an identical issue has held as follows:

> "12. From the above rival contentions, the questions that fall for consideration are : -
>
> (1) Whether respondent Nos. 1 and 2 are justified in treating the Holding Company as the bidder, while considering the bid submitted by the 3rd respondent?

and (2) Whether respondent Nos. 1 and 2 are justified in taking into consideration the experience and financial capacity of the Holding Company, while assessing the bid of the 3rd respondent?

... ...

16. Experience and financial capacity of the Holding Company of the 3rd respondent is not in dispute, so also that of the Joint Venture of the petitioner Company. The aspect of maintainability of the writ petition by the Joint Venture of M/s. Prasad & Company (Project Works) Limited can be resolved in favour of the petitioner, inasmuch as the Joint Ventures are permitted to participate in the bids and the experience and financial capacity of the Constituents of the Joint Ventures can also be taken into consideration for assessing the eligibility. The petitioner, which is a Joint Venture of the said Bidder, was, therefore, justified in prosecuting the present writ petition, as the bidder was

one of its Constituents and duly authorised and empowered by the Joint Venture.

... ...

20. In support of his contention, the learned Senior Counsel placed strong reliance upon a decision of the Honble Supreme Court in BALWANT RAI SALUJA v. AIR INDIA LTD., and paras-66 to 71 and 74 of the said judgment, which are relevant, are extracted hereunder, for the sake of convenience and ready reference:

> 66. In the present set of appeals, it is an admitted fact that the HCI is a wholly owned subsidiary of the Air India. It has been urged by the learned Counsel for the 2015 SCC OnLine Hyd 623
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NC: 2024:KHC:3759 Appellants that this Court should pierce the veil and declare that the HCI is a sham and a camouflage. Therefore, the liability regarding the Appellants herein would fall upon the Air India, not the HCI. In this regard, it would be pertinent to elaborate upon the concept of a subsidiary company and the principle of lifting the corporate veil.

67. The Companies Act in India and all over the world have statutorily recognized subsidiary company as a separate legal entity. Section 2(47) of the Companies Act, 1956 (for short "the Act, 1956") defines 'subsidiary company' or 'subsidiary', to mean a subsidiary company within the meaning of Section 4 of the Act, 1956. For the purpose of the Act, 1956, a company shall be, subject to the provisions of Sub-section (3) of Section 4, of the Act, 1956, deemed to be subsidiary of another. Clause (1) of Section 4 of the Act, 1956 further imposes certain preconditions for a company to be a subsidiary of another. The other such company must exercise control over the composition of the Board of Directors of the subsidiary company, and have a controlling interest of over 50% of the equity shares and voting rights of the given subsidiary company.

68. In a concurring judgment by K.S.P. Radhakrishnan, J., in the case of Vodafone International Holdings BV v. Union of India : (2012) 6 SCC 613, the following was observed:

> Holding company and subsidiary company.
>
> ....
>
> 257. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors....
>
> 258. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any Director if it so desires by a resolution in the general body meeting of the

subsidiary.

Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting

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NC: 2024:KHC:3759 relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary is allowed decentralized management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries.

69. The Vodafone case (supra), further made reference to a decision of the US Supreme Court in United States v. Best foods [141 L Ed 2d 43 : 524 US 51 (1998)]. In that case, the US Supreme Court explained that as a general principle of corporate law a parent corporation is not liable for the acts of its subsidiary. The US Supreme Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, only if it is shown that the corporal form is misused to accomplish certain wrongful purposes, and further that the parent company is directly a participant in the wrong complained of. Mere ownership, parental control, management, etc. of a subsidiary was held not to be sufficient to pierce the status of their relationship and, to hold parent company liable.

70. The doctrine of 'piercing the corporate veil' stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. A. Salomon and Co. Ltd. (1897) AC 22. Lord Halsbury LC (paragraphs 31-33), negating the applicability of this doctrine to the facts of the case, stated that:

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NC: 2024:KHC:3759 ...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself..., whatever may have been the ideas or schemes of those who brought it into existence.

Most of the cases subsequent to the Salomon case (supra), attributed the doctrine of piercing the veil to the fact that the company was a 'sham' or a 'facade'. However, there was yet to be any clarity on applicability of the said doctrine.

71. In recent times, the law has been crystallized around the six principles formulated by Munby J. in Ben Hashem v. Ali Shayif (2008) EWHC 2380 (Fam). The six principles, as found at paragraphs 159-164 of the case are as follows-(i) ownership and control of a company were not enough to justify piercing the corporate veil;

(ii) the Court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must be linked to the use of the company structure to avoid or conceal liability; (v) to justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and (vi) the company may be a 'facade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The Court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

... .

74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner,

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NC: 2024:KHC:3759 that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case.

... ...

22. An unreported decision of Delhi High Court in ROHDE AND SCHWARZ GMBH AND CO.KG v. AIRPORT AUTHORITY OF INDIA is also relied upon, where the Holding Company was claiming experience of its subsidiary as its own and a Division Bench of the said Court negatived the said contention.

... ...

25. The said ratio is also reiterated in another decision of the Hon'ble Supreme Court in JAGDISH MANDAL v. STATE OF ORISSA Apart from that, strong reliance is placed upon another decision of the Apex Court in NEW HORIZONS LTD. v. UNION OF INDIA, paras-23 and 24, by the learned senior counsel for the 3rd respondent also, which are relevant, are extracted hereunder, for the sake

of convenience and ready reference:

> 23. 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

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NC: 2024:KHC:3759 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 home 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 tile 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

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NC: 2024:KHC:3759 satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery arid equipment is outdated. Conversely lack of experience may be made good by improved technology arid 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.

24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is

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NC: 2024:KHC:3759 an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart : Joint Ventures in East Asia Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it.

We are unable to agree with the said view of the High Court.

... ...

29. The learned Senior Counsel would also submit that the Special Resolution passed by the Holding Company specifically states that the 3rd respondent is their fully owned subsidiary and authorised the said subsidiary to submit all the documents for completeness of the tender and for other requirements related thereto and also empowered the 3rd respondent with a Power of Attorney on behalf of the Holding Company, under which the Holding Company has delegated all its powers to the 3rd respondent and declared that the Holding Company will be liable for all acts or deeds performed by the 3rd respondent with reference to the NIT and the said power would remain irrevocable until discharge of the above contract under the NIT dated 12.03.2015. He, therefore, submits that there cannot be any doubt of the Holding Company taking every responsibility with regard to the tender submitted by the 3rd respondent in terms of the power bestowed on it by the Holding Company. On the ground of public interest also, the learned Senior Counsel would urge the Court that no interference is called for, as respondent Nos. 1

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NC: 2024:KHC:3759 and 2 will have to pay additional Rs. 42.00 Crores, if they were to consider the bid of the petitioner.

30. In reply thereto, Sri. D. Prakash Reddy, learned Senior Counsel appearing for the petitioner, would contend that the legal position with regard to Lifting of Corporate Veil is now settled by the latest decision of the Honble Supreme Court in BALWANT RAI SALUJA's case (1 supra), wherein the Supreme Court itself held that the permissibility to lift the Corporate Veil has a limited application. He also submits that the Special Resolution and the Power of Attorney relied upon by the 3rd respondent is not in accordance with the requirements of the NIT and, to the said effect, the learned Senior Counsel relied upon an un-reported decision of the Delhi High Court in AIRPORT AUTHORITY OF INDIA's case (2 supra).

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                ...                         ...                 ...
     Discussion:
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32. It would, thus, be apparent from the contentions that the permissibility to examine Corporate Identity of the bidder is itself in controversy. While the petitioner contends that it is impermissible to pierce the Corporate Veil, as the principle of piercing the Corporate Veil has a limited application whereas, Sri. C.V. Mohan Reddy, learned Senior Counsel for the 3rd respondent, contends that in the present day scenario of Joint Ventures, it is clearly permissible to look into the Corporate structure so as to satisfy the capacity of the bidder. He would submit that the ratio laid down in NEW HORIZONS LTD.'s case (5 supra) is not referred to in BALWANT RAI SALUJA's case (1 supra) and, as such, it cannot be said that the decision in NEW HORIZONS LTD.'s case (5 supra) is not approved by the said later decision.

33. In DHN Food Distributors Ltd. v. London Borough of Tower Hamlets12 the Court of Appeal was dealing with three companies, out of which one was the holding company and the other two were its subsidiaries. After quoting the views of Prof. Gower that "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group" Lord Denning, M.R. has observed:"This group is virtually the same as a partnership in which all the three companies are partners. They should not be

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NC: 2024:KHC:3759 treated separately so as to be defeated on a technical point." (p. 467) In the same case, Goff, L.J. has said:"[T]his is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil." (p.468) The observations of Shaw, L.J. were to the following effect:

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

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

... ...

37. In State of U.P v. Renusagar Power Co.14 this Court lifted the veil to hold that Hindalco, the holding company, and Renusagar Power Co., its subsidiary, should be treated as one concern and the power plant of Renusagar must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis. It was observed : (SCC p. 94, para 66) "It is high time to reiterate that in the expanding of horizon of modem jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. ... The horizon of the doctrine of lifting of corporate veil is expanding."

38. Similarly, in STATE OF U.P. v. RENU SAGAR POWER PROJECT CO., wherein the Honble Supreme Court held as follows:

> It is hightime to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The horizon of the doctine of lifting of corporate veil is expanding.
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NC: 2024:KHC:3759 It was further stated The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence.

Therefore, it was held that -

..where concerns are closely connected with each other and the affairs of one are controlled by the other, the Corporate Veil must be lifted and both the concerns should be treated as one.

39. The aforesaid view also endorsed the earlier view of the Honble Supreme Court in LIFE INSURANCE CORPORATION OF INDIA v. ESCORTS LTD., wherein it was held as follows : Generally and broadly speaking, it may be said that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.

... ...

42. In NEW HORIZONS LTD.'s case (5 supra), the Honble Supreme Court interpreted the concept of requirement of experience of the tenderer, in his name, does not mean that the experience should be of the tenderer in his name only and gave various instances, such as Partnerships and Joint Venture Firms, for the purpose of community of interest in the performance of the subject matter and it recognised similar growing Joint Ventures in our country, where foreign companies joined the Indian partners towards capital and technical know-how for the success of the venture."

(Emphasis supplied) In the light of the law laid down by the Apex Court and that of the High Court of Hyderabad (supra), what would unmistakably emerge is, the Corporation could not have held the tender of

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NC: 2024:KHC:3759 the petitioner as non-responsive, on the reason so rendered, in the communication. Therefore, I deem it appropriate to notice that any tenderer/subsidiary company which submits its bid on the strength of eligibility/experience of the parent company to which it is subsidiary cannot be rejected on the ground that it does not have enough experience, as a subsidiary can piggyback to the company to which it is subsidiary.

13. When it comes to penal provisions, unless the tenderer has suffered termination or blacklisting its tender cannot be held to be non-responsive on the score that the parent company to which the tenderer is subsidiary has suffered blacklisting or termination. The learned counsel for the respondent submits that since the tender has not been taken forward or a tender process is not carried forward, no right of the petitioner is taken away. In this view of the matter, I deem it appropriate to observe that if and when tender process commences and the petitioner becomes a

tenderer, the reasons now projected cannot be projected as the reason for holding the tender of the petitioner as non-responsive.

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14. For the aforesaid reasons, I pass the following:

ORDER

(i) Writ petition is allowed.

(ii) The reasons communicated to the petitioner by communication dated 8-12-2023 issued by the 2nd respondent stand quashed.

(iii) It is declared that the petitioner is entitled to all consequential benefits that flow from quashment of reasons accompanying communication dated 8.12.2023 as observed in the course of the order.

Sd/-

JUDGE nvj CT:SS