

Ms S K Translines Private Limited ... vs The Maharashtra State Warehousing ... on 11 July, 2016

Author: S. V. Gangapurwala

Bench: S. V. Gangapurwala, K. K. Sonawane

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wp 3393.16

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3393 OF 2016

M/s S. K. Translines Private Limited

1st Floor, 17-19, Sureshdada Jain
Complex, Ajanta Road, Jalgaon,
Through its Director,
Hemant S/o Kantilal Kothari,

Age : 42 Years, Occu. : Business,
R/o 32, Arihant, Jalgaon District

Central Co-operative Director
Bungalow, Bhikamchand Jain
Nagar, Jalgaon.

.. Petitioner

Versus

1. The Maharashtra State Warehousing

Corporation Ltd., 583/B, Gul Tekadi,
Market Yard, Pune

Through its Chairman/Managing Director.

2. The Regional Manager,

Maharashtra State Warehousing
Corporation.

3. The Deputy Manager,
Maharashtra State Warehousing

Corporation, Jalgaon.

4. Raj Transport Company
Radhakunj, Bhusar Lane,
Kapad Line, Latur,
Through its Partner.

.. Respondents

Shri R. N. Dhorde, Senior Advocate i/by Shri V. R. Dhorde,
Advocate for the Petitioner.

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Shri Prasad Dhakephalkar, Senior Counsel i/by Shri N. B.
Suryawanshi, Advocate for Respondent Nos. 1 to 3.

Shri Pravin Samdhani, Senior Advocate i/by Shri D. R.
Deshmukh, Advocate for the Respondent No. 4.

Ms S K Translines Private Limited ... vs The Maharashtra State Warehousing ... on 11 July, 2016
Shri S. B. Talekar, Advocate h/f Shri S. U. Choudhari, Advocate
for the Intervenor.

WITH
CIVIL APPLICATION NO. 4102 OF 2016
IN

WRIT PETITION NO. 3393 OF 2016

M/s Joshi Freight Carriers
Through Proprietor Anil Biharilal
Joshi .. Applicant

Versus

S. K. Translines Private Ltd. and others .. Respondents

Shri S. B. Talekar, Advocate h/f Shri S. U. Choudhari, Advocate

for the Applicant.
Shri R. N. Dhorde, Senior Advocate i/by Shri V. R. Dhorde,
Advocate for the Respondent No. 1.

Shri Prasad Dhakephalkar, Senior Counsel i/by Shri N. B.
Suryawanshi, Advocate for Respondent Nos. 2.
Shri Pravin Samdhani, Senior Advocate i/by Shri D. R.
Deshmukh, Advocate for the Respondent No. 3.

WITH
WRIT PETITION NO. 3578 OF 2016

M/s Skyrail Logistics Pvt. Ltd.

Plot No. E-8, Additional MIDC,
Jalgaon,
Through its Director,
Sunil Ramnarayan Mantri,
Age : 53 Years, Occu. : Business,

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R/o E-8, Additional MIDC,
Jalgaon.

.. Petitioner

Versus

1. Maharashtra State Warehousing

Corporation Ltd., 583, B, Gul Tekadi,
Market Yard, Pune
Through its Chairman/Managing Director.

2. The Regional Manager,
Maharashtra State Warehousing

Corporation, 583, B, Gul Tekadi,
Market Yard, Pune.

3. The Deputy Manager,
Maharashtra State Warehousing
Corporation, Jalgaon.

4. Raj Transport Company
Radhakunj, Bhusar Lane,

Kapad Line, Latur,
Through its Partner.

.. Respondents

Shri P. M. Shah, Senior Advocate i/by Shri Aditya N. Sikchi,

Advocate for the Petitioner.

Shri Prasad Dhakephalkar, Senior Counsel i/by Shri N. B.
Suryawanshi, Advocate for Respondent Nos. 1 to 3.

Shri Pravin Samdhani, Senior Advocate i/by Shri D. R.

Deshmukh, Advocate for the Respondent No. 4.

WITH

WRIT PETITION NO. 3787 OF 2016

S. P. Jaisingani,
A Government Transport Contractor
and Fleet Owner, Station Road,
Dondaicha, District Dhule,

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Through its Proprietor,
Sevakram Parasram Jaisangani,

Age : 53 Years, Occu. : Business,
R/o Dondaicha, District Dhule.

.. Petitioner

Versus

1. The Maharashtra State Warehousing Corporation Limited, 583/B, Gultekadi, Market Yard, Pune,

Through its Managing Director.

- 2.

The Regional Manager,
Maharashtra State Warehousing Corporation Limited.

3. The Deputy Manager,
Maharashtra State Warehousing Corporation Limited, Jalgaon,

District Jalgaon.

4. Raj Transport Company
Radhika Kunj, Bhusar Lane,
Kapad Line, Latur,
District Latur,

Through its Partner.

.. Respondents

Shri V. D. Hon, Senior Advocate i/by Shri Ashwin V. Hon,
Advocate for the Petitioner.

Shri Prasad Dhakephalkar, Senior Counsel i/by Shri N. B.
Suryawanshi, Advocate for Respondent Nos. 1 to 3.
Shri Pravin Samdhani, Senior Advocate i/by Shri D. R.

WITH
WRIT PETITION NO. 4349 OF 2016

M/s Joshi Freight Carriers

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wp 3393.16

Through Proprietor
Shri Anil Biharilal Joshi,

Age : 40 Years, Occu. : Business,
R/o Besides Hotel Residency,
Agra Road, Dhule.

.. Petitioner

Versus

1. The State of Maharashtra,
Through the Department of

Co-operation, Marketing & Textile
Department, Mantralaya,

Mumbai.

2. Maharashtra State Warehousing

Corporation, A Public Sector undertaking
having its address at 583/B, Gultekadi,
Market Yard, Pune - 411 037.

3. Chairman/Managing Director,
Maharashtra State Warehousing

Corporation, 583/B, Gultekadi,
Market Yard, Pune - 411 037.

4. Raj Transport Company

A Partnership Firm registered under
the Provisions of the Indian Partnership
Act, 1932 and having its address at
"Radhakunj", Kapad Line,

Latur - 431 512.

5. S. K. Translines Pvt. Ltd.
Off-7-19, 1st Floor,
Sureshdada Jain Complex,
Ajanta Road, Jalgaon.

6. S. P. Jaisingani Transport Company
Pvt. Ltd. Through Prop.

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Sunil Ramnarayan Mantri,
Off;- Dondaicha, Tq. Sindkheda,

Dist. Dhule.

.. Respondents

Shri S. B. Talekar, Advocate h/f Shri S. U. Chaudhari, Advocate
for the Petitioner.

Shri A. V. Deshmukh, A.G.P. for the Respondent No. 1.
Shri Prasad Dhakephalkar, Senior Counsel i/by Shri N. B.
Suryawanshi, Advocate for Respondent Nos. 2 and 3.
Shri Pravin Samdhani, Senior Advocate i/by Shri D. R.

Deshmukh, Advocate for the Respondent No. 4.
Shri R. N. Dhorde, Senior Advocate i/by Shri V. R. Dhorde,

Advocate for the Respondent No. 5.
Shri V. D. Hon, Senior Advocate i/by Shri Ashwin V. Hon,
Advocate for the Respondent No. 6.

WITH
CIVIL APPLICATION NO. 5648 OF 2016
IN

WRIT PETITION NO. 4349 OF 2016

M/s Joshi Freight Carriers
Through Proprietor
Shri Anil Biharilal Joshi, .. Applicant

Versus

1. The State of Maharashtra
and others .. Respondents

Shri S. B. Talekar, Advocate h/f Shri S. U. Chaudhari, Advocate

for the Applicant.

Shri A. V. Deshmukh, A.G.P. for the Respondent No. 1.

Shri Prasad Dhakephalkar, Senior Counsel i/by Shri N. B.

Suryawanshi, Advocate for Respondent Nos. 2 and 3.

Shri Pravin Samdhani, Senior Advocate i/by Shri D. R.

Deshmukh, Advocate for the Respondent No. 4.

Shri R. N. Dhorde, Senior Advocate i/by Shri V. R. Dhorde,

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Advocate for the Respondent No. 5.

Shri V. D. Hon, Senior Advocate i/by Shri Ashwin V. Hon,

Advocate for the Respondent No. 6.

CORAM : S. V. GANGAPURWALA

K. K. SONAWANE, JJ.

CLOSED FOR JUDGMENT ON

: 06.05.2016

JUDGMENT PRONOUNCED ON :

11.07.2016

JUDGMENT (Per S. V. Gangapurwala, J.) :

-

. The Maharashtra State Warehousing Corporation invited online tenders for allotment of work for transportation of food grains from Jalgaon Railway Station to various godowns of the respondent No. 1 in M.I.D.C. The tenders of all these petitioners are rejected. The tenders of writ petitioners in Writ Petition No. 3393 of 2016, Writ Petition No. 3578 of 2016 and Writ Petition No. 3787 of 2016 are rejected on the ground that, they have formed cartel and the tender of writ petitioner in Writ

Petition No. 4349 of 2016 is rejected on the ground that, the petitioner has produced incorrect and false certificate about experience. The work order pursuant to the tender is allotted to the respondent No. 4. The petitioners in all these writ petitions have challenged the rejection of their tender, the issuance of show cause notice to petitioners as to why their E.M.D. should not be forfeited and also have challenged the work order issued in favour of the respondent No. 4. As all these petitions are assailing the same work order issued in favour of the respondent No. 4 and 8 wp 3393.16 challenging the rejection of their bid in the same tender process, as such all these petitions are decided by the common judgment.

02. Mr. R. N. Dhorde, the learned senior advocate appearing for the petitioner in Writ Petition No. 3393 of 2016 strenuously submits that :

(i) While rejecting the tender of the petitioner on the ground of formation of cartel, no reasoned order is passed. The reason is supplied by way of affidavit by the respondent No. 1. The unreasoned order of rejecting the tender of the petitioner in tender process and the reasons supplied subsequently of formation of cartel by way of affidavit and compilation of documents is contrary to law. For the said purpose reliance is placed on the judgment of the Apex Court in the case of State of Punjab Vs. Bandeep Singh and others reported in (2016) 1 SCC 724.

(ii) It is further submitted that, mere suspicion of cartel cannot disqualify the tenderer. According to the learned senior advocate, the respondent/corporation has formed an opinion of the petitioner having formed cartel with other two on grounds viz I. P. address of these three tenderers is the same and that tenders are filled by all the three on the same day within a short span of time. However, out of ten tenders which are received by the respondent/corporation, nine are filled on the 9 wp 3393.16 same day within a span of three to four hours. The petitioner runs a P.C.O. and http facility which is available to public at large and anybody can use the same by paying the necessary charges. The allegation of forming cartel is only on suspicion and is without evidence. Now, the State Government has also removed the condition of I.P. address in tender status. Another ground that all the three have taken bond papers from the same vendor is also erroneous. The tenderer S. P. Jaisingani had taken bond paper at Dondaicha and also executed affidavit on the bond paper at Dondaicha. The petitioner and Skyrail Logistics Pvt. Ltd. have office in the same complex, which is a transport hub having separate offices. Therefore, the bond papers came to be purchased from the same vendor and the same cannot be a ground to infer formation of cartel. Further ground that, in the tender of Skyrail Logistics Pvt. Ltd. document of petitioner is annexed cannot be a ground to hold the petitioner guilty for cartel. The learned senior advocate relies on the judgment of the Apex Court in the case of Union of India and others Vs. Hindustan Development Corporation and others reported in (1993) 3 SCC 499.

(iii) The decision making process was malafide and arbitrary and is conducted in a manner to favour the respondent No. 4. The tender conditions No. 2 and 3 along with its note was sufficient to

disqualify Vikram Transport Agency as it failed to give Chartered Accountant's certificate of the financial turn over 10 wp 3393.16 of three years, which is mandatory. In spite of mandatory condition being not complied, the tender of Vikram Transport Agency was accepted so that three tenders remained in contest and the respondent No. 4 can be given work order. The same State Warehousing Corporation in a tender process of Latur in February, 2006 had rejected the tender of M/s Sun Roadways on the very said ground. The hearing on the objection of the respondent No. 4 is taken on 05.02.2016, whereas hearing in respect of five tenderers whom the respondent/corporation wanted to reject were taken on 02.02.2016. The decision making process for allotment of tender was arbitrary and the same deserves to be set aside. For the said purpose the learned senior advocate relies on the judgment of the Division Bench of this Court in a case of Premier Irrigation Equipment and another Vs. Maharashtra Tourism Development Corporation Ltd. and others reported in 2009(03) Bom.C.R. 464.

(iv) It is further submitted by the learned senior advocate that, the respondent No. 4/Raj Transport could not have been allotted the tender as it was disqualified. The old partnership firm of the respondent No. 4 was registered on 08.08.2006 and new partnership firm was formed on 16.01.2016. One of the partners of the respondent No. 4 partnership firm namely, Ashok Dhulange died on 06.08.2013. The partnership deed dated 08.08.2006 does not contain a clause that the firm will continue 11 wp 3393.16 its business even after death of its partner. Hence as per Sec. 42(c) of the Partnership Act, the partnership firm automatically stood dissolved on 06.08.2013. The tender was filled in on 28.12.2015 in the name of dissolved partnership firm showing Ashok Dhulange as living partner. According to the learned senior advocate, the surviving partners could not have continued the partnership firm in such a case. The learned senior advocate relies on the judgment of the Apex Court in the case of Commissioner of Income Tax Vs. Seth govindram Sugar Mills reported in AIR 1966 SC 24, another judgment in the case of Commissioner of Income Tax Central-I Bombay Vs. Empire Estate, Bombay reported in (1996) 2 SCC 345 and judgment in the case of K. P. A. Vellayappa Nadar (Dead) through L.Rs. Vs. Bhagirathi Ammal and others reported in (1997) 1 SCC 211. It is further submitted by the learned senior advocate that, the respondent No. 4 suppressed the fact that, the firm is dissolved and is not entitled to participate in the tender process. As there is suppression of material facts, the tender of the respondent No. 4 ought to have been rejected on the said ground itself. Reliance is placed on the judgment of the Apex Court in the case of Bhaskar Laxman Jadhav and others Vs. Karmaveer Kakasaheb Wagh Education Society and others reported in (2013) 11 SCC 531. The petitioner has taken objection on the tender of the Joshi Freight Carrier, as false experience certificate was submitted by it. It is clear from the fact that, the Orient Cement 12 wp 3393.16 Company has disowned the experience certificate granted by its employee in favour of the M/s Joshi Freight Carrier.

03. Mr. P. M. Shah, the learned senior advocate appearing for the petitioner in Writ Petition No. 3578 of 2016 submits as under :

A. The rejection of tender of the petitioner on the ground of formation of cartel is per-se erroneous. The S. K. Translines Pvt. Ltd. owns P.C.O. from, number of years. The said P.C.O provides services to the customers giving I.T. solutions and charging for the same, which are not gratuitous. The tender was filled in from the said public

P.C.O., which was uploaded using a pen drive after following complete secrecy. The fact that, the petitioner filled in the tender from the same P.C.O. owned by S. K. Translines Pvt. Ltd. cannot be a ground to form a suspicion of forming a cartel. Purchasing stamp and sending the same representative to purchase stamp from the same vendor also cannot be a sufficient ground to infer formation of cartel. By mistake one truck number was mentioned wrongly, which was owned by S. K. Translines Pvt. Ltd. Only on this basis the inference was drawn of petitioner forming a cartel and rejecting the tender of petitioner. The same is absolutely erroneous and does not stand to reason, more particularly in absence of any direct evidence of cartel apart from alleged circumstantial, without there being any shred of evidence, any proof of plus 13 wp 3393.16 factor, it is always unsafe to conclude that the petitioner indulged in to carteling. The learned senior counsel relies on the judgment of the Competition Appellate Tribunal in the case of Director General Vs. M/s Escorts Ltd. dated 16.01.2014 in RTPE No. 12 of 2006. Without any sufficient material, the bid of the petitioner could not have been rejected on the ground of cartel.

B. The decision making process was itself vitiated. The learned senior counsel relies on the judgment of the Division Bench of Gujrat High Court in the case of Om Sainath Carting Vs. State of Gujrat and others reported in II (2011) BC 290. So also he relies on the judgment of the Apex Court in a case of Union of India Vs. Hindustan Development reported in 1994 CTJ 270 (SC).

C. The learned senior counsel further submits that, even as per the definition of cartel as embodied U/Sec. 2(C) of the Competition Act 2002, the facts of the present case do not even remotely establish formation of cartel. The financial bid was not opened. It was too premature to conclude any element of cartel. There is nothing on record to suggest an association of these three tenderers, nor there is even an allegation of agreement being formed amongst them to control the price. The learned senior advocate relies on the judgment of the Division Bench of Orissa High Court in the case of Jagdamba Packaging Pvt.

14 wp 3393.16 Ltd. Vs. Union of India and others reported in II (2011) BC 413.

D. Before opening the financial bid, it would be premature to say that the petitioner formed cartel with another tenderer. Cartel should be to control prices to obtain monopoly. It is unfair trade practice. It is to exclude the competition from the trade. In the present case, no such fact exists. According to the learned senior advocate, the decision making process suffers from basic infirmities and it unreasonably denies the opportunity of equality in participation as well as infringes fair competitiveness in contractual matters with the State. In such case, judicial intervention is necessary. The reliance is placed on the judgment of the Division Bench of this Court in the case of Vijaykumar Gupat Vs. State of Maharashtra reported in 2008(4) Mh. L. J. 370.

E. It is further submitted that, show cause notice is issued to the petitioner to reply as to why E.M.D. should not be cancelled for formation of cartel. In case the petitioner satisfies the respondent/corporation pursuant to the said show cause notice that there is no formation of cartel, still the petitioner already stands disqualified from participating in the tender on the ground of

cartel. The said decision rejecting the tender of the petitioner on the ground of cartel is too premature.

15 wp 3393.16 F. The learned senior advocate further contends that, the respondent No. 4 could not have been awarded the tender. The partnership firm in the name of the respondent No. 4 was constituted in the year 2006 vide partnership deed dated 08.08.2006. The said partnership deed did not contain a clause to the contrary as is required U/Sec. 42(c) of the Partnership Act i. e. it does not contain a clause that on the death of one of the partners, the partnership firm would continue. One of the partner having died in the year 2013, the firm stood dissolved by operation of Sec. 42(c) of the Partnership Act with effect from 06.08.2013 on account of death of partner Ashok Dhulange. A dissolution of partnership firm U/Sec. 42(c) of the Partnership Act, followed by some of the erstwhile surviving partners taking over assets and liabilities of the dissolved firm and forming themselves into a partnership amounts to formation of new partnership and would not be continuation of old partnership firm. From 06.08.2013 till the new partnership deed dated 16.01.2016, there is no written agreement of continuation of partnership firm, nor there is any pleading of existence of express agreement either in writing or oral to continue the same partnership firm by surviving partners without dissolving it. There is no pleading on behalf of the respondent No. 4 even about an implied agreement with regard to continuation of the partnership by conduct of surviving partners. The partnership deed dated 16.01.2016 expressly excludes its relation back. The new partnership dated 16.01.2016 cannot relate back to 16 wp 3393.16 06.08.2013 after intervening period of 27 months for the reason three new additional partners are added with variation in the proportion of shares. The registration of partnership firm is neither attribute of formation of partnership, nor of the termination of partnership. The existence of the partnership firm is not co-terminus with the de-registration of the partnership firm. Chapter V of the Partnership Act deals with incoming and out going partner, while Chapter VI separately deals with dissolution of a firm. The two are totally different concepts and cannot be equated with each other. The learned senior advocate relies on the judgment of the Full Bench of Allahabad High Court in the case of Vishwanath Seth Vs. Commissioner of Income Tax reported in (1084) 38 CTR (All) 366. So also the judgment of the Apex Court in the case of Sharad Vasant Kotak Vs. Ramnilal reported in (1998) 2 SCC 171 and another judgment of the Apex Court in the case of V. Subramaniam Vs. Rajesh Raghuvandra Rao reported in (2009) 5 SCC 608.

G. The learned senior advocate further submits that, another ground for rejection of the tender of the petitioner was that, the petitioner has submitted the bond but had not stated that it has not carried out transportation of more than the sanctioned capacity. The compliance was only technical and not fundamental. The same is not required as per rules. According to the learned senior advocate in the case of Vikram Transport, 17 wp 3393.16 though it has not submitted the Chartered Accountant's certificate thereby certifying turnover for last three financial years, yet his tender was accepted. As such, the decision making process of the respondent/corporation itself is arbitrary.

04. Mr. Hon, the learned senior advocate for the writ petitioner in Writ Petition No. 3787 of 2016 submits that, the rejection of the tender of the petitioner on the ground of formation of cartel is absolutely erroneous and does not stand to any reason. The petitioner is not concerned with other two petitioners in whatsoever manner. The said objection is only with a view to deprive the

petitioner of the participation in the tender process. The petitioner has availed the services of P.C.O. provided by M/s S. K. Transline Pvt. Ltd. and many individuals have taken benefit of the services provided by the said P.C.O. The same cannot be a ground to conclude that the petitioner has formed a cartel. Even the allegations that, the bond paper has been purchased from the same vendor is incorrect. The petitioner had purchased the bond paper at Dondaicha and has also filled in at Dondaicha. The petitioner could not have been disqualified on the said ground. The learned senior advocate also relies on the judgments relied on by the learned senior advocates in the earlier two writ petitions.

05. Mr. Talekar, the learned counsel for the petitioner in Writ Petition No. 4349 of 2016 submits that, the State Warehousing 18 wp 3393.16 Corporation has intentionally given arbitrary treatment to the petitioner by selectively disqualifying it. The petitioner is disqualified on the basis of 'make believe' enquiry dated 02.02.2016. The petitioner was neither shown the letters received from various authorities of the Corporation, nor was afforded any opportunity to rebut the same. The principles of natural justice are flouted. When an action adversely affects a party, principles of natural justice are required to be adhered to.

The learned counsel relies on the judgment of the Apex Court in the case of Manohar Manikrao Anchule Vs State of Maharashtra and another reported in (2012) 13 SCC 14 and another judgment of the Apex Court in the case of Namit Sharma Vs. Union of India reported in (2013) 1 SCC 745.

06. The learned counsel further submits that, the Corporation had called for providing explanation on the basis of objection received by it with regard to the genuineness of the experience certificate submitted by the petitioner. The petitioner on 02.02.2016 had not only submitted the certificate of Chartered Accountant showing receipt of transportation freight, balance sheet, profit and loss account statement, but also bank statements and ledger books maintained from all dealers showing the exact amount of payment received from each of them and the nature and duty of payment. Even proof of payment of income tax on the said income was also shown. Nearly 900 pages of documents were filed, however, the same were overlooked. The 19 wp 3393.16 letter of General manager (Finance) of the Orient Cement Company was discarded, which would favour the petitioner. The General Manager (Finance) did not only deny the contents of the said certificate, but rather supported the same. The matter ought to have been over at that stage. There was no further reason to seek clarification from Vice President (Human Resource), who has no concern with the amount of payment made to each contractor of the transportation undertaken either from the company or its authorized dealers. The petitioner had a contract with the Orient Cement Company for transporting cement both, on trade and non-trade works. For the works undertaken on trade work basis, the payments were released by the company, whereas for the non-trade works or the works on ex-

factory basis, the payments were released directly by the customers. The certificate issued by the Manager Logistic dated 23.11.2015 filed along with the bid document shows eligibility in terms of experience. The certificate including the payments made by Orient Cement Company to the tune of Rs. 04 crores as well as various dealers/consumers (Ex-work basis) to the tune of Rs. 08 crores.

07. Considering the illegalities committed by respondents, the petitioner approached the Chief Operations Officer of the Orient Cement to provide true and correct statement of facts with regard to the payments received by the petitioner. The Chief Operations Officer gave letter dated 22.02.2016 that the company 20 wp 3393.16 had made payment of Rs. 04 crores, whereas, rest of the payment was received by the petitioner on Ex-works basis for 75532 tonnes of cement. Despite such a clear statement the corporation chose to ignore the same. As a matter of fact, it is nowhere challenged that the petitioner has not received Rs. 12 crore or has not undertaken the said work. The petitioner is always subjected to arbitrary treatment. With regard to the contracts at Khamgaon, the petitioner was the lowest, however, corporation saw to it that writ petition is filed in the Court. Though the notice is received by the corporation, the corporation has not placed on record the verification conducted by it. It also planned a similar illegal disqualification of the petitioner in the year, 2014 for the contract of transportation of Dhule and Dondaicha. The bid at Dhule was rejected on the same ground of disparity in trade work and non-trade work. The petitioner was issued show cause notice of forfeiting E.M.D. The reply of the petitioner was accepted and the E.M.D. was refunded.

08. It is further submitted by the learned counsel for the petitioner that, the petitioner is eligible, as is clear from the experience certificate, the certificate of Chief Operations Officer, Orient Cement Company and certificate of Chartered Accountant. If two possible interpretations are present, the one holding the tender to be qualified has to be accepted. The learned counsel relies on the judgment of the Apex Court in the case of Shalby Ltd. and another Vs. State of Goa and 21 wp 3393.16 others reported in 2012 (1) Mh. L. J. 533.

09. The learned counsel further submits that, the petitioner made a complaint to the Hon'ble Chief Minister. The Hon'ble Chief Minister passed an order staying the further proceedings of awarding the work order until the Secretary conducts proper and fair enquiry. According to the petitioner the contention of the respondent/corporation is that on telephone it was communicated by the Secretary to the Corporation that the stay is vacated. The order of stay granted by the Hon'ble Chief Minister could have been vacated only by subsequent order of the Hon'ble Chief Minister. The State affairs are not conducted on telephonic instructions. No enquiry was concluded, as such the order of stay has not been vacated as yet. After issuance of work order, on the same day to respondent No. 4 withdrew its writ petition challenging the order of stay passed by the Hon'ble Chief Minister, it only shows that the respondent/corporation wanted to favour the respondent No. 4. According to the learned counsel, there is absolute arbitrariness in the award of contract given to the respondent No. 4.

10. According to the learned counsel, the respondent No. 4 also did not comply the tender condition stipulated in Clause 12(viii) and 12(ix) which are incorporated from Government Resolution dated 26.11.2012. The respondent No. 4 has mentioned the list of trucks to be used for transportation. The same vehicles are 22 wp 3393.16 mentioned in another bid submitted for tender contract for distribution of free books to the under privileged by the Director of Education. The learned counsel further submits that, the respondent No. 4 has formed the cartel with the petitioners of Writ Petition No. 3393 of 2016 and Writ Petition No. 3578 of 2016, so also Writ Petition No. 3787 of 2016. The petitioners of other three writ petitions and the respondent No. 4 had formed a firm known as Vayudut Partnership Firm. The said partnership firm is nodal entity of the Bhutada group,

Mantri Group and Holani group. Vayudut Partnership firm consists of three partners, namely, Madusudhan Purushottam Bhutada, Sunil Ramnarayan Mantri and Ujjwal Kothari, as is evident from the partnership deed dated 16.01.2014 of the Vayudut Partnership Firm.

Whereas the respondent No. 4/Raj Transport is wholly owned and managed by Mr. Purushottam Bhutada real father of Madhusudan Bhutada, the partner in Vayudut Partnership Firm.

11. The learned counsel submits that, the petitioner was already disqualified on 09.02.2016 and thereafter show cause notice was issued. The Managing Director of the respondent/corporation vide its letter dated 29.02.2016 intimated the Additional Chief Secretary, Marketing Federation Department that, further technical aspects are being considered with regard to the experience certificate submitted by the petitioner of Orient Cement and at present the Corporation has 23 wp 3393.16 not taken any decision and after considering all the technical aspects further decision would be taken. According to the learned counsel, even on 29.02.2016 the enquiry in respect of experience certificate submitted was not concluded and as per the respondent/corporation it had submitted its report on 12.02.2016, which itself is contrary.

12. It is further submitted by Mr. Talekar, the learned advocate that, the facts on record are sufficient to show that, all the petitioners in other three matters and the respondent No. 4 have formed cartel. The learned counsel relies on the judgment of the Division Bench of this Court in the case of Techno Precision Engineers Pvt. Ltd. and another Vs. M/s Western Coalfields Limited and another reported in 2014 (4) All M. R. 111 and the judgment of the Apex Court in the case of Union of India Vs. Hindustan Development Corporation reported in (1993) 3 SCC 499.

13. The learned counsel further submits that, the date of the registration of the reconstitution of the respondent No. 4 is much later than the date of acceptance of the tender by the respondent/corporation. The same is in back date and in haste, after the objection is filed by the petitioner regarding the continuation of said firm after death of one of its partners. As per Sec. 42(c) of the Partnership Act, firm automatically stands dissolved, in absence of clause to the contrary. The learned 24 wp 3393.16 counsel relies on the judgment of the Apex Court in the case of Commissioner of Income Tax Central - I, Bombay Vs. Empire Estate, Bombay reported in (1996) 2 SCC 345.

14. The learned counsel further submits that, as Ashok Dhulange, the partner in the respondent No. 4/partnership firm died on 06.06.2013, the firm stood dissolved and the tender is filled in on behalf of the respondent No. 4 by the dissolved firm.

As per Clause 2(B) of the tender document, even if there is slightest of change in the partnership deed and there is any reconstitution of the partnership firm, then prior permission of warehousing corporation is essential in order to make bid. Despite death of partner, no permission is sought, in that regard from the corporation. The same is in absolute breach of mandate of the tender condition. The respondent No. 4 is guilty of filing false affidavit before the High Court in Writ Petition No. 12057 of 2015. The same was filed by Mr. Ganesh Ramchandra Mundada, who was not even partner of the firm. Filing false affidavit in judicial proceedings in the Court of law ought to be treated as

contempt and perjury. The learned counsel relies on the judgment of the Apex Court in the case of Dhananjay Sharma Vs. State of Haryana and others reported in (1995) 3 SCC 757. Because of the illegalities committed by the Bhutada group, Mantri group, Holani group and formation of cartel loss of nearly Rs. 100 crore is caused to the Government Exchequer. The same is due to collusion of the said entities and 25 wp 3393.16 officials of the warehousing corporation. The respondents are favouring the cartel members. The present petitioner has quoted price much less than the respondent No. 4. The petitioner is eligible and the contract needs to be awarded to the petitioner in public interest. The petitioner has met the essential conditions. The award is required to be given to the lowest bidder, even if technical non compliance is there. The learned counsel relies on the judgment of the Apex Court in the case of B. S. N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. and others reported in (2006) 11 SCC 548.

15. The learned counsel submits that, the work order allotted to the respondent No. 4 be set aside and the petitioner be allotted the work.

16. Mr. Dhakephalkar, the learned senior advocate appearing for the respondent/corporation replied the contentions of all the petitioners and submits that, the petitioners are guilty of delay and laches. Their tenders were rejected and the show cause notice was issued to the petitioners of all the writ petitions on 09.02.2016. The writ petitions were only filed in March, 2016 after the work under the subject contract was started by the respondent No. 4. On this count itself the petitions be dismissed.

17. The learned senior advocate further submits that, the petitioners in first three writ petitions have made averments 26 wp 3393.16 that the petitioners are not connected with each other, whereas the documents clearly indicate that the petitioner in Writ Petition No. 3393 of 2016 has a controlling interest in the business of the petitioner of Writ Petition No. 3578 of 2016.

Ujjwal Kothari and Hemant Kothari are brothers and have controlling authority respectively of petitioner companies in Writ Petition No. 3393 of 2016 and Writ Petition No. 3578 of 2016. The tender documents filed by the petitioner of Writ Petition No. 3393 of 2016 is signed by Hemant Kothari, whereas the tender document submitted by the petitioner of Writ Petition No. 3578 of 2016 is signed by Ujjwal Kothari. They are real brothers. The petitioner of Writ Petition No. 3787 of 2016 had a transaction with the petitioner of Writ Petition No. 3578 of 2016. Apart from the above, the petitioners of first three writ petitions that is except petitioner of Writ Petition No. 4349 of 2016 have uploaded their tenders from the same I. P. address in immediate succession of each other, which clearly raises a sufficient suspicion between the Kothari family and the petitioner of Writ Petition No. 3787 of 2016 that, there is an undisclosed agreement between them. The learned senior advocate places reliance on the judgment of the Apex Court in the case of Techno Precision Engineers Pvt. Ltd. and another Vs. M/s Western Coalfields Limited and another referred to supra. It is further submitted that, all the tenders were filled in same handwriting. The said averment was made in affidavit dated 02nd April, 2016 of the respondent/corporation. The same 27 wp 3393.16 is not denied by petitioners in all these three writ petitions. The petitioner of Writ Petition No. 3393 of 2016 has come with a case that he is carrying business of inter-net service provider to the public at large. However, he has not produced requisite documents to show that the said petitioner is carrying

the business of inter-net service provider to the public at large. The stamp papers which were submitted along with the tender were purchased in the name of same person in respect of three petitioners. The learned senior advocate submits that, for disqualification mere reasonable suspicion of cartelization is sufficient and all these facts taken together arouses reasonable suspicion of cartelization and the same would be sufficient to disqualify them from further tender process. The learned senior advocate relies on the judgment of the Apex Court in the case of Union of India and others Vs. Hindustan Development Corporation and others referred to supra. According to the learned senior advocate for disqualification mere reasonable suspicion of cartelization is sufficient, however, to substantiate the charge of cartelization, the show cause notice is issued. It will be absurd to accept that before disqualification, the charge of cartelization is required to be proved beyond all doubts. A long drawn enquiry is not contemplated for disqualifying a tender on the ground of formation of cartel and the reasonable suspicion would be sufficient.

18. The learned senior advocate further submits that, 28 wp 3393.16 the respondent No. 4 submitted valid registration certificate along with documents showing that the respondent No. 4 is continuing business in its name. The allegations of dissolution of the respondent No. 4 is raised for the first time by way of averments made in Writ Petition No. 3578 of 2016. The said issue as such was not part of decision making process of the respondent/corporation. The intimation of reconstitution of the respondent No. 4 was given on 11th February, 2016. The same was considered and thereafter the work contract was again given on 23.03.2016. On the basis of partnership deed dated 11.02.2016 control still remains with Purushottam Bhutada family. The learned senior counsel further submits that, in respect of petitioner in Writ Petition No. 4349 of 2016, the corporation had sent letters for verification of the experience certificate annexed with the tender document. Vide letter dated 07.01.2016 the respondent/corporation requested Orient Cement to certify the genuineness and correctness of certificate dated 23.11.2015 submitted by the petitioner. The Orient Cement by its letter dated 21.01.2016 and 28.01.2016 informed this respondent that the certificate is issued by an employee without any authority and the contents of the same are incorrect. The Orient Cement Company disowned the certificate. In fact, reply by Orient Cement vide its letter dated 22.02.2016 to the petitioner in Writ Petition No. 4349 of 2016, once again confirms the contents of letters dated 21.01.2016 and 28.01.2016. The said letters also state that the petitioner in the 04th petition has rendered 29 wp 3393.16 services for an amount of Rs. 04 crores approximately. The said letter also records that, the Orient Cement cannot comment on the payment made by the customers directly to the petitioner of the 4th petition. The petitioner of Writ Petition No. 4349 of 2016 knowingly obtained fabricated documents from the unauthorized person of Orient Cement. The said petitioner was admittedly aware that the contents of letter dated 23rd November, 2015 are incorrect and false. The learned senior counsel further submits that, the condition No. 3 of the tender document is for verifying financial condition of the tenderer, whereas the condition No. 11 is an experience certificate, which is required to be issued by the third party certifying the experience of the tenderer in terms of clause 14. Therefore, the documents submitted under condition No. 3 cannot fulfill the requirement of document required under condition No. 11. The documents annexed to the tender under condition No. 11 are necessarily required to be issued by third parties certifying the experience in terms of clause No. 14 and annexure No. 7. The petitioner of Writ Petition No. 4349 of 2016 had submitted fabricated documents and similar certificate in other tenders also for which he has been disqualified that is Khamgaon work for transportation and rake

handling.

19. The learned senior advocate further submits that, this Court would only consider that the decision making process is proper and the decision would not be subject matter of scrutiny. This Court would not sit in appeal over the decision 30 wp 3393.16 taken by the Corporation. The learned senior advocate relies on the judgment of the Apex Court in the case of Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651. The learned senior advocate further submits that, the tender of Vikram was accepted, though it had not submitted the certificate of chartered accountant regarding turnover for last three financial years, as the turnover was per-se visible from audited accounts submitted by said Vikram and no further enquiry was necessary. Whereas the experience certificate was required to be submitted by the third party and which was fundamental document. As such, fallacious experience certificate filed by the petitioner in Writ Petition No. 4349 of 2016 cannot be equated with non filing of chartered accountant's certificate regarding turnover by Vikram. The learned senior advocate submits that, the decision has to be tested by the application of Wednesbury principle of reasonableness. The respondent corporation has not committed any illegality in decision making process, as such writ petitions be dismissed.

20. Mr. Pravin Samdhani, the learned senior advocate appearing for the respondent No. 4/Raj Transport submits that, the partnership deed of Raj Transport was executed on 08th August, 2006. The said partnership was registered with Registrar of firms under Indian Partnership Act on 21st August, 2006 bearing Registration No. ABD/1371. The certificate of registration accordingly is issued under the Indian Partnership 31 wp 3393.16 Act, 1932. As per the partnership deed dated 08.08.2006, Purushottam Bhutada had 88% share in the profit and 100% share in loss. The remaining six partners including Ashok Dhulange had 2% each share in the profit only. Though Ashok Dhulange died on 16.08.2013, the partnership continued its business and a partnership deed was again executed on 16.01.2016. Clause 3 of the partnership deed dated 16th January, 2016 specifically refers that, continuation of work contract given in favour of the respondent No. 4/partnership firm to continue as it is. As such, it is clear that, an agreement existed amongst the partners contrary to Sec. 42(c) of the Indian Partnership Act. Vide partnership deed dated 16.01.2016, son of Ashok Dhulange was taken as a partner with 9% share. The partnership deed distributes the responsibility of carrying out the business of the firm, which remains with the family of Purushottam Bhutada. On 01st February, 2016 notice/application U/Sec. 63 of the Indian Partnership Act for recording of changes in M/s Raj Transport, Latur is made to the Assistant Registrar of Firms at Aurangabad along with a fees of Rs. 1,200/-. The Registrar of Firms accepted the penalty and recorded the changes in the record of Registrar of Firms as per deed dated 16.01.2016. In the records of Registrar of Firms, Raj Transport, Latur registered under the Registration No. ABD/1371 still continues with the changes incorporated as per the notice dated 01.02.2016. The learned senior advocate further submits that, it is an admitted position that business was carried on and in the name of the respondent 32 wp 3393.16 No. 4/firm by the consent of all the partners and/or legal heirs of deceased partner. The audited balance sheet and other documents of the respondent No. 4 clearly show the continuation of business in the name of the respondent No. 4. The issue of dissolution of partnership was raised for the first time on 20th March, 2016 vide averments made in Writ Petition No. 3578 of 2016 that is much after the decision making process of the respondent/corporation was complete in all respects. The said contention

cannot be raised for the first time in the writ petition. It is further submitted that, the partners can contract to the contrary to Sec. 42(c) of the Indian Partnership Act. The partners after demise of Ashok Dhulange on 06th August, 2013 continued the business in the name and style of M/s Raj Transport, Latur. The respondent No. 4 through its authorized partner filed an affidavit stating that the partnership firm continues. The contract to the contrary to Sec. 42(C) of the Indian Partnership Act may be express or implied by the conduct of partners. The learned senior advocate relies on following judgments.

1. M/s Mettupalayam Industrial Roadways (P) Ltd.

Mettupalayam and another Vs. Thiru Mohamed Ismail Rowther and Co. reported in 1976 Madras Law Journal Reporter 446.

2. Punjab and Sind Bank ltd. Vs. Kishen Singh Gulab Singh and others reported in 1934 Vol. XVI 33 wp 3393.16 Lahor Series 881.

3. Haramohan Poddar and others Vs. Sudarson Poddar reported in The Calcutta Weekly Notes - Vol. XXV 847.

4. M/s Shiva Transport Company Vs. Food Corporation of India and others reported in (2013) 169 PLR 345.

5. Pawan Nandlal Agrawal Vs. Asian Dye Chemicals reported in 2008 (1) Mh. L. J. 290.

21. It is further submitted that, the respondent No. 4 has filed its Income Tax return, continued its bank accounts, continued its work order, bid in the subject tender, filed proceedings in the Court, so also affidavit in the Court, which clearly indicates and concludes the contract to the contrary. According to the respondent No. 4, none of the partners have ever disputed the continuation of the respondent No. 4 and a stranger cannot contend that the respondent No. 4 stood dissolved on 06th August, 2013. The learned senior advocate further submits that, false averments are made in the writ petitions, as such writ petitions deserve to be dismissed at the threshold. The learned counsel relies on the judgments of the Apex Court in the case of S. P. Chengalvarya Naidu Vs. Jagannath reported in (1994) 1 SCC 1 and in the case of Krishna Kumar @ Siyaram Vs. State of U. P. reported in (2010) 2 SCC

114. 34 wp 3393.16

22. We have considered submissions canvassed by learned counsel for respective parties. There cannot be any dispute with the proposition that in the matters of tender, the powers of judicial review are to be sparingly exercised. In such case, the power of judicial review is not to be exercised like an appellate authority in an appeal from the decision. The Apex Court in the case of Tata Cellular Vs. Union of India referred to supra has laid down the guidelines with regard to the exercise of powers of judicial review in contractual matters, which can be culled out as under :

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) 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.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

35 wp 3393.16 (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

23. The principle or power of judicial review will apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercising the said powers of judicial review as held by the Apex Court. The duty of the Court is to confine itself to the question of legality. It is concerned with the manner in which those decisions have been taken.

24. In the present case after the decision making process carried out by the respondent/Warehousing Corporation was over, the Hon'ble Chief Minister had stayed the proceedings and directed enquiry to be conducted. A written endorsement was made to that effect by the Hon'ble Chief Minister. The contention of the respondent/corporation is that after the enquiry 36 wp 3393.16 was conducted, it was informed by the Secretary telephonically to proceed ahead. It is also a fact that, after the orders of stay was passed by the Hon'ble Chief Minister, the respondent No. 4 had filed a writ petition before the Bombay High Court at its Principal seat challenging the same and said writ petition was withdrawn on 23.03.2016 and on the very same day work order was issued to the respondent No. 4. The enquiry conducted pursuant to the orders of the Hon'ble Chief Minister and its outcome or the report is not placed on record.

25. The following dates and events are not disputed.

Sr. No.

Date

Events

1 03/12/15 The respondent No. 1 invited tenders

online for allotment of tender work for

transportation of food grains from Jalgaon Railway Station to various godowns of the respondent No. 1 in M.I.D.C. 2 28/12/15 The last date for filing online tender.

3 01/01/16 S. K. Transline objected to the tender filed by M/s Joshi Freight Carriers. S. K.

Transline Pvt. Ltd. also filed objections to the tender of Jalgaon Golden Transport Pvt. Ltd.

4 02/01/16 S. P. Jaysinghani filed objections challenging the tender of Jalgaon Golden Transport Pvt. Ltd.

5 11/01/16 Joshi Freight Carriers filed objection to the tenders of S. K. Transline Pvt. Ltd., Skyrail Logistic Pvt. Ltd and S. P. 37 wp 3393.16 Jaysinghani.

6 11/01/16 Date of opening of technical bid.

7 11/01/16 Technical bids opened by the respondent No. 1 at its head office at Pune. T

respondent No. 1 received in all ten bids i.

e. (1) S. K. Translines, (2) M/s Joshi Freight Carriers, (3) Skyrail Logistics Pvt. Ltd., (4) Jalgaon Golden Transport Ltd., (5) Vikram Transport Agencies, (6) Vijayant Agencies Pvt. Ltd., (7) Raj Transport, (8) Dinesh Roadlines, (9) ig Shrinath Transport Companies, (10) S. P. Jaysinghani.

8 12/01/16 Skyrail Logistics Pvt. Ltd. filed objections to the tender of Vijayant Agencies Pvt.

Ltd.

9 12/01/16 Skyrail Logistics Pvt. Ltd. filed objections to the tender of Vikram Transport Agencies.

10 02/02/16 The Chairman and Managing Director of the respondent No. 1 heard objection of the following. (a) S. K. Translines, (b) Joshi Freight Carriers, (c) Skyrail Logistics Pvt.

Ltd., (d) Jalgaon Golden Transport Ltd.

and (e) S. P. Jaysinghani.

11 05/02/16 The Chairman and Managing Director of the respondent No. 1 heard objections of the following : (a) Dinesh Roadlines and

(b) Raj Transport.

12 09/02/16 The respondent No. 1 considered the objections of the parties and disqualified seven from the ten bidders. Following are the conclusions reached by the respondent No. 1.

(i) Joshi Freight Carriers had provided false and incorrect experience certificate, 38 wp 3393.16 hence its bid was rejected and show cause notice was issued to M/s Joshi Freight Carriers.

(ii) Considering objections of Joshi Freight Carriers it was concluded that, S. K. Transline Pvt. Ltd. Skyrail Logistics Pvt. Ltd. and S. P. Jaysinghani had formed a cartel and hence were disqualified.

(iii) Having heard the objections of various parties, three bidders were considered eligible, whose names are as follows :

(A) Dinesh Roadlines, (B) Raj Transport, (C) Vikram Transport Vt. Ltd.

(iv) Remaining bidders were rejected for non fulfillment of the tender conditions mainly pertaining to the experience.

13 09/02/16 The respondent No. 1 issued show cause notice to the following :

a) S. K. Translines Pvt. Ltd.

b) Skyrail Logistics Pvt. Ltd.,

c) S. P. Jaysinghani thereby informing them that prima facie evidence indicates that the above named parties had formed a cartel and asking them to show cause as to why their EMD of Rs. 50 Lacs should not be forfeited.

The show cause notice was also issued to Joshi Freight Carriers informing it that based on the evidence it is clear that Joshi Freight Carriers had supplied false and incorrect documents to the respondent No. 1 and why its EMD of Rs. 50 Lacs should not be forfeited.

14 09/02/16 Work order was issued in favour of Raj 39 wp 3393.16 Transport. The work under the said order was to commence on 15th February, 2016.

15 09/02/16 Joshi Freight Carriers addressed a letter to the Hon'ble Chief Minister alleging corruption and making a grievance that its bid has been wrongly rejected.

16 09/02/16 The Hon'ble Chief Minister issued handwritten directions to the Secretary asking him to look into the matter personally and also stayed the tender process.

17 11/02/16 The respondent No. 1 issued a letter to Raj Transport informing that until further orders and pending enquiry, the work order issued in favour of Raj Transport is stayed.

18 March - Writ Petition No. 3192 of 2016 filed by the respondent No. 4 before the Principal Seat at Bombay assailing the stay granted by the Hon'ble Chief Minister.

19 23/03/16 The Writ Petition No. 3192 of 2016 is withdrawn by the respondent No. 4.

20 23/03/16 Work order issued to the respondent No. 4 by the respondent No. 1.

26. Although, one of the grounds agitated by the petitioners is, while disqualifying the petitioners, no reasoned order is passed, it may have to be noted that, the respondent/corporation was not supposed to be performing a quasi judicial function, but was dealing with acceptance and/or rejection of tender in a commercial transaction. The corporation 40 wp 3393.16 was supposed to consider the objections raised to the tenders of the respective parties. The corporation has given opportunity to petitioners to rebut the said objections and the respondent/corporation jotted down the causes for rejection of the tender. The corporation is not supposed to write a detailed judgment. As such, it may not be said that, no reasons are given while rejecting the tenders or that principles of natural justice are not adhered to. On 09.02.2016, the respondent/corporation rejected the tenders of petitioners and on the very same day issued show cause notices to the petitioners detailing the reasons on which the tenders are rejected. The argument of the petitioners could have been accepted in case, the respondent/corporation would not have brought to the notice of the petitioners objections raised to their tenders and not afforded opportunity of hearing to them. The corporation in the instant case has brought to the notice of the petitioners the grounds of objections raised to their tenders, sought their explanation, heard them and thereafter upheld the objections and rejected the tenders. In the circumstances process of decision making to a fair degree appears to have been adhered to. Though the reasons are given for rejection of tenders, however, the question would be sustainability of the said grounds or reasons.

27. The Apex Court in a case of State of Punjab Vs. Bandeepsing and others referred to supra has observed that, "Every decision of an administrative or executive nature must be a composite and self-sustaining one, in that it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion. It is beyond cavil that any authority cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned action. Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of

explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do." Considering the aforesaid observations of the Apex Court, subsequent grounds taken up in the affidavit before the Court may not be considered for the first time in writ petition.

28. The tenders of petitioners in Writ Petition No. 3393 of 2016, Writ Petition No. 3578 of 2016 and Writ Petition No. 3887 of 2016 were rejected on the ground of cartelling and show cause notice is issued to them informing them that prima facie evidence indicates that above named parties had formed a cartel and asking them to show cause as to why their EMDs of Rs. 50 Lacs each ought not be forfeited. The said impression of the respondent/corporation is formed by following facts.

(1) The petitioners in these three writ petitions have uploaded their tenders from the same I. P. address in immediate succession to each other.

42 wp 3393.16 (2) Kothari family has controlling authority over petitioners in Writ Petition No. 3393 of 2016 and Writ Petition No. 3578 of 2016.

(3) The stamp papers are purchased in the name of same person.

29. The term cartel is defined under the Competition Act 2002. The said definition reads as under :

THE COMPETITION ACT, 2002

1.

2.

2(a)

2(c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

30. The anti-competitive agreement is defined U/Sec. 3 of the Competition Act 2002, which reads as under :

THE COMPETITION ACT, 2002

1.

2.

43 wp 3393.16

3. Anti-competitive agreements : 1. No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

2. Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which--

(a) directly or indirectly determines

purchase or sale prices;

(b) limits or controls production, supply,

markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this 44 wp 3393.16 sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

31. The Apex Court in the case of Union of India Vs. Hindustan Development Corporation referred to supra has observed that, the cartel therefore is an association of producers, who by agreement amongst themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. In other words, it amounts to an unfair trade practice, which is not in public interest. The intention to acquire monopoly power can be spelt out from formation of such cartel by some of the producers.

However, the determination, whether such agreement unreasonably restrains the trade depends on the nature of the agreement and on the surrounding circumstances that give rise to an inference that the parties intended to restrain the trade and monopolise the same. It was further observed in the said judgment that, whether in a given case there was formation of cartel by some of the manufacturers, which amounts to unfair trade practice depends upon the available evidence and the surrounding circumstances.

In the said case, the tender committee formed an opinion that, three big manufacturers formed a cartel on the ground that, the price initially quoted by them was identical and 45 wp 3393.16 was only a cartel price. The Apex Court held that, though the attitude of these three manufacturers gave rise to a suspicion that they formed cartel, but there is not enough material to conclude that in fact there was such formation of a cartel. It was further observed that, however, such an opinion entertained by the concerned authorities including the Minister was not malicious, nor was actuated by any extraneous considerations.

They entertained reasonable suspicion based on the record and other surrounding circumstances and only acted in a bonafide manner in taking the stand that the three big manufacturers formed a cartel. The action held was bonafide, reasonable and non arbitrary.

32. The Orissa High Court in the case of Jagdamba Packaging Pvt. Ltd. Vs. Union of India and others referred to supra observed that, mere offer of lower price by itself does not manifest requisite intent to gain monopoly. In absence of specific agreement, formation of cartel amongst the producers cannot readily be inferred, though it may appear to be predatory. It was also observed that, before opening the price bid, it would be premature to say that the petitioner has formed cartel with another tenderer.

33. In the case of Om Sainath Carting Vs. State of Gujrat and others, the Gujrat High Court in the facts of the said case held that, only because the bidders were using 46 wp 3393.16 mobile phones freely and were sending messages from the said mobile phones without any other significant material, cannot be considered a basis of cartel.

34. In the case of Director General Vs. M/s Escorts Ltd. referred to supra, the Competition Appellate Tribunal, New Delhi observed that, in absence of any direct evidence of cartel other than the circumstantial evidence and without there being even shred of evidence and proof of any plus factor, it is unsafe to conclude that the respondent indulged in any cartel.

35. The judgments of the Apex Court and the High Courts may not be read as euclid-therom and will have to be read in the context they were delivered, keeping in view the facts of the cases being considered. The agreement regarding formation of cartel need not necessarily be in writing. The same can be evinced by the circumstances on record. In fact, no particular form of agreement is necessary to conclude about formation of cartel. The word agreement is defined under the Competition Act 2002, which reads as under :

THE COMPETITION ACT, 2002

1.

2.

47 wp 3393.16 2(a)

2(b) "agreement" includes any arrangement or understanding or action in concert,--

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

36. The word 'agreement' is couched in a language in the said definition having a wide connotation. The phraseology in the definition of "agreement" includes arrangement, understanding or action in concert and whether such arrangement, understanding or action is formal or in writing.

The definition of the cartel and anti-competitive agreement is also wide. As such even from the circumstances on record, it can be viewed and concluded as to whether understanding is reached between the parties regarding formation of a cartel.

37. It is a matter of fact that, the commercial/financial bids of these petitioners were never opened and they were disqualified at the time of opening of technical bid. The contention of the petitioners is that, these petitioners could not have been disqualified on the ground of formation of cartel without opening financial bid, as without opening financial bid, it would not come to the knowledge of the respondent/corporation 48 wp 3393.16 that the bidding has been made in a manner that there is collusive bidding or bid rigging or that there is elimination or reduction in competition for the bid. It would be too premature to disqualify them on the ground of cartel.

38. The agreement as contemplated can be written, oral or implied. It is the cumulative circumstances, which are required to be considered while considering the decision making process. The corporation is required to arrive at subjective satisfaction based upon objective assessment of all the circumstances before it. The show cause notice is issued to these petitioners on prima facie satisfaction of the respondent/corporation that they have entered into a cartel. As far as petitioner in Writ Petition No. 3787 of 2016 is concerned, the only allegation made against it, even as per the show cause notice issued, is that, it had filled in the tender from the same I. P. address as that of petitioners in other two writ petitions and that same person has brought in the stamp paper. As far as stamp paper is concerned, the petitioner in Writ Petition No. 3787 of 2016 has purchased stamp at Dondaicha, whereas the petitioners in other two writ petitions have purchased stamp papers at Jalgaon. As such the only allegation against it is that, it has filled in the tender from the same I. P. address as the petitioners of other two writ petitions. Save and except the said allegations, there is no other averment made in the show cause notice or while rejecting the tender of the said petitioner in Writ 49 wp 3393.16 Petition No. 3787 of 2016. For the first time in the writ petition when the matter had come up before the Court, the respondent/corporation has come with the case that the

tenders filled in by the petitioners of all these three writ petitions are in the handwriting of one person i. e. one and the same person has filled in the tenders of all three petitioners. That was not a ground taken by the respondent/corporation while rejecting the tender of the said petitioner. Only because the said petitioner in Writ Petition No. 3787 of 2016 had filled in the tender from the same I. P. address, it would not be safe to disqualify him on the ground of formation of cartel without any further evidence or circumstance. No doubt, at the time of taking decision of disqualifying a tenderer from the further tender process on the ground of cartel a long drawn enquiry and investigation would not be contemplated as it is not a judicial or quasi judicial process, but an administrative function. The authority is required to be satisfied subjectively based on objective assessment of all the circumstances and facts before it. Merely a singular instance of a party filling in the tender from the same I. P. address as the other tenders would be too slender a consideration to come to a conclusion of the said person forming a cartel. It is a fact that the petitioner in the said Writ Petition No. 3787 of 2016 is resident of Dondiacha and has filled in tender from Jalgaon I. P. address. That fact alone would be stretching too far for coming to the conclusion of the said petitioner forming a cartel and thus disqualifying him.

50 wp 3393.16

39. In view of aforesaid discussion, as far as tender of the petitioner in Writ Petition No. 3787 of 2016 i. e. S. P. Jaisingani is concerned, it would not be acceptable that, there was reasonable suspicion in forming an opinion that, the said petitioner had entered into a cartel with other two petitioners. However, in the writ petition by way of affidavit, the respondent/corporation has come up with additional ground that, the tender of the said petitioner is also filled in, in the handwriting of the same person who filled in the tenders of other two petitioners in Writ Petition No. 3393 of 2016 and Writ Petition No. 3578 of 2016. So also this petitioner in Writ Petition No. 3787 of 2016 had some transaction with petitioner in Writ Petition No. 3578 of 2016 in the year 2014.

These grounds do not appear to have played any role in decision making process. The only ground was that, the petitioner/S. P. Jaisingani resides at Dondaicha and has filled in the tender from the same I. P. address at Jalgaon as is filled in by the other two tenderers. It would be stretching too far to contend that, only on the said ground a reasonable suspicion arises of the petitioner in Writ Petition No. 3787 of 2016 forming a cartel. If the other contentions raised by the respondent of the tender being filled in, in the same handwriting as that in the other two tenders, then the respondent/corporation could have been justified in forming a reasonable suspicion. However, in that case, the opportunity is not given to the petitioner in Writ Petition No. 3787 of 2016 to rebut and to explain the said contention, nor the 51 wp 3393.16 same appears to be material consideration in decision making process. The same cannot, as such be sustained. As observed above, even in case of petitioners in Writ Petition No. 3393 of 2016 and Writ Petition No. 3578 of 2016, the fact that the tenders are filled in, in the handwriting of the same person, so also the controlling authority of companies in both the writ petitions are real brothers does not appear to be material considerations in decision making process. The same certainly cannot be considered for the first time in the writ petition. If one person has filled in tenders of all the three petitioners, then certainly there is possibility that all the petitioners would know the rates at which the tenders are filled in by each one of them. That may be one of the circumstance to arrive at reasonable conclusion of formation of

cartel. For disqualifying from the process of tender on the ground of cartel, a reasonable suspicion arrived at by the authority on the basis of attending circumstances and which is not actuated with malice would be sufficient to disqualify the tender. However, when an action involving further consequences is to be taken, such as forfeiting of E.M.D. which is the consequence of disqualifying the said person from entering into any contract with the corporation for further years, a deeper probe would be necessary.

40. As far as the petitioner in Writ Petition No. 4349 of 2016 is concerned, his tender is rejected on the ground of submission of a false experience certificate. It is the contention 52 wp 3393.16 of the petitioner that he has submitted 900 pages documents showing the details of the quantum of transportation done and the same have not been considered. There was a controversy with regard to the certificate issued by the Orient Cement Company. The contention of the petitioner is that, the copies of the documents relied on by the corporation to negate the experience certificate issued by the Manager (Logistic) were not given to the petitioner. The said petitioner had approached the Hon'ble Chief Minister, wherein stay was granted to the further proceedings and enquiry was directed to be conducted. Thus in said back-drop we are considering the present case, however, as observed above, pursuant to the stay granted and the enquiry directed, there is nothing on record to show any further enquiry having been conducted. The respondent/corporation received the information about the stay on 11.02.2016 and on 12.02.2016 submitted a report. The work was estimated at Rs. 25 crores. The experience certificate was submitted by the petitioner of about Rs. 12 odd crores. The letters received by the respondent from the other officers of the Orient Cement Company stating about the work done by the petitioner for which payment is made by the company is to the tune of Rs. 04 crores and some quantities transported on non trade basis for which payment is made directly by the customers. The respondent has not rejected the tender of the petitioner on the ground that, it does not have experience of 25% or 50% of the estimated cost, but on the ground that he has submitted the experience certificate from an 53 wp 3393.16 unauthorized person of the company. The same is on the basis of the letters received from the Manager (Human Resources) and the Manager (Finance).

41. It is not clear, as to whether General Manager (Human Resources) would be competent person to comment about the certificate issued by the General Manager (Logistic).

Certainly, there is no letter from the Managing Director or Chief Executive Officer (C.E.O.). A better probe could have been made by the respondent/corporation about the authenticity of the experience certificate relied on by the petitioner, more particularly when the same was stayed by the Hon'ble Chief Minister and had directed enquiry. It could have also been counter checked with the balance sheet submitted before it and the documents filed by the petitioner before it and then could have come to the conclusion that, whether the petitioner has satisfied condition of experience or that whether he has transported 25% or 50% of the estimated quantity of the estimated cost. The Managing Director of the respondent/corporation had vide letter dated 29.02.2016 informed the Additional Chief Secretary (Marketing) that, further technical aspects are being considered with regard to experience certificate submitted by petitioner of Orient Cement and at present Corporation has not taken any decision and after considering all technical aspects further decision would be taken. As such, even on 29.02.2016 enquiry with regard to experience 54 wp 3393.16

certificate submitted by said petitioner was not concluded, however, report was already submitted on 12.02.2016. The documents submitted by the petitioner are not before this Court. As such, it would be appropriate for the respondent/corporation to reconsider the same.

42. All the petitioners have assailed the work order given to the respondent No. 4 on the ground that, the respondent No. 4 partnership firm which was constituted in the year 2006 stood dissolved on the death of one of its partner on 16.08.2013 and there is no clause in the partnership deed dated 08.08.2006, that, in case of death of one of the partner, the firm would continue and would not stand dissolved. Sec. 42(c) of the Indian Partnership Act lays down that subject to contract between the partners a firm is dissolved by the death of a partner. It is a fact that, in the partnership deed dated 08.08.2006, the clause does not exist with regard to continuation of the partnership business, on death of one of the partners. The judgments relied on by the respective parties stating that, unless there is a contract to the contrary, the firm stands dissolved on the death of partner, does not require any debate. The same is settled proposition of law. The petitioners are strangers to said partnership. It is the contention of the respondent No. 4 that, even after death of the partner, the respondents continued with the business. The agreement to the contrary need not be in writing. The same may be express or implied. The contract to the contrary can be 55 wp 3393.16 implied by the conduct of the partners. So also the same would be reflected from the balance sheet. The said documents are not placed before the Court to know as to the manner in which the said partners conducted the business. By conduct of the partners also the contract can be proved to be contrary. The objection regarding respondent No. 4/firm having been dissolved on the death of one of the partner was not the subject matter of the decision making process before the respondent/corporation and none of the parties had raised any objection to the tender of the respondent No. 4 on the said ground at any point of time during the decision making process and for the first time by filing a writ petition the same is agitated. The respondent/corporation as such was not required to examine the said aspect. The documents with regard to continuation of business of the respondent No. 4 even after death of partners are not before the Court. The manner in which the business was continued cannot be judged in absence of the documents. It is for the respondent/corporation to consider the same.

43. Conspectus of aforesaid, leads to following order.

(i) The rejection of tender of S. P. Jaisingani i. e. the petitioner in Writ Petition No. 3787 of 2016 is on a shaky ground and other grounds raised by the respondent/corporation about the said petitioner forming a cartel was not subject matter of decision 56 wp 3393.16 making process, as such the said decision of rejection of tender of the said petitioner cannot be sustained.

The respondent/corporation can consider the additional grounds raised against the said petitioner with regard to formation of cartel by giving opportunity to the said petitioner.

(ii) The additional grounds raised as far as petitioners in Writ Petition No. 3393 of 2016 and Writ Petition No. 3578 of 2016 were also not subject matter of decision making process and as such the respondent/corporation shall reconsider the said grounds and take decision afresh about the said petitioners forming a cartel.

(iii) So also in case of petitioner in Writ Petition No. 4349 of 2016, the respondent/corporation may consider the contentions of the petitioner in the light of the documents and take decision afresh. The Hon'ble Chief Minister had directed to conduct an enquiry and take decision vide his order dated 09.02.2016. The respondent/corporation would also consider the objection in case of the respondent No. 4.

(iv) The order disqualifying all the petitioners of their respective writ petitions including show cause 57 wp 3393.16 notices issued to them are set aside.

(v) We leave it to the respondent/corporation either to proceed with the present tender or issue fresh tender, if it so chooses. The respondent/corporation is at liberty to take decision afresh with regard to the petitioners of Writ Petition No. 3393 of 2016, Writ Petition No. 3578 of 2016 and Writ Petition No. 3787 of 2016 forming cartel, so also with regard to submission of experience certificate by petitioner of Writ Petition continuing with the partnership, on death of one of its partner.

(vi) The issuance of work order in favour of the respondent No. 4 is set aside with liberty as aforesaid.

(vii) The writ petitions as such are partly allowed to the extent as observed above.

(viii) The writ petitions are disposed of. No costs.

(ix) All civil applications are also disposed of.

Sd/-
[K. K. SONAWANE, J.]

Sd/-
[S. V. GANGAPURWALA, J.]

bsb/July 16