

Srsc Infra Private Limited vs National Highways Authority Of India on 5 July, 2021

Author: Jasmeet Singh

Bench: Vipin Sanghi, Jasmeet Singh

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on 19th May, 2

Pronounced on 05th July

+ W.P.(C) 3947/2021

SRSC INFRA PRIVATE LIMITED

Through: Mr. Saurabh Kirpal, Sr. Adv.

Ms. Ruchi Kohli, Mr .Yash Mishra, Ms.

Mishra, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Respondent

Through: Ms. Kaadambari, St. Counsel with

Ms. Mansi Sinha, Advs. for Resp./NHAI

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+ W.P.(C) 4173/2021

SRSC INFRA PRIVATE LIMITED

Through: Ms. Ruchi Kohli, Mr. Yash Mi

Srishti Mishra, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Respondent

Through: Ms. Kaadambari, St. Counsel

Mansi Sinha, Advs. for Resp./NHAI

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT

: JASMEET SINGH, J CM APPL. 12696/2021 - (EXEMPTION) in W.P.(C) 4173/2021 Allowed, subject to all just exceptions.

The application stands disposed of.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 W.P.(C) 3947/2021 & W.P.(C) 4173/2021 (COMMON GROUNDS) The above said two writ petitions raise similar issues and are, therefore, being dealt by a common judgment.

The brief common facts giving rise to filing of the writ petitions are as under:

1. The Petitioner Company, SRSC Infra Private Limited is a Private Ltd.

Company incorporated on 21.06.2018 with the intention and object of furtherance of the business of M/s Shobha Ram Sharma Contractor (hereinafter referred to as SRSC). SRSC is a sole proprietorship of Mr. Shobha Ram, having its registered office at AA-12, Chandan Van, Mathura-281001 and is engaged in the business of Construction/ Repair/ Maintenance of Road/ Bridge/ Cross Drain/ Building Work in the State of Uttar Pradesh, Haryana, Bihar, Madhya Pradesh, Rajasthan for National Highways Authority of India (NHAI), State Public Works Departments and various other organisations of repute on item rates, lump sum, percentage above or below, and EPC mode basis.

2. The Respondent herein is a government body which was set up by an Act of the Parliament - NHAI Act, 1988, for the development, maintenance and management of national highways.

3. Mr. Shobha Ram, the proprietor of SRSC was inducted as a Director of the Petitioner Company and has a beneficial ownership of WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 34,48,129 shares in the Petitioner Company.

4. Upon formation of the Petitioner Company, a Business Transfer Agreement (hereinafter referred as the BTA) dated 03.08.2019 was entered into between the Petitioner Company and Mr. Shobha Ram for selling, transferring, assigning, conveying and delivering business of SRSC to the Petitioner Company.

5. In accordance with the terms and conditions stipulated under the BTA, all saleable assets and transferable liabilities were to be transferred from SRSC to the Petitioner Company on or before the closing of the said Agreement.

6. The goodwill of the business along with the necessary experience in the form of previous works done for various organisations, along with necessary technical know-how were to be transferred on or before the closing of the BTA, and the same was not to be used by SRSC for the purpose of new tender/ contract. However, SRSC may use the same for new tenders/ contracts only in the event where SRSC has license/ registration mandatory for the said tender/ contract and which has not yet been procured by the Company.

7. As per the BTA, the last date for giving effect to all the terms and conditions agreed upon was 30.09.2020. However, due to outbreak of the Novel Coronavirus pandemic throughout the country, effective transfer of saleable assets and transferable liabilities could not take place completely.

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8. Having noted the common facts, it may now be prudent to discuss the peculiar facts of each petition.

W.P.(C) 3947/2021 & CM APPL. 11863/2021- (STAY)

1) In this case, the Petitioner has substantively prayed as under:

"PRAYER In the light of the facts and circumstances stated hereinabove it is most humbly prayed that this Hon'ble Court may be graciously pleased to:

a) Quash the Result of Technical Evaluation dated 17.03.2021 wherein the Petitioner Company has been declared ineligible, saying that the Result of Technical Evaluation is violative of Article 14, 19(1)(g) & against principles laid down in the Constitution of India, 1950; and

b) Issue a writ of mandamus or any other similar writ, order or direction directing the Respondent to consider the Representation of the Petitioner Company dated 18.03.2021; and

c) Issue a writ of mandamus or any other similar writ, order or direction restraining the Respondent from opening of the Financial Bid before giving due consideration to the Representation of the Petitioner Company dated 18.03.2021 in a time bound manner, so that the project can be started as soon as possible".

2) The case of the Petitioner in the pleading and as argued before us is WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 that the Respondent floated a tender bearing ERPOC Tender No. NHAI/UP/2018-19/709AD/Pkg-IV with Tender ID - 2018_NHAI_19177_1-reg, calling for bids for the upgradation of Bijnor - Kotwali Section of NH-709 AD from Km 153.660 to Km 175.280 on EPC Mode (hereinafter called "RFP").

3) The Petitioner participated in the tender and submitted its bid. The last date for submission of the bids was 09.03.2021.

4) The Respondent vide email dated 12.03.2021 sought clarification from the Petitioner with respect to responsiveness, technical capacity, financial capacity and bid capacity of the Petitioner Company. The Petitioner Company on 13.03.2021 replied to the queries of the Respondent.

5) On 17.03.2021, the result of technical evaluation was declared and the Petitioner Company was pronounced ineligible with respect to only one criteria of "net worth" [Clause 2.2.2.3(i) of RFP].

6) Clause 2.2.2.3 (i) of Request for Proposal (RFP) deals with Financial Capacity and reads as under:

"2.2.2.3 Financial Capacity:

(i) The bidder shall have a minimum Net Worth (the "Financial Capacity") of Rs.12.58 crore (Rs. twelve crore and fifty eight lakhs only) at the close of the preceding financial year".

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7) The Petitioner has submitted and argued before us that the net worth of the Petitioner Company is aggregating to Rs. 36.46 Crores at the close of the preceding financial year, as opposed to Rs. 9.55 crores wrongfully computed by the Respondent.

8) The case of the Petitioner as set up in the petition as well as submitted and argued before us, is that the net worth of the Petitioner Company cannot be computed by treating it as a separate entity from SRSC, and both SRSC and the Petitioner Company are one single entity for all intents and purposes. Thus, the net worth of SRSC ought to have been added to the net worth of the Petitioner to arrive at the correct net worth of the Petitioner for assessing the financial capacity of the Petitioner.

9) The Respondent in its technical evaluation dated 17.03.2021, has accepted the Petitioner Company to be eligible on all criteria including the experience criteria by taking into account the experience of SRSC, except on the requirement of net worth.

10) The case of the Petitioner is that the Respondent cannot treat SRSC and Petitioner as one entity for certain purposes, and as two separate entities, for computation of the net worth.

11) The Petitioner has further argued that the relevant documents pertaining to net worth of the Petitioner Company being Rs. 36.46 Crores as confirmed by the Chartered Accountant in its certificate, were duly submitted by the Petitioner with the tender.

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12) The Petitioner has also taken us through a list of tenders wherein the Petitioner company has been duly qualified - on the same eligibility criteria on which the Respondent has declared the Petition Company as ineligible - effectively considering the Business Transfer Agreement to have been concluded.

13) The Petitioner has further argued that the acts of the Respondent are violative of Article 14 and 19 of the Constitution of India, as well as amounts to pick and choose policy. The respondent, to suit its own ends, has conveniently bifurcated the Petitioner Company on account of its own mis-consideration.

14) The Respondent, on the other hand, has argued that SRSC and the Petitioner Company are still two separate legal entities and existing separately. Thus, the net worth of the proprietary firm SRSC cannot be added to the net worth of the Petitioner.

15) The Respondent has submitted and argued that the Petitioner - as a bidder, had to fulfil the eligibility criteria laid down in the technical specifications under the first part of technical bid, and only after fulfilling the said criteria, the Petitioner's bid could be considered for the second part i.e. financial bid evaluation. In this regard, Clause 1.2.1 of the RFP was brought to our notice which reads as under:

"Brief description of Bidding Process:

1.2.1 The Authority has adopted a single stage two part system (referred to as the "Bidding Process") for selection of the Bidder for award of the Project. Under this process, the bid WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 shall be invited under two parts. Eligibility and qualification of the Bidder will be first examined based on the details submitted under first part (Technical Bid) with respect to eligibility and qualifications criteria prescribed in this RFP (the "Bidder", which expression shall, unless repugnant to the context, include the members of the Joint Venture). The Financial Bid under the second part shall be opened of only those Bidders whose Technical Bids are responsive to eligibility and qualifications requirements as per this RFP." (emphasis supplied)

16) The Respondent has also argued that the stand of the Petitioner to be eligible and qualified, owing to the execution of the BTA dated 03.08.2019 is misconceived. Reliance is placed on the BTA dated 03.08.2019 and, more particularly, upon recital Clause E, and the conditions contained in the BTA in Clause 4(Conditions Precedent), Clause 5(Conduct Prior to Closing) and Clause 6(Closing). The Respondent has further argued that a combined reading of all the clauses shows that the takeover of SRSC was not complete at the close of the preceding financial year.

17) As per the Respondent, the documents filed by the Petitioner, namely, the separate Balance Sheet, separate Net Worth Certificate reveal separate financial and legal existence of two entities, and hence, the Respondent correctly considered the Petitioner Company and SRSC as two separate entities. Respondent has further pleaded and argued that as per the Petitioner's own admission, the BTA dated 03.08.2019 was not concluded in due time and the transfer of business - as mentioned in Clause 6 of the BTA - remained unfulfilled.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 W.P.(C) 4173/2021 & CM APPL. 12695/2021- (STAY)

1) As for W.P.(C) 4173/2021, the Petitioner has substantively prayed as follows:

"

a) Quash the Result of Technical Evaluation dated 23.03.2021 wherein the Respondent disqualified the Joint Venture and the Petitioner Company was declared as ineligible for the bidding process; saying that the Result is violative of Article 14, 19 (1)(g) & against principles laid down in the Constitution of India, 1950; and

b) Issue a writ of mandamus or any other similar writ, order or direction restraining the Respondent from opening of the Financial Bid; and

c) Issue a writ of mandamus or any other similar writ, order or direction directing the Respondent to re-consider the technical bid submitted by the JV."

2) This matter concerns another bid of the Petitioner Company. The Respondent had floated the Tender bearing Tender Reference Number: NHAI/Raebareli-Jagdishpur/NH-330A/EPC/2020 and Tender I.D. 2021_NHAI_67809_1 floated for two/four laning of Raebareli - Jagdishpur Section of NH - 330A from K.M.0.000 to K.M.47.800 (Design Length - 46.020 K.M.) including Jagdishpur Bypass with NH - 731 (Old NH - 56), in the state of Uttar Pradesh on EPC Mode under NH(O) (hereinafter called "RFP").

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3) The Petitioner Company participated in the above-mentioned Tender as the Lead Member along with one other Company as a Joint Venture, vide their technical and financial bid.

4) The Respondent had sought clarifications from the Joint Venture, on 18.03.2021, for carrying out the Technical Evaluation of the bid submitted. The clarifications were with respect to the Lead Member details; details of Eligible Products; Financial Capacity of the Bidder, Bid Capacity etc. The Petitioner Company states that it duly answered each query on 19.03.2021 and the Respondent accepted the response without any further questions.

5) The Respondent declared the result of the technical evaluation on 23.03.2021, wherein, the Joint Venture - pursuant to the Clause 2.2.2.3 (i) of RFP, was disqualified pursuant to the Clause 2.2.2.4 (i) of RFP.

6) It was stated in the Result that the Lead Member i.e., the Petitioner Company has a net worth of Rs.9.54 Crore only, which is less than 60% of the financial capacity as per Clause 2.2.2.4 (i) of RFP. Therefore, it was stated that the Lead Member does not meet the eligibility Criteria of Net Worth with its net worth of Rs. 9.54 Crore only. Hence, they were not considered for the next stage of Bidding.

7) Clause 2.2.2.3 (i) and Clause 2.2.2.4 (i) of RFP deal with the aspect of financial capacity, and are iterated below:

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 "2.2.2.3
Financial Capacity:

(i) The bidder shall have a minimum Net Worth (the "Financial Capacity") of Rs.25.92 Crore (Rs. Twenty Five Crore and Ninety Two Lakh only) at the close of the preceding financial year".

"2.2.2.4 In case of a Joint Venture:

(i) The Bid Capacity, Technical Capacity and Financial Capacity of all the Members of Joint Venture would be taken into account for satisfying the above conditions of eligibility.

Further, Lead Member shall meet at least 60% requirement of Bid Capacity, Technical and Financial Capacity as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3 and each of other JV members shall meet at least 20% requirement of Bid Capacity, Technical and Financial Capacity individually as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3. For avoidance of doubt it is further clarified that the Joint Venture must collectively and individually satisfy the above qualification criteria i.e. JV shall cumulatively/collectively fulfill the 100% requirement.

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8) The Petitioner Company contends that the minimum Net Worth required for the Lead Member was 60% of Rs.25.92 Crores, which amounts to Rs.15.552 Crores, whereas as on 31st March 2020, the Lead Member (Petitioner Company) had a net worth of Rs.36.46 Crores - if the net worth of SRSC were to be added to the net worth of the Petitioner - which is way beyond the required margin. Not only this, the Other Company/ JV partner had a net worth of Rs.43.33 Crores, which is also way beyond the required margin which was Rs.5.184 Crores (20% of Rs.25.92 Crores). Therefore, ousting the Petitioner Company by the Respondent even after due fulfilment of the required eligibility criteria is beyond comprehension of the Petitioner Company.

9) The Petitioner Company argued that the Respondent, for the purpose of determining the Net Worth of the Petitioner Company, is conveniently looking at it as a Separate Entity from SRSC. However, when it comes to the other relevant criteria of experience, both SRSC and the Petitioner Company are being looked at as a single Entity.

10) The Petitioner Company also sent a letter dated 25.03.2021 to the Respondent clarifying its stand with respect to the criteria of Net- Worth on which the JV has been disqualified.

11) The Respondent, in this case as well, pursues the same line of reasoning as it did in W.P.(C) 3947/2021, and argued that the Petitioner Company and SRSC are separate legal entities, as the BTA dated 03.08.2019 was not concluded in due time and the transfer of WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 business/ assets as mentioned in Clause 6 of the BTA had not been concluded. Thus, the net worth of SRSC cannot be clubbed with the net worth of the Petitioner for assessment of the Petitioner's financial capacity as on 31.03.2020.

W.P.(C) 3947/2021 & W.P.(C) 4173/2021 (DISCUSSION) Since the core issue in both the cases is the same viz. whether the net worth of SRSC could be added to the net worth of the Petitioner for the purpose of evaluating the Financial Capacity of the Petitioner, we proceed to deal with the said issue.

1) Mr. Kirpal, firstly, placed reliance on the judgment of the Gauhati High Court in G.R. Engineering Works Ltd. vs. Oil India Ltd. and Ors.1, where it has been held:

"16. While considering the question as to whether the experience of M/s. Fabtech Engineers could have been counted in favour of the respondent No. 3, it is important to bear in mind that there is no provision in law, which bars a company from taking over the business of any proprietary concern or of a registered or unregistered firm. In the absence of any law barring the taking over of the business of a firm by a company, interpretation of law has to be consistent with the view, which would help strengthen the commercial relationship and lead to growth of the economy. It also needs WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 to be borne in mind that the taking over of the business of a firm by a company, as in the present case, is, in the ultimate analysis, a commercial transaction. It is, therefore, necessary that the facts are considered, as would be considered, by a person, who is in business."

2) Additionally, the Petitioner relied on the view taken by High Court of Andhra Pradesh in M.V.V. Satyanarayana vs. Engineer-in-Chief (R and B) and Ors.2, wherein the court held that:

"23. In this context let me examine the issue from another angle. Supposing the firm was a proprietary concern with the petitioner as a sole partner, in such a case if the petitioner filed the tender in his personal name and filed the income tax return of the firm as proprietary concern, would the Respondents have rejected the tender of the petitioner? The answer should be an emphatic 'no'. This being so, respondents could not have rejected the petitioner's tender merely because he filed the income tax return standing in the name of the firm."

3) Based on these precedents, Mr. Kirpal contends that the action of the Respondent to assess the Financial Capacity of the Petitioner Company separately from the proprietorship SRSC - that it has absorbed, is unjustified and baseless. The proprietorship, SRSC has been duly taken (2007) 3 Gauhati Law Reports 899.

2007 SCC Online AP 911/ (2008) 1 ALT 715.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 over by the Petitioner Company and, therefore, for meeting the criteria, the financial capacity was to be considered in totality of that of the sole proprietorship SRSC, and the Petitioner Company.

4) The Petitioner also relied on the decision of the Supreme Court in New Horizons Ltd. v. Union of India³, where it was observed:

"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 the tender is submitted in the name of the reorganised (1995) 1 SCC 478.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted."

5) Additionally, the Petitioner relied on the CRRC Corpn. Ltd. v. Metro Link Express for Gandhinagar & Ahmedabad (Mega) Co. Ltd.⁴ case, wherein it was held, "36. As recorded in Consortium of Titagarh Firema Adler S.P.A. [Consortium of Titagarh Firema Adler S.P.A. -- Titagarh Wagons Ltd. v. Nagpur Metro Rail Corpn. Ltd.(2017) 7 SCC 486] , the appellant Corporation is a Government- owned entity with 100% wholly owned subsidiaries as a (2017) 8 SCC 282.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 composite unit, so much so that the experience of any one of its constituent 100% wholly owned subsidiaries would be

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

6) As for the Respondent, the Respondent has relied on the Supreme Court judgment that is *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & Anr.*⁵, wherein, the court by relying on *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*⁶ observed that "the decision making process of the employer or owner of the project in 2016 (16) SCC 818.

2016 (8) SCALE 99/ (2016) 8 SCC 622.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone.....In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous."

The Supreme Court also observed the following:

"14. We must reiterate the words of caution that this Court has stated right from the time when *Ramana Dayaram Shetty v. International Airport Authority of India*⁶ was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. In this context, the use of the word 'metro' in Clause 4.2 (a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 itself is not a reason for interfering with the interpretation given."

7) Then the Respondent stressed upon the necessity of complying with essential tender conditions by relying on the judgment, Vidarbha Irrigation Development Corporation v. M/s Anoj Kumar Garwala 7, wherein it was held that, "17) It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

8) The Respondent also relied on West Bengal State Electricity Board v.

Patel Engineering Co. Ltd. and Ors.8, where the Supreme Court observed the following:

"24.....The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a 2019 SCC OnLine SC 89.

(2001) 2 SCC 451.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 causality. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest."

9) We have heard Mr. Saurabh Kirpal, Leaned Senior Counsel for the Petitioner and Ms. Kaadambari, Learned Standing Counsel for the Respondent and have given our due consideration to the submissions, the documents placed on record and the case laws cited before us.

10) The core issue raised in the present petition is whether the decision of the Respondent in the matter of computation of the net worth of the Petitioner Company, not to add the net worth of SRSC - a proprietorship concern, even though they have entered into the BTA dated 03.08.2019 is an arbitrary, unreasonable or malafide decision calling for interference by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India. For this, it is essential to examine the scope and interpretation of the BTA dated 03.08.2019, and WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 its implementation and effect. If the view taken by the Respondent is blatantly contrary to the plain meaning and interpretation of the terms of the BTA, the same may call for interference. On the other hand, if the view taken, by the Respondent is a plausible view, interference may not be called for. In order to answer the issue, it will be relevant to quote some relevant Clauses of the BTA. The "Seller" is SRSC and the "Company" is the Petitioner.

11) Clause D of the Recital reads as under:

D. The Seller is desirous of selling, transferring, assigning, conveying and delivering to the Company, and the Company is desirous of purchasing and acquiring an undertaking comprising of Saleable Assets (as more particularly described under Schedule F of this Agreement) and Transferable Liabilities (as more particularly described under Schedule G of this Agreement) engaged in the Business (hereafter referred as "Business Undertaking") as a going concern on a slump exchange basis in consideration of equity shares of the Company (hereafter referred as "Transaction") with the object of transferring the qualifications, experience, financial strength, technical expertise attained by Seller through the Business and the Business undertaking.

12) Clause E of the Recital reads as under:

E. On consummation of the Transaction, the Seller shall cease to operate the Business for the purpose of participating in any new tender/ bid called by any organization or authority, except where WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 the Seller holds in the name of Business any license/ registration which has not yet been procured by the Company and is a mandatory requirement for bidding for the said tender/ bid.

13) Clause 2.1 of the BTA reads as under:

2.1 Transfer of Business: The Seller hereby agrees to sell, assign, convey and transfer the Business as a going concern to the Company, and the Company agrees to purchase and acquire the Business Undertaking which comprises of Saleable Assets (as more particularly described under Schedule F of this Agreement) and Transferable Liabilities (as more particularly described under Schedule G of this Agreement) as a going concern, free from encumbrances together with goodwill of the Business in accordance with the terms of this Agreement, at closing. Notwithstanding the above or any other terms or condition of this Agreement except the Saleable Assets and Transferable Liabilities, no other asset (saleable or otherwise) and/ or liabilities (transferable or otherwise) of Business shall be deemed to be sold, transferred, assigned, conveying and delivered under the terms of this Agreement.

14) Clauses 4, 5 and 6 read as under:

4. CONDITIONS PRECEDENT:

4.1 The obligations of the company to proceed with the Closing of the transaction contemplated under this WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 Agreement shall be subject to the fulfilment on or before the Closing, of each of the condition precedent set out Clause 4.2 of this Agreement.

4.2 The following conditions shall constitute as condition precedent:

4.2.1 The Ancillary Agreements shall have been duly executed, with effect from closing date by the respective Parties, including all such agreements, deeds or such other documents as may be deemed necessary by the Parties for the purpose of transfer of Business Undertaking from the Seller to the Company.

4.2.2 The representations and warranties of the Seller contained in the Agreement shall be true in all respects at and as of the Closing with the same effect as if made at and as of the Closing.

4.2.3 The Seller shall have performed and complied with all agreements, obligations and conditions contained in this Agreement, that are required to be performed or complied with by it on or before the Closing.

4.2.4 No action, suit, investigation, or Proceeding by any person or Government Authority has been instituted or threatened to restrain, prohibit, invalidate or otherwise challenge the Transactions contemplated under this WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 Agreement.

4.2.5 No event or circumstance shall have occurred or shall be likely to occur which has or is likely to have a Material Adverse Effect on the Business or Business Undertaking.

4.2.6 The Seller shall his best efforts to cause all the Employees to agree to accept employment with the Company, effective from the Closing. The Seller shall further make best endeavours to ensure that the Employees accepting employment with the Company effective from Closing shall consent to the termination of their employment with the Seller and commencement of employment with the Company, by executing such documents as may be required by the Company.

4.2.7 The operations of the Business shall have been conducted in the Ordinary Course of Business up to and including Closing.

4.2.8 The Seller shall have made or stand willing to make all the deliveries to the Company described in Schedule D of the Agreement.

4.2.9 The lender Bank/ Person/ Institution holding charge over the Saleable Assets forming a part of the Business Undertaking being transferred herein, shall be WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 approached for a no objection certificate in respect of the transaction contemplated under this Agreement.

4.3 Notwithstanding anything mentioned hereinabove, the Company, at its sole discretion, have the right waive any or all of the condition precedents mentioned in Clause 4.2 of this Agreement.

5. CONDUCT PRIOR TO CLOSING:

5.1 The Seller agrees that from the Commencement date till the Closing, the Seller shall:

5.1.1 ensure that the Business is carried on in the Ordinary Course of Business in substantially the same manner as heretofore conducted;

5.1.2 timely render the payment of any debts and dues (statutory or otherwise) accrued in respect of the Business Undertaking before the Closing.

5.1.3 ensure the timely performance of all contractual or other obligations in respect to the Business Undertaking;

5.1.4 preserve intact the Business Undertaking, which includes but is not limited to keeping available the services of the present Employees and preserving relationship with, customers and lessors, in order to ensure that the ongoing ability to provide services shall be unimpaired at the WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 Closing.

5.1.5 assist in smooth transitioning of the Business Undertaking from the Seller to the Company.

6. CLOSING:

6.1 Subject to the fulfilment of the Conditions Precedent set forth in Clause 5 hereto and the receipt of the Deliverables by the Company set forth in Schedule "D", the closing shall take place at Mathura or any other place as mutually agreed by the Parties in writing, on 30th September, 2020 or on any other date as mutually agreed by the Parties in writing on.

6.2 At the Closing:

6.2.1 the seller shall transfer, assign and deliver the Business Undertaking to the Company, free from all encumbrances.

6.2.2 the Company shall render the Purchase Consideration to the Seller, by way of delivering share certificates and undertaking other compliances in accordance with the Companies Act, 2013 and ancillary Rules 6.2.3 all of the original books and records in respect to the Business Undertaking shall be delivered to the registered

address of the Company.

6.2.4 the Seller shall make the deliveries listed at Schedule "D"

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 to the Company.

15) A bare perusal of the above Clauses of the BTA read in conjunction clearly leads to the conclusion that as per Clause 6 of the BTA, only upon receipt of the deliverable, the closing was to conclude. At the closing, SRSC was to transfer, assign and deliver the business undertaking to the Petitioner Company free from all encumbrances, and only then, the Petitioner Company had to render the purchase consideration by delivering the entire share certificate to SRSC. Till the closing takes place, the Petitioner does not get vested with any right, title and interest in the assets of SRSC which were to be transferred only on the date of closing.

16) Conditions precedent and the conduct prior to closing were an essential part for the closing of the transaction contemplated in the BTA. Admittedly, the same has not been done. Thus, the assets of SRSC have not yet vested in the Petitioner Company. Petitioner has claimed that on account of the lockdown due to the COVID-19 pandemic, the time lines could not be adhered to. Be that as it may, the fact remains that the assets of SRSC did not get transferred, and are not entirely owned by the Petitioner Company till the end of the preceding financial year ending on 31.03.2020.

17) The Respondent on 12.03.2021 sought clarification as to the existence of SRSC. The Petitioner responded as under:

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Clarifications:

a. This is to certify that M/s Shobha Ram Sharma Contractor is ceased to exists for all new tendering purposes however, ongoing works which was awarded in the name of a M/s Shobha Ram Sharma Contractor were completed by M/s Shobha Ram Sharma Contractor b. Further, entity of M/s Shobha Ram Sharma Contractor will exist from the Income Tax and GST point of view.

18) Thus, we are of the view that the stand taken by the respondent that the takeover of SRSC by the Petitioner was not complete on the relevant date i.e. at the close of the preceding financial year, which was 31.03.2020, is a plausible and reasonable view. As per the BTA dated

03.08.2019, the following transactions were yet to be completed - even on the date of tender submission (which was well after the end of the preceding financial year on 31.03.2020) - in order to close the BTA dated 03.08.2019 and to vest the Petitioner Company with the entire business of SRSC-

a. As per the Petitioner's own case set up in para 5(v) of the petition, effective transfer of saleable assets and transferable liabilities could not take place completely, on account of outbreak of Novel Corona Virus. This is enlisted as a deliverable as per Clause D of the recital. Clause 4.1 (Conditions Precedent) clearly states that 'the obligations of WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 the Company to proceed with the Closing of the transactions contemplated under this Agreement shall be subject to the fulfilment on or before the Closing, of each of the condition precedent set out Clause 4.2 of this Agreement.' All the deliverables as described in Schedule D had to be made/ executed/ completed.

Schedule "D" of the BTA is as follows:

"SCHEDULE "D"

DELIVERABLES TO COMPANY AT CLOSING

1. A certificate signed by the Seller stating that the representations and Warranties of Seller are true and correct as of the Closing.
2. A certificate signed by the Seller stating that the conditions precedent have been fulfilled prior to the Closing.
3. All of the Transaction Agreements duly signed by the Seller."

Admittedly, as pointed out by the Respondent, and in view of the clear admission in para 5(v), it is clear that conditions precedent have not been fulfilled and hence, there is no closure on the date of end of the preceding financial year i.e. as on 31.03.2020.

WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 b. Clause 6.1 clearly states that the Closing shall take place subject to the Conditions Precedent set forth in Clause 5 and the receipt of the Deliverables by the Company set forth in 'Schedule D'. Therefore, the Agreement was not concluded in due time and the Petitioner Company has not provided the Respondent with proof of transfer and completion as on 31.03.2020.

c. The Petitioner has further admitted that only a partial asset transfer has been done as on 01.01.2020 amounting to Rs.8,39,64,731/-. The Petitioner has further admitted that the transfer of entire asset and/ or removal of lien on the assets as per the terms of the BTA could not be completed due to Corona Virus pandemic.

d. As pointed out by the Respondent, under Clause 9 of the BTA i.e. 'Conditions Subsequent', the seller was duty bound to issue letters to all appropriate Governmental authorities/ organizations intimating them of the Transfer of Business undertakings to the company after 30 days of the closing. However, the Respondent Authority has not received any such letter.

e. As pointed by the Respondent, under 'Schedule F.6', Licenses, etc were also to be finalized at the time of Closing, which both, the Petitioner Company and SRSC have failed to deliver and transfer.

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19) For the above given reasons, we are of the view that the Respondent's finding that the closing of the BTA has not taken place, is plausible and reasonable. The Petitioner Company contends that through the BTA, it intends to take over the businesses of the proprietorship concern SRSC which includes various assets, liabilities, licenses, customers, policies, employees, etc to become eligible and a qualified bidder. Therefore, it is pivotal for the Petitioner Company to get vested with all the assets and achieve the closing, which the Petitioner Company has failed to do before the relevant date.

20) We are called upon to examine - within the limited scope of the enquiry that we undertake in such cases, whether the Respondent's actions are justified and reasonable. The purpose of laying down the minimum net worth criteria for the bidder is to ensure that - looking to the nature and extent of financial involvement in the tendered works - the bidders should have a certain minimum financial standing and capacity. Since the Petitioner does not actually own the assets, that belong to SRSC - a proprietorship concern, and the transfer of those assets has legally not been completed, the Respondents were, in our view, completely justified in not taking into account the possibility of the assets of SRSC getting transferred to the Petitioner in future. The Respondents had put a cut-off date i.e. the close of the previous financial year, to evaluate the net worth of the bidder, and they were justified in computing the Petitioner's net worth as on 31.03.2020. The approach adopted, and the view taken by the Respondent cannot WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 be termed as either unreasonable, or arbitrary or mindless. The Respondents' decision is based on consideration of relevant and germane materials. It is based on a sound approach, and does not call for interference. The Petitioner has not pleaded, or made out a case of malafides, nor advanced any submission in that regard.

21) The reliance of the Petitioner on the judicial pronouncements is also misconceived and the judgments relied upon are clearly distinguishable. There can be no quarrel with the legal propositions pronounced by the 4 judgments relied on by the Petitioner, however, the facts of this case are clearly distinguishable from the facts of the cases relied upon by the Petitioner. In *New Horizons Ltd. v. Union of India* (Supra), the joint venture between the Indian company and the foreign-based company was already in existence and the joint venture participated in the tender process. In the case at hand, we have already concluded that the BTA dated 03.08.2019 has not yet attained finality and hence, reliance on the *New Horizon* (Supra) is misconceived.

22) In *CRRC Corpn. Ltd. v. Metro Link Express for Gandhinagar & Ahmedabad* (Mega) Co. Ltd(Supra), the appellant corporation was a government owned entity with 100% wholly owned subsidiaries as a composite unit. Hence, it was held that the experience of a constituent, being 100% wholly owned subsidiary, will be construable as the experience of the appellant company. In the present case, the takeover of SRSC by the Petitioner company is yet to conclude. Thus, this decision is also of no avail to the Petitioner.

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23) In the judgment of the High Court of Andhra Pradesh, M.V.V. Satyanarayana vs. Engineer-in-Chief (R and B) and Ors.(Supra), the Petitioner was the managing partner of the firm and the income tax return reflected the turnover achieved by the Petitioner in his individual name. The Court held that the experience of the firm can be construed as the experience of the partner. This is not the situation in hand.

24) In G.R. Engineering Works Ltd. vs. Oil India Ltd. and Ors. (Supra), the business of the partnership was duly taken over by the private limited company. All the assets, liabilities, and dues became assets, liabilities and dues of the private limited company. The partnership firm was dissolved, the works order of the partnership firm were modified as the works order with the private limited company. In the present case, as already found in paras above, the transactions required to fully effectuate the BTA dated 03.08.2019 are yet to be completed.

25) The argument of the learned Senior Counsel for the Petitioner by placing reliance on Section 18(3) of Goods and Services Act, 2017 and Section 47 of Income Tax Act, 1961, does not persuade us to hold otherwise. The Respondent is not required in law, or otherwise, to consider the provisions of the Goods and Services Act, 2017 or the Income Tax Act, 1961 in order to come to the conclusion that the takeover of SRSC by the Petitioner was not complete.

26) The financial capacity is an essential condition of the RFP as stated in WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41 Clause 2.2.2.3(i) for tender bearing ERPOC Tender No. NHAI/UP/2018-19/709AD/Pkg-IV with Tender ID - 2018_NHAI_19177_1-reg and Clause 2.2.2.3(i) and Clause 2.2.2.4(i) for Tender bearing Tender Reference Number:

NHAI/Raebareli-Jagdishpur/NH-330A/EPC/2020 and Tender I.D. 2021_NHAI_67809_1 and the same needs to be complied with. In Vidarbha Irrigation Development Corporation v. M/s Anoj Kumar Garwala(Supra,) the Supreme Court has stated that there can be no condonation of non-compliance with an essential condition of a tender. In West Bengal State Electricity Board v. Patel Engineering Co. Ltd. and Ors.(Supra), the Court held that the precise reason for issuing rules/instruction is to ensure that rule of law is not a casualty.

27) As regards the contention of the Petitioner that SRSC and the Petitioner have been considered for certain purposes as one entity and separate entities for net worth parameter, also does not find favour with us. Firstly, even if the Respondent has taken SRSC and Petitioner Company as one entity for the purposes of experience, personal capabilities, equipment capabilities, litigation history, qualification, etc., the Petitioner and SRSC are not one entity in terms of the net worth parameters as already observed by us, above. SRSC and Petitioner are two separate entities and takeover is yet not complete. Hence, no fault can be founded with the actions of the Respondent in considering SRSC and petitioner as two separate entities for net worth parameters. At best, considering SRSC and the WP(C) 3947/2021 & WP(C)

4173/2021 Signing Date:08.07.2021 09:31:41 Petitioner as one entity for certain purposes can be a mere aberration, which cannot give a right to the petitioner to be considered as one entity along with the SRSC for the purposes of net worth parameter.

28) Petitioners claim that SRSC and Petitioner have been considered as one entity for certain tenders is also incorrect, as has been stated by the Respondent in the Counter Affidavit. As regards the list submitted by Petitioner, wherein the Petitioner has been duly qualified in tenders on the same eligibility criteria, the Respondent has categorically stated on affidavit that most of the tenders were either not awarded to the Petitioner, or were not pertaining to the Respondent/NHAI. The only tender which the Respondent awarded to Petitioner was 'NIT No. 107/RO-Patna/NHAI/2020-21'. The same was awarded as the net worth criteria in the said tender was Rs. 5.94 crores which the Petitioner duly met.

29) Having held that the decision of the respondent - that the Petitioner does not meet the financial capacity/net worth condition, is reasonable, plausible and justified, we are not inclined to interfere with the same.

30) Consequently, we find that the rejection of the Petitioner's bids, by the Respondents:

1. on 17.03.2021 for tender bearing ERPOC Tender No. NHAI/UP/2018-19/709AD/Pkg-IV with Tender ID -

2018_NHAI_19177_1-reg, and WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41

2. on 23.03.2021 for Tender bearing Tender Reference Number:

NHAI/Raebareli-Jagdishpur/NH-330A/EPC/2020 and Tender I.D. 2021_NHAI_67809_1 on account of non-compliance with the essential conditions of the tender, to be valid and correct.

The writ petitions are, therefore, dismissed being devoid of merit, with costs quantified at Rs. One Lakh each to be deposited within two weeks with the Delhi High Court Bar Association.

JASMEET SINGH, J VIPIN SANGHI, J July 05, 2021 / 'ms' WP(C) 3947/2021 & WP(C) 4173/2021 Signing Date:08.07.2021 09:31:41