

HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

WRIT PETITION No.14741 of 2015

ORDER :

In this writ petition, the petitioner herein questions the action of the 2nd respondent in considering the bid of the 3rd respondent and declaring it as the successful tenderer on 16.05.2015 in respect of the notified works, as arbitrary, illegal and unconstitutional.

2 . It is stated that the 2nd respondent has issued a e-Tender Notice, (hereinafter referred to as "the NIT") in respect of the works pertaining to Drilling, Excavation, Loading, Transportation, Dumping, Spreading & Levelling etc., of 1896.286 LBCM of overburden (i.e., 1863.006 LBM of In-Situ OB and 33.280 LCM of Coal) by using HEMM including Additional works viz., 6.00 lakh Drilling Meterage, 1500 Shovel Hours, 1500 Dozer Hours and De-silting of 3 LBCM from 2 No's of Cheruvu/Tanks at RKOCP, Mandamarri area for a period of 72 months – Enquiry No: E111300503, dated 12.03.2015. The tenders submitted were opened on 16.05.2015 at 5-00 p.m., and out of 12 bids received, one was disqualified technically and, the other 11 price bids were opened and rankings were given, whereby the 3rd respondent was ranked as the lowest L-1 and the petitioner herein was ranked as the lowest L-2. While the 3rd respondent's bid was for Rs.1,021.00 Crores, the petitioner's bid was for Rs.1,062.00 Crores.

3. It is submitted that the petitioner herein is a Joint Venture Company, of which the bidder is a constituent and the same was confirmed under Ex.P-3, letter No.PSIV/TECH/2367, dated 27.04.2015 of the petitioner, which has participated in the bid and submitted bank guarantee towards the Earnest Money Deposit (EMD). The petitioner states that the 3rd respondent is disqualified as it does not fulfil the minimum experience and the turnover requirement, as mentioned

in Clauses 1.14 and 2.7, respectively, of the NIT and in support of that, the petitioner submits that the 3rd respondent was incorporated only on 19.02.2014, however, it is unilaterally treated as eligible and designated as L-1. The petitioner also submits that the 3rd respondent is a Private Limited Company, but it claims experience and annual turnover of M/s. Dott Services Limited, which is a Foreign Company, registered at Kampala, Uganda, and the later company, being distinct and different from the 3rd respondent, and ignoring the fact that it is only the 3rd respondent, who has submitted the bid, respondent No.2 has wrongly treated that the Uganda Company is the bidder and has erroneously taken into consideration the experience and financial capacity of the said foreign company for qualifying the 3rd respondent and thereby the actions of the 2nd respondent are said to be contrary to the NIT, discriminatory, arbitrary and leads to favouritism and also opposed to the Rule of Law.

4. In support of the writ petition, various provisions of the NIT, as stated above, and other provisions are quoted *vis-à-vis*, it is contended that the petitioner – Joint Venture has fully complied with the necessary experience and financial capacity and as it has already executed a Power of Attorney in favour of the bidder company, which is now erroneously treated as L-2. Copies of the Power of Attorney by the Joint Venture and the Power of Attorney of the Managing Director of the bidder company, together with the Board Resolution of the bidder company, are appended to the affidavit filed in support of the writ petition.

5. Sri D. Prakash Reddy, learned Senior Counsel, instructed by Sri Prabhakar Sripada, learned counsel appearing for the petitioner, has elaborated the aforesaid submissions by placing strong reliance upon various decisions of the Hon'ble Supreme Court and the Delhi High Court, a reference of which will be made, at the appropriate place.

6. The 1st respondent has filed a counter affidavit, on behalf of respondent Nos.1 and 2, denying the averments of the petitioner. It has given the details of all the bidders, the amount quoted by them and the rankings given to each one of them, and submitted that the 3rd respondent has emerged as L-1 on competitive basis and M/s. Prasad and Company (Project Works) Limited, who

was the bidder, was ranked as L-2. A contention is raised that the present writ petitioner is not a bidder, but the writ petition is filed in the capacity of a Joint Venture, whereas the bidder is M/s. Prasad and Company (Project Works) Limited and the maintainability of the writ petition is opposed. It is also stated that the 3rd respondent is a subsidiary of the Holding Company, which is registered in Uganda, and the said Holding Company passed a Special Resolution dated 02.04.2015, resolving that the 3rd respondent is a fully owned subsidiary, authorised to tender experience to the NIT and resolved that the 3rd respondent would submit the bid documents for completeness of the tender or any other requirements related thereto and an appropriate Power of Attorney was also executed in favour of the 3rd respondent, delegating all powers of Holding Company, thereby the Holding Company held itself answerable to the 1st respondent for all actions of the 3rd respondent. It is also stated that the eligibility criteria under the NIT is fully satisfied by the 3rd respondent, as the Power of Attorney holder of the Holding Company, and it is further clarified that the 1st respondent has treated the bid of the 3rd respondent as on behalf of the Holding Company. It is further pleaded that the 3rd respondent is not the bidder, at all, and it is actually the Holding Company, which is the bidder, and since a subsidiary company is entitled to claim experience and financial capacity of the Holding Company, the 1st respondent justifies that it has assessed the bids in due conformity with the NIT and there is no arbitrariness, as alleged. Copies of the Special Resolution of the Holding Company and the Power of Attorney executed by it in favour of the 3rd respondent are enclosed to the counter affidavit.

7. The 3rd respondent also filed a separate counter affidavit, wherein the capacity of the deponent of the affidavit filed in support of the writ petition was strongly disputed as well as the claim of the petitioner, being a Joint Venture of M/s. Prasad & Company (Project Works) Limited. The counter affidavit further states that the Holding Company was incorporated in 1994 in Uganda and has vast experience of executing many projects in various African countries and has requisite experience and financial capacity, as is evident from the statements of Financial Year 2013-14, which certifies the turnover of Rs.496.00 Crores and the experience fully satisfies the requirements of the NIT. It is

stated that the 3rd respondent is fully owned by the Holding Company and out of 10,000 shares of the 3rd respondent, the Holding Company owns 9,998 shares and the remaining 2 shares are held by the Nominee Directors of the Holding Company, thereby the entire shareholding of the 3rd respondent is held by the Holding Company. It is also stated that the Articles of Association of the 3rd respondent Company would show that its business objects are the same as that of the Holding Company and the entire finances and operations of the 3rd respondent are controlled by the Holding Company and the Management of the 3rd respondent also vests with the Holding Company, thereby the 3rd respondent do not have any independent experience, apart from the Holding Company. The 3rd respondent also confirms that, apart from the Board Resolution passed by the Holding Company, Power of Attorney was also executed authorising and delegating all powers of Holding Company in its favour, undertaking the entire liability of the 3rd respondent by the Holding Company. It is stated that the bid was submitted by the 3rd respondent, on behalf of the Holding Company, and the 2nd respondent was fully justified in taking into consideration the experience and finances of the Holding Company, while assessing and qualifying the 3rd respondent for evaluation of bids.

8. The counter affidavit further refers to the earlier tenders issued by the 1st respondent, wherein the Holding Company's bid was already accepted, satisfying the eligibility criteria. Clause 1.18 of the NIT is also relied upon to contend that the 1st respondent is fully aware of the composition of the 3rd respondent that it is the Holding Company, which has financial control over the 3rd respondent. Along with the counter affidavit, the documents, evidencing that the shareholding of 3rd respondent is duly held by the Holding Company, together with a copy of Declaration in Form-MGT.4, disclosing beneficial interest of the Holding Company, are also produced. Similarly, Form-MGT.5 submitted by the 3rd respondent company and Special Resolution of the Holding Company, together with Power of Attorney, are also appended.

9. The learned Additional Advocate General appearing on behalf of respondent Nos.1 and 2; and Sri C.V. Mohan Reddy, learned Senior Counsel, instructed by

Sri M. Karthik Pavan Kumar, learned counsel appearing for the 3rd respondent, have placed reliance upon various decisions of the Hon'ble Supreme Court in support of their respective contentions, a reference of which will be made hereinafter, at an appropriate place.

10. To the counter affidavits filed by respondent Nos.1 to 3, as above, the petitioner has filed a reply affidavit, denying the contentions, that it is not the bidder, by asserting that the bidder – M/s. Prasad & Company (Project Works) Limited has complied with the requirements of having Digital Services, supported by the petitioner's letter, as prescribed under Annexure A-5, and the authorisation in favour of the deponent are referred to and it is stated that the petitioner is fully entitled to present the writ petition. The petitioner supports the existing Joint Venture, comprises of Prasad & Company (Project Works) Limited, which was within the knowledge of respondent Nos.1 and 2 and, as such, they cannot raise an objection regarding maintainability of the writ petition.

11. From the above rival contentions, the questions that fall for consideration are:--

1. Whether respondent Nos.1 and 2 are justified in treating the Holding Company as the bidder, while considering the bid submitted by the 3rd respondent? and
2. Whether respondent Nos.1 and 2 are justified in taking into consideration the experience and financial capacity of the Holding Company, while assessing the bid of the 3rd respondent?

Inre. Point No.1 :

12. Before I discuss the respective contentions, it is appropriate to notice certain Clauses of the NIT, the operative portion of which, to the extent relevant, are extracted hereunder:

“DEFINITIONS:

i. to ii.

iii. The word “contractor”/contractors” wherever occurs means the successful Bidder/Bidders who has/have deposited the necessary Earnest Money and has/have been given written intimation about the acceptance of tender and shall include legal representative of such individual or persons composing a firm or a company or the successors and permitted assignees of such individual, firm or company, as the case may be.”

ELIGIBLE TENDERERS:

2.1 The invitation for Bids is open to all Bidders eligible to participate as per qualifying criteria laid down separately hereinafter.

2.2 All bidders shall provide in their bid Forms of Bid and Qualification Information.

2.3 Joint Venture: Two or three companies/ contractors may jointly undertake contract/contracts. Each entity will be jointly responsible for completing the task as per the contract.”

13. Clause 1.14: Experience at page-56; Clause 1.18: Personal details of the Bidder at page-58; Claus 2.6 (b): Financial Capacity of the Bidder at page-61; and Clause 2.71: Annual Turnover of the Bidder at page-62, respectively, are extracted hereunder, for convenience sake.

“1.14: EXPERIENCE:

The bidder shall have a minimum experience of 3 years in carrying out the works of similar nature like excavation, loading, transportation of broken rock/ earth etc., and dumping by contracting works by bidder himself or works executed as sub-contractor to others. Documentary proof issued by the agency originally awarded the contract should be submitted. (Bidders are requested to furnish details as per Annexure-A1 with necessary enclosures, such as order copies, work completion reports etc.)

Bidders shall also give the details of works on hand, if any, and current status of the same. (Bidders are also requested to indicate volume of work handled by them monthly to complete the awarded work in any single

biggest order/ contract at any site including SCCL in the proforma given in Annexure-A1.

The bidders quoting for more than one work shall have financial and organisational capacity to start the work simultaneously and they shall furnish the details to the satisfaction of SCCL.”

“1.18: PERSONAL DETAILS OF THE BIDDER(S):

- a. The bidders shall give their personal details along with a passport size photograph duly attested by a Gazetted Officer or Company official not less than the rank of E-8 grade as per the proforma given in Annexure ‘A4’.
- b. In case the bidder is a Partnership firm, the personal details of all the Partners along with passport size photographs duly attested by a Gazetted Officer or SCCL Company official not less than the rank of E-8 grade as per the proforma given in Annexure ‘A4’ shall be given.
- c. In case the bidder is a registered company, the personal details of all the Board of Directors respectively along with passport size photographs duly attested by a Gazetted Officer or SCCL Company official not less than the rank of E-8 grade as per the proforma given in Annexure ‘A4’ shall be given.
- d. Two or three companies/contractors participating in the bid as Joint Venture should submit Firm-wise participation details. Banker’s name, execution of work with details of contribution of each and all other relevant details.”

“2.6 FINANCIAL CAPACITY OF THE BIDDER:

- a.
- b. The bidder has to demonstrate financial capacity to execute the work by submitting the solvency certificate for a sum of Rs.25.00 Crores issued by banker for liquid assets or revenue authorities of not less than the rank of MRO for immovable property or separately from both the authorities along with bid. The date of issue of such solvency certificates shall not proceed by more than 12 months from the date of submission of the bid.”

“2.7 ANNUAL TURNOVER OF THE BIDDER:

The bidder shall have an annual turnover (by contracting the works by bidder himself or works executed as sub-contractor to others or both) of valuing 65% of the annualised volume of the work IN ANY ONE YEAR during previous 7 years (2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13

and 2013-14). In support of this, the bidder shall furnish a copy of audited annual accounts/ a certificate from a practicing Chartered Accountant indicating year-wise turnover.”

14. A plain reading of the above clauses would show that every bidder has to satisfy the requirements of the NIT, in particular, the experience and the financial capacity.

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

16. The Power of Attorney submitted by the said bidding Company, a copy of which is placed on record at page-255 of the material papers filed along with the writ petition, supports the case of the petitioner in maintaining the present writ petition.

17. It is, however, the contention of the petitioner that the 3rd respondent, being the bidder, and having filed bid and participated in the tender process in its own individual capacity, it is not open for respondent Nos.1 and 2 to treat the Holding Company as a bidder.

18. Learned Senior Counsel for the petitioner contended that there was no impediment for the Holding Company itself to bid, instead, it is the 3rd respondent, who has submitted the bid. The 3rd respondent, being a registered company, has its own independent existence and it is not entitled to claim experience or finances of a Holding Company as its own. The learned Senior Counsel would point out specific paragraphs of the counter affidavit filed on behalf of respondent Nos.1 and 2, wherein they have treated the bid as being on behalf of the Holding Company, whereas the 3rd respondent itself claims in

its counter affidavit that it has submitted the bid. The learned Senior Counsel would, therefore, submit that the separate legal entity of the 3rd respondent is erroneously understood by respondent Nos.1 and 2 as the legal entity of the Holding Company, which is foreign based.

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

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

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

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

Holding company and subsidiary company

....

257. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors....

258. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any Director if it so desires by a resolution in the general body meeting of the subsidiary. Holding companies and subsidiaries can be considered as

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

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

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

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

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

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

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

72.

73.

74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case.”

20. Learned Senior Counsel for the petitioner would, therefore, contend that it is not open for respondent Nos.1 and 2 to contend that, ignoring the independent existence of respondent No.3, as a registered company, it would look at the experience and financial capacity of a Holding Company, which is not a bidder. He would further submit that the 3rd respondent, admittedly, does not satisfy the eligibility requirement on both the counts of ‘Experience’ and ‘Eligibility’ and, as such, the 3rd respondent ought not to have been qualified for opening of its price bid and the decision to treat the 3rd respondent as L-1 is equally

erroneous and arbitrary.

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

22. *Per contra*, the learned Additional Advocate General appearing for respondent Nos.1 and 2 submits that the technical bids were opened on 28.04.2015, wherein the 3rd respondent was declared as qualified and, at that time, the petitioner never raised any objection with regard to the competency of the 3rd respondent and, only after opening of Price Bids, when the tender of the 3rd respondent was found to be the lowest, the present writ petition is filed questioning the eligibility of the 3rd respondent. The learned Additional Advocate General relies upon the definition of “Contractor” under the NIT, which is already extracted above, which includes the present Firm or Company, to contend that the Holding Company has to be treated as part of 3rd respondent, as the entire shareholding of the 3rd respondent is held by the Holding Company. He further relied on a decision of the Hon’ble Supreme Court in RAUNAQ INTERNATIONAL LTD. v. I.V.R. CONSTRUCTION LTD., wherein it was held, in para-9, as follows:

“9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be: (1) The price at which the other side is willing to do the work; (2) Whether the goods or services offered are of the requisite specifications; (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important; (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be

the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.”

23. The learned Additional Advocate General submits that on the aforesaid criteria, public interest is in support of the decision taken by respondent Nos.1 and 2 to award contract to the 3rd respondent, as the price quoted by it is less by about Rs.40.00 Crores than the price quoted by the petitioner. He further submits that the power of Judicial Review permits only examination of the decision making process and while exercising such power, larger public interest is required to be kept in mind and, unless such overwhelming public interest requires interference, the Court would not intervene in such decision making process relating to a commercial contract.

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

“23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the [Companies Act](#) having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a

company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by I IPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that I IPL will be providing its unique integrated directory management system along with the expertise of its managers and

that the managers will be actively involved in the project both out of Singapore and resident in India.

24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart : Joint Ventures in East Asia Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court."

As regards the principle of Lifting Corporate Veil, paras-26 to 30 of the aforesaid judgment, which are relevant, are extracted hereunder:

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

27. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of Salomon v. Salomon & Co.⁸ Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions

as well as by judicial pronouncements. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. (See : Gower's Principles of Modern Company Law, 4th Edn., p. 112.) This concept, which is described as "piercing the veil" in the United States, has been thus put by Sanborn, J. in *US v. Milwaukee Refrigerator Transit Co.*⁹: "When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

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

29. In *Scottish Coop. Wholesale Society Ltd. v. Meyer*¹⁰, a case under [Section 210](#) of the Companies Act, 1948, Viscount Simonds has quoted with approval the following observations of Lord President Cooper:

"The law is not confined to a narrow legalistic view. It takes account of the facts and realities of the situation and does not confine them to a narrow legalistic view."

30. Similarly in *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies*, it was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. The argument was rejected by Lord Reid with the observation: "This is too technical an argument." The learned law Lord went on to hold 8 1897 AC 22: (1895-9) All ER Rep 33 9 (1905) 142 Fed 247, 255 10 1959 AC 324,343 :(1958) 3 All ER 66: (1958) 3 WLR 404 11 (1955) 1 All ER 725 :(1955) 1 WLR 352 "This is an argument in re mercatoria, and it must be construed in the light of the facts and realities of the situation." (All ER p. 738)

25. Based on the aforesaid ratio, the learned Additional Advocate General would submit that as the Holding Company holds the entire shareholding of the 3rd respondent and which has authorised the 3rd respondent, under a Special Resolution and a General Power of Attorney, to submit bid for the NIT in question, taking into consideration the economic viability of the Holding Company, respondent Nos.1 and 2 are clearly justified in taking such a decision. He, therefore, submits that the 1st respondent did not commit any error in taking into consideration the experience and financial capacity of the Holding Company, while assessing the bid of the 3rd respondent, and having found the bid of the 3rd respondent as the lowest, the said decision is not open

for Judicial Review on the facts and circumstances of the case.

26. Sri C.V. Mohan Reddy, learned Senior Counsel, instructed by Sri M. Karthik Pavan Kumar, learned counsel for the 3rd respondent, placed strong reliance upon the Special Resolution passed by the Holding Company and the General Power of Attorney given to the 3rd respondent. He also placed reliance upon the decision of a learned single Judge of this Court in SERUM INSTITUTE OF INDIA LTD., PUNE v. A.P.H. & M. H & I DEVELOPMENT CORPN., as well as an unreported judgment of another learned single Judge in W.P.No.22527 of 2005, dated 20.12.2005, wherein experience of a Joint Venture Company, similar to the Holding Company, was taken into consideration.

27. The learned Senior Counsel would also submit that the Special Resolution passed by the Holding Company specifically states that the 3rd respondent is their fully owned subsidiary and authorised the said subsidiary to submit all the documents for completeness of the tender and for other requirements related thereto and also empowered the

3rd respondent with a Power of Attorney on behalf of the Holding Company, under which the Holding Company has delegated all its powers to the 3rd respondent and declared that the Holding Company will be liable for all acts or deeds performed by the 3rd respondent with reference to the NIT and the said power would remain irrevocable until discharge of the above contract under the NIT dated 12.03.2015. He, therefore, submits that there cannot be any doubt of the Holding Company taking every responsibility with regard to the tender submitted by the 3rd respondent in terms of the power bestowed on it by the Holding Company. On the ground of public interest also, the learned Senior Counsel would urge the Court that no interference is called for, as respondent Nos.1 and 2 will have to pay additional Rs.42.00 Crores, if they were to consider the bid of the petitioner.

28. In reply thereto, Sri D. Prakash Reddy, learned Senior Counsel appearing for the petitioner, would contend that the legal position with regard to Lifting of Corporate Veil is now settled by the latest decision of the Hon'ble Supreme Court in BALWANT RAI SALUJA's case (1 supra), wherein the Supreme Court itself held that the permissibility to lift the Corporate Veil has a limited

application. He also submits that the Special Resolution and the Power of Attorney relied upon by the 3rd respondent is not in accordance with the requirements of the NIT and, to the said effect, the learned Senior Counsel relied upon an un-reported decision of the Delhi High Court in AIRPORT AUTHORITY OF INDIA's case (2 supra).

29. Sri C.V. Mohan Reddy, learned Senior Counsel appearing for the 3rd respondent, has supplemented his submissions, while contending that the stand taken by respondent Nos.1 and 2 *vis-a-vis* the capacity of the 3rd respondent is inconsequential, as the 3rd respondent itself is the bidder, however, supported by Power of Attorney and Special Resolution of the Holding Company and relied upon a decision in NEW HORIZONS LTD.'s case (5 supra), in support of his contention.

Discussion:

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

31. In DHN Food Distributors Ltd. v. London Borough of Tower Hamlets¹² the Court of Appeal was dealing with three companies, out of which one was the holding company and the other two were its subsidiaries. After quoting the views of Prof. Gower that "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group" Lord Denning, M.R. has observed : "This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point." (p. 467) In the same case, Goff, L.J. has said : "[T]his is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil." (p.468) The observations of

Shaw, L.J. were to the following effect:

“...but the result is that the company is entitled to compensation for disturbance from premises in its occupation on account of compulsory purchase of the property which belonged to one of the subsidiaries and in which the holding company had no interest. This was a case in which the court lifted the corporate veil so as to confer a benefit on the company.” (p.473)

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

32. It may, however, be stated that the existing state of the law in England in this field is not very satisfactory. According to Professor Gower the development “has been essentially haphazard and irrational” (See Gower's Principles of Modern Company Law, 4th Edn., p. 138).

33. This Court in [Juggi Lal Kamalapat v. CIT](#)¹³ has laid down that “in certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade”. (SCR p.995).

34. [In State of U.P. v. Renuagar Power Co.](#)¹⁴ this Court lifted the veil to hold that Hindalco, the holding company, and Renuagar Power Co., its subsidiary, should be treated as one concern and the power plant of Renuagar must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis. It was observed: (SCC p. 94, para 66)

“It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. ... The horizon of the doctrine of lifting of corporate veil is expanding.”

31. Similarly, in [STATE OF U.P. v. RENU SAGAR POWER PROJECT CO.](#), wherein the Hon’ble Supreme Court held as follows:

“It is hightime to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation.”

“.....The horizon of the doctrine of lifting of corporate veil is expanding. ...”

It was further stated –

“The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence.”

Therefore, it was held that

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

32. The aforesaid view also endorsed the earlier view of the Hon’ble Supreme Court in LIFE INSURANCE CORPORATION OF INDIA V. ESCORTS LTD., wherein it was held as follows:

“Generally and broadly speaking, it may be said that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.....”

33. In my view, the principle laid down in the above decisions is not, in any manner, departed from the decision in BALWANT RAI SALUJA’s case (1 supra) and it states that application of the said principle would depend upon the facts and circumstances of each case. In fact, the ratio laid down in ESCORTS LTD.’s case (8 supra) was reiterated and relied upon in BALWANT RAI SALUJA’s case (1 supra). I am, therefore, unable to accept the contention of Sri D. Prakash Reddy, learned Senior Counsel for the petitioner, that the said principle of piercing the Corporate Veil is not required to be applied while assessing the bid of the 3rd respondent.

34. On a deep consideration of the matter, I record my agreement with the contention of the learned Senior Counsel for the 3rd respondent.

35. In NEW HORIZONS LTD.’s case (5 supra), the Hon’ble Supreme Court interpreted the concept of requirement of experience of the tenderer, in his name, does not mean that the experience should be of the tenderer in his name only and gave various instances, such as Partnerships and Joint Venture Firms, for the purpose of community of interest in the performance of the subject matter and it recognised similar growing Joint Ventures in our country,

where foreign companies joined the Indian partners towards capital and technical know-how for the success of the venture.

36. Consequently, Point No.1 is answered against the petitioner.

Inre. Point No.2 :

37. In view of the aforesaid discussion, since the experience and financial capacity of the Holding Company is not in dispute, respondent Nos.1 and 2 are fully justified in treating the bid of the 3rd respondent as qualified and the allegation of arbitrariness, as alleged by the petitioner, is required to be answered in negative.

38. The overwhelming public interest also requires that this Court would not interfere with the decision making process of respondent Nos.1 and 2, in view of the specific contention that the Holding Company is already executing earlier works for respondent Nos.1 and 2 and that the impugned decision of respondent Nos.1 and 2 in treating the 3rd respondent as L-1 would save them with an additional expenditure of about Rs.40.00 Crores.

39. Accordingly, Point No.2 is also held against the petitioner.

40. I am, therefore, of the opinion that no grounds are made out for issuance of a Writ, as prayed for.

41. The writ petition, therefore, fails and is accordingly dismissed. However, there shall be no order as to costs.

JUSTICE VILAS V. AFZULPURKAR

Date: 29.09.2015.

NOTE: L.R. Copy be marked.

(B/O)

Msr

HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

WRIT PETITION No.14741 of 2015

29.09.2015

Msr