

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Writ Petition No.5818/2016

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Consortium of Titagarh Firema Adler
S.P.A.- Titagarh Wagons Ltd.,
through Authorised Signatory,
Titagarh Towers,
756, Anandapur, E.M. Bypass,
Kolkata- 700 107, West Bengal,
Tel. +91 33 40190800,
Fax. +91 33 40190823.
E-mail: sanjay.deshpande@titagarh.in. ..

PETITIONER

.. **Versus** ..

1. Nagpur Metro Rail Corporation Ltd.
(NMRCL) having its Head Office at
Metro House, Bunglow No.28/2,
Anand Nagar, C.K. Naidu Road,
Civil Lines, Nagpur, through its
General Manager (Procurement).

2. CRRC Corporation Limited (China
Railway Rolling Stock Corporation)
through its Director/Chairman,
having its office at No.16 West
4th- Ring Mid Road, Haidian
District, Beijing, Zip Code- 100036. ..

RESPONDENTS

Mr. C.S. Kaptan, Senior Advocate with Mr. Anjan De, Advocate for
Petitioner.

Mr. S.K. Mishra, Senior Advocate for Respondent No.1.

Mr. Sunil Manohar, Senior Advocate with Mr. A.A. Naik, Advocate
for Respondent No.2.

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**CORAM : B.R. Gavai & V.M. Deshpande, JJ.
DATED : October 05, 2016.**

ORAL ORDER (per B.R. Gavai, J.)

1. Heard Mr. C.S. Kaptan, learned Senior Counsel for petitioner, Mr. S.K. Mishra, learned Senior Counsel for respondent no.1 and Mr. Sunil Manohar, learned Senior Counsel for respondent no.2.

2. The petitioner has approached this Court mainly praying for the following reliefs:

"Issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order under Article 226 of the Constitution of India against respondent no.1 and call for the records pertaining to the Bid No. NIRS-1/2016(ICB) dated 25.01.2016 (Annexure A1 and A2) and declare the Respondent no.2 as disqualified and declare that the opening of price of respondent no.2 as illegal, arbitrary, irrational and unreasonable and violative of Article 14 and Article 19(1)(g) of the Constitution of India, apart from being violative of principles of natural justice."

3. The few facts necessary for appreciating the rival submissions are as under:-

Respondent no.1- Nagpur Metro Rail Corporation Ltd. (hereinafter referred to as "the employer" for short) had issued a tender notice on 25.01.2016 thereby inviting the tenders for the work of Design, Manufacture, Supply, Testing, Commissioning of Passenger Rolling Stock (Electrical Multiple Units) and Training of Personnel (hereinafter referred to as the "said work" for short).

4. The minimum experience that a bidder was required to possess for participating in the bid was as under:-

"12. Delivery Record

Has the Bidder/Consortium/Joint Venture of its members, individually or jointly as a member of other Consortia/Joint Venture have experience of and carried out Vehicle Design, Interface (with other designated Contractors such as signaling, track, traction etc.) Assembly & Supply, Testing and Commissioning of minimum of total 60 metro (i.e. MRT, LRT, Suburban Railways or High Speed Railways) cars out of which minimum 30 cars shall be either Stainless Steel or Aluminium in the last ten(10 years).

12.1. Operation Performance

Out of 60 or more cars commissioned in accordance with SN 12 above, have minimum of total 30 metro (i.e. MRT, LRT, Suburban Railways or High Speed Railways) cars completed satisfactory revenue operation.

** At least in one country outside the country of origin/manufacture.*

** Or in India.*

** Or at least in one G8 country viz. Canada, France, Germany, Italy, Japan, United Kingdom and United States in the last three (3) years."*

5. In response to the said bid, three bidders had submitted their bids. One was found to be technically disqualified and as such only the petitioner and respondent no.2 remained in the fray. Vide communication dated 19.09.2016, the petitioner and respondent no.2 were informed that the financial bid would be opened on 22.09.2016. However, subsequently it was postponed to 29.09.2016 again under an intimation given to petitioner as well as respondent no.2. In the financial bid opened on 29.09.2016, it was found that the petitioner had given a bid of Rs.852 crores for the said work whereas respondent no.1 has given a bid of Rs.851

crores. On a pertinent query, as to whether the work order to respondent no.2 is issued or not, the learned senior counsel appearing for the employer fairly concedes that the Director Level Tender Committee has agreed with the report of the tender evaluation committee and has recommended to accept the lowest offer of respondent no.2. It is further submitted that the work order would be issued after certain technical requirements are complied with. At this stage, the petitioner has approached this Court contending therein that respondent no.2 is not technically qualified and, therefore, his financial bid could not have been opened.

6. Mr. Kaptan, the learned senior counsel appearing on behalf of the petitioner submits that Clause 26 of the tender document prevents a person from getting any knowledge about the technical qualification of the competitor, till the contract is awarded. It is, therefore, submitted that the said clause is patently arbitrary, unreasonable and violative of Article 14 of the Constitution of India. It is submitted that in view of the said clause, even a person who is not technically qualified, would be entitled to participate in the price bid and the matter of disqualification of such a bidder would come to light only after the contract is awarded. It is submitted that the said situation would result in *fait accompli*.

7. The learned senior counsel, however, submits that the petitioner has received a reliable information that respondent no.2 is not having the requisite experience as required under the tender document of its own, but is relying on the experience of its subsidiary. The learned senior counsel relying on the judgment of the Division Bench of the Delhi High Court in the case of **Rohde and Schwarz GMBH And Co. Kg. .vs. Airport Authority of India and another** (W.P.No.(C) 6547/2013 & CM No. 14245/2013 - decided on 01.11.2013) submits that the experience of the subsidiary of the petitioner cannot be taken into consideration,

while considering the experience of a bidder.

8. After we heard the matter at length and when we expressed our inclination to reject the writ petition, Mr. Kaptan made a request that the petitioner be permitted to withdraw the writ petition, so that after the award of the contract, he can get the requisite information from the employer with regard to technical qualification of respondent no.2 and thereupon with a complete information file a petition afresh if it is found that respondent no.2 is not technically qualified. The learned senior counsel fairly submits that after the relevant documents are received by the petitioner, if it is satisfied that respondent no.2 possesses the requisite experience, the petitioner may not even challenge the award of contract in favour of respondent no.2, if it is so awarded.

9. For appreciating the first submission of Mr. Kaptan, it will be appropriate to refer to clause 26 on which the learned senior counsel heavily relies:-

"26.1. Information relating to the examination, evaluation and comparison of the bids, and qualification of the Bidders and recommendation of contract award shall not be disclosed to Bidders or any other persons not officially concerned with the bidding process until information on Contract award is communicated to all Bidders in accordance with ITB 40.

26.2. Any attempt by a Bidder to influence the Employer in the examination, evaluation and comparison of the bids, and qualification of the Bidders, or Contract award decisions may result in the rejection of its bid."

10. We do not propose to go into the legality or otherwise of the said clause in the present proceeding. No doubt that the learned senior counsel is justified in contending that in view of this clause a party would not be entitled to have the requisite knowledge about the technical qualification of the competitor

unless the contract is awarded. Insofar as clause No.26.2 is concerned, in our view the said clause would not be applicable, inasmuch as the said clause deals only with any attempt by a Bidder to influence the employer in the examination, evaluation and comparison of the bids and qualification of the bidders or contract award decisions, may result in the rejection of its bid.

11. As already discussed hereinabove, we do not find it necessary to go into the legality or otherwise of clause 26.1 at this stage, inasmuch as the petitioner has approached this Court after participating in the tender process and only after the completion of the tender process and almost after a period of 10 months from the date on which the said condition was notified. The matter would have been different had the petitioner, immediately after the tender notice was published in the month of January, 2016, challenged the said condition, on the grounds which are sought to be urged now. Having participated in the tender bid, knowing very well that such a clause exists, not only that but having participated in the financial bid in response to the communication of the employer dated 19.09.2016 which was held on 29.09.2016, the petitioner has now woken up from deep slumber, to contend that the said clause is onerous and lacks transparency and, therefore, violative of the Article 14 of the Constitution of India. It is only on 29.09.2016 when the petitioner comes to know that its financial bid is Rs.852 crores and that of respondent no.2 is Rs.851 crores, the petitioner realised that clause 26.01 is violative of Article 14 of the Constitution of India.

12. We ask the question to ourselves, as to whether, if the figures would have been reverse and the petitioner's figure would have been lower than that of respondent no.2, whether the petitioner would have raised same grounds which are sought to be raised now.

13. We find that the contention of the petitioner with regard to the challenge to the validity of Clause 26.1 of the tender document needs to be rejected on the short ground that the petitioner having participated in the tender process, knowing very well that the said clause exists in the tender document, has challenged the same only after it is found that its financial bid is higher than that of respondent no.2.

14. We could have non-suited the petitioner on this short ground. However, taking into consideration that the project is an important project for the city of Nagpur, we have requested the learned senior counsel appearing on behalf of the employer, to place the record before us, only to find out as to whether the decision making process of the employer has been legal and valid or not. This was done only in order to examine, as to whether the decision arrived at by the respondent-employer that respondent no.2 possesses requisite experience, has been done in a legal and valid manner or not. The learned senior counsel for the respondent-employer has placed the entire documents on record with regard to the evaluation of the technical qualification of the petitioner as well as the respondent no.2.

15. It is to be noted that the tender evaluation committee consists of Chief Project Manager/RS, General Manager/Procurement, Chief Project Manager/Signaling and the General Manager/Finance. The said Committee has evaluated the documents with regard to the technical qualification of the petitioner as well as respondent no.2. The Committee has noted that respondent no.2 was formed in June 2015 by merger of CRC Corporation and CNR Corporation limited. The documents relating to the merger has been submitted along with the bid. The Evaluation Committee has also noted that after the incorporation of

the respondent no.2, upon the merger of CSR Corporation and CNR Corporation, respondent no.2 was awarded contract for supply of 76 cars for Noida Metro Project by Delhi Metro Rail Corporation Ltd. The Committee found that insofar as Clause No.12 is concerned, though the minimum requirement was that the bidder must have an experience of total 60 metro cars and out of which 30 cars should be either stainless steel or aluminium, respondent no.2 was having an experience of total 594 metro cars and all the cars were of stainless steel. Insofar as clause 12.1 is concerned, which requires that out of the number of cars manufactured, there has to be completed satisfactory revenue operation at least in one country outside country of origin/manufacturer or in India or at least one in G8 country of 30 metro cars, respondent no.2 was having an experience of 432 outside country of origin. It could thus be seen that the perusal of the document placed on record would reveal that the decision making process of the technical evaluation committee has been guided by the relevant factors and it cannot be said that they have not taken into consideration any of the relevant factors. We are, therefore, of the considered view that the decision of the technical evaluation committee would fall within the ambit of 'rationality'.

16. It is further to be noted that the minutes of the tender evaluation committee was further placed for approval before the Director Level Tender Committee consisting of Director (Rolling Stock and Systems), Director (Projects) and Director (Finance). It could thus be seen that the matter has not been examined at only one level of expert committee, but has gone through examination at two levels of experts.

17. Insofar as the judgment on which the learned senior counsel for the petitioner heavily relies is concerned, the facts in the said case are totally different. The perusal of para 24 of the

said judgment would reveal that the petitioner therein had claimed to have acquired the experience of supply and installation of equipments as complying with the requirements of Clause 4.3 of NIT in the year 2008 on the basis of experience of one of its subsidiary. However, it is to be noted that the experience which was required to be was of the year 2008, whereas the petitioner therein had acquired the majority of the shares of the company of which the experience was sought to be put in service, in the year 2010. It could thus be seen that the experience of a subsidiary which was sought to be pressed into service by the petitioner therein, was of the period prior to the petitioner therein acquiring the majority of the shares of the subsidiary. Such is not the case here. Here the two companies i.e. CSR Corporation and CNR Corporation have been amalgamated thereby resulting incorporation of respondent no.2. Not only that but after the respondent no.2 has come into existence, the contract for supply of 76 cars for Noida Metro Project by Delhi Metro Rail Corporation has already been awarded in favour of respondent no.2. It will not be out of place to mention here that the said number of 76 itself is more than the number of 60 metro cars which is stipulated under Clause 12. However, as it is settled law, it will not be permissible for us to go into the opinion of the experts. The limited enquiry that would be permissible is as to whether the decision making process is vitiated on the ground of irrationality, arbitrariness etc. or not. It is to be noted that no allegations of *mala fide* are made in the writ petition and as such the challenge on that ground would also not be permissible in the present matter.

18. In any case the contention which is advanced by the learned senior counsel for the petitioner is very well answered by Their Lordships of the Apex Court in the case of **New Horizons Limited and another .vs. Union of India and others** reported in **(1995) 1 Supreme Court Cases 478**. It will be relevant to

refer to following observations of the Apex Court in the said case :

"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."

The perusal of para 24 of the judgment of the Apex Court in the

said case would also show that Their Lordships have clearly held that a joint venture can take the form of a corporation wherein two or more persons or companies may join together. However, in the present case it is to be noted that respondent no.2 has been incorporated much prior to issuance of the tender notice, by merger of the two Corporation i.e. CSR Corporation and CNR Corporation. In that view of the matter, we find no error in the approach of respondent no.1 in considering the experience of CNR Corporation and CNR Corporation as an experience of respondent no.2, after the amalgamation of CSR Corporation and CNR Corporation and incorporation of respondent no.2.

19. By now the scope of the interference in contractual matters is very well crystallized by Their Lordships of the Apex Court in the case of **Tata Cellular .vs. Union of India** reported in **(1994) 6 Supreme Court Cases 651**. It will be appropriate to refer to para 77 of the said judgment:-

77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) *Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.*

(ii) *Irrationality, namely, Wednesbury unreasonableness.*

(iii) *Procedural impropriety.*

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind²⁸, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention"

We find that none of the grounds on which the decision making process of the authority can be assailed, are available in the present case. It cannot be said that the decision making authority has exceeded its powers nor can it be said that it has committed an error of law. It cannot be said that the decision arrived at by the authority is vitiated by the principle of Wednesbury unreasonableness, nor it can be said that the decision making authority has abused its powers. We find that the decision of the decision making authority is on the basis of correct understanding of the law and the decision of the decision-maker has been regulated by the law on the point. In that view of the matter, we find that in view of the judgment of the Apex Court in the case of **Tata Cellular** (supra), the decision cannot be faulted with.

20. Before parting with the present order, we find it will be appropriate for us to refer to two latest judgments of Their Lordships of the Apex Court in the case of **Central Coalfields Limited .v. SLL -SML (Joint Venture Consortium)** reported in **2016 (8) SCALE 99** and another in the case of **Afcons**

Infrastructure Ltd. .vs. Nagpur Metro Rail Corporation Ltd and another. It will be appropriate to refer to paragraph Nos.47, 48 and 49 of the judgment in the case of Central Coalfields Limited:-

"47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber.

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the Courts take over the decision-making function of the employer and make a distinction between essential and non-essential

terms contrary to the intention of the employer and thereby re-write the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any Bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive." Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL the GTC has been impermissibly re-written by the High Court."

It could thus be seen that Their Lordships have in unequivocal term held that the tender conditions are not to be looked only from the view point of the bidder, but also from the view point of the employer. No doubt that if the Court finds that the interpretation placed by the employer is totally arbitrary, irrational and does not stand the test of Wednesbury reasonableness or when the decision making process is vitiated on any of the grounds, as are laid down by Their Lordships of the Apex Court in the case of *Tata Cellular*, it will always be open for this Court to exercise its powers under Article 226 of the Constitution of India. However, when it is found that the power is exercised within the parameters as laid down by the Apex court, in our considered view it will not be permissible for this Court to interfere with the decision of the employer, when the decision making process has not been found to be vitiated on any of the grounds as are laid down in the case of **Tata Cellular** (supra).

21. It will also be appropriate to refer to the latest judgment of the Apex Court in the case of **Afcons Infrastructure Ltd .v. Nagpur Metro Rail Corporation Ltd.** wherein this Court had placed its own interpretation regarding one of the tender conditions and found the said condition to be of a non-essential character. Reversing the judgment of this Court, Their Lordships

observed thus:-

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court."

It could thus be seen that Their Lordships have in unequivocal term held that this Court should refrain from giving an interpretation to the tender document merely because the interpretation given by the employer is not acceptable to it. The law is well settled that unless it is found that the interpretation given by the employer is found to be perverse, *mala fide* or intended to favour one of the bidders, it will not be permissible for this Court to interfere with the same.

22. In the present case clause 12 provides for experience and clause 26 provides for evaluation and comparison of bids. Clause 12 and clause 26 are very clear and unambiguous. We do not propose to go into the legality or otherwise of clause 26.1 on

the short ground that the petitioner has approached this Court only after he has participated in the financial bid. Had the petitioner come up before this Court in the month of January or February, 2016, prior to opening of the technical bid, may be the things would have been different.

23. That leaves us with the last submission of Mr. Kaptan that the petitioner be permitted to withdraw the writ petition with further liberty to approach this Court after award of the contract, so that all the documents pertaining to the technical qualification of respondent no.2 come to light. On such request being made, we were inclined to permit simpliciter withdrawal of the petition. However, Mr. Kaptan insisted that the petitioner be permitted to withdraw the petition, only if the liberty as prayed for is granted. We are inclined to reject this request on the basis of the observations made by Their Lordships of the Apex Court in the case of **Central Coalfields Limited** (Supra). It will be relevant to refer to para 54 of the said judgment:-

"54. In this context, and in the present times, it is important to note that the World Bank has ranked India extremely low in matters relating to enforcement of contracts and ease of doing business. Out of 189 countries worldwide, India is ranked 178 in the matter of enforcement of contracts and 130 in the matter of ease of doing business. One of the possible reasons for this extremely low ranking given to our country is the failure of all parties concerned in strictly adhering to the terms of documents such as the NIT and the GTC. In so far as the present case is concerned, the NIT was floated on 5th August, 2015 and one year later, we are still struggling with the issue of acceptance of a bank guarantee for a contract of about Rs.2000 crores- certainly not a small sum."

Their Lordships have observed that out of 189 countries worldwide, India is ranked 178 in the matter of enforcement of contracts and 130 in the matter of ease of doing business. Their Lordships have

further observed that one of the possible reasons for this extremely low ranking given to our country, is the failure of all parties concerned in strictly adhering to the terms of documents such as the NIT and the GTC. Their Lordships have further observed that in the said case the NIT was floated on 5th August, 2015 and one year later, the matter was still struggling with the issue of acceptance of a bank guarantee.

24. We find that if we accept the prayer as made by the petitioner, it will be giving leverage to the petitioner to again approach this Court and delay the project further. Taking into consideration the public interest, we have ourselves scrutinised the entire minutes of the Tender Evaluation Committee and Director Level Committee to find out as to whether the decision making process, answers the test as laid down by Their Lordships of the Apex Court. We have found that the decision making process cannot be termed to be vitiated on the ground of arbitrariness, irrationality or *mala fides*. Accepting the request of the learned senior counsel for the petitioner would further permit the project to be delayed. Needless to state that the project is an important project for the city of Nagpur. In that view of the matter, though the prayer which on first impression appears to be innocuous, is liable to be rejected.

25. We find no merit in the petition. The petition is dismissed.

(V.M. Deshpande, J.)

(B.R. Gavai, J.)

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