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**HIGH COURT OF CHHATTISGARH, BILASPUR****Judgment Reserved on: 05/01/2017****Judgment Delivered on : 17/01/2017****Writ Petition (C) No. 3160 of 2016**

Shailendra Bahadur Singh son of Late Awadh Bihari Singh, aged about 45 years, B Class Contractor, Proprietor- M/s. Shailendra Bahadur Singh, resident of Main Road, Mastaanpara, Sukma, District Sukma, Chhattisgarh, Civil and Revenue District Sukma.

**---- Petitioner****Versus**

1. State of Chhattisgarh, Through its Secretary, Department of Panchayat & Rural Development, Mahanadi Bhawan, Naya Raipur.
2. Chhattisgarh Rural Road Development Agency, Through its Chief Engineer (Tender Cell) Civil Lines, Raipur.
3. The Chief Engineer, Public Works Department, Sirpur Bhawan, Raipur.

**---- Respondents****Writ Petition (C) No. 3161 of 2016**

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**---- Respondents**

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| For Petitioners      | : | Shri B.P.Sharma with Shri Hari Agrawal, Advocates.  |
| For Respondent/State | : | Shri Prafull N Bharat, Additional Advocate General. |

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**Hon'ble Shri Deepak Gupta, Chief Justice**  
**Hon'ble Shri Sanjay Agrawal, J.**

**C.A.V. Judgment**

**Per Deepak Gupta, Chief Justice**

1. The question that arises for decision in these writ petitions relates to interpretation of clause 1.3.1 of the Notice Inviting Tenders (hereinafter called 'the NIT'), which reads as follows:

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| "1.3.1 | Work performed as prime Contractor (in the same name and style) on construction works of a similar nature and volume over the last five years. Attach certificate from the Engineer-in-Charge." |
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2. Briefly stated facts of the cases are that on 07.10.2016, the Respondents/State of Chhattisgarh through Respondent No. 2 issued an NIT for construction of certain roads in Sukma, Bijapur, Kanker and Bastar districts. All these districts are affected with naxalite activities. The Petitioner submitted his bid on 21.10.2016 and his bid was rejected on the ground that the Petitioner did not fulfill the qualifying criteria in terms of clause 1.3.1 quoted hereinabove.
3. The dispute is very simple. Petitioner-Shailendra Bahadur Singh was a partner in a firm known as M/s. Balaji Infrastructure which had done the work of construction of roads. The Petitioner had 50% share in this partnership. The case of the Petitioner is that if 50% of the work done by M/s. Balaji Infrastructure in the last five years is taken into consideration, then he fulfills the qualifying criteria regarding the work to be done.

4. The stand of the Respondents is that in terms of clause 1.3.1 the work was to be performed by the prime contractor (in the same name and style). On behalf of the Respondents, it is submitted that since the bidder was Shailendra Bahadur Singh and the earlier works were done by M/s. Balaji Infrastructure, that work cannot be taken into consideration.
5. We have heard learned counsel for the parties.
6. Shri B.P.Sharma, learned counsel for the Petitioner urges that experience has to be of the individual and not of the firm and he has placed strong reliance on a judgment of the Apex Court in *New Horizons Limited and Another v. Union of India & Others* {(1995) 1 SCC 478}; a judgment of learned Single Judge of the Andhra Pradesh High Court in *S.Kireetendranath Reddy v. A.P.Transco, represented by its Board of Directors, Hyderabad and Another* {(2001) 1 Arb LR 263} and a judgment of the Division Bench of Delhi High Court in *Delhi Jal Board Contractors Welfare Association v. Delhi Jal Board & Others* {(2011) SCC Online Del 2483}. He submits that as per the aforesaid judgments, the experience of the partners of the firm has to be taken into consideration. It is urged by him that since the Petitioner was having 50% share in the partnership firm known as M/s. Balaji Infrastructure, at least 50% work done by M/s. Balaji Infrastructure should be taken into account. It is further submitted that for the purpose of registration of contractors as per the scheme of State of Chhattisgarh, the work done by the partners is taken into consideration. It is lastly submitted that when the work performed as sub-contractors can be taken into consideration in terms of clause 1.3.2, then there is no reason why the share of the partner in the partnership firm should not be taken into consideration for reckoning the work experience.
7. On the other hand, Shri Prafull N Bharat, learned Additional Advocate General submits that the language of the NIT is very clear that only that

work can be taken into consideration for reckoning experience which has been done as contractor or sub-contractor in the same name and style. He therefore submits that the name and style of the bidder must be the same as the name and style reflected in the experience certificate. If the bidder is an individual, then the work done by the partnership firm cannot be taken into consideration. He submits that as far as registration is concerned, the rules are entirely different and the rules provide that if a person is a partner in a partnership firm or shareholder in a company, then while grading him, his experience or work done is reckoned by taking into consideration the extent of his percentage share in the company or firm.

8. In *New Horizons* (supra), the tender condition which was under consideration before the Apex Court reads as follows:

"The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephones systems with the capacity of more than 50,000 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in this field."

9. Before dealing with the judgment, it would be pertinent to mention that the words "the same name and style" were not there in the judgment of the Apex Court.
10. Shri B.P.Sharma has placed strong reliance on the following observations made in *New Horizons* (supra):

"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..."

11. No doubt, on first blush, the observations of the Apex Court appear to support the Petitioner. However, when we compare the language of the tender conditions, we find that in the case before the Apex Court, there

was no condition that the experience should be of the firm which has worked in the same name and style. This is a crucial difference. Judgments are not to be read like statutes. A judgment is based on the factual situation and the factual situation in the *New Horizons* (supra) was that the Court was only considering the fact whether the word tenderer would include partners or members of joint venture or not. The observations quoted above have to be read in this context.

- 12.** As far as the judgment of the learned Single Judge of the Andhra Pradesh High Court in *S. Kireetendranath Reddy* (supra) is concerned, in our view, the judgment has to be treated to be *per incuriam*. In this regard, it would be pertinent to mention that a Division Bench of Andhra Pradesh High Court disposed of three writ appeals in which one of the condition of the tender notice was that the intending applicants in the same name and style should have good experience in executing similar work of not less than Rs. 46 Lacs. The tender documents were not issued in favour of the petitioner because he could not produce the experience certificates pertaining to the same name and style as the petitioner firm. The Division Bench rejected the appeals and dismissed the claim of the appellant for counting his experience in the earlier firms in which he was a partner and held as follows:

"But, in that case, the language similar to the condition extracted above, is not found. The emphasis in condition No. 1 is that the experience should relate to the works done by the applicant in the same name and style'. Obviously, that condition is not satisfied. Whether or not such condition is constitutionally valid does not arise for consideration in the present case."

- 13.** The aforesaid judgment clearly held that the judgment of the Apex Court in *New Horizons* (supra) would not be applicable where the condition in the tender was that the applicant should have experience of work done "in

the same name and style". The learned Single Judge virtually set aside the judgment of the Division Bench in the following terms:

"38. If I may say so with respect, a totally artificial distinction is sought to be made in all these three judgments of this Court between the "experience of a tenderer" and "the experience of such tenderer in particular name and style" without the support of reasons, theoretical or case law-wise and without stating what is the ratio of the judgment of the Supreme Court in NHL's case. "

**14.**With due respect to the learned Single Judge, we are clearly of the opinion that judicial discipline demands that a learned Single Judge cannot virtually set aside the judgment of a Division Bench. If the learned Single Judge did not agree with the judgment of the Division Bench, he may have referred the matter to the Chief Justice for constituting a larger Bench but of his own, he could not have set aside the judgment. We therefore do not agree with the judgment of the learned Single Judge in *S.Kireetendranath Reddy* (supra) and follow the judgment of the Division Bench of the Andhra Pradesh High Court.

**15.**As far as the judgment of the Delhi High Court in *Delhi Jal Board Contractors Welfare Association* (supra) is concerned, it may be true that in the tender conditions, it was mentioned that the work should have been executed in the same name and style in which the enlistment is sought, but on a careful perusal of the judgment, we find that there is no discussion with regard to the words "in the same name and style". Only the judgment of *New Horizons* (supra) has been followed.

**16.**It is for the person floating the tender to decide what should be the conditions laid down. In this case, the condition which was laid down is that the experience should be in the same name and style. The Petitioner who is a government contractor, knowing this condition submitted the tender without challenging the tender condition. Even till now, the condition in the tender has not been challenged. The tender condition is

clear that the work should have been done in the same name and style. This tender condition having not been challenged, has to govern the contract and since the experience claimed by the Petitioner as partner of M/s. Balaji Infrastructure is not in the same name and style as the tenderer (Shailendra Bahadur Singh), the previous experience cannot be taken into consideration.

**17.** In view of the above discussion, we find no merit in these writ petitions.

They are dismissed accordingly.

Sd/-

(Deepak Gupta)  
**CHIEF JUSTICE**

Sd/-

(Sanjay Agrawal)  
**JUDGE**