

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.3267 OF 2017

Maha Active Engineers India Private Limited ... Petitioner
Vs.
Maharashtra State Electricity Transmission Co. Ltd.
and others ... Respondents

Mr. Pravin Samdani, Senior Advocate with Mr. Mayur Khandeparkar, Mr. Dhiraj Mhetre, Ms Smiti Tewari and Mr. Bankim Gangar i/b. Khaitan Legal Associates for Petitioner.

Mr. N. V. Walavalkar, Senior Advocate a/w. Mr. A. Desai i/b. Desai Legal for Respondents No.1 and 2.

Mr. U. S. Upadhyay, AGP for Respondent No.3-State.

Mr. Iqbal Chagla, Senior Advocate with Mr. Ameet Hariani, Mr. Rhishikesh Bidkar, Mr. Satchit Bhogle i/b. M/s. Hariani & Co. for Respondent No.4.

Mr. Jehaan Mehta, Mr. Rhishikesh Bidkar, Mr. Satchit Bhogle i/b. M/s. Hariani & Co. for Respondent No.5.

**CORAM : SHANTANU KEMKAR &
R.G. KETKAR, JJ.**

Reserved on : DECEMBER 20, 2017.

Pronounced on : DECEMBER 22, 2017.

ORDER: [Per R.G. KETKAR, J.]

Heard Mr. Samdani, learned Senior Counsel for petitioner, Mr. Walavalkar, learned Senior Counsel for respondents No.1 and 2, Mr. Upadhyay, learned AGP for respondent No.3, Mr. Chagla, learned Senior Counsel for respondent No.4 and Mr. Mehta, learned Counsel for respondent No.5 at length.

2. By this Petition under Article 226 of the Constitution of India, petitioner has prayed for issuance of writ of prohibition restraining respondents No.1 to 3 from taking any further action pursuant to the opening of the price bids of the consortium comprising respondents No.4 and 5 on 08.11.2017; for writ of prohibition restraining respondents No.1 to 3 from taking any decision, executing any documents / letters, accepting any payments in pursuance of opening of the price bid of the consortium comprising respondents No.4 and 5; for writ of certiorari setting aside the decision of respondent No.1 in opening the price bid of the consortium comprising respondents No.4 and 5 and declaring them the the L1 bidder; for writ of prohibition restraining respondents No.1 to 3 from awarding the contract to the consortium comprising respondents No.4 and 5; for writ of mandamus directing respondents No.1 to 3 to disqualify the bid submitted by the consortium comprising respondents No.4 and 5; for writ of mandamus directing respondents No.1 to 3 to award the contract under the tender in question to the petitioner. The relevant and material facts giving rise to filing of the Petition are as under:

3. On 05.08.2017, respondent No.1 floated an e-tender bearing No.SRM e-Tender No.T-1747/MSETCL/CO/DC&M/D&T/SS-Pretender. On 11.08.2017, pre-bid meeting was held. On 19.08.2017, respondent

No.1 published clarifications in respect of the pre-bid queries. On 04.09.2017, respondent No.1 re-floated the tender. 13.10.2017 was the last date of submission of the bids. On 08.11.2017, bids were opened. Petitioner addressed letters to the first respondent requesting the disqualification of bid submitted by the consortium comprising respondents No.4 and 5. It is the case of the petitioner that respondent No.1 illegally and arbitrarily declared consortium comprising respondents No.4 and 5 as a lowest and successful bidder when evidently the said consortium was not technically qualified. It is the case of the petitioner that it has been inter alia rendering services pertaining to design, procurement, supply, installation / erection, testing and commissioning of T & D systems such as lines, substations and distribution centres for the last 20 years. Respondent No.1 published an e-tender on 05.08.2017 for establishment of new 220/132/33 KV substation at Narangwadi District, Osmanabad under Aurangabad Zone. The relevant clauses for deciding the present controversy are the clauses 3.3.1 and 3.5.2 which read thus,

- 3.3.1 The bidder should have, in last 3 years executed the work on
- (a) turnkey basis including civil works, supply of equipments, erection, testing and commissioning as mentioned at (i) or (ii) below.
 - (i) Minimum one no. of 220/33 KV substation (in single order) having scope of work as below.
 - Atleast 6 no. of 220 KV bays, out of which minimum required
 - 1. T/F with Bays – 2 Nos.
 - 2. Line Bays – 2 Nos.

- (ii) Minimum one no. of 132/33 KV substation (in single order) having scope of work as below.

Atleast 6 no. of 132 KV bays, out of which minimum required

1. T/F with Bays – 2 Nos.

2. Line Bays – 2 Nos.

In addition to above standard scope of work the bidder should also have completed the work of atleast 4 no. of 220 KV bays, out of which 1 Bay should be of T/F with ET&C experience of T/F.

- 3.5.2 **One of the consortium partners should satisfy 100% technical qualifying criteria at 3.3** and subject to fulfillment of remaining qualifying criteria jointly by both the partners.

(emphasis supplied)

4. It is the case of the petitioner that on a conjoint reading of the above mandatory conditions of the invitation of bid, at least one of the bidders of the consortium ought to have completed 100% of the works as specified under clause 3.3 (subject to fulfillment of remaining qualifying criteria jointly by both the partners) of the Invitation for Bid. The consortium comprising respondents No.4 and 5 had raised a specific query to the respondent No.1 in respect of clause 3.3.1 of the Invitation for Bid in the following terms:

“We understand that experience in AIS as well as GIS Substations shall be considered for eligibility. GIS being technically more complex.”

5. In response to that query, respondent No.1 issued clarification in the following terms:

“Experience in AIS as well as GIS Substations **of equivalent or higher voltage** class as specified in Qualifying requirement is acceptable. **Experience of only GIS will not be considered**”
(Emphasis supplied).

6. It is the case of the petitioner that the consortium comprising respondents No.4 and 5 does not fulfill the primary technical qualifying criteria specified under clause 3.5.2 read with clause 3.3.1(a) of the Invitation for Bid. It is the case of the petitioner that the certificate dated 07.02.2017 in respect of the respondent No.4 is only in respect of past experience of Gas Insulated Substation (G.I.S.). In other words, respondent No.4 does not have past experience of Air Insulated Substation (A.I.S.). As far as the certificate dated 03.10.2017 of the respondent No.5 is concerned, it pertains to 220 kV GIS and 66 kV AIS . 66 kV AIS does not meet the qualifying requirement and therefore, the same cannot be considered as the A.I.S. experience as it is less than the minimum specified voltage of 220/33 kV under clause 3.3.1(a)(i) or 132/33 kV as per clause 3.3.1(a)(ii). Respondent No.5 was also not the lead bidder or contractor in the contract in question under the second certificate. The certificate dated 03.10.2017 pertains to the Joint Venture Entity and not to only respondent No.5. The consortium comprising respondents No.4 and 5 therefore, cannot rely upon certificate dated 03.10.2017 to contend that it has executed 100% of the works as required under Clause 3.3 of the Invitation for Bid.

7. It is the case of the petitioner that the certificate dated 03.10.2017 sought to be relied upon for technical qualification of respondent No.5

pertains to 245kV GIS Bays and 66 kV AIS Bays. As per the requirement under clause 3.3 of the Invitation for Bid read with the clarification issued by the respondent No.1, it is clear that (i) experience of only G.I.S. will not be considered; (ii) experience of A.I.S. as well as G.I.S. can be considered only in a case when such AIS / GIS is of a higher or equivalent voltage as required. Evidently, the AIS voltage in the second certificate is lower than the required value.

8. On behalf of respondents No.1 and 2, Vilas Krishna Khachane, authorized signatory has made affidavit in reply dated 06.12.2017. It is asserted that in the entire bid document, it is nowhere stated that the certificate submitted by the bidders in the form of experience in Joint Venture will not be considered for the purpose of technical qualification. The certificate for qualification submitted by respondent No.4 was issued by Gujarat Energy Transmission Corporation Limited (GETCO). When a tender is undertaken by a contractor in the form of consortium, the experience of the said work is considered as 100% to each member of the consortium as any work undertaken in the form of consortium is a team work and their experience is not divisible. Respondent No.1 has acted rightly by considering the experience certificate dated 03.10.2017, which is in the form of Joint Venture for qualifying respondents No.4 and 5 for technical bid.

9. Mr. Ankit Khandelwal, the authorized signatory of the respondent No.4 has made affidavit in reply dated 08.12.2017. It is asserted that respondent No.4 is in the business of Engineering, Procurement and Construction (EPC) contractors and manufacturers and switchgears, meter, etc. and the lead bidder for the tender under reference in consortium with respondent No.5. Respondent No.5 is an Engineering, Procurement and Construction (EPC) contractor with experience in designing and commissioning electrical substations and a joint venture partner with respondent No.4 jointly bidding for the tender under reference.

10. Jignesh G. Patel, Director of respondent No.5 has made affidavit dated 08.12.2017 asserting that the tender in question permitted bidding through consortium or joint venture. Respondent No.5 was an EPC contractor and met the technical qualifications. Respondent No.5 bid for the tender in question in a joint venture with TBEA Energy (India) Pvt. Ltd. (TBEA). TBEA was designated the lead bidder for administrative convenience. Respondent No.5 and TBEA were jointly and severally responsible for completion of GETCO project.

11. Sagar Sunil Vidolkar, Director of the Petitioner has filed affidavit in rejoinder dated 18.12.2017 to the affidavit in reply filed by

respondents No.1 and 2.

12. In support of this Petition, Mr. Samdani submitted that clause 3.3.1 (a)(i) or (ii) and clause 3.5.2 are mandatory conditions of Invitation for Bid. The certificate dated 07.02.2017 in respect of respondent No.4 does not meet the requisite qualifying criteria. The certificate pertains to only GIS. He submitted that respondent No.4 raised following queries:

1. Kindly define “Single Order”.
2. We understand that you will accept Higher Voltage class substation both for primary as well as secondary side i.e. 220/33 kV or above Voltage Class Substations for qualification.
3. We understand that experience in AIS as well as GIS Substations shall be considered for eligibility. GIS being technically more complex.

13. Respondent No.1 issued clarification which is as under:
 “Definition “Single Order” - All the works specified in the Qualifying requirement are to be completed under single work order / LoA.
 Substations above 220/33kV such as 765/400kV, 400/220kV and 220/132kV are acceptable.
 Experience in AIS as well as GIS Substations of equivalent or higher voltage class as specified in Qualifying requirement is acceptable. Experience of only GIS shall not be considered.”

14. He submitted that perusal of the clarification shows that experience in AIS as well as GIS Substations of equivalent or higher voltage class as specified in qualifying requirement is acceptable. Experience in only GIS shall not be considered. He has taken us through the certificate dated 07.02.2017 issued by GETCO in favour of respondent No.4 having joint venture with M/s. Chint Electric Company Limited, China. A perusal of this certificate shows that the certificate pertains only to GIS. Respondent No.1 therefore ought not to have taken cognizance of the same.

15. As far as the certificate dated 03.10.2017 issued in the name of M/s. TBEA Energy (India) Pvt. Ltd. Joint Venture with respondent No.5 shows that they were awarded contract of “Engineering, Supply, Erection, Testing & Commissioning of 220/66kV GIS equipments, materials on turnkey basis including all civil works at 220/66kV Atul GIS Substation, Gujarat. As against this, clause 3.0 lays down qualifying requirement. The bidder has to satisfy the qualifying requirements for 220/132/33 KV **AIS Substations.** *(emphasis supplied)*

16. This certificate pertains to 220kV GIS and 66kV AIS. 66kV AIS does not meet the qualifying requirement, and therefore, the same cannot be considered as the AIS experience as it is less than the minimum specified voltage of 220/33 kV under clause 3.3.1(a)(i) or 132/33kV

under clause 3.3.1(a)(ii). The requisite AIS experience of respondent No.5 cannot be drawn from this certificate. Respondent No.5 was not the lead bidder or a contractor of a contract in question. The certificate pertains to JV Entity of M/s. TBEA Energy (India) Pvt. Ltd. with respondent No.5. Respondent No.5 cannot rely upon the said certificate to contend that it has executed 100% of works as required under clause 3.3 of the Invitation for Bid.

17. Mr. Samdani invited our attention to paragraph 19.5.2 of the Petition and reply of respondents No.1 and 2 dealing with the said paragraph. He submitted that respondents No.1 and 2 failed to appreciate that respondent No.4 does not fulfill 100% of the technical qualifying criteria as required under clause 3.3 read with clause 3.5 of the Invitation for Bid. Respondents No.4 and 5 even when put together do not fulfill the remaining technical qualifying criteria as required under clauses 3.3 read with 3.5 of the Invitation for Bid. For all these reasons, he submitted that Petition requires consideration and respondents No.1 and 2 should be prohibited from taking any decision, executing any documents / letters, accepting any payments pertaining to the opening of the price bids of the consortium comprising respondents No.4 and 5 on 08.11.2017.

18. On the other hand, Mr. Walavalkar submitted that the contentions raised in paragraph 19.05.2 are completely false and are denied. In the entire bid document, it is nowhere stated that the certificate submitted in the form of Joint Venture will not be considered for technical qualification. He submitted that when a tender is undertaken by the contractor in the form of consortium, the experience of the said work is considered 100% to each member of the consortium as any work undertaken in the form of consortium is a team work and their experience is not divisible.

19. Mr. Chagla submitted that clarification issued by respondent No.1 clearly states that experience in AIS as well as GIS substations of equivalent or higher voltage class as specified in the qualifying requirement is acceptable. In the present case, certificate dated 03.10.2017 is to the following effect:

“The system mainly comprising of:-

1. 245KV GIS Bays-
 - 220KV Line bays – 4 Nos.
 - Power Transformer bays 220/66KV - 2 Nos. (HV Side)
 - Bus coupler bays – 1 No.
 - PT bay – 2 No.
2. 66KV AIS Bays-
 - Line Bays – 6 Nos.
 - Power Transformer bays 220/66KV - 2 Nos. (LV Side)
3. Substation Automation System.

The above substation work has been completed and successfully commissioned on 09.11.2015. The performance of the substation is found satisfactory as on date.”

20. The clarification further states that the experience of only GIS shall

not be considered. Clause 3.3.1(a) lays down that the bidder should have, in last 3 years executed the work on turnkey basis including civil works, supply of equipments, erection, testing and commissioning as mentioned at clause (i) or clause (ii). Clause (i) specifies minimum one number of 220/33 KV substation (in single order) having scope of work as under:

Atleast 6 no. of 220 KV bays, out of which minimum required

1. Transformer with Bays – 2 Nos.
2. Line Bays – 2 Nos.

21. Clause (ii) specifies minimum one no. of 132/33 KV substation (in single order) having scope of work as under.

Atleast 6 no. of 132 KV bays, out of which minimum required

1. Transformer with Bays – 2 Nos.
2. Line Bays – 2 Nos.

In addition to above standard scope of work, the bidder should also have completed the work of atleast 4 number of 220 KV bays, out of which 1 Bay should be of transformer with erection, testing and commissioning experience of transformer.

22. He submitted that a perusal of certificate dated 03.10.2017 clearly satisfies the criteria laid down under clauses 3.3.1 and 3.5.2. In support of his submissions, he relied upon notification dated 20.08.2010 issued by Central Electricity Authority, and in particular clause 42(1) which lays down that the substation or switchyard can be a conventional air insulated substation (AIS) or a gas insulated substation (GIS) or a hybrid substation. In the present case, consortium comprising respondents No.4 and 5 satisfy

the technical qualification prescribed in the tender. He also relied upon the following decisions:

- a. ***New Horizons Limited Vs. Union of India*, (1995) 1 SCC 478**, and in particular paragraphs 23, 24 and 26 thereof;
- b. ***Atasha Ashirwad Build Vs. State of Maharashtra*, 2011 (1) Mh.L.J. 282**, and in particular paragraphs 8 to 10 thereof;
- c. ***Coastal Marine Construction & Engineering Limited Vs. The Shipping Corporation of India*** decided on 16.11.2017 to which one of us (Shantanu Kemkar, J.) was a member, and in particular paragraphs 2, 14, 15 and 17 thereof.

23. He submitted that the terms and conditions of tendered document are required to be construed from a standpoint of a prudent businessman. The experience of constituencies of joint venture is required to be taken into consideration and if experience of respondent No.5 is taken into consideration, it cannot be said that consortium comprising respondents No.4 and 5 does not meet the technical qualification.

24. Mr. Chagla further submitted that the Apex Court in the case of **New Horizons Limited** (*supra*) has considered decisions in ***Ramana Dayaram Shetty Vs. International Airport Authority of India*, (1979) 3 SCC 489** as also ***Tata Cellular Vs. Union of India*, (1994) 6 SCC 651** among others dealing with the scope of judicial review in the field of exercise of contractual powers by the Government bodies. In the light of the principles laid down in **Tata Cellular** (*supra*), he submitted that no case is made out

for invocation of powers under Article 226 of the Constitution of India.

25. We have considered the rival submissions advanced by the learned Counsel appearing for the parties. We have also perused the material on record. In the case of **Tata Cellular** (*supra*), the Apex Court examined the scope of judicial review in the field of exercise of contractual powers by the Government bodies and laid down the following principles:

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

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

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

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

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

26. In paragraph 17, the Apex Court observed that in the matter of

entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of the Apex Court insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere.

27. Applying the principles laid down in the **Tata Cellular** (*supra*) to the facts of the present case, can it be said that the action of respondents No.1 and 2 in holding that the consortium comprising respondents No.4 and 5

satisfies the technical criterion is not fair and reasonable and that respondents No.1 and 2 have acted arbitrarily and their action is mala fide.

28. We have already extracted relevant clauses earlier. A perusal of the clauses extracted hereinabove read with certificate dated 03.10.2017 of respondents No.4 and 5 indicates that respondents No.4 and 5 meet the requirements laid down in clauses 3.3.1 and 3.5.2. We have already extracted the relevant portion of the certificate dated 03.10.2017. Respondent No.5 having joint venture with M/s. TBEA Energy (India) Pvt. Ltd. have completed and successfully commissioned the substation work specified therein on 09.11.2015 and performance of the substation is found satisfactory as on date. Their system comprises of 245 KV GIS Bays having specifications as under:

“245KV GIS Bays-

- 220KV Line bays – 4 Nos.
- Power Transformer bays 220/66KV – 2 Nos. (HV Side)
- Bus coupler bays – 1 No.
- PT bay – 2 No.”

29. Their system also comprises of 66KV AIS Bays having following specifications:

66KV AIS Bays-

- Line Bays – 6 Nos.
- Power Transformer bays 220/66KV - 2 Nos. (LV Side)

30. A perusal of clarification issued by respondent No.1, extracted

hereinabove, shows that experience of only GIS shall not be considered. In the present case, it is not in dispute that the certificate dated 03.10.2017 speaks about 245 kV GIS Bays and 65 kV AIS Bays.

31. The decision in **New Horizons Limited** (*supra*) was considered by the Division Bench in **Atasha Ashirwad Build** (*supra*). Paragraphs 8 to 10 thereof read thus,

8. Joint Ventures are commonly formed by two or more individuals with a view to pool their resources, skill, experience etc. in order to inter alia meet the eligibility criteria of tenders of specific projects. The fact that participation of the constituents of the Joint Venture is in a particular ratio cannot become a reason to whittle down and reduce the experience of constituents. The partners, who constitute the Joint Venture, may agree to limit investment and profit sharing to a certain percentage. This does not mean that they have thereby agreed to have a limited experience. If, in fact, a partner has certain amount of experience, that experience remains as a part of experience of a Joint Venture when the Joint Venture makes a bid and the ratio of investment and profit sharing are the factors, which have nothing to do with such experience.

9. In **New Horizons Limited Vs. Union of India**, the Supreme Court has observed as follows:

“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.”

10. In view of the above, we find that for judging the credentials of a Joint Venture, the past experience of the constituents of the Joint Venture will have to be taken into account to arrive at the experience of Joint Venture. Admittedly, in the present case, if that is considered and taken together, the experience of Joint Venture is more than 5433 Cum. of cement concrete work during one working season on any one work site and 12000 Cum. cement concrete works on all work sites as required by Sub Clause II of Clause 2.9 reproduced supra.”

32. Mr. Samdani relied upon the order dated 16.11.2017 passed in **Writ Petition (L) No.1211 of 2017** by this Court in which one of us (Shantanu Kemkar, J.) was member. In that case, in paragraph 2, this Court reproduced clauses 6.1 to 6.6 and in that context observed in paragraph 17 thus,

“17. On a plain reading of clause Nos.6.1 and 6.5 we find ourselves unable to agree with the claim of the Respondents that the experience of the “Group Company” can also be taken into consideration while considering the experience of bidder when the clauses are so clear requiring therein that “the bidder independently should have experience”. ...”

33. In the present case, we have already extracted the relevant clauses. In none of the said clauses, there is similar clause as was in the case of **Writ Petition (L) No. 1211 of 2017** requiring that “*the bidder independently should have experience*”. The Clause No. 3.5.2 says that “*one of the consortium partners should satisfy 100% technical qualifying criteria at 3.3 and subject to fulfillment of remaining qualifying criteria jointly by both the partners.*” On plain reading of this Clause, it clearly indicates that one of the consortium partners should satisfy 100% technical qualifying criteria. It does not say that consortium partner should independently satisfy technical qualifying criteria. Therefore, in view of the law laid down by the Hon'ble Supreme Court in the case of **New Horizons Limited** (*supra*) and in the order passed by the Division Bench of this Court in the case of **Atasha Ashirwad Build** (*supra*), it cannot be said that the experience gained by the consortium partner should be independently gained by him and not as a consortium partner with any other joint venture. In the circumstances, in our considered view, the order dated 16th November, 2017 passed in **Writ Petition (L) No.1211 of 2017** has no application in the facts of the present case.

34. Applying the principles laid down in **Tata Cellular** (*supra*) as also **New Horizons Limited** (*supra*), we do not find that the respondents No.1 and 2 have acted arbitrarily and mala fide in holding that the consortium

comprising respondents No.4 and 5 satisfied the conditions laid down in clauses 3.3.1 and 3.5.2. In the result, no case is made for invocation of powers under Article 226 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

(SHANTANU KEMKAR, J.)

35. At this stage the learned counsel for the Petitioner has made oral prayer that the ad-interim stay granted on 23rd November, 2017 be continued for a period of four weeks enabling the Petitioner to seek interim order from the Hon'ble Supreme Court.

36. The prayer has been opposed by the learned counsel for the Respondents.

37. Having regard to the fact that ad-interim order was granted till the next date of hearing and that we have adjudicated the Petition on merits and have held that the 4th and 5th respondents are qualified for contract in question, we do not find it fit to continue the ad-interim relief granted on 23.11.2017. Hence, oral prayer is rejected.

(R. G. KETKAR, J.)

(SHANTANU KEMKAR, J.)