

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 26.07.2017
Pronounced on: 28.08.2017

+ W.P.(C) 5312/2017 & CM No.22512/2017 (stay)

+ W.P.(C) 5550/2017 & CM No.23336/2017 (stay)

CONSORTIUM OF ALSTOM TRANSPORT INDIA LTD. &
ALSTOM TRANSPORT S.A. & ANR Petitioners

versus

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA
LTD. & ANR Respondents

Present: Mr. Neeraj Kishan Kaul, Sr. Adv. with Mr. Dinesh Pardasani, Mr. Milanka Chaudhry and Ms. Ashly Cherian, Advocates for petitioners.

Mr. Sanjay Jain, Sr. Adv. with Mr. Rishi Manchanda, Mr. Kartik Rai, Ms. Adrija Thakur, Mr. Vidur Mohan and Mr. Arun Kumar, Advs. for respondents.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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Facts:

1. The Petitioners are a Joint-Venture Consortium bidding for both the subject tenders. The respondents are the Dedicated Freight Corridor Corporation of India Ltd. (DFCC) a Central Government PSU, and the Ministry of Railways. The DFCC had issued a tender for Procurement of Design, Supply, Construction, Installation, Testing and Commissioning of 2

X 25 KV AC Electrification, Signalling & Telecommunication, E&M and Associated Works on Design-Build Lump Sum Basis of Sahnewal-Pilkhani Section (approximately 175 Route Km of Single Line) of Eastern Dedicated Freight Corridor- Contract Package CP-304 and Contract Package CP-105 for Procurement of Design, Supply, Construction, Installation, Testing and Commissioning of 2 X 25 KV AC Electrification, Signalling & Telecommunication, E&M and Associated Works on Design-Build Lump Sum Basis For Dadri-Khujra Section (Approximately 47 Route Km Of Double Line) – [hereafter called “the work”]. The Petitioners are aggrieved by the rejection of their bid, as not fulfilling the eligibility criteria.

2. The tender process was a multi-staged one. The Petitioners’ bid was declined at the prequalification stage, specifically on interpretation of Clause 4.1, which deals with General Construction Experience. The said condition reads as follows:

“Clause 4.1: Experience under construction contracts in the role of prime contractor, JV member, sub-contractor, or management contractor for at least the last 5 (five) years between 1st January 2010 and application submission deadline. Note: Contracts where the JV member was an OEM, and designed, manufactured, tested and commissioned the signaling processor based equipment will be considered.”

3. The Petitioners complain that they were disqualified from the tender process in both the matters through letters sent to them and in both the cases the reasons for the disqualification state that:

“ATIL had submitted a statement jointly signed by the Managing Director of ATIL & AIL stating that AIL has sold and transferred the Transport Business of AIL to ATIL on Slump Sale Basis, and the transaction was completed on 31.03.2014. Since the Transport Division/Undertaking of AIL

purchased by ATIL is not a legal entity, credit for- the experience for the works executed by APIL/AIL before 01.04.2014 cannot be given to ATIL.”

4. The facts are that both the Petitioners formed a consortium. Alstom Transport (India) Ltd was incorporated on 21.04.1997. In the year 2002, due to restructuring in the Alstom Group, another Alstom Group Company, namely Alstom Power India Ltd (incorporated in 1992) filed a petition before this Court for amalgamation of Alstom Transport (India) Ltd, Alstom Systems Ltd and Alstom Power Boilers Ltd with Alstom Power Ltd., which was allowed by the Court by its order, dated 31.10.2002. Thereafter, Alstom Power India Ltd changed its name to Alstom Projects India Ltd ("APIL"), which was recorded by the Registrar of Companies, and a fresh certificate of incorporation was issued on 11.11.2002. In 2012, APIL further changed its name to Alstom India Limited ("AIL") vide fresh Certificate of Incorporation dated 06.06.2012, which was issued consequent upon the change of name of the company. It is stated that in 2011, the Alstom Group, as a business decision, decided to have a separate company to carry out its transportation business and also set up a Rolling Stock Manufacturing Unit at Sri City, Andhra Pradesh to manufacture Metro Cars for the Chennai Metro and consequently incorporated a new company in the name of Alstom Transport India Limited i.e. the second petitioner ("ATIL") on 19.01.2011.

5. The petition alleges that during 2013-14, Alstom Group, as part of its global business restructuring strategy consolidated the business sectors worldwide into four sectors, namely Power, Transport, Renewable and Grid. As part of the restructuring, the transport business was to be streamlined and consolidated under one legal entity in the country and, therefore, Alstom

India Ltd ("AIL") by a board resolution dated 15.01.2014 and with shareholders' consent approved the sale and transfer of the transport undertaking/business to Petitioner No.2 as a going concern on a "slump sale" basis for a lump sum consideration without any values being assigned to individual assets and liabilities through Agreement to Sell Business dated 06.03.2014 (ASB). The first petitioner was part of AIL and which had sold and transferred the Transport Business to ATIL on "Slump Sale" basis. It is stated that this joint-venture has been accepted and admitted in principle by the respondents.

6. The Petitioners allege that as bidders they fulfilled the eligibility condition spelt out in Clause 4.1, which relates to General Building Experience. It is stated that since cumulatively, the consortium has the adequate amount of experience as required by the respondents in the Prequalification Document, which is part of the tender document, the Petitioners should not have been disqualified in bidding for the tender. It is stated that the respondents could not have rejected the bid as not eligible, at the pre-qualification stage, on the ground that AIL was not a legal entity and that its experience could not, therefore, have been validly conveyed to ATIL.

7. It is submitted that the ASB provided for transfer of assets, including transfer of properties, rights of every kind and description that are related to the said business, including immovable and movable properties, customer contracts, business authorizations, books and records, insurance policies, employees, goodwill, work experience, intellectual property rights and knowhow, all past track credentials and market share which would forthwith be deemed to be the track record of ATIL for all commercial and regulatory purposes. The Petitioners rely on Clause 2.1 of the ASB, in this regard. It is

stated that on 23.08.2016 the Petitioners received a letter from DFCC, which *inter alia*, sought queries, in the following terms:

*"xiv: **Qualification Criterion 4.1:** In respect of Consortium member ATIL, you have claimed Four (4) numbers of works which were awarded to APIL/AIL. You have also submitted a statement jointly signed by the Managing Directors of ATIL & AIL stating that AIL has sold and transferred the Transport Business of AIL to ATIL on Slump Sale basis and the transaction was completed on 31.03.2014. The credit for the experience of works before 31.03.2014 cannot be given to ATIL.*

Therefore, you are requested to submit Form EXP-4.1 along with Client's certificates for the works of General Construction Experience executed by ATIL for the period 1st January 2010 to 31.03.2014."

8. It is contended that the Consortium by its letter dated 07.09.2016 responded to the letter dated 23.08.2016 issued by DFCC with its clarifications, including a detailed clarification to issue no. xiv raised. The Consortium clarified that ATIL had General Construction Experience as required for the last five years up to the application submission and was in fact the rightful owner of all the General Experience as submitted by them and that the credit for experience of works prior to 31.03.2014 has been rightfully claimed by it. The Consortium further clarified that as per the terms of the ASB dated 06.03.2014, wherein AIL transferred its Transport Business as a going concern (i.e. on an ongoing basis) through slump sale to Petitioner No.2, included assets as well as contracts pertaining to the Transport Business then subsisting, including those set out in the schedule of the ASB. It was further submitted that by virtue of the said ASB, ATIL acquired the entire transport business and thereafter transport business

continued under it. All the assets, employees, equipment, IPR stood transferred to ATIL.

9. It is submitted that after the transfer of Transport Undertaking to ATIL, past credentials of AIL were accepted by all other government entities, including Delhi Metro Rail Corporation, KMRL, LMRC and Indian Railways. Furthermore, ATIL even provided proof in order to demonstrate the acceptance of its past credentials by other government entities. It was submitted that in the year 2014 AIL participated in the Kochi Metro project KE-13 and were initially a consortium of AIL and Alstom Transport S.A. However, after issuance of the bid to the parties and post the slump sale in 2014, AIL and ATIL applied for change in consortium to induct the latter in the shoes of AIL, which was duly approved by the relevant authority. It was also highlighted that the General Construction criteria for each member was the same criteria in the present context. It is also stated that most of the projects are or were financed by multilateral agencies.

10. Mr. Neeraj Kishan Kaul, learned senior counsel for the Petitioners relied on *New Horizons Ltd. v. Union of India*, (1995) 1 SCC 478 where it was held that experience of an undertaking or constituent of a JV, should be considered as experience of the entire JV. The Supreme Court had stated as follows:

“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.”

11. It is argued that once the effect of the slump sale, which is a mode of transfer which the income tax laws recognize, is known, the respondents could not have legitimately refused to give credit and weight to the project and work experience of AIL which stood conveyed to ATIL. Given that ATIL acquired everything that was part of the division that stood transferred, such as technical knowhow, personnel, ongoing contracts and intellectual property law and even could claim depreciation for the machinery, equipment and other properties from the date of transfer, there was no logic or *rationale* claiming that it had no prior experience from 2011, as the respondents have done, in the present case.

12. It is also stated that the respondents acted in a completely arbitrary manner in disqualifying the Consortium on the ground that ATIL cannot use the past experience of transport business of AIL for the purposes of participation in the bidding process. It is urged that DFCC ignored that the ASB expressly provides that pursuant to the transfer between AIL and ATIL, all past records, experience, including all employees and credentials of AIL in relation to the Transport Business shall be deemed to be track record ATIL's for all commercial and regulatory purpose. DFCC even failed to consider the Certificate under Section 281(1)(iii) of the *Income Tax Act 1961*, issued by the Dy. Commissioner of Income Tax granting permission to

AIL to transfer assets in favour of ATIL, thereby validating the ASB executed between the two.

13. Learned senior counsel argues that DFCC failed to consider that other government entities accepted the past credentials and experience of AIL after 1st April 2014 onwards in respect of the Transport Undertaking as Petitioner's experience, while awarding bids in favour of ATIL. DFCC overlooked ATIL's documents on record where DMRC was permitted to step in the shoes of AIL post the slump sale. AIL participated in the Kochi Metro project KE-13 and were initially a consortium of AIL and Alstom Transport S.A. However, after issuance of the bid to the parties and post the slump sale in 2014, AIL and ATIL applied for change in consortium to induct ATIL in the shoes of AIL, which was duly approved by the said Authority.

14. Mr. Sanjay Jain, the learned Additional Solicitor General (ASG) argues that ATIL was incorporated only on 28.01.2011, in terms of the certificate for commencement of business issued by Deputy Registrar of Company, Karnataka. Moreover, the said company has no General Construction Experience from the date of its incorporation i.e 28.01.2011 to 31.03.2014, in terms of its own showing. Even from 01.04.2014 onwards, the ATIL has claimed General Construction Experience against those works only which were transferred from AIL due to slump sale of transport business of AIL to ATIL. Therefore, notwithstanding the inclusion of the said experience claimed from 01.04.2014, ATIL falls short of the requisite experience, as required under the Pre-Qualification Criterion.

15. It is submitted that an independent General Consultant carried out scrutiny of the bids, in terms of the stipulations of the funding agency, i.e the

World Bank. In its evaluation it considered experience of work transferred to ATIL through slump sale from 01.04.2014 onwards and not considered experience before 01.04.2014 due to following reasons:

"ATIL had submitted a statement jointly signed by the Managing Director of ATIL & AIL stating that AIL has sold and transferred the Transport Business of AIL to ATIL on Slump Sale Basis, and the transaction was completed on 31.03.2014. Since the Transport Division/Undertaking of AIL purchased by ATIL is not a legal entity, credit for- the experience for the works executed by APIL/AIL before 01.04.2014 cannot be given to ATIL."

16. The Respondents contend in their response to the Petitioners' letters that they clarified that the ATIL had submitted a statement jointly signed by the Managing Director of ATIL & AIL stating that AIL has sold and transferred the Transport Business of AIL to ATIL on Slump Sale Basis, and the transaction was completed on 31.03.2014. Since the Transport Division/Undertaking of AIL purchased by ATIL is not a legal entity, credit for- the experience for the works executed by APIL/AIL before 01.04.2014 cannot be given to ATIL. It is submitted that the Petitioners were inherently ineligible to participate in view of Clause 25.4 of the Pre-Qualification document, which is as under:

"Only the qualifications of the Applicant shall be considered. In particular, the qualifications of a parent or other affiliated company that is not party to the Applicant under a JV in accordance with ITA 4.2 (or participating as a sub-contractor as per ITA 25.2) shall not be considered."

Analysis and Conclusions

17. The Petitioners' contention is premised on the fact that the consortium i.e. Petitioners No.1 and No.2 form a joint venture, in the strictest sense. Alstom Transport (India) Ltd was incorporated on 21.04.1997. In the year 2002, due to restructuring in the Alstom Group, another Alstom Group Company namely Alstom Power India Ltd (incorporated in 1992) filed a petition before this Court for amalgamation of Alstom Transport (India) Ltd, Alstom Systems Ltd and Alstom Power Boilers Ltd with Alstom Power Ltd which was allowed by the High Court of Delhi by its order dated 31.10.2002. Thereafter, Alstom Power India Ltd changed its name to Alstom Projects India Ltd ("APIL") which was recorded by the Registrar of Companies and a fresh certificate of incorporation was issued on 11.11.2002. In 2012, APIL further changed its name to Alstom India Limited ("AIL") vide fresh Certificate of Incorporation dated 06.06.2012, which was issued consequent upon the change of name of the company.

18. In 2011, the Alstom Group took a business decision to have a separate company to carry out its transportation business and also set up a Rolling Stock Manufacturing Unit at Sri City, Andhra Pradesh to manufacture Metro Cars for the Chennai Metro and consequently incorporated a new company in the name of Alstom Transport India Limited i.e. Petitioner No.2 on 19.01.2011. During, 2013-14, Alstom Group as part of its global business restructuring strategy consolidated the business sectors worldwide into four sectors namely Power, Transport, Renewable and Grid. As part of the restructuring, the Transport business was to be streamlined and consolidated under one legal entity in the country and, therefore, Alstom India Ltd ("AIL") by board resolution dated 15.01.2014 and with shareholders' consent approved the sale and transfer of the transport undertaking/business to ATIL

as a going concern on a slump sale basis for a lump sum consideration without any values being assigned to individual assets and liabilities vide Agreement to Sell Business dated 06.03.2014 (ASB).

19. Clause 2.1 of the ASB which is relied upon by the Petitioners, is reproduced below.

"2.1: Upon the terms and subject to the conditions of this Agreement and the Ancillary Documents, and subject to the exclusions set forth in Clause 2.2, the seller agrees to sell, assign, transfer, convey and deliver to the Buyer, free and clear of all Liens, and the Buyer agrees to purchase, acquire and accept from the Seller, the entire right, title and interest of the Seller in, to and under the Undertaking as a going concern. The purchase, sale and transfer of the Undertaking shall be on a 'slump sale' basis (as defined under Section 2(42) of the Income Tax Act, 1961, 1961) for a lump sum consideration without values being assigned to individual assets and liabilities as contemplated under Applicable Laws, such that after the Closing Date (a) the Undertaking shall be delivered to have been transferred to and vested in the buyer as of the Closing Date; (b) the Buyer would be entitled to and shall bear, subject to the terms and conditions of this Agreement and the Ancillary Documents, all rights, title, interest, obligations, risks, and rewards of the Undertaking as of the Closing Date; and (c) the past track record of the Seller in relation to the Undertaking, including without limitations, the experience, credentials and market share, shall be deemed to the track record of the Buyer for all commercial and regulatory purposes including for the purpose of eligibility, standing, evaluation and participation of the Buyer in all existing and future bids, tenders and contracts of all authorities, agencies and clients. It is further clarified that determination of the value of any Purchased Asset or Assumed Liability for the purpose of payment of stamp duty, registration fees or other similar Taxes or fees, shall not be regarded assignment of values to Individual assets or liabilities."

20. The corporate genealogy of the Consortium and ATIL is relevant in the context of the dispute in this case. Alstom Transport SA is the other joint venture partner of ATIL, in the first petitioner Consortium. Alstom Transport India Ltd was incorporated in 1997; before that one Alstom Power Ltd was incorporated in India, in 1992. This Court, on 31.10.2002, approved a scheme of amalgamation of Alstom Transport India Ltd, Alstom Systems Ltd and Alstom Power Boilers Ltd with Alstom Power Ltd. This composite new entity (Alstom Power Ltd.) changed its name to Alstom Projects India Ltd on 11.11.2012. It changed its name further to Alstom India Ltd (AIL) in 2012 and a certificate was issued by the Registrar, in that regard, on 06.06.2012. In 2012, ATIL was set up for the purpose of transportation business and rolling stock manufacture. In the meanwhile, the Alstom group went a restructuring, resulting in organization of its ventures into four broad commercial lines/“verticals”; the transport business of AIL was transferred to ATIL, on slump sales basis.

21. Clause 2.1 of the ASB, which was entered into between AIL (the seller of the transport business) and ATIL (the purchaser) specifically stated that all rights, title, interest, obligations, risks, and rewards of the Undertaking as of the Closing Date (defined in that agreement) and the past track record of AIL in relation to the Undertaking, including “*without limitations*”, credentials, experience and market share, “*shall be deemed to the track record of the Buyer for all commercial and regulatory purposes including for the purpose of eligibility, standing, evaluation and participation of the Buyer in “all existing and future bids, tenders and contracts of all authorities, agencies and clients”*”. This unequivocally meant that any pre-existing eligibility experience, credentials, or other track records

of AIL, devolved upon and was conveyed to ATIL. AIL was left with no expertise too, given that all contracts of its personnel and its expertise, which went with that transfer as well as knowhow and IPRs, were sold to ATIL. The ABS contained a Schedule, which listed 30 past contracts (spanning the eleven year period between 2003 and 2014) which too devolved upon ATIL, in terms of the sale. ATIL has, in addition, annexed voluminous documents in the form of third party certification for past work done, in respect of AIL's transportation business, which was transferred to it through the slump sale.

22. *New Horizons (supra)* was relied on heavily by the Petitioners to say that the corporate veil should be lifted, if necessary at times, to discern the reality. In the context of tender evaluation as well, if the bid conditions enable fulfillment of eligibility terms, by JV partners, the principle of lifting the corporate veil should be resorted to. In *Patel Engineering Ltd. & Anr. v National Highways Authority Of India* AIR 2005 Delhi 298, the Court had ruled that experience certificates issued to one joint venture partner, for the work it had performed, could not be ignored, since the joint venture was not in existence when the bid was submitted. The Court held that the experience certificates could not be ignored, even though the joint venture did not function. The Court had relied on *New Horizons (supra)*.

23. *G.R Engineering Works Ltd. v. Oil India Limited & Ors.* (2007) 3 GLR 899 is a Gujarat High Court decision, which throws some light. The tender experience demanded was 7 years. It was held that the newly incorporated tendering entity was entitled to use the previous experience of the erstwhile partnership. The High Court held as follows:

"It may, now, be pointed out that when the owner of a proprietary concern decides, in order to expand his business, to

form a partnership firm with some others, strictly speaking, a new entity is born in the form of a firm. The firm, which may be so born, could not have had any experience in its own name. This does not mean that a businessman would not take into consideration the earlier experience of one of the partners of such a firm for the purpose of determining the capability of the firm to execute a contract if allotted to them. Similarly, a firm may consist of two persons as partners and in order to expand their business, they may bring in some new partners and a new firm, in a new name, may be organized and formed. Though the newly born firm may not have any experience in its own name, would the experience of those, who had been carrying on the business of the type, which the newly born firm is required to do, not be counted by a prudent businessman for determining the technical experience of the newly born firm to do the business? It is not uncommon that a company, on account of merger or amalgamation, undergoes a reorganization and a tender may be submitted in the name of such a reorganized company. Shall the experience of the company, which has merged into re-organized company, not be taken into consideration, because the tender has not been submitted in the name of the company, which has merged, but has been submitted in the name of a re-organized company, which has no experience, in its own name? Similarly, there may be a split in a company and the persons, who had been looking after a particular field of the business of the company, may form a new company after leaving the earlier company. The new company, though have persons with experience in the field, may not have experience in its own name; while the original company would have experience in its own name, but it would lack persons with experience, who had done work in the field. The requirements, regarding experience, cannot mean that the offer of the original company must be considered, because it has experience, in its name, though it does not have any experienced person with it to carry on the work and ignore the offer of the new company on the ground that it has no experience in its own name, though it has persons having experience in the field and also capability to undertake and execute the work. A tender process, in such a

case, is nothing, but a commercial transaction; The terms and conditions of the bidding documents have to be, therefore, construed, from the standpoint of a prudent businessman. When a businessman enters into a contract, whereunder some work is required to be performed, he would seek to assure himself about the credentials of the person whom he has to choose for the purpose of performance of the work. If such credentials are to be examined from a commercial point of view, it logically means that if the contract is to be entered into, a company, as a prudent person in business, will look into the background of the entity, be it a company or firm, and the persons, who are in control of the same and capable to execute the work. A businessman would not go by the name of the company alone, but by the persons behind it, who have experience to do the work. Similar has to be approach of the State and its instrumentalities, while considering the eligibility of a tenderer, as is the case at hand, for the purpose of awarding the contract. These aspects of law have been succinctly explained in New Horizon Ltd. v. Union of India, (1995) 1 SCC 478"

24. *Ganpati RV-Tallers Alegria Track Private Limited v. Union of India* 2009 (1) SCC 589 is another pertinent decision. Relying on the ratio of *New Horizons (supra)* the Court permitted the appellant to submit its bid which was in the context of joint-venture entity using the ISO certifications and other approvals of one of its shareholders (a joint-venture partner). It was held as follows:

"Learned counsel for the Union of India, on the other hand, submitted that New Horizon's case (supra) related to the experience of the joint venture partners and that logic cannot be applied to the present case where the parameters are different. So far as the factual position is concerned, it is to be noted that the appellant annexed ISO 9001 certification of Joint venture partners with the tender offer. Though the ISO 9001 certification of the Joint venture company prior to the date of opening of tender existed, the same was not annexed with the

tender as the appellant was under the impression that submission of certificate in the name of individual partners is sufficient and the respondents had also never demanded the same, in respect of RDSO approval it was pointed out that one of the Joint venture partners i.e. M/s R. V. Rail Products Pvt. Ltd. is also an existing RDSO approved manufacturer of conventional curved switches i.e. 1 in 12 curved switches. The said certificate was enclosed with the appellant's offer."

25. DFCC, no doubt, argues that the AIL's Transport Division, was not a legal entity and, therefore, the experience of the joint-venture, cannot be assimilated from either of the undertakings. This defence is wrong in fact and in law. Clause 4.1, this Court notices, does not specify that the Transport Division had to be a separate entity, and since it was one of the divisions of the undertakings, this submission is insubstantial. The Petitioners have the same parent company Alstom, and through a process of restructuring, and slump sale, have formed a joint-venture. The assets and liabilities of the transport business have been transferred to ATIL. The Petitioners submit that this sale includes the transfer of the professional expertise, credentials and market share to ATIL. This Court has to consider, the application by adopting a flexible and commercial approach, and analyze whether the applicants/Petitioners would have the General Construction Experience in fact or just on paper. It has been admitted that the entity Alstom India Ltd., formerly Alstom Projects India Ltd., has General Construction Experience whereby contracts before the ASB in 2014, have been changed in favor of ATIL. Therefore, lifting the corporate veil would show that the ASB along with the assigning of AIL's contracts to ATIL, prove that the joint venture

was in fact, and not just on paper, an undertaking whereby the experience of AIL could be associated with the consortium as a whole.

26. *New Horizons (supra)* was both forthright and perceptive when it held that;

“It is possible to visualize 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 reorganized 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 where under 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 of the advertisement issued on April 22, 1993. This would require that the first 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 April 22, 1993 when read with the notice for inviting tenders dated April 26, 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 IIPL, 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 IIPL 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.”

27. This court had, in a recent ruling in *Pratap Technocrats Pvt. Ltd. v Bharat Sanchar Nigam Limited* [W.P.(C) 1712/2017, decided on 30.05.2017]) distinguished *New Horizons (supra)*. The reason for distinguishing was that the tender condition did not envision a sole proprietorship’s experience devolving upon a newly set up company. The Court was considerably influenced by the fact that there was no mention of transfer of previous experience, or personnel in the conveyance document, which made over the business of the sole proprietorship and that the sale tax/VAT registrations – as well as Employee Provident Fund registrations of the sole proprietorship continued. Furthermore, its contracts continued in the name of the sole proprietorship. All these facts showed that the entire business of the proprietorship or its undertaking was not transferred.

28. In the present case, in this Court’s opinion, the Petitioners have established that the consortium is a joint-venture in the strictest sense. The *ratio* of *New Horizons (supra)* clearly visualizes that the experience of one of the members of a joint-venture can be associated to the consortium and in that regard the Petitioners together do qualify the General Construction Experience Clause as stated above and the petitions are admitted. The respondents’ approach is not driven by commercial logic, but appears to be technical and semantic. An enterprise, as the kind which DFCC wished to bid for its contract, clearly is one that depends on technical knowledge, a

fund of experience and human ingenuity of its thought leaders and employees. Once that asset, which is part of the undertaking is transferred (with the attendant right to claim past experience of the previous owner) to another enterprise or undertaking, it becomes the inheritors of that technical knowledge, wealth of experience and human ingenuity. Realistically, this asset is far more valuable than any tangible asset, unless it has intrinsic value other than those who use it. Therefore, the narrow construction or interpretation of the tender condition that led to the rejection of the Petitioners' bid cannot be sustained. The letters dated 02.06.2017 and 06.06.2017 in reference to the first tender, and the letter dated 14.06.2017 are to be quashed and are hereby quashed. The respondents are directed to proceed and evaluate the Petitioners' tender and process it further in accordance with the terms of the NIT. The writ petitions are allowed in the above terms, without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

AUGUST 28, 2017