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HIGH COURT OF CHHATTISGARH BILASPUR**Order Reserved on 05/09/2019****Order Delivered on 08/11/2019****Writ Petition (C) No.2663 of 2019**

M/s Sunil Kumar Agrawal, through its Proprietor Sunil Kumar Agrawal, S/o Radhe Shyma Agrawal, Aged about 48 years, R/o Seva Kunj Road, Near Girls College, District Raigarh, Chhattisgarh.

---- Petitioner**Versus**

1. State of Chhattisgarh, Public Works Department, through its Secretary, Mantralaya, Mahanadi Bhawan, Atal Nagar, Raipur, Chhattisgarh.
2. Chief Engineer, (Central Tender Cell) Office of the Engineer-in-Chief, Public Works Department, Atal Nagar, Raipur, Chhattisgarh.

---- Respondents

For Petitioner	: Mr. Manoj Paranjpe, Advocate
For Respondents/State	: Mr. Gagan Tiwari, Dy. Govt. Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C A V Order**Per Parth Prateem Sahu, Judge**

1. The Petitioner has approached this Court by filing writ petition challenging stipulation made by the Respondents in the qualification criteria, in which, it is stipulated that to qualify for award of the contract, each prime contractor in the same name and style (tenderer) in its name must have in the last five years experience as provided in Clause 1(b)(i), 1(b)(ii) & 1(b)(iii).

2. Facts of the case in nutshell are that Respondent No.2 had issued Notice Inviting Tender ('NIT', in short) No.051/TC/19-20, System Tender No.53088 dated 15.07.2019 for the work of construction of Gunderdehi bypass (Khallari to Madiyapar) Road (Length 5.35) k.m. i/c Culverts at District Balod". Clause 1 of qualification criteria in NIT dated 15.07.2019 reads as under :-

"1. To qualify for award of the Contract, each Prime contractor in the same name and style (tenderer), in its name must have in the last five years

(a) Achieved in **"any one financial year"** a financial turnover (in all classes of civil engineering construction works) of construction work of at least **60%** (Sixty percent) of the probable amount of contract for which bid has been invited.

(b)(i) Satisfactorily completed at lease one similar work equal in value **50%** (fifty percent) of the Probable amount of contract as on date of submission of financial offer.

OR

(ii) Satisfactorily completed at lease two similar works each costing minimum 40% (forty percent) of the probable amount of contract for which the tender is invited as on date of submission of financial offer.

OR

(iii) Satisfactorily executing at least one similar work having received payment of

value not less than 60% (sixty percent) of the value of probable amount of contract as on date of submission of financial offer.

Note:-1) The turn over shall be indexed at the compounded rate of 10% (Ten percent) for each earlier years.

(ii) The value of completed work shall be updated to the value of current financial years @ compounded rate of 10% (Ten percent) per year from completion year of work. The completion year shall be taken as base year.

(iii) Similar work mean **Road Works.**"

3. After floating of NIT by the Respondents, Petitioner had approached this Court challenging Clause 1 of the experience criteria on the ground that Petitioner is a sole proprietorship under the name and style of M/s. Sunil Kumar Agrawal and is a contractor registered with the Public Works Department ('PWD', in short) involved in the contract of building and construction business. The Petitioner is a Joint Venture Unit having entered into joint venture agreement with one M/s. ECI Engineering & Construction Company Limited, in which, Petitioner is a lead member having 51% share in the profit and the risk sharing ratio. As the Petitioner does not have the qualification as provided in Clause 1(b)(i), 1(b)(ii) & 1(b)(iii) in the name and style of the prime contractor, he found himself to be ineligible and thereafter filed this petition with following relief(s):-

“10.1 That, the Hon'ble Court may be pleased to issue a writ of an appropriate nature quashing/setting aside the impugned NIT dated 15.07.2019 bearing System Tender No.53088 issued by the respondents.

10.2 Alternatively, the Hon'ble Court may be pleased to annul the requirement of “same name and style” and direct the respondent authorities to allow the petitioner to participate in the tender on the basis of its past experience as a Joint Venture for satisfying the criteria mentioned in Clause 1(b)(i), or 1(b)(ii), or 1(b)(iii) of the NIT.

10.3 Cost of the proceedings.

10.4 Any other relief that may be deemed fit and just in the facts and circumstances of the case.”

4. Mr. Manoj Paranjpe, learned counsel appearing for the Petitioner submitted that qualification of having work experience in the same name and style in last five years as appended in the qualification criteria is arbitrary, illegal, having no nexus with the object sought to be achieved, unreasonable, malafide and discriminatory. He further submitted that Petitioner entered into the contract with the Chhattisgarh Road Development Corporation Limited in the year 2016 for construction of two laning with paved shoulder of Baramkela-Sohela Road Section as a Joint Venture Unit, having joint venture agreement with the same company i.e. M/s. ECI Engineering & Construction Company Limited, in which, he is also having 51% of shares

and is a lead member; the said project is ongoing project, in which, looking to the certificate issued by Chhattisgarh Road Development Corporation Limited, for the portion and amount of work completed on January 2019 a Joint Venture Unit; the Petitioner satisfies requirement as mentioned in Clause 1 of qualification criteria. He further submitted that by including the words in the qualification criteria as “same name and style (tenderer) in name of prime contractor” is only to exclude the bidders of like nature of the Petitioner. He further submitted that by such exclusion, there is restriction imposed on wider participation and there is no nexus with the object sought to be achieved. He lastly submitted that the said condition is arbitrary, unreasonable, malafide and discriminatory, therefore, the said notification of NIT dated 15.07.2019 be quashed or in alternate, the said Clause “same name and style” may be removed from the qualification criteria of the tender document. He placed reliance in the matters of **New Horizons Limited and Another v. Union of India and Others** reported in **(1995) 1 SCC 478** and **S. Kireetendranath Reddy v. A.P. Transmission Corporation Limited, Vidyut Soudha, Hyderabad** reported in **1999 (5) ALD 398**. He further placed reliance on the judgment dated **02.02.2016** passed by the Hon'ble Supreme Court in **Writ Petition (C) No.10240 of 2015 and CM No.25456 of 2015** parties being **M/s. Bharat Power Control Systems v. Govt. of NCT of Delhi and Others**.

5. Per contra, Mr. Gagan Tiwari, learned Deputy

Government Advocate appearing for the State/Respondents submitted that condition appended in the qualification criteria is based on the outcome of policy decision taken by the authorities after due deliberation looking to the nature of work and keeping larger public interest in its mind. He further submitted that aforementioned criteria is only applicable with respect to tender works to be awarded having its value of more than Rs.5 Crores. He further submitted that this Clause is not mentioned only in this particular tender, but as per policy decision of PWD of the State Government, this criteria/condition i.e. "prime contractor in the same name and style (tenderer)" is now forming part of tender document, which is being issued by the Respondent-Department. He further submitted that there is no arbitrariness, unreasonableness or any malafide on the part of Respondents for making said condition as part of the tender document. He further submitted that Petitioner though pleaded in his pleadings the word 'arbitrary', 'unfair', 'unreasonable', 'discriminatory' and 'malafide', but the Petitioner failed to make out his case by placing reliable material on record to substantiate his pleadings and arguments. He further submitted that imposing condition and fixing eligibility criteria is in the domain of the authorities who is floating a tender for particular nature of work to be done under the contract by the interested candidate, company or firm etc. He placed reliance on the matters of **Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and Others** reported in (2005) 7

SCC 764, Michigan Rubber (India) Ltd. v. State of Karnataka and Others reported in **(2012) 8 SCC 216**. He further placed reliance on the judgment dated **21.06.2019** passed by the Hon'ble Supreme Court in **Special Leave Petition (Civil) Nos.13802-13805 of 2019** parties being **Silppi Constructions Contractors v. Union of India and Another etc.** He lastly submitted that the case laws relied upon by the learned counsel for the Petitioner are distinguishable on facts, therefore, the said case laws are not applicable to the facts of the present case.

6. We have heard learned counsel appearing for the parties and perused the records.

7. The question which falls for consideration is whether each prime contractor must have experience in the “same name and style” (tenderer) as provided in Clause 1 of the qualification criteria, in any manner, is arbitrary, malafide, limiting wider participation or having no nexus with the object sought to be achieved?

8. The normal rule in contract matters is that it is for the agencies or authorities issuing the tender document for the purpose of construction, supply, etc. to formulate conditions as per their needs, requirements and also keeping in mind larger public interest. The interference in tender proceedings when all required qualifications and conditions have been specifically mentioned in the tender document is not warranted, unless it is shown that the action on the part of tendering authority is

malafide, arbitrary or misuse of the statutory powers. It is burden on the part of Petitioner challenging the qualification criteria or conditions in the part of tender document framed by the tendering authority to bring within the aforesaid norms and if it is proved that conditions or qualification criteria as made part of the tender document are arbitrary, discriminatory, malafide or unreasonable, then only the Court can interfere in the tender proceedings.

9. Learned counsel appearing for the Petitioner has not specifically argued the grounds as pleaded by him for striking down the condition/qualification criteria as provided in Clause 1(b)(i), 1(b)(ii) & 1(b)(iii), but had only submitted that said criteria in the tender document has no nexus with the object sought to be achieved and it limits wider participation.

10. The case law as relied upon by learned counsel for the Petitioner in the matter of **New Horizons Limited** (supra) to support his contention that Hon'ble Supreme Court has clearly held that the experience of one of the units of Joint Venture are required to be taken into consideration for the purpose of eligibility clause of experience mentioned in the tender document. The facts of the case of **New Horizons Limited** (supra) are that the Department of Telecommunication, Telecom District, Hyderabad invited sealed tenders from competent agencies for printing, binding and supply of specified number of telephone directories in English for three annual issues

commencing from 1993. In the said tender, one of the conditions is that 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. In the said tender proceeding, New Horizon Limited ('NHL', in short) participated and has mentioned that NHL is a Joint Venture Company established by Thomson Press (India) Limited (TPI), Living Media (India) Limited (LMI), World Media Limited (WML) and Integrated Information Pvt. Ltd, (IIPL), a wholly-owned subsidiary of Singapore Telecom wherein 60% of shares are held by Mr Aroon Purie, TPI, LMI, WML and other companies in the same group and 40% of shares are held by IIPL; and the Joint Venture has received approval of the Government of India and is currently in operation. The document submitted by NHL a Joint Venture Company was considered and even no reasons have been intimated for non-consideration. The matter went to the Hon'ble Supreme Court and Telecommunication Department in their reply stated that NHL was converted into a joint venture company in 1992 and have no experience whatsoever in their own name for compiling, printing, binding and supply of telephone directories of telephone systems of more than 50,000 lines capacity. The High Court dismissed the claim of NHL (Petitioner therein) by holding that there is no joint venture as such and there is only a certain amount of equity participation

by a foreign company in NHL. When the case reached before the Hon'ble Supreme Court, the Hon'ble Supreme Court taking into consideration that the participation by a foreign company in NHL (a Joint Venture Company) and having experience as required are to be taken into consideration. The Hon'ble Supreme Court while taking into consideration that the experience of one of the companies forming part of joint venture has to be taken into consideration allowed the petition.

11. In the instant case, the Petitioner though has taken some work as a Joint Venture, but so far as it relates to the subject tender, he has submitted his application in an individual capacity/entity. It is not a case where the dispute is with respect to the experience only without there being specifically mentioning the nature of work experience as required in the tender document. It is a case where tendering authority has specifically mentioned the clause as to what is the requirement of qualification criteria i.e. the experience should be of the firm which has worked in the "same name and style", whereas in the matter of **New Horizons Limited** (supra), the Court was considering the fact that whether the word 'tenderer' would include 'partners and members of joint venture' or not and in that circumstances the Hon'ble Supreme Court has rendered the judgment.

12. From the above, it is clear that judgment passed by Hon'ble Supreme Court in **New Horizons Limited** (supra) is on

different sets of facts and the question for consideration was also on different footings.

13. The another case law as relied upon by learned counsel for the Petitioner in the matter of **M/s. Bharat Power Control Systems** (supra), the eligibility criteria in the NIT was as under :

“1. Contractors who fulfill the following requirements shall be eligible to apply. Joint ventures are not accepted.

(a) Should have satisfactorily completed the works as mentioned below during the last Seven years ending previous day of last date of submission of bids. (Modified vide CM No. DG/MAN/293 dated 31.10.2013)

(i) Three similar works each costing not less than 40% of the estimated cost put to tender

Or

two similar works each costing not less than 60% of the estimated cost put to tender

Or

one similar work costing not less than 80% of the estimated cost put to tender

Similar work shall mean works of : Providing, Installation, Testing and Commissioning of UPS System with minimum capacity of single UPS as 80 KVA. The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum; calculated from the date of

completion to last date of receipt of applications for bids.”

14. From the above, it is clear that in the matter of **M/s. Bharat Power Control Systems** (supra) also, there was no mention of experience should be in the “same name and style”, therefore, this judgment also will not be of any help of the Petitioner in the facts of the present case.

15. The other case law as relied upon by learned counsel for the Petitioner in the matter of **S. Kireetendranath Reddy** (supra) is concerned, the Co-ordinate Bench of this Court vide order dated **17.01.2017** passed in **Writ Petition (C) No.3160 of 2016** parties being **Shailendra Bahadur Singh v. State of Chhattisgarh and Others** held it to be *per incuriam* by stating thus :

“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.”

16. In view of findings recorded by the Co-ordinate Bench, we are in agreement with the rationale given for not agreeing with the judgment in **S. Kireetendranath Reddy** (supra).

17. From the aforementioned discussions of the case laws relied upon by learned counsel for the Petitioner, it is clear that the matters of **New Horizons Limited** (supra) and **M/s. Bharat Power Control Systems** (supra) are on different sets of facts and could not be made applicable to the facts of present case. The other judgment i.e. **S. Kireetendranath Reddy** (supra) has been held *per incuriam*, therefore, the Petitioner cannot get any help from the aforementioned judgment also.

18. The Hon'ble Supreme Court in the matter of **Ajit Kumar Nag** (supra) has held that burden of proving malafide is on the

person making allegation only and held thus :-

“56. It is well-settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". [vide *E.P. Royappa v. State of T. N.*, (1974) 4 SCC 3]. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa v. State of Maharashtra*, (1976) 1 SCC 800 (SCC p.802, para 2); “It (*mala fide*) is the last refuge of a losing litigant”.

19. Further, in the matter of **Michigan Rubber (India) Limited** (supra), the Hon'ble Supreme Court had considered that what action can be made to judicial review and held thus :-

“23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the

national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

20. Again, in the matter of **Silppi Constructions Contractors**

(supra), the Hon'ble Supreme Court considered the scope of

interference of Courts in contract matters and held thus :-

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, malafides or perversity.....”

21. The Hon'ble Supreme Court while dealing with the eligibility criteria in the tender proceedings in the matter of **Directorate of Education and Others v. Educomp Datamatics Ltd. and Others** reported in **(2004) 4 SCC 19** held thus :-

“11. This principle was again restated by this Court in *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal*

Corporation, (2000) 5 SCC 287. It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

13. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms

and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/ government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-2003, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 crores the competent authority took a decision after consulting the technical advisory committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs.40-45 crores. The Government introduced the criterion of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided.....”

22. Further, Hon'ble Supreme Court while considering the other judgments in the matter of **Consortium of Titagarh Firema Alder S.P.A.-Titagarh Wagons Ltd., through**

Authorised Signatory v. Nagpur Metro Rail Corporation Limited (NMRCL) through its General Manager (Procurement) and Another reported in **(2017) 7 SCC 486**, held thus :-

“30.....The Court quoted a passage from *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818, wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional Courts should not interfere. It has also been observed in the said case that 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.....”

23. Coming back to the facts of the present case, learned counsel for the Petitioner has only submitted that his experience as Joint Venture Unit could also be taken into consideration. Apart from this, he had not made any submission as to how the act of Respondents is arbitrary, discriminatory, unreasonable or malafide. Unless these grounds are proved, the Court can not interfere with the tender proceedings in its judicial review. The Petitioner failed to make out any case to strike down the qualification criteria in very specific terms. We do not find any

good ground for interdicting with qualification criteria that the tenderer must possess experience in his own name when he has submitted tender document and participated in tender proceedings in an individual capacity that the work experience should be in his own name and style. Reasons for laying down qualification criteria is best known to the tendering authority. The State authorities have to consider several factors for making preconditions as a qualification criteria looking to the nature of work sought to be made part of the tender document.

24. The argument advanced by learned counsel for the State/Respondents that this condition has been imposed in the tenders having value of more than Rs.5 Crores, because by qualification criteria i.e. experience clause only it can be asserted the person/firm/company is having capability with required infrastructure to execute the volume of work as mentioned in the NIT. The said condition cannot be said to be an extraneous consideration but shows that by imposing condition under challenge is with some object. In any of the Government contract, public money is involved, therefore, every Government contract is of public importance. Merely since the Petitioner became ineligible in view of Clause 1 of the qualification criteria, the terms and conditions laid down in the tender document cannot be held to be arbitrary or discriminatory. Even there is no allegation made by the Petitioner that the terms and conditions in Clause 1(b)(i), 1(b)(ii) & 1(b)(iii) of the qualification criteria are tailor-made for

benefiting of particular person, firm or company.

25. For the foregoing reasons, we are of the considered view that the Petitioner could not make out any case for interference by this Court. The writ petition being devoid of substance, is liable to be and is hereby dismissed.

Sd/-
(P. R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh