

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 21st MARCH, 2023

IN THE MATTER OF:

+ **W.P.(C) 17599/2022 & CM APPL. 56263/2022**

TEQ GREEN POWER XIII PRIVATE LIMITED Petitioner

Through: Mr. Jayant Mehta, Sr. Advocate with
Mr. Vishrav Mukherjee, Mr. PSS
Bhargava, Ms. Priyanka Vyas, Mr.
Raghav Malhotra and Ms. Aayushi
Khurana, Advocates.

versus

REMC LIMITED Respondent

Through: Ms. Pinky Anand, Sr. Advocate with
Mr. Balendu Shekhar, Ms. Saudamini
Sharma, Mr. Sriansh Prakash, Mr.
Rajkumar Maurya and Mr. Krishna
Chaitanya, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The Petitioner has filed the instant Writ Petition filed impugning the decision dated 16.12.2022 bearing Reference No. REMCL/CO/PP/P-85 (hereinafter referred to as "Impugned Decision") rendered by the Respondent, REMC Limited, in terms of which, the Respondent has declared the Petitioner to be technically ineligible to participate in the procurement process of 1000 MW of Round-the-Clock Power from Grid-Connected Renewable Energy Power Projects, issued vide the Request for

Selection bearing reference number REMCL/CO/PP/P-85/RTC/1000MW/2022 dated 14 July 2022 (hereinafter referred to as “Request for Selection”). Shorn of details, the controversy that has arisen before this Court is that the Petitioner was found ineligible to participate in the tender process since the “net worth” quoted by it was inclusive of the value of its preference shares, which, in the view of the Respondent ought to be excluded from such net worth and pursuant to such exclusion, the “net worth” criteria set out under the Request for Selection is not being satisfied. The short issue that is to be decided in this case is whether the value of preference shares can be included while computing “net worth” and accordingly, whether the Respondent erred in declaring the Petitioner ineligible to participate in the tender process in terms of the Request for Selection.

2. The Petitioner, TEQ Green Power XIII Pvt. Ltd. is a wholly owned subsidiary of O2 Power SG PTE. LTD (hereinafter referred to as “O2 Power”), is primarily engaged in generation and supply of power for the purposes of procurement by various nodal agencies and distribution companies. The Respondent, Railway Energy Management Company Limited is a Joint Venture company between Ministry of Railways and Rites Limited, holding 49% and 51% stake in the Respondent respectively. The Respondent is the nodal agency of the Indian Railways for implementation of renewable energy projects.

3. The factual matrix of the dispute leading up to the filing of the instant Petition is set out hereinbelow: -

- i. On 14.07.2022, REMC Limited issued a Notice Inviting Tender (hereinafter referred to as “NIT”), being NIT No:

REMCL/CO/PP/P-85/RTC/1000 MW/2022 inviting bids for and on behalf of the Indian Railways, for selection of project developers for supply of 1000 MW Round-the Clock (RTC) Power from Grid-Connected Renewable Energy (RE) Power Projects. The Request for Selection, which was issued along with the NIT, laid down *inter alia* the procedure for bid evaluation and the requisite eligibility criteria to be fulfilled by prospective applicants.

- ii. On 09.11.2022, the Petitioner submitted the relevant documents along with the technical bid and financial bid.
- iii. On 11.11.2022, the Respondent opened the technical bids submitted by the applicants.
- iv. The Petitioner thereafter discovered that other bidders had received advance intimation to participate in the reverse auction which was scheduled to be held on 19.12.2022. Therefore, on 14.12.2022 the Petitioner wrote to the Respondent *inter alia* stating that it had not received any intimation regarding the reverse auction process despite satisfying the requisite criteria and accordingly requested that the reverse auction be deferred until the said issue is resolved.
- v. Pursuant thereto, the Petitioner, aggrieved of being excluded from the bidding process without being assigned any reasons for such exclusion, proceeded to file a Writ Petition, being W.P.(C) No. 17230/2022 before this Court which was disposed of by the Ld. Single Judge with the following directions to the Respondent: -

“....7. The learned counsel appearing on behalf of the respondent, on instructions, submits that with reference to the request made by the petitioner vide letter dated 14.12.2022 (Annexure P-8), the respondent shall communicate its decision to the petitioner and in the meanwhile, e-reverse auction (e-RA) will remain in abeyance till expiry of one week commencing from the communication of the said decision to the petitioner.

8. Taking the aforesaid statement on record, and binding the respondent to the same, the present petition along with pending applications, is disposed of with liberty to the petitioner to approach the court in altered circumstances...”

vi. In furtherance of the directions of the Ld. Single Judge, on 16.12.2022, the Respondent issued the Impugned Decision, *inter alia* communicating that the Petitioner’s bid stood excluded on the grounds that it *“...is disqualified at Technical Stage based on the Net Worth of the Parent company is less than the required criteria after exclusion of redeemable preference shares in net worth calculation.....”*.

4. Challenging the decision of the Respondent disqualifying the Petitioner from further stage of the tender process, the Petitioner has approached this Court by filing the instant petition.

5. Mr. Jayant Mehta, learned Senior Advocate for the Petitioner, submits that the preference shares issued by O2 Power are redeemable only on the option of the issuer and there is no tenure attached to the shares. He contends that under Section 2(57) of the Companies Act the definition of net worth uses the expression ‘paid-up share capital’ which is defined under Section 2(64) of the Companies Act to mean that the paid up share capital is the aggregate amount of money credited as paid up capital and is equivalent

to the amount received as paid up capital in respect of shares issued including the amount credited as paid up capital in respect of shares of the company. He submits that Section 43 of the Companies Act states that the share capital of a company limited by shares includes equity share capital and preference share capital which means that the expression includes both preference share capital as well as equity share capital of the company. He further states that Section 55(2) of the Companies Act though states that preferences must be redeemed within 20 years, yet the second proviso to sub-Section (2) clarifies that the shares cannot be redeemed except out of the profits of the company which would otherwise be available for the dividends or out of the proceeds paid from issue of shares made for the purposes of such redemption. He states that preference shares cannot be redeemed from the existing share capital. He, therefore, states that the decision of the Respondents to exclude preference shares from the definition of net worth is contrary to the mandate of law. He states that equity share capital of the company is included in the net worth than there is no reason as to why preference shares must be excluded more so if the redemption is only at the instance of the company.

6. Mr. Mehta submits that there is no correlation between the balance sheet and the net worth. He states that the two are two separate and independent concepts. He contends that for the purpose of balance sheet, both equity share capital and preference share capital are shown as liabilities and, therefore, to arrive at the net worth of the company through accounting classification in a balance sheet only excluding preference capital is illogical.

7. *Per contra*, Ms. Pinky Anand, learned Senior Advocate for the

Respondent, submits that Courts must exercise restraint and caution while dealing with tenders. She states that the judicial review on administrative action is only intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafide and the purpose is only to check whether the decision is made lawfully. She states that if the decision taken by the tender issuing authority is made applicable across the board and when there is no evidence of the tenderer adopting the policy of pick and choose, then Writ Courts must not interfere exercising its jurisdiction under Article 226 of the Constitution of India.

8. Ms. Anand places reliance on a Judgment dated 19.12.2022 passed by this Court in GKC Projects Limited v. National Highways Authority of India, W.P.(C) 11752/2022, wherein this Court had refused to interfere with the decision of the tenderer to restrict net worth only on the basis of reserves created out of revenue profits alone. She has relied on Section 129 of the Companies Act read with Schedule III Clause 9 under which a preference share is classified as a liability and redeemable preferences are classified under non-current borrowings or liabilities. She contends that applying the said principles, preference shares are liabilities and, therefore, the decision to exclude preference shares from the definition of the net worth of the company cannot be faulted with. She further states that the financial statement of O2 Power to state that preference share capital has been enlisted separately and, therefore, in terms of the accounting standards, they ought to be treated as liabilities.

9. Mr. Mehta states that a balance sheet is required to be prepared in terms of Section 129 of the Companies Act and Accounting Standards notified in terms thereof, and neither Section 129 nor extant accounting

standards refer to “net worth” of a company per se. He has placed reliance on the judgment of the Hon’ble Supreme Court in JK Industries v. Union of India, (2007) 13 SCC 673, to state that balance sheet is not an indicator of the net worth of a company. It is his argument that calculation of net worth and preparation of balance sheet are two separate exercises and this distinction is manifest by the fact that a balance sheet requires equity share capital to be categorized as a liability as well. He therefore submits that arriving at net worth through accounting classification in a balance sheet is erroneous. Mr. Mehta has further submitted that where redeemable preference shares are issued but not honoured when they are ripe for redemption, the holder of those shares does not automatically assume the status of a ‘creditor’. Building upon this premise, he proceeds to submit that the accounting standards relied upon by the Respondent are inapplicable to the present case since they pertain to preparation of the balance sheet, not computation of net worth.

10. It has also been submitted, *in arguendo*, that in terms of AG 25 of Accounting Standard 32, the test applicable to determine whether preference shares are to be treated as a financial liability or an equity instrument is whether it is redeemable at the option of the holder, as opposed to the issuer and also whether such shares are redeemable at a fixed term or tenure. The preference shares in question do not have any term/expiry and are redeemable solely at the option of the issuer as noted in the financial statement submitted as part of the bid. Therefore, even if accounting standards were applicable, the shares in question cannot be treated as a liability.

11. Heard learned Counsel appearing for the parties and perused the material on record.

12. At the outset, we deem it apposite to refer to the relevant clauses of the Request for Selection that set out the requisite criteria for “net-worth” to be satisfied by a bidder. The same is reproduced hereunder: -

“...4.3.1 Net-worth

(a) The Net Worth of the Bidder should be equal to or greater than INR 3.00 Crores per MW, during the previous financial year i.e., immediately preceding the due date of bid submission.....

b) The net worth to be considered for the above purpose will be the cumulative net-worth of the Bidding Company or Consortium together with the Net Worth of those Affiliates of the Bidder(s) that undertake to contribute the required equity funding and performance bank guarantees in case the Bidder(s) fail to do so in accordance with the RfS.

(c) Net Worth to be considered for this clause shall be the total Net Worth as calculated in accordance with the Companies Act, 2013 and any further amendments thereto...” (emphasis supplied)

13. Under Clause 4.3.1 net worth of a bidder is required to be equal to or greater than Rs. 3 Crore per MW during the financial year preceding the submission of the bid, computed within the scheme and mandate of the Companies Act. The clause also provides that net worth is the cumulative net worth of the bidder along with its affiliates that undertake to contribute the equity funding and performance bank guarantees in cases where bidders fail to do so in accordance with Request for Selection and most importantly,

the net worth shall be net worth as calculated in accordance with the Companies Act.

14. In the instant case the Petitioner has submitted its net worth inclusive of that of its affiliate, i.e., O2 Power since O2 Power has undertaken to contribute the required equity funding and performance bank guarantees in terms of the Clause 4.3.1(b) of the Request for Selection. The cumulative net worth as submitted by the Petitioner includes redeemable preference shares issued by O2 Power. *Vide* the Impugned Decision, the Respondent took the view that computation of net-worth as done by the Petitioner is erroneous since value of redeemable preference shares ought to be excluded from the same. It is discernible that the bone of contention in the present matter, therefore, is whether redeemable preference shares form a part of the “net-worth” of a company within the scheme of the Companies Act and accordingly whether the Petitioner was correct in including the value of such shares while arriving at its value of cumulative net-worth in terms of Clause 4.3.1.

15. In this light, we shall proceed to peruse the relevant provisions of the Companies Act. Section 2(57) states as under: -

“net worth means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation”

16. In terms of Section 2(64), paid-up share capital has been defined as: -

“paid-up share capital” or “share capital paid-up” means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called;

17. It is clear that net worth includes paid-up share capital. The Act sheds light on the kinds of share capital under Section 43, which states as follows:-

“The share capital of a company limited by shares shall be of two kinds, namely:—

(a) equity share capital—

(i) with voting rights; or

(ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and

(b) preference share capital:

Provided that nothing contained in this Act shall affect the rights of the preference shareholders who are entitled to participate in the proceeds of winding up before the commencement of this Act.

Explanation- For the purposes of this section, -

(i) “equity share capital”, with reference to any company limited by shares, means all share capital which is not preference share capital;

(ii) “preference share capital“, with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—

(a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and

(b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;”

(iii) capital shall be deemed to be preference capital, notwithstanding that it is entitled to either or both of the following rights, namely:—

(a) that in respect of dividends, in addition to the preferential rights to the amounts specified in sub-clause (a) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;

(b) that in respect of capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified in sub-clause (b) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.

18. Section 43 of the Companies Act, 2013 provides that share capital can be of two kinds i.e., equity share capital and preference share capital. Explanation (ii) of Section 43 provides that preference share holders have a preferential right in respect of payment of dividend and in respect of repayment in case of winding up or repayment of capital. Explanation (iii) of Section 43 provides that the capital shall be deemed to be preference share capital notwithstanding that it is entitled to either rights in respect of dividends, in addition to the preferential rights to the amounts specified in

sub-clause (a) of clause (ii), and in respect of capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified in sub-clause (b) of clause (ii).

19. Section 55 of the Companies Act, 2013 stipulates as to how preference shares are to be issued and redeemed and the same reads as under:

“Section 55: Issue and redemption of preference shares.

(1) No company limited by shares shall, after the commencement of this Act, issue any preference shares which are irredeemable.

(2) A company limited by shares may, if so authorised by its articles, issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue subject to such conditions as may be prescribed:

Provided that a company may issue preference shares for a period exceeding twenty years for infrastructure projects, subject to the redemption of such percentage of shares as may be prescribed on an annual basis at the option of such preferential shareholders:

Provided further that—

(a) no such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption;

(b) no such shares shall be redeemed unless they are fully paid;

(c) where such shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the nominal amount of the shares to be redeemed, to a reserve, to be called the Capital Redemption Reserve Account, and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the Capital Redemption Reserve Account were paid-up share capital of the company; and

(d) (i) in case of such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133, the premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed:

Provided also that premium, if any, payable on redemption of any preference shares issued on or before the commencement of this Act by any such company shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

(ii) in a case not falling under sub-clause (i) above, the premium, if any, payable on redemption shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

(3) Where a company is not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of issue (such shares hereinafter referred to as unredeemed preference shares), it may, with the consent of the holders of three-fourths in value of such preference

shares and with the approval of the Tribunal on a petition made by it in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed:

Provided that the Tribunal shall, while giving approval under this sub-section, order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares.

Explanation.—For the removal of doubts, it is hereby declared that the issue of further redeemable preference shares or the redemption of preference shares under this section shall not be deemed to be an increase or, as the case may be, a reduction, in the share capital of the company.

(4) The capital redemption reserve account may, notwithstanding anything in this section, be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Explanation.—For the purposes of sub-section (2), the term “infrastructure projects” means the infrastructure projects specified in Schedule VI.”
(emphasis supplied)

20. Section 55 of the Companies Act, 2013 prescribes that no company limited by shares shall, after the commencement of this Act, issue any preference shares which are irredeemable. Section 55(2) provides that preference shares are liable to be redeemed within a period not exceeding 20 years. The proviso (a) of Section 55 provides that no such shares shall be

redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of redemption and no preference shares shall be redeemed unless they are fully paid. Section 55 also provides that preference shares may be redeemed within a period not exceeding 20 years from the date of their issue. A perusal of Section 55, therefore, provides that preference shares cannot be redeemed within the share capital of the company. It, therefore, means that other than two sources i.e., out of profits and out of proceeds of fresh issue of shares, no other source can be used for redemption of preference shares. Clause 4.3.1 (c) of the NIT states that net-worth is to be considered in accordance with the Companies Act, 2013. In the NIT, the tenderer has not specifically excluded preference shares from the definition of net-worth.

21. It has been stated before us, on affidavit, that the preference shares in question are preference shares redeemable at the instance of the issuer without any fixed term or tenure attached to these shares. A perusal *simpliciter* of the aforestated provisions makes it amply clear that such shares would form part of paid-up share capital which in turn is a component of net worth. We are therefore of the opinion that the shares in question can form a part of the net worth within the scheme and mandate of the Companies Act.

22. At this juncture, it is pertinent to advert to the findings of the Hon'ble Supreme Court in JK Industries v. Union of India, (2007) 13 SCC 673. The Hon'ble Supreme Court has observed as under: -

“15. Section 210 of the Companies Act requires a company to place before AGM, a balance sheet and a P&L account for the relevant period. The function of a

balance sheet is to show the share capital, reserves and liabilities of the company at the date on which it is prepared and the manner in which the total monies representing them are distributed over several types of assets. A balance sheet is a historical document. As a general rule it does not show the net worth of an undertaking at any particular date. It does not show the present realisable value of goodwill, land, plant and machinery, etc. It also does not show the realisable value of stock-in-trade, except in cases where the realisable value of stock-in-trade is less than cost. Therefore, it cannot be said that the balance sheet shows the true financial position.”

(emphasis supplied)

23. It is pertinent to mention here that Section 2 (40) of the Companies Act which defines the “financial statement” in relation to a company includes a balance sheet which is to be prepared in accordance with Section 129 of the Companies Act and Section 129 refers to Schedule III of the Companies Act. As stated in JK Industries (supra), it does not deal with net worth of a company. Calculation of net worth and drawing up of a balance sheet are therefore separate concepts. It is well settled that if the preference shares are not redeemed, the holder of the preference shares does not assume the status of a creditor. Even if O2 Power SG PTE. LTD is governed by the Indian Companies Act (which is actually not as it is a company incorporated in Singapore and is governed by the laws of Singapore), the preference shares issued by O2 Power SG PTE. LTD are not redeemable at the option of shareholders, and therefore, cannot be categorized as a debt.

24. A perusal of the above would show that the mode of calculation of net worth which has been adopted by the Respondents to exclude the Petitioner from further stages of the tendering process is contrary to the Sections of the

Companies Act. Clause 4.3.1(c) of the NIT does not exclude preference shares from the definition of net-worth rather it states that net-worth is to be considered for this clause shall be the total net worth as calculated in accordance with the Companies Act, 2013, then the net-worth has to be calculated as per the Companies Act, 2013 and no other method can be permitted to be adopted. There is no reason as to why the tender must exclude preference shares while calculating the net-worth. Respondents cannot be permitted to adopt a method which runs contrary to the provisions. Even though there are no allegation of mala fides or that the method has been calculated to favour any particular party, since the decision has been arrived at in violation of the statute, this Court cannot be a party to uphold any decision which is contrary to the plain reading of the statute.

25. As stated before, balance sheet is not an indicator of the true net worth of a company. Balance sheet reflects the share capital of a company and its treatment as an asset or liability to the company on the date of preparation of the balance sheet. It is not disputed that balance sheets are to be prepared in accordance with extant accounting standards. Even if it were the case that the legality of the Impugned Decision was to be tested within directions laid down by Accounting Standard 32, it has been correctly pointed out by Mr. Mehta that in terms of AG 25 of the standards, the preference shares in question would be treated as a liability only in certain circumstances and not always. AG 25 states as under: -

“AG 25 Preference shares may be issued with various rights. In determining whether a preference share is a financial liability or an equity instrument, an issuer assesses the particular rights attaching to the share to determine whether it exhibits the fundamental characteristic of a financial liability. For example, a

preference share that provides for redemption on a specific date or at the option of the holder contains a financial liability because the issuer has an obligation to transfer financial assets to the holder of the share. The potential inability of an issuer to satisfy an obligation to redeem a preference share when contractually required to do so, whether because of a lack of funds, a statutory restriction or insufficient profits or reserves, does not negate the obligation. An option of the issuer to redeem the shares for cash does not satisfy the definition of a financial liability because the issuer does not have a present obligation to transfer financial assets to the shareholders. In this case, redemption of the shares is solely at the discretion of the issuer. An obligation may arise, however, when the issuer of the shares exercises its option, usually by formally notifying the shareholders of an intention to redeem the shares.”

(emphasis supplied)

26. The Apex Court in a catena of Judgments has held that the scope of interference by the Courts in exercising jurisdiction under Article 226 of the Constitution of India in contractual matters is extremely limited. The Court interferes in contractual matters only when the decision making process is faulty or that the decision arrived at by tenderer is calculated to favour somebody or that the decision is so irrational that no man of prudence would have come to that conclusion. In the facts of the present case, it cannot be said that the decision that has been arrived at by the Respondent is to favour somebody yet the method adopted by the Respondent for calculating net worth is contrary to the definition of net worth given under the Companies Act. Reliance placed by the Respondent on the Judgment of GKC Projects (Supra) is not apt for the reason that in that case the tenderer had decided not to include only reserves arising out of the revenue profits alone while

calculating the net worth which is not contrary to the statute. However, in the facts of the present case, the tenderer has decided to exclude preference shares from the definition of net worth on a wrong notion that preference shares is a liability which is contrary to the Sections in Companies Act. Only when the preference shares are redeemable at the instance of the shareholders then only the preference shares can be called as a liability and not in all cases. Preference shares are redeemed out of profits or out of a fresh issue meant for the purpose and not from the existing share capital. Since the entire basis of calculating net worth by the Respondent is contrary to the provisions of the statute, this Court has no other option but to hold that the decision of the tenderer to exclude preference shares from the calculation of net worth is arbitrary and irrational. In view of the above, the challenge of the Petitioner to its exclusion from the tendering process has to be accepted. The Respondent is directed to re-work the net-worth of the Petitioner herein by including the preference shares while calculating its net-worth and take a decision as to whether the Petitioner's financial bid can be considered or not.

27. The writ petition is allowed. Pending application(s), if any, are disposed of.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

MARCH 21, 2023

hsk/shk