

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.13895 OF 2024

Nandkumar Infrastructure LLP

Through Power of Attorney Holder
Mr. Shamsunder Shajiram Chhabad
Age 44 years, Occ. Business,
Having Office at "Trishul Palace"
Plot No.30, Gulmohar Colony,
Opposite ITI Gendamal,
Satara 415 002.

....Petitioner

Versus

- 1 **The Superintendent Engineer**
National Highway Division, Pune
Having office at Central Building
3, BJ Medical Rd., Agarkar Nagar,
Pune 411 001
- 2 **The Executive Engineer,**
National Highway Division,
Pune, Having office at
Bandhkam Bhavan,
Opposite Hotel Sagar Plaza
Camp, Pune 411 001.
- 3 **The State of Maharashtra**
Through Public Works Department
Mantralaya, Mumbai.
- 4 **Shri Pranil Dattatray Gcharge,**
Age Adult, Occ. Business,
Residing at Dew Drop 1-10,
Sonam Roasd, Saswad, Pune
- 5 **Union of India**
Through Ministry of
Road Transport & Highway
Dayakar Bhavan,
Maharshi Karve Road,
New Marine Line,
Churchgate, Mumbai – 20.

....Respondents

Mr. Yuvraj Narvankar i/b Mr. Suryajeet P. Chavan, *for the Petitioner.*

Ms. Neha S. Bhide, Government Pleader with Mr. O.A. Chandurkar, Additional GP and Ms. G.R. Raghuwanshi, AGP *for Respondent Nos.1 to 3/State.*

Mr. Tejas Deshmukh with Mr. H.D. Chavan, *for Respondent No.4.*

Mr. Dashrath A. Dubey, *for Respondent No.5.*

**CORAM: ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.**

RESERVED ON : 16 JUNE 2025.

PRONOUNCED ON : 24 JUNE 2025.

J U D G M E N T (*Per : Sandeep V. Marne, J.*):

1. **Rule.** Rule is made returnable forthwith. With the consent of the learned counsel appearing for the parties, the Petition is heard finally.
2. Petitioner has filed the present Petition challenging the decision of Respondent No.2 rejecting its bid thereby refusing to consider its financial bid in the impugned tender process. The Petitioner has also challenged the decision of Respondent Nos. 1 and 2 in declaring Respondent No.4 as the successful bidder.
3. Brief facts leading to filing of the Petition are that Respondent Nos.1 and 2 issued Tender Notice dated 23 August 2024 for execution of Road Maintenance Work on NH-965D at estimated cost of Rs.3,22,63,404/-. Petitioner submitted its bid in pursuance of the

Tender Notice. After completion of technical scrutiny of the bids, Petitioner's bid was rejected as 'non-responsive' on the ground that it failed to submit notarized business transfer agreement. Petitioner's bid was rejected as non-responsive vide scrutiny sheet dated 23 September 2024 by citing various reasons such as failure to submit legal document showing relationship between the Petitioner and M/s. Nandkumar Constructions, non-certification of annual turnover by statutory auditor, non-submission of bid capacity in prescribed format, non-attachment of document of Plant Engineer and Quality Surveyor etc. Petitioner made representation dated 23 September 2024 and submitted the relevant documents. It appears that the meeting of the Evaluation Committee was held on 3 October 2024 and by communication dated 4 October 2024, the Petitioner was informed that its bid was rejected as non-responsive for failure to submit notarized Business Transfer Agreement. Petitioner has challenged the rejection letter dated 4 October 2024 in the present Petition. By its representation dated 4 October 2024, Petitioner submitted a copy of the Memorandum of Understanding for Business Transfer executed between the Petitioner and M/s. Nandkumar Constructions. Since the decision for disqualifying the Petitioner is not recalled, it has filed the present Petition challenging the communication dated 4 October 2024 as well as seeking disqualification of Respondent No.4. By order dated 10 October 2024, this Court directed that work order pursuant to the subject tender, if issued, shall not be acted upon.

4. Mr. Narvankar, the learned counsel appearing for the Petitioner would submit that rejection of Petitioner's bid is clearly

arbitrary and irrational. That the bid could not have been rejected on the ground of non-submission of notarized copy of business transfer agreement. That in accordance with the Government Resolution dated 17 September 2019, Petitioner ought to have been granted an opportunity to make good the shortfall. That in any case the Petitioner did submit copy of the Memorandum of Business Transfer vide letter dated 4 October 2024. That the document to evidence business transfer was never requisitioned by the tendering authority.

5. Mr. Narvankar would submit that the tendering authority has apparently refused to take into consideration experience and financial credentials of M/s. Nandkumar Constructions while considering the Petitioner's bid. That it is well settled position of law that experience of the constituent partner of the firm can be considered/counted as experience of the firm and in support, he would rely upon judgment of the Apex Court in *New Horizons Limited and another vs. Union of India and others*¹. That in any case the sole proprietor of M/s. Nandkumar Constructions viz. Mr. Sahajiram Chhabad is otherwise the partner of Petitioner-Nandkumar Construction LLP. That proprietary firm-M/s. Nandkumar Construction has merged with the Petitioner. He would therefore submit that the decision of the Respondent Nos.1 and 2, being arbitrary, is liable to be set aside.

6. The Petition is opposed by Mr. Chandurkar, the learned Additional Government Pleader appearing for Respondent Nos.1

¹ (1995) 1 SCC 478

and 2-State. He would submit that the Petitioner has failed to meet the eligibility criteria prescribed in the tender document. In absence of a valid business transfer agreement, the Tendering Authority was unable to consider the experience or financial credentials of M/s. Nandkumar Constructions to be that of the Petitioner. That Petitioner has raised misleading claim about merger of M/s. Nandkumar Constructions with the Petitioner-LLP and that therefore it has incurred disqualification under the tender clauses. He would submit that judgment of the Apex Court in *New Horizons Limited* (supra) has no application to an LLP. That experience of a partner in LLP cannot be considered as experience of an LLP and in support, he would rely upon the Division Bench judgment of Punjab and Haryana High Court in *A.G. Construction Co. vs. Food Corporation of India and others*². He would pray for dismissal of the Petition.

7. The Petition is also opposed by Mr. Tejas Deshmukh, the learned counsel appearing for Respondent No.4. He would rely upon provisions of Section 23 of the Limited Liability Partnership Act, 2008 (**the Act**) in support of his contention that the partner of an LLP is a distinct person/entity than that of the LLP. He would question the authenticity of the alleged Business Transfer Agreement, which is shown to have been executed on 29 February 2024 but is dated 18 May 2024. That M/s. Nandkumar Constructions cannot be treated to have merged with the Petitioner-LLP as a work order has been issued in the name of M/s. Nandkumar Constructions on 21 August 2024 after execution

² 2021 SCC OnLine P&H 306

of the alleged Agreement of Merger dated 18 May 2024. That the Petitioner has thus relied upon forged documents and is not entitled to discretionary relief from this Court under Article 226 of the Constitution of India. That Petitioner is a body corporate registered under the Limited Liability Partnership Act, 2008 and therefore experience or financial credential of M/s. Nandkumar Construction cannot be treated as that of Petitioner LLP. That a merger or change in shareholding pattern of LLP requires certain procedure to be followed under Section 60 of the Act and there is nothing on record to indicate that such procedure has been followed. That therefore no cognizance can be taken in respect of the so called Agreement of Business Transfer relied upon by the Petitioner. He would accordingly pray for dismissal of the Petition.

8. We have considered the submissions and have perused the records of the case.

9. Petitioner's bid has been rejected by Respondent Nos.1 and 2 vide communication dated 4 October 2024 citing the reason of non-submission of notarized business transfer agreement. Before issuance of the rejection letter dated 4 October 2024, a scrutiny sheet was published declaring the result of evaluation, under which the bid of the Petitioner was declared non-responsive for the following reasons :-

Sr. No.	Name of Contractors	Result of Evaluation
4	M/s. Nandkumar Infrastructures LLP	*Annual turnover not certified by statutory auditor, but certified by chartered Accountant. *Bid capacity is not submitted in prescribed format as in RFP document.

		*Plant Engineer and Quantity Surveyor document not attached. *Drum Type Hot Mix Plant with Electronic Controls of (Minimum 60-90 TPH capacity) not submitted. *Bidder NANDKUMAR INFRA-STRUCTURES LLP fails to provide any legal document stating relation with Nandkumar Constructions.
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10. Petitioner submitted representation dated 23 September 2024 seeking declaration of its qualification by submitting various documents. The Respondent Nos.1 and 2 thereafter issued communication dated 25 September 2024 by making following remarks against documents and response submitted by the Petitioner :-

Name of the Contractor	Uploaded Result of Evaluation	Compliance	Clarification
M/s. Nandkumar Infra-structures LLP	Non-Responsive 1. Annual certified turnover by not statutory auditor, but certified by chartered Accountant. 2. Bid capacity is not submitted in prescribed format as in RPF Document	Responsive and qualified 1. As per Tender Condition 4.5.3 General Experience The applicant shall meet the following minimum criteria (a) Average annual financial turnover (defined as billing for works in progress and completed in all classes of civil engineering construction works only) over the last five years of 40% of the value of contract/contract applied for. This should be duly audited by Chartered Accountant. Year in which no turnover is shown would also be considered for working out the average turnover. Which is uploaded in Envelop no.1 Hence your Point no.1 is Invalid.	1)a) As per ITB-4, 3-(f), reports on financial standing of the Bidder such as profit and loss statements and auditor's report for the past five years, duly certified by statutory auditor. It is hereby requested to clarify that S.K. Soman, chartered Accountant, who audited the balance sheet. P & L statement etc. is a statutory auditor.

	3. Plant Engineer and quantity surveyor attached document not 4. Drum Type hot Mix plant with electronic controls (Minimum 60-90 TPH capacity) not submitted	2. Bid Capacity is submitted as per Tender Condition no.4.5.9 Bid Capacity Applicant who meets the minimum qualification criteria will be qualified only if their available bid capacity is more than the total bid value. The available bid capacity will be calculated as under: 1. Assessed Available Bid capacity = $(A \times N \times 2 - B)$, Hence your Point no.2 is Invalid. 3. Details of Plant Engineer and Quantity Surveyor are uploaded in Tender as per Tender Condition 4.5.4 Personal capabilities The Applicant must have suitably qualified personal to fill the following positions. The Applicant will supply information on a prime candidate and alternate for each position, both of whom should meet the experience requirements below. specified. There's no specific condition in tender to upload Documents for the same. Hence your Point no.3 is Invalid. 4 Batch Type Hot Mix Plant of Atlas ABP 120 TPH with recycling Unit is available for this work. Purchase Deed along with M.O.S.T. Certificate and all other supporting documents are attached in Tender File no.6 Page no.73 to 82 and M.O.S.T. Certificate at Page no.96. Hence your point no.4 is Invalid.	2) The bidder submitted the bid capacity certificate only for PWD works. Value of B is not clearly mentioned. You are hereby requested to submit the bid capacity certificate with updated value of B. Document regarding value of B should be submitted. 3. The bidder is hereby requested to submit document regarding Details of Plant Engineer and Quantity surveyor. 4. Accepted
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Besides M/s. Nandkumar Infrastructure LLP fails to provide any legal document regarding merger or relation with Nandkumar Constructions. Hence, bidder is requested to submit a clarification or concerned document regarding this.

The bidder is requested to submit all the concerned document to this office upto 5:30 Pm dated 26/09/2024."

11. Thus, as per the communication dated 25 September 2024, the Petitioner was directed to submit a legal document evidencing merger or relation with M/s. Nandkumar Constructions. The document was apparently sought for the purpose of meeting the criteria relating to general experience stipulated under Clause 4.5.3 and financial position prescribed under Clause 4.5.6. The Petitioner submitted a response dated 26 September 2024 stating as under :-

“With reference to above subject, we hereby submit all the documents requested/required by you. Details of the same are attached with this letter.

Regarding Merger or relation of Nandkumar Infrastructures LLP with Nandkumar Construction we have already submitted documents in Tender Envelop no.I File no.5 Page no.1 to 10 copies of same is attached for your ready reference.

Further, we request you to kindly review the submitted documents and ask for any additional documents or clarifications if required. We kindly request you to qualify and open our Bid Envelope No.2 in the interest of fair and honest competition and for the sake of Government/Public interest. “

12. The Petitioner was communicated decision of rejection of its bid vide letter dated 4 October 2024 which reads thus :-

“For the above subject work tender, this office has completed the Technical Scrutiny of Bidder’s document.

Accordingly, the documents submitted by you vide reference no.1, regarding legal document for relation/merger of “Nandkumar construction” with “Nandkumar Infrastructure LLP” is not considered by the committee.

Hence, On ground of not submitting Notorized Business transfer agreement, it can’t be considered for qualifying of tender. Hence “Non-Responsive”.

13. Along with its Affidavit-in-Reply, Respondent Nos.1 and 2 have produced the detailed scrutiny sheet dated 4 October 2024,

which elucidates the exact reasons for rejection of Petitioner's bid as under :-

Sr. No.	Name of Contractors	Result of Evaluation
4	M/s. Nandkumar Infrastructures LLP	*The bidder 'Nandkumar Construction LLP' is established in April 2024 and the bidder has given an undertaking on Rs.100 Stamp paper regarding transfer of experience from proprietary firm 'Nandkumar Construction' to the bidder. It is important to note that in such cases, 'Business Transfer Agreement' is mandatory which gives details of the experience, assets, liabilities etc. transferred along with the latest balance sheet of the transferee. In the current case, as the bidder has not provided the notarized Business Transfer Agreement, the experience of the previous firm may not be considered.

14. After its bid was rejected on 4 October 2024 for failure to submit notarized business transfer agreement, the Petitioner submitted copy of Memorandum of Understanding for Business Transfer alongwith its letter dated 4 October 2024.

15. The issue for consideration in the present case is whether Petitioner-LLP can be permitted to rely upon documents of eligibility of its partner who is the proprietor of M/s. Nandkumar Constructions for establishing its own eligibility.

16. The Petitioner has relied upon judgment of the Apex Court in *New Horizons Limited* (supra) in which it is held in paragraph 23 as under :-

23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a

condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company.

(underlining added)

17. The Division Bench of this Court has also decided the issue of consideration of experience of partner as the experience of partnership firm in *Sagar Lookouts vs. Maharashtra Housing and*

*Area Development Authority and others*³. After referring to various judgments of the Apex Court including the judgment in *New Horizons Limited* (supra), *Maa Nabadurga Construction vs. Saroj Kumar Jena*⁴ and of Division Bench of this Court in *IMS Bhatia Transport Contractor vs. Union of India*⁵, this Court has held in paragraphs 31, 33, 34 and 35 as under :-

31. A coordinate Bench of this Court in *IMS Bhatia Transport Contractor* (supra) followed the decisions of the Apex Court in *New Horizons Limited* (supra) and *Maa Nabadurga Construction* (supra) and in paragraph 19 observed thus:

“19. It has been held by the Apex Court in the aforesaid case that the person having past experience enters into the partnership and the tender is submitted in the name of 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.

Experience is intangible. It cannot be computed in monetary terms. The experience is not a property as contemplated under section 14 of the Partnership Act.”

33. In these facts, let us test if the approach of the Committee in discarding these documents, in view of its understanding that the experience of the firm itself is relevant for consideration and not that of its partner, is justified. What happens in a situation where the firm has the requisite experience but the partners fall short of the experience? Will such firm be held eligible? There may be a situation where the firm may not have the experience but the partners who are to execute the work are experienced. The term ‘bidder’ is not defined in the RFP.

34. It is a settled law that a partnership has been held to be a compendious name for its partners and that the experience is a human attribute which does not form part of the property or the assets of the firm in the usual sense. It is the experience of the persons executing the work that will have to be considered. This is our understanding of what Their Lordships observed in *New Horizons Limited* (supra).

35. Looking at the issue from another angle, will a prudent businessman like MHADB hand over a tender in favour of a firm of which partners do not have the requisite experience stipulated? As a prudent businessman, it is of course best left to MHADB to look after its business

3 2022 SCC OnLine Bom 1483

4 2015 SCC OnLine SC 1933

5 2021(4) Mh.L.J. 233

interest and the scope of interference in such decisions is extremely limited. But to allow MHADB to construe the term 'Bidder' in a literal manner, that it is the firm's experience itself will qualify, is something which does not commend to us. It is here that the observations of His Lordship Mathew J. in *V. Punnani Thomas* (supra) which we have quoted in paragraph 19 of this judgment assume significance. There is no provision in the RFP that the Bidder is given a restricted meaning to mean the firm itself and not the person in charge of it. The Bidder has to be understood to mean the person in charge of the firm, though the bid is by or on behalf of the firm. The notice inviting tender does not preclude adoption of this course of action. If the contention of MHADB is to be accepted, then once a bid is by a firm having experience, irrespective of whether the person in charge is experienced or not, the firm's bid will have to be held eligible for consideration.

18. The Division Bench of Gauhati High Court has also held that experience of a partner can be treated as experience of the partnership firm in *Trio Stony Mart vs. Jamal Ahmed and others*⁶, the Division Bench has held in paragraph 25 to 29 as under :-

25. It is a settled proposition that a partnership firm is not a juristic person. It is an association of persons where individual identity of the individual partners is recognized. This means that a partnership firm is a collection of the partners and nothing else. It is not a legal entity and has no separate legal existence. It is a mere collective name for the individuals who are the members of the partnership. That apart, requirement of the clause is not that financial soundness certificate has to be of the tendering firm if it is a partnership firm. All that it says is that a financial soundness certificate from the concerned Deputy Commissioner or Sub-Divisional Officer ascertaining the financial capability to operate the mining lease/contract should accompany the tender papers.

26. In *New Horizons Ltd. v. Union of India*, (1995) 1 SCC 478, Supreme Court was considering evaluation of one of the eligibility criteria for the tenderers, namely, 'experience' by the Tender Evaluation Committee. The tenderer in that case was a joint venture company. In the context of that case, Supreme Court held that the requirement regarding 'experience' cannot be construed to mean that such 'experience' should be of the tenderer in his name only. It was possible to visualize a situation where a person having past experience had entered into a partnership and the tender had been submitted in the name of

6 (2018) 3 Gauhati Law Reporter 92,

the partnership firm, which may not have any past experience in its own name. This would not mean that the earlier experience of one of the partners of the firm could not be taken into consideration. Similarly, a company incorporated under the Companies Act, 1956 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 re-organised company. It cannot be the purport of the requirement that the 'experience' of the company which had merged into the re-organized company cannot be taken into consideration because tender has not been submitted in its name and has been submitted in the name of the reorganized company which does not have 'experience' in its name. Conversely, there may be a split in the company and the 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. Supreme Court held that 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. Terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. Thereafter, Supreme Court went on to explain the evolving concept of joint venture.

27. The reasonings given by the Supreme Court in respect of the eligibility requirement of 'experience', in our considered opinion, would also be applicable in the case of a financial soundness certificate as required under clause 12(d) of the sale notice.

28. In *Master Marine Services (P.) Ltd. v. Metcalfe & Hodgkinson (P.) Ltd.*, (2005) 6 SCC 138, Supreme Court in the context of the tender conditions requiring the bidder to have licence to act as Surveyor/Loss Assessor under the Insurance Act to prequalify, held that tender document did not say that in a case where a company had made a bid, the licence to act as Surveyor/Loss Assessor under the Insurance Act must be in the name of the company itself or that a licence personally in the name of the Chairman or a Director of the company would not be treated as a valid compliance with the requirement of the tender.

29. In the instant case, requirement of clause 12(d) is that tender papers must be accompanied by a financial soundness certificate ascertaining the financial capability to operate the mining lease/contract which is to be obtained from the concerned Deputy Commissioner/Sub-Divisional Officer. It nowhere says that the financial soundness certificate has to be that of a partnership firm if the tenderer is a partnership firm. We have already noted that a partnership firm is not a juristic entity and is only an association of persons. It is a collective name of the individual partners comprising the partnership. A partnership firm being not a legal person, the ultimate liability would be that of the partners. Every partner is liable for all acts of the partnership firm, jointly as well as severally. Therefore, having regard to the settled legal position, a financial soundness certificate of any one of the partners comprising the partnership, to our mind, would fulfill the requirement of the aforesaid condition. Whether the particular tenderer is financially sound or not, the decision is that of the tendering authority or may be, that of the higher authorities, including the Appellate Authority under the Assam Minor Mineral Concession Rules, 2013. Ordinarily, Court should not substitute its understanding of financial soundness for that of the administrative authorities. Of course, in a case of arbitrariness or unreasonableness or mala fide exercise of power, certainly court would interfere with such decision but in the facts and circumstances of the case, interpretation given by the learned Single Judge to the requirement of clause 12(d) of the sale notice would not be justified.

19. On the other hand, Mr. Chandurkar has relied upon judgment of Division Bench of the Punjab and Haryana High Court in *A.G. Construction Co.* (supra). The case before the Punjab and Haryana High Court involved a reverse situation where a proprietary concern M/s. A.G. Construction Co. had submitted bid in pursuance of the Tender Notice and it was the contention of the Petitioner-Proprietor that the experience earned by him while being a partner of the Partnership Firm-M/s. B.G. Constructions Co. Bathinda be reckoned as his own experience. It is in the light of the above peculiar facts that the Division Bench of Punjab and Haryana High Court distinguished the judgment of the Apex Court in

New Horizons Limited (supra) by holding that in each of the illustrations described by the Apex Court an individual or entity possessed the requisite tangible experience in its individual capacity which was quantifiable and with which it could merge itself in another company or enter into partnership with a firm which lacked the necessary experience. The Division Bench held in paragraph 25 as under :-

“25. In fact, upon an analysis of the decision in *New Horizons Limited* (supra), we are rather of the opinion that our view finds resonance and support in few of the observations emphasized by us, while extracting relevant paragraphs of the judgment. For instance, in each of the illustrations described by the Supreme Court, an individual or an entity possessed the requisite tangible experience in its individual capacity, which was quantifiable (qualitatively and/or quantitatively), and with which it could merge itself in another company or enter into a partnership with a firm which lacked the necessary experience. Since the fact that such individual or entity actually had the experience was incontrovertible in these illustrations, the Supreme Court remarked on how absurd it was to discount such experience just because the re organized company or the firm which had submitted the bid did not have that experience in its name.”

20. In the peculiar factual matrix of the case in *A.G. Construction Co.* (supra) the Division Bench of Punjab and Haryana High Court held that experience in the name of erstwhile partnership firm in which the Petitioner was a partner could not be considered as an experience earned by him in its individual capacity. The judgment is thus clearly distinguishable and cannot be a reason for taking a different view than the one enunciated by the Apex Court in *New Horizons Limited and another* (supra) as followed by Division Bench of this Court in *Sagar Lookouts* (supra).

21. In our view therefore the experience of Proprietor of M/s. Nandkumar Constructions is required to be taken into

consideration as experience of the Petitioner-LLP for the purpose of evaluation of Petitioner's technical eligibility.

22. Mr. Deshmukh has strenuously relied upon Section 23 of the Act in support of his contention that LLP stands on completely different footing than that of partnership firm and that therefore the law enunciated by the Apex Court in *New Horizons Limited* (supra) would have no application in relation to the LLP. Section 23 of the Act provides thus:-

"23. Relationship of partners.-

(1) Save as otherwise provided by this Act, the mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners, shall be governed by the limited liability partnership agreement between the partners, or between the limited liability partnership and its partners.

(2) The limited liability partnership agreement and any changes, if any, made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be prescribed.

(3) An agreement in writing made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document may impose obligations on the limited liability partnership, provided such agreement is ratified by all the partners after the incorporation of the limited liability partnership.

(4) In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and the partners shall be determined by the provisions relating to that matter as are set out in the First Schedule".

23. In our view, what Section 23 of the Act provides for is governing of rights and duties of partners and rights and duties of LLP by the agreement. In our view, provisions of Section 23 of the Act would not make inapplicable to a LLP, the principle of reckoning an experience of partner prior to his entry into partnership firm as experience of the firm. Both Respondent Nos.1

to 3 as well as Respondent No.4 have raised doubts about authenticity of Memorandum of Understanding for business transfer relied upon by the Petitioner. In our view, once the principle of reckoning of experience a proprietor after his entry into LLP as experience of LLP is recognized, whether there is actual merger of the business or not becomes irrelevant. In that sense, it was not really necessary for the Petitioner to prove merger of business of the proprietary concern into the LLP. Nonetheless Petitioner has produced document evidencing such merger. Mr. Deshmukh has relied upon provisions of Section 60 of the Act in support of his contention that the said provision envisages following of a detailed procedure for a scheme of arrangement or merger of LLP. In our view, the argument has no basis as Section 60 of the Act deals with compromise or arrangement of LLP with its creditors or partners. Here we are not concerned with any arrangement between the existing partners of the LLP. The proprietor of M/s. Nandkumar Constructions has become partner of LLP by its very formation and therefore Section 60 of the Act would not have any application in relation to formation of the LLP. In any event, Section 60 of the Act is wholly irrelevant for applying the principle of reckoning experience of M/s. Nandkumar Constructions as the experience of the LLP.

24. After considering the overall conspectus of the case, we are of the view that the tendering authority has grossly erred in holding Petitioner's bid as non-responsive. Petitioner has qualified the prescribed eligibility criteria and accordingly his financial bid is required to be considered.

25. Mr. Narvankar had submitted that Petitioner is L-I and deserves to be awarded the contract. As of now, the tendering authority is not aware about the exact price quoted by the Petitioner since its financial bid was never opened. Respondent No.4 has been adjudged successful bidder. Mr. Deshmukh, after taking instructions from his client, has made a fair statement that in the event financial bid of the Petitioner being found L-I, Respondent No.4 is willing to match the same. Mr. Narvankar would submit that the Petitioner is willing to revise his financial bid. In *Ram & Sham Company vs. State of Haryana*⁷ the Apex Court has recognized the principle of rebidding between the two contesting parties for the purpose of ensuring that the tendering authority achieves best rates. Since both Petitioner and Respondent No.4 are willing to renegotiate their financial bids, Respondent Nos.1 to 3 shall, after opening the financial bid of the Petitioner, invite both the parties for negotiations and award the contract to the party quoting the lowest rates.

26. The Petition accordingly succeeds partly and we proceed to pass the following order :-

- i) Order dated 4 October 2024 adjudging Petitioner's bid as non-responsive is set aside.
- ii) Petitioner is held eligible for opening of the financial bid and its financial bid be accordingly opened.
- iii) After opening of Petitioner's financial bid, the tendering authority shall invite both Petitioner and Respondent

⁷ MANU/SC/0017/1985

No.4 for renegotiation process and thereafter proceed to award tender to the entity offering the lowest bids. It is clarified that except Petitioner and Respondent No.4 no other bidder will be entitled to participate in the renegotiation process.

27. With the above directions, the Petition is **partly allowed and disposed of**. Rule is made partly absolute. There shall be no order as to costs.

(SANDEEP V. MARNE, J.)

(CHIEF JUSTICE)

SUDARSHAN
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KATKAM
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by SUDARSHAN
RAJALINGAM
KATKAM
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