

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION NO.4761 OF 2024****Nitin Laxmidas Dama**

An adult Indian inhabitant, residing at
106, Poonam Vihar C4 CHS Ltd.,
Poonam Nagar, Mahakali Caves,
Andheri (East), Mumbai – 400 093.

...Petitioner

: Versus :

1. The State of Maharashtra

Through its Principal Secretary,
Ministry of Dairy Development,
having its office at
Mantralaya, Mumbai 400032

2. The Commissioner

Dairy Development Department,
having its office at
Worli, Mumbai – 400 017

3. The Dy. Commissioner

Dairy Development Department,
having its office at
Worli, Mumbai – 400 017

4. The Dy. Secretary (Diary)

Government of Maharashtra
having its office at
Mantralaya, Mumbai – 400 032.

5. Chief Executive Officer,

Aarey Milk Colony,
Having its office at Goregaon (East),
Mumbai – 400 065

6. Nyraa Entertainment

constituted under the provisions of the
Indian Partnership Act,
having its office at C/o Om Cars
Kent Enclave, Haridasnagar,
Kalpana Chowk Road,
Borivali (W), Mumbai – 400 092
through its partners Mr. Viral Ramniklal
Khokhani, Mr. Ketankumar Tarun Bhura
and Mr. Shridhar Nagolkar

....*Respondents*

Mr. Aseem Naphade with Ms. Chaitra Rao, Ms. Meera Parmar and
Mr. Jatin Sheth, for the Petitioner.

Mr. Kevic Setalwad, Senior Advocate with Mr. Mohit P. Jadhav,
Additional Government Pleader and Mr. Amar Mishra, AGP, for Respondent
Nos. 1 to 5-State.

Mr. Rahul Gaikwad with Mr. Nitin Jagtap and Mr. Dewang Mhatre i/b
Mr. Pavan Patil, for Respondent No.6.

CORAM : ALOK ARADHE, CJ. &

SANDEEP V. MARNE, J.

Reserved On : 13 June 2025.

Pronounced On : 19 June 2025.

JUDGMENT : (Per Sandeep V. Marne, J.)

1) The Petitioner has filed the present petition invoking jurisdiction of this Court under Article 226 of the Constitution of India seeking declaration of ineligibility of Respondent No.6 in the tender process initiated by Respondent Nos.1 to 5 for allotment of warehouses on lease for a period of 30 years. Petitioner has also sought writ of mandamus for consideration of its bid for allotment of seven warehouses which have been allotted to Respondent No.6.

2) Brief facts leading to filing of the present petition are as under :-

Respondent Nos.1 to 5 floated tender vide Notice dated 24 July 2024 for grant of lease in respect of 16 warehouses and one Central Store Office for a tenure of thirty years. The tender notice stipulated eligibility criteria, *inter-alia* pertaining to turnover and net worth of the bidders. The tender notice required the bidders to have annual financial turnover exceeding Rs. 50,00,000/- and in the event of the bidder bidding for more than one warehouse, the bidder was required to satisfy eligibility of annual financial turnover exceeding Rs.50,00,000/- for each warehouse. Similarly, the tender notice prescribed eligibility criteria of bidder's net worth exceeding Rs. 50,00,000/- for each of the warehouses. Petitioner submitted his bids in respect of the eight warehouses and one Central Store Office on 9 August 2024. Similarly, nine other bidders submitted their bids in pursuance of the tender notice, which included Respondent No.6. After conducting technical evaluation, seven bidders were adjudged technically eligible by the tendering authority, including Petitioner and Respondent No.6. The financial bids were opened on 16 August 2024 and thereafter allotment in respect of 16 warehouses and one Central Store Office was finalised by Respondent Nos.1 to 5, under which total 10 warehouses are allotted to Respondent No.6. Warehouse No.16 and the Central Store Office are allotted to the Petitioner. Petitioner is aggrieved by the decision of Respondent Nos.1 to 5 in allotting 7 out of the 10 warehouses (for which Petitioner had bid) in favour of Respondent No.6 on the ground that Respondent No.6 is erroneously held eligible in the tender process. Petitioner has accordingly filed the present petition seeking disqualification of Respondent No.6 in the impugned tender process and for consideration of his bid for allotment of the said 7 warehouses.

3) We have heard Mr. Naphade, the learned counsel appearing for the Petitioner. He would submit that Respondent Nos.1 to 5 have erroneously held Respondent No.6 eligible though it had not fulfilled the mandatory eligibility criteria relating to turnover and net worth. That Respondent No.6 is a partnership firm, which was set up only on 2 July 2024 i.e. merely 20 days prior to issuance of tender on 22 July 2024. That therefore it was impossible for Respondent No.6 to satisfy the requirement of annual financial turnover exceeding Rs.50,00,000/- each year and for previous three years. He would further submit that partners of Respondent No.6 also did not submit requisite certificate of Chartered Accountant to indicate that they possessed annual financial turnover exceeding Rs.50,00,000/-. That therefore Respondent Nos.1 to 5 ought to have rejected the technical bid of Respondent No.6 for failure to submit certificate of Chartered Accountant to demonstrate annual financial turnover as required in the E-Tender Notice. Mr. Naphade would further submit that for satisfying the mandatory condition of networth of Rs.50,00,000/- per warehouse, Respondent No.6 submitted Networth Certificate dated 27 April 2024 of one Mr. Rajiv Chandulal Darji issued by the Chartered Accountant reflecting his networth to be Rs.15.21 crores. However, Mr. Rajiv Chandulal Darji is not the partner of Respondent No.6-Firm. He is merely a Director of the Company, who happens to be the partner of Respondent No.6. That therefore personal networth of Mr. Rajiv Darji cannot be the networth of Respondent No.6. That except the said Certificate of networth of Mr. Rajiv Darji, Respondent No.6 has not submitted any other document to demonstrate possession of the requisite by it. That therefore the bid of Respondent No.6 ought to have been rejected. He would further submit that the income tax returns of Respondent No.6 have also not been submitted. That income-tax returns of some of the partners are unaudited. Similarly, professional tax

returns, as well as GST Certificates have also not been submitted by Respondent No.6. He would therefore submit that Respondent No.6 has been erroneously held technically qualified in the bidding process. He would accordingly pray for cancellation of allotment of seven warehouses to Respondent No.6 and for consideration of Petitioner's bid therefor.

4) Mr. Setalwad, the learned senior advocate appearing for Respondent Nos.1 to 5 would oppose the petition submitting that the objection of eligibility of Respondent No.6 raised by the Petitioner are absolutely baseless and are premised on surmises and conjectures. He submits that Respondent Nos.1 to 5 have duly verified the documents of Respondent No.6 who fulfills the prescribed eligibility criteria. He would invite our attention to the relevant clause in the NIT to demonstrate that the requisite documents could be submitted by a company/institute/partnership firm/individuals. He would therefore submit that it was permissible for the partners to rely upon their individual financial statements in support of eligibility of Respondent No.6-partnership firm. He would submit that the law is well settled that financial documents of a partners can be relied upon to demonstrate the turnover and networth of the partnership firm. In support of his contention, he would rely upon judgment of the Apex Court in New Horizons Limited and another Versus. Union of India and others¹ and of Division Bench of judgment of Gauhati High Court in Trio Stoney Mart Versus. Jamal Ahmed and Ors.² In support of his contention of irrelevancy of the date on which partner has joined, Mr. Setalwad has relied upon judgment of Division Bench of this Court in IMS Bhatia Transport Contractor Versus. Union of India and others³. Mr. Setalwad would further rely upon relevant clauses in the NIT,

¹ (1995) 1 SCC 478

² (2018) 3 GAUHATI LAW REPORTS 92

³ 2021(4) MH.LJ. 233

under which bidders submitting bid for higher number of warehouses were to be given preference during the selection process. He would submit that since Respondent No.6 had submitted bids for 10 warehouses as compared to Petitioner's bid for 7 warehouses and Central Store Office, the tendering authority has rightly given preference to Respondent No.6 over the Petitioner. He would submit that Mr. Rajiv Darji is the director of the Company who is a partner in Respondent No.6-Firm and that therefore the documents of networth of Mr. Rajiv Darji have rightly been taken into consideration by the tendering authority for deciding eligibility of Respondent No.6. He would pray for dismissal of the petition.

5) Mr. Gaikwad, the learned counsel appearing for Respondent No.6 would also oppose the petition submitting that the Petitioner did not participate in the meeting of the committee, which had opened bids in presence of all the bidders. If Petitioner had any objection about technical eligibility of Respondent No.6, he could have raised such an objection immediately after bids were opened by the committee. Having not raised any objection about technical qualification of Respondent No.6 at the time of opening of the bids, Petitioner is now estopped from doing so at such a belated stage. He would submit that as against the requirement of networth of Rs.50,00,000/- per warehouse i.e. Rs. 5 crores for 10 warehouses, Respondent No.6 produced documents showing networth of Rs.15 crores. He would submit that the financial capacity of Respondent No.6 has been duly verified by the tendering authority and its decision is not open for being challenged as this Court, is not an appellate authority over the decision of the tendering authority. He would accordingly pray for dismissal of the petition.

6) Rival contentions of the parties now fall for our consideration.

7) Respondent Nos.1 to 5 had floated tender for allotment of 16 warehouses and one Central Store Office on lease basis for a tenure of 30 years. The bidders were permitted to bid for either one or more warehouses or for all of them. The relevant eligibility criteria prescribed in the NIT was as under :-

1. General eligibility

(i) The bidder must be an Indian citizen as per the laws of India.

or

(ii) In the case of a Partnership Firm, at least one of the partners must be an Indian citizen.

or

(iii) Alternatively, the bidder may be a Company registered under the provisions of the Companies Act.

or

(iv) Public trust or societies.

or

(v) Women self-help groups.

(vi) The bidder must have a good reputation. He must not have ; been declared bankrupt under the laws in India, must not have been convicted by any Court in India or sentenced for moral turpitude, must not have been involved in any case where a Court has issued a judgment against him for having been involved in a criminal activity or have been blacklisted by any governmental, semi-governmental or cooperative institutions.

2. Financial Eligibility:

I. ***Turnover Requirement:*** The bidder's annual turnover for the financial years 2020-21, 2021-22, and 2022-23 must meet the following criteria : A) For Unit no. 2, Warehouses 1-14, the Central Store Office, and Unit 25, Warehouse 15, as well as Unit 4, Warehouse 16, the annual turnover must exceed ₹50 lakh for each warehouse

B) If bidding for more than one warehouse, the total annual turnover must be equivalent to combined requirement of turnover for all the warehouses.

II. ***Net Worth Certificate:*** The bidder must submit a net worth certificate certified by a Chartered Accountant. The requirements are:

A) For Unit 2, Warehouses 1-14, the Central Storage Office, and Unit 25, Warehouse 15, as well as Unit 4, Warehouse 16, the annual net worth must exceed ₹50 lakh for each warehouse.

B) If bidding for more than one warehouse, the total annual net worth must be equivalent to combined requirement of networth for all the warehouses.

8) The documents that bidders were required to submit in support of their eligibility were as under :-

I) A self- attested copy of Permanent Account Number (PAN) Card and Aadhar Card issued by the competent authorities;

II) A self-attested copy of Goods and Services Tax (GST) registration Certificate issued by the competent authorities;

III) Proof of payment of security Deposit and tender fee of Rs. 10,000/- + 18% GST through SBI GRAS system;

IV) Certified copy of required licenses, registration certificates, Income Tax certificates, professional tax certificate and any other relevant permissions required for the business for which the warehouse was being leased;

V) Details of **Income Tax returns for the last three years in the name of the bidder-** the company/ institution/partnership firm/ individual;

VI) Details of Professional Tax of last three years up to December, 2023 in the name of the bidder —company/institution/ partnership firm/individual;

VII) **Audited accounts and certificate from a Chartered Accountant confirming that the bidder's turnover** for the last three Financial Years meets or exceeds the required amount. This was required to be in the name of the company/ institution/ partnership firm/ individual;

VIII) Certificate from a Chartered Accountant confirming that the bidder's net worth meets or exceeds the required amount. This was required in addition to the turnover certificate;

IX) To specifically state in which capacity the bidder had signed the bid. For e.g., If the bidder was a partnership firm, it was necessary to list the names of all partners and append the signatures of all partners. It was mandatory to enclose a certified copy of partnership agreement as well as certified copy of a power of attorney in favour of the representative of the partnership firm who was authorized to handle financial transactions on behalf of the partnership firm;

X) Provide signed checklist of the documents to be attached with the bid (as per Appendix-C) and

XI) The bidder must sign each page of the bid document.

9) The tender document envisaged a preference clause which reads as under :-

IV. The bidder submitting bids for maximum number of warehouses collectively in the e-tender process will be given preference during the selection process.

10) The Petitioner submitted his bids for 8 warehouses and one Central Store Office, whereas Respondent No.6 submitted bids for 10 warehouses. Respondent No.6 has succeeded in securing allotment of 7 warehouses whereas Petitioner has succeeded in securing allotment of Warehouse No.16 and Central Store Office. Another bidder, N S Bizcorp LLP, Pune has secured allotment of four warehouses. It appears that no bid was submitted in respect of Warehouse No.15 located in Unit No.25 which has remained unallotted. Despite securing allotment of one warehouse (Warehouse No.16) and Central Store Office, Petitioner has still chosen to file the present petition on account of denial of allotment in respect of balance 7 warehouses for which also he had bid. Since the Petitioner had submitted bid for allotment of eight warehouses and one Central Store Office, the petition challenges decision by which allotment is made in favour of Respondent No.6 in respect of seven warehouses against which Petitioner had submitted bid. In addition to the said warehouses, Respondent No.6 has been allotted additional three warehouses about which Petitioner has not sought any prayer possibly on account of the fact that no bid was submitted by him in respect of the said three warehouses. The details of the warehouses in respect of which the present petition is filed is as under :-

- (i) Warehouse No. 1, admeasuring 3244 sq. ft. in Unit No. 2;
- (ii) Warehouse No. 2, admeasuring 3268 sq.ft. in Unit No. 2;
- (iii) Warehouse No. 3, admeasuring 3235 sq. ft. in Unit No. 2;
- (iv) Warehouse No. 5, admeasuring 3217 sq. ft. in Unit No.2;
- (v) Warehouse No. 12, admeasuring 3268 sq. ft. in Unit No. 2;
- (vi) Warehouse No. 13, admeasuring 3268 sq. ft. in Unit No. 2;
- (vii) Warehouse No. 14, admeasuring 3268 sq. ft. in Unit No. 2

situated at Aarey Milk Colony, Goregaon (East), Mumbai 400065.

11) The main objection raised by the Petitioner is about Respondent No.6 not fulfilling the criteria with regard to the turnover and network. Petitioner has also objected to technical qualification of Respondent No.6 despite non-submission of documents such as income-tax return, professional tax returns and GST returns. The exact objections raised by the Petitioner about eligibility of Respondent No.6 have been summarised in the Note of arguments submitted by the Petitioner, which is as under :-

Sr. No.	Eligibility under the e-tender dated 24.07.2024	Respondent No.6's compliance
1.	<u>Turnover:</u> As per Clause 2(I)(A)/Pg.115 of the e-tender the bidder should have an annual financial turnover exceeding Rs. 50 Lakhs for each year and for the last 3 years. As per Clause 2(I)(A)/Pg.115 of the e-tender, if the bidder submits a bid for more warehouses than one then the eligibility of annual financial turnover (exceeding Rs. 50 Lakhs for more than 3 years) must be shown for each warehouse. For example – If a bidder bids for 10 warehouses he must show annual financial turnover exceeding Rs. 5 crores for each year and for the last 3 years (Rs.50 lakhs x 10)	Respondent No.6 is a partnership firm which was set up only on 02.07.2024 i.e. merely 22 days prior to the issuance of the e-tender on 24.07.2024. Therefore, Respondent No. 6 could never have had an annual financial turnover exceeding Rs. 50 Lakhs for each year and for the last 3 years, since it did not even exist for that period. The partners of Respondent No. 6 i.e. Mr. Viral Ramniklal Khokani, Mr. Ketankumar Tarun Bhura and Mr. Shridhar Nagolkar also have not submitted the requisite certificate of the chartered accountant (as required by Clause 3(vii) of the e-tender) to show that they had an annual financial turnover exceeding Rs. 50 Lakhs for each year and for the last 3 years. Hence, Respondent No. 6 has not submitted any certificate by a chartered accountant to show the annual financial turnover as required in e-tender.
2.	<u>Net Worth:</u> As per Clause 2(II)(A)/Pg. 115 of the e-tender the bidder	Respondent No. 6 submitted a net worth certificate dated 27.04.2024 at Pg. 760 of one Mr. Rajiv Chandulal Darji issued by a

	should have a net worth certificate of a chartered accountant certifying that the net worth of the bidder exceeds Rs. 50 Lakhs. As per Clause 2(II)(B)/Pg. 115 of the e-tender, if the bidder is submitting a bid for more warehouses than one then such certificate of net worth exceeding Rs. 50 Lakhs is required for each warehouse for which a bid is proposed to be submitted. For example – If a bidder bids for 10 warehouses he must show a chartered accountant certificate certifying that his net worth exceeds Rs. 5 Crores (Rs. 50 Lakhs x 10).	Chartered Accountant (Ravi B. Soni & Co.) which shows a net worth of Rs. 15,21,26,783/-. However, the said Mr. Rajiv Chandulal Darji is <u>not</u> even a partner of Respondent No. 6. The partners of Respondent No. 6 have not submitted any net worth certificate. Hence, Respondent No. 6 has not submitted any net worth certificate as required by the e-tender.
3.	<u>Non-submission of documents:</u> The bidder was required to submit documents such as Income Professional Tax Returns, Tax Returns, GST returns for 3 years.	Income Tax Returns of Respondent No. 6 have not been submitted. Unaudited income tax returns of Mr. Ketan Kumar Bhura have been submitted for A.Y. 2019-20. Unaudited income tax returns of Mr. Viral Ramniklal Khokani have been submitted for AY 2021-22, 2022-23 and 2023-24. Unaudited income tax returns of Mr. Shridhar Nagolkar for AY 2022-23 and 2023-24. Professional Tax Returns have not been submitted either by Respondent No. 6 or any of its partners. Goods and Service Tax certificate (GST) has not been submitted by Respondent no. 6.

12) In our view, the objection raised by the Petitioner about constitution of Respondent No.6-partnership firm 20 days prior to the issuance of E-Tender is wholly untenable. As on the date of submission of the bids, Respondent No.6 had a valid existence in law and it was a legal entity capable of participating in the tender process. The tender document specifically made partnership firm eligible to participate in the impugned tender process. It is sought to be contended by the Petitioner that it was impossible for Respondent No.6 to satisfy the condition of financial turnover exceeding Rs.50,00,000/- for each year during previous three years on account of its constitution on 2 July 2024. However, Respondent No.6 has relied upon annual financial turnover of its partners to meet the prescribed requirement. It is well settled position of law that for satisfaction of eligibility criteria by a partnership firm, the experience, as well as financial documents of individual partner can also be taken into consideration. In *New Horizons Limited* (supra), the Apex Court has held 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. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.

40. Thus the approach from the legal standpoint also leads to the conclusion that for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated 22-4-1993, the experience of the constituents of NHL, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company, (IIPL) has to be taken into consideration. As per the tender of NHL, one of its Indian constituents (LMI) had printed and bound the telephone directories of Delhi and Bombay for the years 1992 and its Singapore-based constituent (IIPL) has 25 years' experience in printing the telephone directories with "yellow pages" in Singapore. The said experience has been ignored by the Tender Evaluation Committee on an erroneous view that the said experience was not in the name of NHL and that NHL did not fulfil the conditions about eligibility for the award of the contract. In proceeding on that basis the Tender Evaluation Committee has misguided itself about the true legal position as well as the terms and conditions prescribed for submission of tenders contained in the notice for inviting tenders dated 26-4-1993. The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of Respondent 4. The total amount of royalty offered by Respondent 4 for three years was Rs 95 lakhs whereas NHL had offered Rs 459.90 lakhs, i.e., nearly five times the amount offered by Respondent 4. Having regard to this large margin in the amount of royalty offered by NHL and that offered by Respondent 4, it must be held that decision of the Tender Evaluation Committee to refuse to consider the tender of NHL and to accept the tender of Respondent 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed.

(underlining supplied)

13) The Division Bench of Guwahati High Court in *Trio Stoney Mart* (supra) has decided similar issue and has held in paras-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 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.

14) Following the law enunciated by the Apex Court in *New Horizons Limited* the past experience and financial credentials of partners of Respondent No. 6-Firm are required to be considered as experience and financial credentials of the partnership firm as well. In our view, tendering authority has rightly taken into consideration the financial documents relied upon by Respondent No.6 in respect of its partners.

15) Reliance by Mr. Setalwad on judgment of Division Bench of this Court in *IMS Bhatia Transport Contractor* (supra) is also apposite in which the Division Bench has held that the date on which the partner is added in the firm is irrelevant and experience of such added partner can also be considered as experience of the firm. It has been held in para-21 to 24 as under :-

21. Reading clause of experience in the tender document, the past seven years experience ending last day of the month previous to in which the applications are invited is sufficient.

22. Once the partner has entered into the partnership firm before the submission of the tender document, then it is immaterial as to the date on which he has entered into the partnership for the purpose of experience as contemplated in the afore mentioned clause of experience. We cannot comprehend the argument on behalf of the respondents that if the newly added partner would have entered into the partnership prior to 31st July, then his experience could have been counted and only because he has entered into the partnership firm on 14th August, 2020, his experience prior to 31st July cannot be counted. The same does not appear to be purport of the clause of experience.

23. The Apex Court in case of *New Horizon Limited* (supra) has also observed that the expression "joint venture" connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks.

24. In light of all the aforesaid facts, we have no hesitation to conclude that the experience of the 4th partner admitted to the partnership on 14th August, 2020 has to be considered while considering the experience of the petitioner partnership firm.

(emphasis supplied)

16) So far as the objection of networth of Respondent No.6 is concerned, the tendering authority has taken into consideration the net worth of Mr. Rajiv Chandulal Darji, who is the Director of one of the constituent partners of Respondent No.6. The tendering authority has exercised its discretion in adjudging the net worth of Respondent No.6 on the basis of the documents submitted by the director of one of the partners. We cannot sit in appeal over such discretion exercised by the tendering authority. It must also be borne in mind that the objection behind prescribing the condition of net worth is to ensure that bidders, who are financially incapable of executing the work are excluded from the tendering process. In the instant case, the tender was floated for allotment of premises owned by Respondent Nos. 1 to 5 on lease basis

for a tenure of 30 years. The networth condition is inserted with a view to ensure that the bidders have the sound financial background and capability of paying the lease premium in respect of the allotted warehouses. In the present case, if the tendering authority has exercised the discretion of considering the networth of director of a company, which happens to be the partner of Respondent No.6 and has accordingly concluded that Respondent No.6 is financially capable of performing the contract, it would be beyond the scope of power of judicial review of this Court to sit as an appellate authority over the discretion exercised by the tendering authority. This Court can merely review the decision-making process. In Tata Cellular Versus. Union of India⁴, it is held as under :-

94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.**
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.**
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

(emphasis supplied)

⁴ (1994) 6 SCC 651

17) In Silppi Constructions Contractors Versus. Union of India⁵, after analyzing various judgments on the subject, the Apex Court has held that Courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters and that Courts would normally be loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or *mala fides* or bias or irrationality is made out. The Apex Court has held as under :-

19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

(emphasis supplied)

18) The scope of interference by Courts in tender matters lies in an extremely narrow compass. The Courts must show deference to the discretion exercised by the tendering authority. The Division Bench of this Court in Sagar Lookouts Versus. Maharashtra Housing and Area

⁵ (2020) 16 SCC 489

*Development Authority and Others*⁶ has held in paragraphs 18 to 24 and 32 to 36 as under :-

18. We have pondered over the erudite submissions canvassed on behalf of the contesting parties by learned senior advocates. There is no disputing the proposition that unless the eligibility criteria prescribed in Clause 3.2 of the RFP is satisfied by the bidder, the bid cannot be held eligible. The condition which Sagar Lookouts does not fulfil, according to the tendering authority, is the experience of at least 10 (Ten) years in erection and handling of city advertising/outdoor advertising media of 50 Hoardings each of minimum 450 sq.ft. in corporation/Authority area. The Committee found that Sagar Lookouts has the requisite experience of 10 years of erecting and handling hoardings but that it has put up 47 hoardings only. Sagar Lookouts as a partnership firm, per se, i.e. without considering the partners experience, does not satisfy the eligibility condition of erecting and handling 50 hoardings. This standard or norm of eligibility laid down by MHADB cannot be faulted nor is it the contention of Sagar Lookouts that the said eligibility condition is arbitrary or unreasonable. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Viteralli v. Seaton*¹⁴ where the learned Judge said that "An executive agency must be rigorously held to the standards by which it professes its action to be judged.... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword." Their Lordships in *Ramana Dayaram Shetty* (supra) observed that this rule was accepted as valid and applicable in India. In *A.S. Ahluwalia v. Punjab*¹⁵ and in subsequent decision given in *Sukhdev v. Bhagatram*¹⁶, His Lordship Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority.

19. In *V. Punnan Thomas v. State of Kerala*¹⁷, it is observed that "The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal".

20. Furthermore, we have to bear in mind the principles enunciated by the Supreme Court in paragraph 94 of the decision in *Tata Cellular* (supra), so often quoted, while answering the question posed for our consideration. To what extent this Court can interfere in such matters is laid down in *SILPPI Constructions Contractors* (supra) which is an authority for the proposition that the Court should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters.

⁶ 2022 SCC ONLINE BOM 1483

21. In a decision of recent origin rendered by this Court in *Adani Ports and Special Economic Zone Limited* (supra), upon considering a plethora of decisions of the Supreme Court in relation to tender matters which rules the field, the following observations in paragraph 43 which are relevant reads thus:—

“43. Our understanding of the law, drawing guidance from the decisions noticed above, is that the terms and conditions of a tender are not to be read and interpreted in the same manner a statute is read and interpreted. The legislatures make laws actuated with some policy to curb public evil or to effectuate public good. As and when an issue arises before them, it is the duty of the constitutional courts to interpret the law and declare what the law is. If the Courts find gaps in the working of the law while interpreting and declaring what the law is, it is not precluded from ironing out the creases by appropriate technique of interpretation to infuse life into the law; but it is impermissible for the Courts to alter the material of which the law is woven. Such ironing out of the creases, inter alia, is generally premised on the Court's perception of what the legislative intent was. In so doing, the Courts are entitled to interpret and declare the law without consulting the legislature to explain what was intended while enacting the law. Legislative functions come to an end once the law is passed. When the constitutionality of a law is challenged or when the Court is otherwise required to interpret and declare what the law is, the parties opposing/supporting the law are only heard. However, in regard to interpretation of tender terms and conditions, the perspective is completely different and such an exercise, as can be taken recourse to in interpreting a statute, would be impermissible. Terms and conditions in a tender are set which would advance the tendering authority's interest. When the terms and conditions of a tender fall for consideration and the need arises for the Court to understand what is meant by a particular clause or what is the requirement of a particular clause in such tender, the tendering authority's version has to be heard by the Court. If such version of what it intended by inserting the relevant clause appears to the Court not to be manifestly unfair, utterly unreasonable, totally arbitrary, or thoroughly unjust, the Court cannot substitute its view of what would have been a better course for the tendering authority to follow to achieve the object of the tender. Deference to the view of the tendering authority by the Courts is the general rule. The adverbs in the preceding sentence would signify a level higher than, what in one's perception, the requirement of a clause would amount to being seen as unfair, unreasonable, arbitrary or unjust. When a party invokes the Court's jurisdiction and claims that a clause in the tender ought to be read in the manner he/it reads it, in such a case, the tender terms and conditions have to be read by the Court and understood in the language they are plainly expressed. Even if any particular clause is ambiguous and upon a query being raised by the Court as to what the clause precisely means or what is its requirement, the meaning that the tendering authority gives has to be accepted without reservation unless, of course, such meaning contravenes a constitutional right. This is because of the freedom that has to be conceded to the tendering authority to choose with whom it would like to enter into a

contractual relationship and the allowance of certain measure of 'free play in the joints', which is a necessary concomitant for an agency working in the administrative sphere as in the present case."

22. Applying the principles set out in the above decisions, there is no doubt that Sagar Lookouts ipso facto (without the partner's experience) does not possess the experience of erecting and handling 50 hoardings. As Sagar Lookouts does not fulfil the eligibility criteria, it should not have been a difficult task for us to dismiss the writ petition on this count itself. The contention of Mr. Ravi Kadam, that the experience of the partner of Sagar Lookouts has to be regarded as the experience of the firm, in the light of the decisions of the Supreme Court in *New Horizons Limited* (supra), *Maa Nabadurga Construction* (supra) and one rendered by this Court in *IMS Bhatia Transport Contractor* (supra), that we deliberated on this aspect further.

23. Let us consider the objection of Dr. Milind Sathe that considering the experience of the bidder firm's partner in some other enterprise, as the experience of the bidder, for the purpose of eligibility, would virtually be permitting a consortium to participate which is in the teeth of Clause 2.1. The argument of Mr. Milind Sathe at first blush sounds attractive. There is no dispute that the bidder in the present case is Sagar Lookouts. It is not as if Sagar Lookouts, along with Urja, has submitted its bid as a consortium. The *Concise Oxford English Dictionary* defines 'consortium' as an association, typically of several companies. *Black's Law Dictionary* assigns a historical meaning to the word 'consortium' as a group of companies that join or associate in an enterprise. Such is not a case here, as Sagar Lookouts and Urja have not joined or associated as an enterprise for the purpose of the RFP, to bid as a consortium. The point is, whether the experience of the partner of the firm in Urja, can be considered as the experience of the bidder firm, for the purpose of the present RFP, to qualify the eligibility criteria of experience or will it tantamount to mean a bid by a consortium.

24. To answer this question posed for our consideration, we need to take the help of the decision of the Supreme Court in the case of *New Horizons Limited* (supra), *Maa Nabadurga Construction* (supra) and that of this Court in *IMS Bhatia Transport Contractor* (supra).

32. In the present case, undoubtedly, the eligibility criteria provides for the experience which the bidder must possess is of erecting and handling 50 hoardings. The bidder Sagar Lookouts is a partnership firm registered under the provisions of the Indian Partnership Act, 1932. Though documents were produced about the partner's experience in Urja, the Committee refused to look into these documents as the same were not in the name of the bidder - Sagar Lookouts. It is pertinent to note that the partners of Sagar Lookouts are Mr. Prashant Joshi and his mother Mrs. Shubhada Nishikant Joshi. Urja is a private limited company of which the only shareholders/Directors/Stakeholders are Mr. Prashant Joshi, Mrs. Shubhada Nishikant Joshi and Mrs. Ashwini Prashant Joshi. Thus, two of the shareholders of Urja are partners of Sagar Lookouts. We are not considering the documents pertaining to Mystical Polyplast and Mystical Technoplast private Limited in view of the contention of Mr. Ravi Kadam, that the experience of the partner in Urja itself is sufficient to satisfy the requirement of fulfilling the eligibility criteria of 50 hoardings. There are on record,

documents in the nature of agreements between Sagar Lookouts and Urja, which though produced, were not considered by the Committee. At Exhibit 'N' is an agreement for the assignment of the rights of marketing for the advertisement Display sites dated May 1, 2011 between Urja and Sagar Lookouts. The said agreement pertains to the assignment of the marketing rights by Urja to Sagar Lookouts in respect of 7 number of hoardings allotted by MSRDC and other private entities Ltd. At page 433 of the paper book is an agreement dated May 1, 2012 for construction, erection and maintenance of various advertisement sites between Urja and Sagar Lookouts. These agreements are signed by Mrs. Ashwini Prashant Joshi as a Director of Urja and Mr. Prashant Joshi in his capacity as a partner of Sagar Lookouts. The said agreement for construction, erection and maintenance inter alia provided that Sagar Lookouts agreed to conduct fabrication, erection, maintenance of the hoarding sites according to the norms of government and other authorities. The details of the advertisement sites are listed in Schedule I. Exhibit 'M' at page 421 of the paper book is a chart pertaining to Urja in respect of these 8 hoardings. These 8 hoardings which have valid MCGM permits are of dimension more than 450 sq.ft. and situated within the city limits of Bombay. The MCGM permits, at least in respect of 6 hoardings are on record, enclosed from page nos. 422 to 427. Even on as many as five permits, the name of the firm is indicated as Urja and the name of permit holder is recorded as Mr. Prashant Joshi. There are thus overwhelming documents on record to demonstrate that the partner of Sagar Lookouts, apart from being a shareholder of Urja, has actually the experience of erecting and handling the hoardings of the stipulated dimensions to fulfil the eligibility criteria of experience. The authenticity of these documents is not in dispute nor is it the case of any of the parties that the said hoardings have not been fabricated or erected at the sites mentioned in the agreement. The Committee simply refused to look into these documents on the ground that these documents do not pertain to Sagar Lookouts.

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. In the present case, the partner (Prashant Joshi) of Sagar Lookouts has the experience, but the firm itself does not have the experience. The approach of the tendering authority is that the firm - Sagar Lookouts - is an independent person distinct from its partners and that the firm is carrying on the business independently from that of the partners. On behalf of the tendering authority, the submission is that the experience of the partner cannot be the experience of the partnership firm. Their Lordships in *New Horizons Limited* (supra) have observed in paragraph 23 quoted hereinabove, that it is possible to visualise a situation where a person having past experience has entered into a partnership and a 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. The bidder - Sagar Lookouts - has experience of

erecting 47 hoardings, 3 short of the eligibility. The partner of Sagar Lookouts as a shareholder of Urja has the experience of erecting 8 hoardings. While considering the requirement regarding the 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 stand point 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 entrusted with the work. He would not go by the name of the firm but the persons behind the firm. Had the Committee examined the tender of Sagar Lookouts in this perspective, it would have found from the documents, that the bidder - Sagar Lookouts-fulfilled the experience criteria. Their Lordship in *Maa Nabadurga Construction* (supra) referred to the meaning of the word 'experience' given in *Black's Law Dictionary*. 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 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. Punnan 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.

36. The argument of Dr. Milind Sathe and Mr. Ram Apte that considering the experience of the partner of Sagar Lookouts in Urja would tantamount to a bid being submitted by a consortium does not also commend to us. We have to bear in mind that the tender condition required the bidder to have an experience of erecting and handling 50 hoardings each of minimum 450 sq.ft. in corporation/Authority area. From the stand point of MHADB, the credentials of the person who is entrusted with the performance of work viz. the background of the firm and the persons who are in control of the same and their capacity to execute the work has to be seen. The tendering authority will not go by the name of the firm but the person/s behind it. We have no hesitation in concluding that the Committee completely erred in discarding/ignoring the documents relating to the experience of the partner of the bidder firm. It is not disputed that the bid of the petitioner is held ineligible only on the ground that it does not have the experience of erecting and handling 50 hoardings and on no other ground.

19) The judgment of Division Bench of this Court in *Sagar Lookouts* is an authoritative pronouncement on twin points of Courts showing restraint in tender matters and experience of partner being capable of considered as experience of the firm. The judgment thus applies squarely to the issue at hand.

20) After considering the overall conspectus of the case, we are unable to interfere in the impugned decision of the tendering authority in accepting the bids of Respondent No.6 in respect of the seven warehouses. Petitioner himself has been successful in securing allotment of one warehouse and Central Store Office in the same tendering process. Since we are unable to trace any element of perversity, irrationality or arbitrariness in the impugned tender process implemented by Respondent Nos.1 to 5, there is no warrant for interference in the decision of Respondent Nos.1 to 5. The petition must fail. It is accordingly **dismissed** without any order as to costs.

[SANDEEP V. MARNE, J.]

[CHIEF JUSTICE]