$~31, 34 & 35

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

Date of Decision: 06.12.2019

\+ W.P.(C) 12857/2019

CONSORTIUM OF SIEMENS LTD. INDIA, SIEMENS SA SPAIN AND SIEMENS AG GERMANY & ORS.....Petitioners

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Dayan Krishnan, Senior Advocate, Mr. Susmit Pushkar, Advocate, Mr. Gaurav Sharma, Advocate and Ms. Bhavna Mishra, Advocate.

versus

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA LTD. & ANR. ..... Respondents

Through: Ms. Pinky Anand, ASG with Mr. Jitender Kumar Singh, Advocate, Mr. Sumit Teterwal, Advocate and Ms. Saurabh Sharma, Advocate for respondent No.1.

Mr. Jagjit Singh, Senior Standing Counsel with Mr. Preet Singh, Advocate and Ms. Rachita Garg, Advocate for respondent No.2.

\+ W.P.(C) 12868/2019

CONSORTIUM OF SIEMENS LTD. INDIA, SIEMENS SA SPAIN AND SIEMENS AG GERMANY & ORS.....Petitioners

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Dayan Krishnan, Senior Advocate, Mr. Susmit Pushkar, Advocate, Mr.

Gaurav Sharma, Advocate and Ms. Bhavna Mishra, Advocate.

versus

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA LTD. & ANR. ..... Respondents

Through: Ms. Pinky Anand, ASG with Mr. Jitender Kumar Singh, Advocate, Mr. Sumit Teterwal, Advocate and Ms. Saurabh Sharma, Advocate for respondent No.1.
Mr. Jagjit Singh, Senior Standing Counsel with Mr. Preet Singh, Advocate and Ms. Rachita Garg, Advocate for respondent No.2.

\+ W.P.(C) 12869/2019

CONSORTIUM OF SIEMENS LTD. INDIA, SIEMENS SA SPAIN AND SIEMENS AG GERMANY & ORS.....Petitioners

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Dayan Krishnan, Senior Advocate, Mr. Susmit Pushkar, Advocate, Mr. Gaurav Sharma, Advocate and Ms. Bhavna Mishra, Advocate.

versus

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA LTD. & ANR. ..... Respondents

Through: Ms. Pinky Anand, ASG with Mr. Jitender Kumar Singh, Advocate, Mr. Sumit Teterwal, Advocate and Ms. Saurabh Sharma, Advocate for respondent No.1.
Mr. Jagjit Singh, Senior Standing Counsel with Mr.

Preet Singh, Advocate and Ms. Rachita Garg, Advocate for respondent No.2.

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

C.M. No.52539/2019 (exemption) in W.P.(C) No.12857/2019
C.M. No.52573/2019 (exemption) in W.P.(C) No.12868/2019
C.M. No.52575/2019 (exemption) in W.P.(C) No.12869/2019

Exemptions are allowed, subject to all just exceptions.

Applications stand disposed of.

W.P.(C) No.12857/2019 and C.M. No.52538/2019
W.P.(C) No.12868/2019 and C.M. No.52572/2019
W.P.(C) No.12869/2019 and C.M. No.52574/2019

These three writ petitions under Article 226 of the Constitution of India pertain to three tenders for procurement of Design, Supply, Construction, Installation, Testing and Commissioning of 2x25kV AC Electrification, Signalling & Telecommunication, E&M and Associated Works on Design-Build Lump Sum Basis. Although the terms and conditions of these tenders are the same, the tenders were issued and dealt with separately for the reason that the stretches of road to which they pertain are different. The essential factual matrix in these three petitions is essentially the same and the petitions involve identical issues; hence these petitions are being decided by this common judgment. For convenience, the facts of W.P.(C) No.12857/2019 are being referred to for purposes of the present

judgment.

2. Petitioners are aggrieved by communication dated 26.11.2019 issued by the respondents, by which the technical bid of the petitioners stand rejected.

3. With the consent of the parties, the writ petitions are set-down for final hearing and disposal at the admission stage itself.

4. In the year 2015, respondent No.1 issued an invitation for pre-qualification dated 22.12.2015 bearing ICB no. HQ/SYS/EC/D-B/Dadri-Khurja for procurement of Design, Supply, Construction, Installation, Testing and Commissioning of 2x25kV AC Electrification, Signalling & Telecommunication, E&M and Associated works on Design-Build Lump Sum Basis for Dadri-Khurja section (approximately 47 Route Km of Double Line) of Eastern Dedicated Freight Corridor (‘project’ for short). For completeness it may be noted that the length of the stretch of road in the other two petitions is 175 km for Sahnewal-Pilkhani and 220 km for Khurja-Pilkhani respectively.

5. Petitioner No.1 responded to this invitation on 25.05.2016. On 13.06.2017 the petitioner was informed that the consortium was pre-qualified for the project. The tender process which commenced on 22.12.2015 continued between the period 2016 to 2019 and it is not necessary to explain in detail the process, except to say that petitioner No.4 addressed a communication to respondent No.1 on 05.06.2018, which reads as under:-

" *Madrid, June 5th, 2018*

Dedicated Freight Corridor Corporation of India. Ltd. (DFCC)
5th Floor, Pragati Maidan,
Metro Station Building Complex
New Dehll- 110001

Ref: Transfer of contracts from Siemens, S.A, to Siemens Mobility, S.L.U

Dear Sir,

We make reference to the Public Tender for the "Design, Supply, Construction, Installation, Testing and Commissioning of 2x25kV AC Electrification, Signalling & Telecommunication, E&M and Associated Works on Design-Build Lump Sum Basis of Dadri- Khurja Section (approximately 47 Route Km of double Line) of Eastern Dedicated Freight Corridor", ICB No.: HQ/SYS/EC/D-B/ Dadri-Khurja, announced on June 14th, 2017.

On June 13th, 2017, the consortium comprised by Siemens AG, Siemens, S.A. and Siemens, LTD, were prequalified.

By means of this letter, we would like to formally inform you that Siemens is into a restructuring process as result of its decision to combine the mobility business with Alstom (subject to necessary approvals). Within the framework of this global transaction, Siemens, S.A., incorporated in Spain, has transferred its mobility business to Siemens Mobility, S.L.U on June 1st, 2018, as it is reflected in the public deed of the contract executed on April 23, 2018. Please find attached as ***Exhibit 1*** *the incorporation public deed of Siemens Mobility, S.L.U and its Bylaws, and as* ***Exhibit 2****, the extract of the public deed where it is contained the mobility business transfer.*

The transfer of Siemens, S.A. (Spain) mobility business to Siemens Mobility, S.L.U includes all rights and obligations

regarding the bid process and contracts pertaining to Siemens' mobility business, and therefore the corresponding credentials. The Siemens Mobility, S.L.U. is a wholly owned subsidiary of Siemens AG, one of the consortium members.

Counting on your support of the global transaction we kindly ask you to please consent to the transfer and assignment of the contractual relationships to Siemens Mobility, S.L.U, by signing the acknowledgment below and returning it to us, to the following address.

Siemens Mobility, S.L.U
For the attention Of: David Arenas
Ronda de Europa 5, 28760, Tres Cantos, Madrid
Phone:+346.70043578
E-Mail: david.arenasr@.siemens.com

Should you have any questions, please do not hesitate to contact us.

Thank you in advance for your support and for your cooperation.

Sincerely yours,
Siemens, S.A.

Name: Enrique Torres Verdasco
Attorney"

(Emphasis Supplied)

6. Accordingly, by the above communication respondent No.1 was informed that Siemens, S.A. was in the process of restructuring to combine the 'mobility business' with Alstom. Respondent No.1 was also informed that Siemens, S.A. incorporated in Spain, had transferred its mobility business to Siemens Mobility, S.L.U on

01.06.2018. It is common ground that the subject tender is related to the 'mobility business' of the petitioners. Respondent No.1 was also informed that Siemens Mobility, S.L.U is a wholly owned subsidiary of Siemens A.G., one of the consortium members; and respondent No.1's consent was sought for transfer and assignment of the contractual relationships in relation to the tender to Siemens Mobility S.L.U. The consent sought was however declined, though with much delay, by communication dated 26.11.2019, by which the petitioner's technical bid was also rejected, which we reproduce below:-

> *"No.: HQ/S&T/EC/DER-KRJ/Eval./91/Part-IV*
>
> *Date. 26.11.2019*
>
> *Consortium of Siemens Ltd. India, Siemens SA Spain and Siemens AG Germany*
> *Birla Aurora, Level 21, Plot no. 1080,*
> *Dr. Annie Besant Road, Worli,*
> *Mumbai 400030*
>
> *(Kind Attention, Mr. Anupam Arora & Mr. Puneet Mehra)*
>
> *Sub: Design, Supply, Construction, Installation, Testing and Commissioning of 2x25kV AC Electrification, Signalling & Telecommunication, E&M and Associated Works on Design-Build Lump Sum basis for Dadri-Khura section (approximately 47 Route km of double line) of Eastern Dedicated Freight Corridor (CP 105).*
>
> *Ref: 1) Your letter No.:MO-TPE-RE/D3526/ARA/CP-105/Clarification-6, dated 16.11.19.*
>
> *2) This office letter No.:HQ/S&T/EC/DER-KRJ/Eval./91/Part-IV, dated 14.11.19.*

In reference to your letter at #1 above, It is reiterated that the rejection of your technical proposal submitted for subject work is due to failure of consortium to meet the minimum qualification criteria required under ITA 25.4 of PQ document.

Based on the documents submitted by the consortium, it is established that the mobility business of SIEMENS AG and SIEMENS SA (the original bidders) has been transferred to wholly owned subsidiary of SIEMENS AG namely Siemens Mobility SLU, Spain and Siemens Mobility GmbH, Germany. These new entities are not part of the bid. As a result of these changes, the qualification of the original bidders is different from the time they were qualified. As per ITA 25.4 of the PQ document, only the qualification of the Applicant shall be considered. In particular the Qualification of a Parent or other Affiliated Company that is not party to the applicant under a JV in accordance with ITA 4.2 (or participating as a sub-contractor as per ITA 25.2) shall not be considered. The qualification of Siemens Mobility SLU and Siemens Mobility GmbH cannot therefore be considered.

Hence, after transfer of mobility business, which is the scope of this tender, the claim by Siemens AG, Germany and Siemens SA, Spain to continue to meet the requirement of ITA 25.4 is not established.

(Satish Kumar)
GGM (S&T)/EC-l/DFCCIL"

(Emphasis Supplied)

7. In response to the aforesaid communication, the petitioner responded on 27.11.2019 protesting the rejection of technical bid, which has subsequently led to filing of the present writ petition.

8. Mr. Rajiv Nayar, learned senior counsel appearing for the petitioners has placed reliance upon clause No. 4.2 of tender conditions, which we reproduce below:-

> *"4.2 An Applicant may be a firm that is a private entity, a government-owned entity- subject to ITA 4.9- or a combination of such entities in the form of a joint venture ("JV") under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. In the case of a JV, all members shall be jointly and severally liable for the execution of the Contract in accordance with the Contract terms. The JV shall nominate an authorized representative who shall have the authority to conduct all business for and on behalf of any and all the members of the JV during the prequalification process, bidding (in the event the JV submits a bid) and during contract execution (in the event the JV is awarded the Contract). Unless specifice in the PDS, there is no limit on the number of members in a JV."*
>
> (Emphasis Supplied)

9. Mr. Nayar submits that as per the aforementioned tender condition, an applicant is permitted to include a combination of various entities in the form of a Joint Venture under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. He submits that a reading of this clause would show the flexibility available to a bidder. He submits that as the petitioners' case stands, the petitioners stand on a better footing since the mobility business has been hived-off to entities that are wholly owned subsidiaries and therefore continue to remain under the umbrella and control of one of the consortium members i.e. Siemens A.G.

10. The second submission of learned senior counsel for the petitioners is that clause No. 25.4 read alongwith clause No. 30.1 of the tender conditions in fact contemplate change in corporate structures, subject only to formal approval from the respondents, which the petitioners had sought and which was unfairly denied. Clause Nos. 25.4 and 30.1 are reproduced below:-

> *" 25.4 Only the qualifications of the Applicant shall be considered. In particular, the qualifications of a parent or other affiliated company that is not party to the Applicant under a JV in accordance with ITA 4.2 (or participating as a sub-contractor as per ITA 25.2) shall not be considered.*
>
> *"30.1 Any change in the structure or formation of an Applicant after being prequalified in accordance with ITA 27 and invited to bid (including, in the case of a JV, any change in the structure or formation of any member thereto) shall be subject to the written approval of the Employer prior to the deadline for submission of bids. Such approval shall be denied if (i) a prequalified applicant proposes to associate with a disqualified applicant or in case of a disqualified joint venture, any of its members; (ii) as a consequence of the change, the Applicant no longer substantially meets the qualification criteria set forth in Section III, Qualification Criteria and Requirements; or (iii) in the opinion of the Employer, the change may result in a substantial reduction in competition. Any such change should be submitted to the Employer not later than fourteen (14) days after the date of the Invitation for Bids."*
>
> (Emphasis Supplied)

11. It is further submitted by learned senior counsel for the petitioners that global restructuring has not impacted the experience of

the bidder, as required under the tender conditions since the wholly owned subsidiaries remain within the umbrella and control of the consortium, which comprises three companies viz M/s Siemens Limited, M/s Siemens, S.A. and M/s Siemens A.G. Senior counsel submits that the approach of the respondents is hypertechnical and unreasonable for the reason that in letter dated 27.11.2019, the petitioners had categorically asserted that there had been no change in the consortium of Siemens despite carving-out of the mobility business; and that Siemens A.G. was part of the consortium and also the parent company of the carved-out entities i.e. Siemens Mobility S.L.U, Spain and Siemens Mobility GmbH, Germany. It is reiterated that the carved-out entities are 100% subsidiaries of Siemens A.G. and are fully controlled by Siemens A.G. ; and further that the ultimate responsibility for execution of the contract would lie with Siemens A.G./consortium, which is the original bidder. It is the stand of the petitioners that the consortium remains unchanged and unaffected by hiving-off of these businesses; and hence it is not in violation of clause Nos. 25.4 or 30.1 of the tender conditions. Accordingly, the petitioners contend that they continue to retain the tender qualifications. On these lines the petitioners have addressed not one, but three communications dated 02.08.2018, 06.10.2018 and 07.11.2018 to the respondents.

12. Learned senior counsel for the petitioners has placed reliance upon a decision rendered by a Division Bench of this court in the case of ***Consortium of Alstom Transport India Ltd. & Alstom Transport S.A. & Anr. vs. Dedicated Freight Corridor Corporation of India Ltd. & Anr.*** reported as 2017 SCC Online Del 10132. Para Nos. 4, 16,

18, 20, 25 and 28 of this judgment are relied upon and these paras read as under:-

> *"4. The facts are that both the Petitioners formed a consortium. Alstom Transport (India) Ltd was incorporated on 21.04.1997. In the year 2002, due to restructuring in the Alstom Group, another Alstom Group Company, namely Alstom Power India Ltd (incorporated in 1992) filed a petition before this Court for amalgamation of Alstom Transport (India) Ltd, Alstom Systems Ltd and Alstom Power Boilers Ltd with Alstom Power Ltd., which was allowed by the Court by its order, dated 31.10.2002.Thereafter, Alstom Power India Ltd changed its name to Alstom Projects India Ltd ("APIL"), which was recorded by the Registrar of Companies, and a fresh certificate of incorporation was issued on 11.11.2002. In 2012, APIL further changed its name to Alstom India Limited ("AIL") vide fresh Certificate of Incorporation dated 06.06.2012, which was issued consequent upon the change of name of the company. It is stated that in 2011, the Alstom Group, as a business decision, decided to have a separate company to carry out its transportation business and also set up a Rolling Stock Manufacturing Unit at Sri City, Andhra Pradesh to manufacture Metro Cars for the Chennai Metro and consequently incorporated a new company in the name of Alstom Transport India Limited i.e. the second petitioner ("ATIL") on19.01.2011."*
>
> *XXXXX*
>
> *"16. The Respondents contend in their response to the Petitioners' letters that they clarified that the ATIL had submitted a statement jointly signed by the Managing Director of ATIL & AIL stating that AIL has sold and transferred the Transport Business of AIL to ATIL on Slump Sale Basis, and the transaction was completed on 31.03.2014. Since the Transport Division/Undertaking of*

AIL purchased by ATIL is not a legal entity, credit for-the experience for the works executed by APIL/AIL before 01.04.2014 cannot be given to ATIL. It is submitted that the Petitioners were inherently ineligible to participate in view of Clause 25.4 of the Pre-Qualification document, which is as under:

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

XXXXX

"18. In 2011, the Alstom Group took a business decision to have a separate company to carry out its transportation business and also set up a Rolling Stock Manufacturing Unit at Sri City, Andhra Pradesh to manufacture Metro Cars for the Chennai Metro and consequently incorporated a new company in the name of Alstom Transport India Limited i.e. Petitioner No.2 on 19.01.2011. During, 2013-14, Alstom Group as part of its global business restructuring strategy consolidated the business sectors worldwide into four sectors namely Power, Transport, Renewable and Grid. As part of the restructuring, the Transport business was to be streamlined and consolidated under one legal entity in the country and, therefore, Alstom India Ltd ("AIL") by board resolution dated15.01.2014 and with shareholders' consent approved the sale and transfer of the transport undertaking/business to ATIL as a going concern on a slump sale basis for a lump sum consideration without any values being assigned to individual assets and liabilities vide Agreement to Sell Business dated 06.03.2014 (ASB)."

XXXXX

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

XXXXX

"25. DFCC, no doubt, argues that the AIL's Transport Division, was not a legal entity and, therefore, the experience of the joint-venture, cannot be assimilated from either of the undertakings. This defence is wrong in fact and in law. Clause 4.1, this Court notices, does not specify that the Transport Division had to be a separate entity, and since it was one of the divisions of the undertakings, this submission is insubstantial. The Petitioners have the same parent company Alstom, and through a process of restructuring, and slump sale, have formed a joint-venture. The assets and liabilities of the transport business have been transferred to ATIL. The Petitioners submit that this sale includes the transfer of the professional expertise, credentials and market share to ATIL. This Court has to consider, the application by

adopting a flexible and commercial approach, and analyze whether the applicants/Petitioners would have the General Construction Experience in fact or just on paper. It has been admitted that the entity Alstom India Ltd., formerly Alstom Projects India Ltd., has General Construction Experience whereby contracts before the ASB in 2014, have been changed in favor of ATIL. Therefore, lifting the corporate veil would show that the ASB along with the assigning of AIL's contracts to ATIL, prove that the joint venture was in fact, and not just on paper, an undertaking whereby the experience of AIL could be associated with the consortium as a whole."

XXXXX

"28. In the present case, in this Court's opinion, the Petitioners have established that the consortium is a joint-venture in the strictest sense. The ratio of New Horizons (supra) clearly visualizes that the experience of one of the members of a joint-venture can be associated to the consortium and in that regard the Petitioners together do qualify the General Construction Experience Clause as stated above and the petitions are admitted. The respondents' approach is not driven by commercial logic, but appears to be technical and semantic. An enterprise, as the kind which DFCC wished to bid for its contract, clearly is one that depends on technical knowledge, a fund of experience and human ingenuity of its thought leaders and employees. Once that asset, which is part of the undertaking is transferred (with the attendant right to claim past experience of the previous owner) to another enterprise or undertaking, it becomes the inheritors of that technical knowledge, wealth of experience and human ingenuity. Realistically, this asset is far more valuable that any tangible asset, unless it has intrinsic value other than those who use it. Therefore, the narrow construction or interpretation of the tender condition that led to the rejection of the Petitioners' bid

> *cannot be sustained. The letters dated 02.06.2017 and 06.06.2017 in reference to the first tender, and the letter dated 14.06.2017 are to be quashed and are hereby quashed. The respondents are directed to proceed and evaluate the Petitioners' tender and process it further in accordance with the terms of the NIT. The writ petitions are allowed in the above terms, without any order as to costs."*
>
> (Emphasis Supplied)

13. Learned senior counsel submits that the present case would be fully covered by the decision rendered by a Division Bench of this court in the afore-cited case; and is also a fit case where this court must lift the corporate veil and satisfy itself that carving-out two companies would have no implication or impact on the constitution of the members of consortium.

14. Reliance is also placed on a judgment of the Supreme Court in ***Consortium of Titagarh firema Alder S.P.A. vs. Nagpur Metro Rail Corporation Limited & Anr.*** reported as (2017) 7 SCC 486 to buttress the petitioners' submissions that commerical wisdom should be applied while interpreting clause No. 25.4. Paras 35 and 38 of this judgment, which are relied upon, read as under:-

> *"35. Respondent 2, as is evident, is a company owned by the People's Republic of China and, therefore, it comes within the ambit of Clause 4.1 of the bid document as a government-owned entity. We have already reproduced the said clause in earlier part of the judgment. As perceived by the 1st respondent, a single entity can bid for itself and it can consist of its constituents which are wholly-owned subsidiaries and they may have experience in relation to the project. That apart, as is understood by the said respondent, where the*

singular or unified entity claims that as a consequence of merger, all the subsidiaries form a homogenous pool under its immediate control in respect of rights, liabilities, assets and obligations, the integrity of the singular entity as owning such rights, assets and liabilities cannot be ignored and must be given effect. While judging the eligibility criteria of the second respondent, the 1st respondent has scanned Article 164 of the Articles of Association of Respondent 2 which are submitted along with the bid from which it is evincible that the Board of Directors of the Respondent 2 has been entrusted with the authority and responsibility to discharge all necessary and essential decisions and functions for the subsidiaries as well. According to the 1st respondent, the term "government-owned entity" would include a government owned entity and its subsidiaries and there can be no matter of doubt that the identity of the entities as belonging to the government when established can be treated as a government-owned entity and the experience claimed by the parent of the subsidiaries can be taken into consideration. ”

XXXXXX

“38. As is noticeable, there is material on record that the Respondent 2, a government company, is the owner of the subsidiary companies and subsidiary companies have experience. The 1st respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the Committee concerned and the financing bank. We are disposed to think that the concept of "government-owned entity" cannot be conferred a narrow construction. It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a consortium. In the obtaining fact situation, the interpretation placed by the 1st Respondent in the absence of any kind of perversity, bias or mala fide

should not be interfered with in exercise of power of judicial review. Decision taken by the 1st respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court."

(Emphasis Supplied)

Relying upon the above judgment, it is argued that the petitioners expertise and experience must be taken to include that of the hived-off mobility business of their wholly owned subsidiaries.

15. Ms. Pinky Anand, learned Additional Solicitor General who appears for respondent No.1 on the other hand submits that the law with regard to dealing with matters arising out of tenders is well-settled. The scope of interference is narrow. The court in judicial review is not concerned with the decision but only with the decision-making process. The learned ASG contends that nothing has been placed on record to show that the decision taken by the respondents is either *mala fide*, unreasonable, arbitrary or unjustifiable. She submits that the tender conditions are to be applied strictly and no part of the tender conditions can be termed as superfluous. Neither can the courts substitute their own view nor can they interpret the tender conditions contrary to their plain meaning. She has placed strong reliance on clause No.25.4 which, she states, is clear and unambiguous, viz. that only the qualifications of the applicants/bidders, which in this case are Consortium of Siemens Ltd. India, Siemens SA Spain and Siemens AG Germany, are to be considered; and not those of their subsidiaries. She submits that at the time of the bid, the mobility business, which is

the real heart of the tender and the contract, was being carried-out by the bidders. Two divisions/businesses of Siemens A.G. have since been hived-off and two new companies viz. Siemens Mobility SLU, Spain and Siemens Mobility GmbH, Germany have been formed. The mobility business being the most central of the qualifications, the respondents have rightly rejected the technical bid for good reason; and this would require no interference in the proceedings under Article 226 of the Constitution of India. She also places reliance upon clause No. 30.1, which she states, in fact supports the case of the respondents and not the petitioners. She submits that this clause cautions the bidders that any change in structure or formation by an applicant/bidder after being pre-qualified would be subject to written approval of the employer, namely the respondents, prior to the deadline for submission of bid. She further submits that on 18.01.2016 a pre-bid meeting had taken place, where a somewhat similar issue had arisen when a request was made that while computing the technical and financial capacity of an applicant, the technical and financial capacity of their associates should also be considered. This request was however not accepted. This meeting, held on 18.01.2016; and the relevant part of the minutes of the meeting dated 18.01.2016 is extracted below:-

"

S.No.	Referecne to PQ Document	Clarification Sought by the Applicant	DFCC's Response
Xxx	Xxx	Xxx	Xxx
2.	Section 1: Instruction to Applicants Sub Clause 25.	Request you that while computing	Request not accepted.

	Evaluation of applicants Sub clause 25.4 Only the qualifications of the Applicant shall be considered. In particular, the Qualifications of a parent or other affiliated company that is not party to the Applicant under a JV in accordance with ITA 4.2 (or participating as a sub-contractor as per ITA 25.2) shall not be considered	the technical and financial capacity of the applicant, the Technical and financial capacity of their associate should also be eligible. Definition of associate with respect to the applicant: is one who directly/indirectly controls, or are controlled by, or are under common control	Provision(s) of PQ Document shall prevail.

"

16. We have heard learned counsel for the parties and have given our thoughtful consideration to the matter. It is no longer *res integra* that the court while dealing with issues regarding tenders is to examine only the decision making process and not the decision.

17. The law on the scope of judicial review in tender matters is well-settled. A brief reference to some judicial precedents may not be out of place. In the case of ***Tata Cellular v. Union of India*** reported as (1994) 6 SCC 651, the Supreme Court held as under:

> *"70. ...the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to*

protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

xxx xxx xxx

"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."

18. Further in the case of ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another*** reported as (2016) 16 SCC 818, the Supreme Court held as under:

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us."

xxx xxx xxx

"13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere.

The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision."

19. Following the principles of ***Tata Cellular*** (supra) and ***Afcons Infrastructure Limited*** (supra) the Supreme Court in ***Municipal Corporation, Ujjain and Another v. BVG India Limited and Others*** reported as (2018) 5 SCC 462, has further held as under:

20.

"64. Thus, the questions to be decided in this appeal are answered as follows:

64.1. Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.2. ...

64.3. It is not open to the court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the court ordinarily should exercise judicial restraint."

20. Also, in ***Silppi Constructions Contractors v. Union of India and Another*** reported as 2019 SCC OnLine SC 1133, the Supreme Court has held as under:

21.

"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.

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best

judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

21. Considering the matter within the afore-cited contours of settled-law, we find that the real dispute between the parties revolves around clause Nos. 25.4 and 30.1 of the tender conditions, which we have extracted in the foregoing paras. The question which arises for our consideration is as to the effect of two new entities having been created by the petitioners after being pre-qualified and after placing their technical bid. The request of the petitioners to the respondents to grant consent to the transfer and assignment of the contractual relationships to their subsidiaries was rejected for the reason that the business that has been hived-off to the two new companies was the real 'heart and soul' of the subject matter of the tender relating to the 'mobility business'. As the names of these subsidiary companies, viz. Siemens Mobility S.L.U, Spain and Siemens Mobility GmbH, Germany suggest, the entire mobility business of Siemens A.G. has been transferred-out of the parent company; and according to the respondents, it is these two new companies which now carry with them all necessary experience, expertise and the human, and technological resources required as per the eligibility criteria of the tender.

22. Upon a conspectus of the submissions made by the parties, we are of the view that evidently the tender in question was in relation to

the ‘mobility business’ of the bidder-consortium, of which Siemens A.G. was one of the members. Accordingly, at the stage of pre-qualification, as well as at the stage of evaluating the technical bid of the petitioners, the respondents evaluated and assessed the experience, expertise, availability of trained manpower and other resources, both human and infrastructural, available with the consortium including those available with Siemens A.G. in relation to the mobility business.

23. However, admittedly the entire mobility business of Siemens A.G. has now been transferred to Siemens Mobility S.L.U. and Siemens Mobility GmbH by way of the global restructuring exercise conducted. Evidently therefore, all the experience, expertise, human, technological and infrastructural resources that were available with Siemens A.G. have now been transferred to the said two entities. The said two entities however are not part of the consortium, nor are the bidders in their own right. To say that the said two entities are wholly owned subsidiaries of Siemens A.G. is not a full answer since each of these companies is a separate and distinct incorporated entity, which are now independently engaged in the mobility business. In this view of the matter, the submission made on behalf of the petitioners that by way of global restructuring exercise ‘nothing has changed’ is unacceptable since a global restructuring exercise would not have been conducted if nothing was to change.

24. Insofar as reliance placed by the petitioners on decisions in ***Nagpur Rail Corporation Limited & Anr.*** (supra) and ***Alstom Transport India Ltd.*** (supra) is concerned, the said two cases are clearly distinguishable inasmuch as both these cases concern a

situation of ‘amalgamation’ and ‘merger’ of businesses into the bidder company, by reason of which the core business for which the tender was floated, alongwith all experience, expertise, human, technological and infrastructural resources, was being transferred *into* the bidder company and not out of it. It was in these circumstances that the Supreme Court and Division Bench of the High Court in those cases decided that the bidder would not suffer any disqualification. What is more, is that in the present case, a conjoint reading of clause Nos. 25.4 and 30.1 of the tender conditions makes it clear that the respondents had, in its discretion, decided that the qualification of a parent or other affiliated company, which is not a bidder or party to a bidder-consortium, shall not be considered when assessing the qualification of the bidder ; and further that if, after being pre-qualified, there is any change in the structure of the bidder company, such change ‘shall be subject to written approval of the employer prior to the deadline for submission of the bid’, thereby conveying the unequivocal intention not to permit *inter alia* restructuring of bidder corporations without the respondents’ written approval ; and that too, prior to the bid submission deadline. In fact in clause No. 30.1, the respondents clearly specified that one of the grounds for not according approval for restructuring is that as a consequence of the change, the bidder may no longer substantially meet the qualification criteria for the tender.

25. In view of the above discussion, firstly, we find that the terms and conditions of the tender insofar as they relate to restructuring of a bidder corporation are clear and unambiguous ; and secondly, we find that such terms and conditions are reasonable, rational and bear a

meaningful connection with the contract for which the tender was issued. Besides, we are also of the view that hiving-off the mobility business by one of the consortium members namely Siemens AG into two separate and distinct, though wholly owned subsidiary companies, had the effect of ousting the experience, expertise, human and infrastructural resources from Siemens A.G. and thereby from the bidder consortium ; and this was certainly a valid and justifiable reason for the respondents to reject the technical bid of the petitioners by reason of changed circumstances after their pre-qualification. For completeness we may observe that no *mala fides* have been alleged on the respondents part; nor are any discernible from the turn of events.

26. In the above view of the matter, we find no infirmity in the decision taken by the respondents in rejecting the technical bid of the petitioners; and accordingly, there is no reason why we should interfere in such decision in exercise of our powers of judicial review under Article 226 of the Constitution.

27. The writ petition alongwith the pending application, if any, are accordingly dismissed ; without however, any order as to costs.

Dasti under signatures of the Court Master.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 06, 2019/Ne