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**(2005) 02 DEL CK 0172**

**In the Delhi High Court**

**Case No :** Writ Petition 18680-81/04 and WP (C) No. 18730-31/04

Patel Engineering Ltd. and Another

APPELLANT

Vs

National Highways Authority of India and Others

RESPONDENT

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**Date of Decision :** 28-02-2005

**Acts Referred:**

**Citation :** AIR 2005 Delhi 298 : (2005) 1 CTLJ 377 : (2005) 118 DLT 623 : (2005) 80 DRJ 458

**Hon'ble Judges :** S. Ravindra Bhat, J;D.K. Jain, J

**Bench :** Division Bench

**Advocate :** Ashok H. Desai, Milind Sathe and M. Doctor, for the Appellant; A.M. Singhvi and Parag Tripathi, Ravi Kini and Sachin Sood for R-1, A.S. Chandhiok Vijay Sondhi, Sanjay Kumar and Varun Pareek for R-4 and 5, for the Respondent

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## Judgement

S. Ravindra Bhat, J.—In these proceedings under Article 226 of the Constitution, appropriate directions have been sought against the National Highway Authority of India (a statutory body, hereafter called "NHAI"); the petitioners seek directions to the effect that two pre-qualifying bids/applications made by them, which rely upon experience certificates issued by NHAI, should be processed, and considered on merits.

I Facts as per pleadings and documents

2. The petitioner No 1 (hereafter called "Patel Engineering") claim to be a leading Civil Engineering company, who have executed several important public works within the country, and abroad. It entered into Joint Venture Agreement (JV) some time in 1999, with LG C&E, a company incorporated under the laws of South Korea. The shares of LG and Patel Engineering, respectively, in the JV, were 75%:25%.

3. The JV bid and was awarded a work known as "The SURAT-MANOR TOLLWAY PROJECT", by the NHAI. The JV entered into an agreement on 16.10.2000 with the NHAI, for the purpose of executing the contract namely, the Surat-Manor Toll-

way Project (hereinafter called the "Surat Contract"). One of the terms in the Surat Contract/Agreement was that both partners of the JV were jointly and severally liable for execution of the contract awarded. Contrary to the commitment made in the JV, it is alleged that LG did not measure up to the performance levels held out, leading to the Patel Engineering eventually "taking over" the execution of the project entirely. A document, styled as "Supplementary Joint Venture Agreement" was executed on 2.9.2002. Nomenclature apart, the document recorded the parting of ways between LG and Patel Engineering. Clause 1 of that Supplementary Agreement reads as follows :-

"Patel shall take over, execute and complete the remaining work of L,G,E & C portion of 75% and all additional work to the original contract with the employer under the Contract as well as works originally earmarked for Patel".

4. The NHA I it is averred, was intimated about this Supplementary agreement, by LG and also the Team Leader under the Surat Contract. The supplementary agreement stipulated inter alia, that Patel would give LG a lump sum compensation amount of Rs.2.6 crores, as a single payment at the completion of the Surat contract when the client (i.e. NHA I) refunded the security deposit.

5. The petitioners aver they completed the work under the Surat Contract in January, 2004. On 13.1.2004 the team leader for the Surat Contract addressed a letter to the General Manager, NHA I stating that the petitioners ought to be granted a certificate with regard to the entire project. The value of the entire project, it may be mentioned was Rs.205 millions. The letter was addressed by the team leader to the Chief General Manager of NHA I. Under cover of another letter, the Chief General Manager sought the approval of Member (Administration) NHA I for the issuance of such certificate to enable Patel Engineering for securing other jobs in NHA I or elsewhere.

6. The petitioners were issued a certificate by NHA I, on 19.3.2004 to the effect that as on 7.2.2004 they had satisfactorily completed the total work on the Surat-Manor Project to the tune of Rs.2050 millions. On the same date pursuant to notices issued by the NHA I, tender documents were issued for a project namely "Construction of 4/6 Lance Access Controlled Chittorgarh Bye Pass (KM 15.90 of NH-79 to KM 2131.0 of NH-76) in the State of Rajasthan" (hereinafter called the Chittorgarh Tender). These tender documents were available till 20.4.2004. It is averred that the petitioners submitted their pre-qualification bid for the project as per the instructions issued by NHA I, in two separate envelopes, the first containing the technical bid, second, the financial bid. In support of their claim, the petitioners enclosed the experience certificate issued on 19.3.2004 along with the technical bid.

7. The experience certificate earlier issued on 19.3.2004 was subsequently amended by NHA I, on 13.5.2004 to include additional work - resulting in value of the works Therefore, being shown as Rs.2550 millions. The relevant portion of this certificate which is identical to the one dated 19th March, 2004 (except as

regards the quantities and the amount), are reproduced below :-

"13.5.2004

TO WHOM IT MAY CONCERN

This is to certify that M/s Patel Engineering Ltd., Patel Estate, S.V. Road, Jogeshwari (West) Mumbai have executing (SIC) the work of "Rehabilitation and Upgrading of Surat-MANOR Section of NH-8 (KM. 343.0002 to KM 381.600) SURAT-MANOR TOLWAY PROJECT; Package-II) wide agreement with National Highway Authority of India dated 16.10.2000 for Rs.1620.51 millions. The work is substantially completed by 07.02.2004 and the total value of work done including additional works and escalation is Rs.2550.00 millions."

8. The relevant criteria dealing with qualification and experience is contained in Section (1)(B) of the Section called "Instructions to Bidders" which forms part of the bid document. The condition dealing with experience and turnover is clause 3. The relevant portion of that clause is extracted below :-

"Experience

(a) The Applicant shall provide a list of the works with documentary evidence that it has worked on at least one highway construction project during the last 7 years in the role of prime contractor or partner in joint venture.

(b) The Applicant shall provide evidence that it has successfully completed or substantially completed at least the following Contract/s pertaining to similar Highway project/Airport Runway of value not less than during last 7 years commencing from the year 1996-97 on or before 29th February 2004 :

(a) Three similar completed works of value not less than : Rs. 68 crores or (b) Two similar works of value not less than : Rs. 85 crores or (c) One similar completed work of value not less than : Rs. 136 crores

At least one work involving rigid pavement with quantity of PQC not less than 80,000 cum (certificate of the client is required to be submitted).

Similar highway project means a project of widening and strengthening of existing two-lane highway of four lane/six lane standards or construction of new two or more lane highway project. Only strengthening of existing two lane or four lane road (s), or airport pavements will not be considered as similar highway project.

National Highway (NH) or State Highway (SH) or bypass roads of NH/SH standard in India and equivalent type of road(s) outside India will only be considered towards experience.

For bridge packages similar project means a bridge project involving similar type of design and construction of length equal to at least 50% of the proposed bridge length.

The work may have been executed by the Applicant as prime contractor or as member of joint venture. The experience of working as sub-contractor will not be considered.

Substantially completed works means those works which are at least 90% completed as on the date of submission (i.e. gross value of work done up to 1 month before the date of submission is 90% or more of the original contract price) and continuing satisfactorily. For these, a Certificate from the employer shall be submitted along with the application incorporating clearly the name of the work, Contract value, billing amount, date of commencement of works, quality of PQC as mentioned in para 3.3.1(b), if any satisfactory performance of the Contractor and any other relevant information.

In case a project has been executed as JV by two or more firms, weightage towards experience in the project would be given to the JV partners in proportion to their participation in the Joint Venture.

The escalation factors as mentioned in para 3.2 shall be applied on the cost of completion.

(C) Additional experience in Bridges (Applicable to projects involving construction of a bridge having length equal to or more than 200 meter)

The applicant (in case of sole applicant) or at least one of the partners (in case of joint venture) shall meet the following additional criteria in respect of their experience in construction of bridges :

"Should have completed/substantially completed as civil work contractor within the last seven years at least one bridge of length equal to 50% of the proposed bridge length."

9. The petitioners aver that according to their information some objections were raised with regard to their alleged lack of experience, in respect of their bid for Chittorgarh. Hence they represented to NHAI on 28.5.2004 and subsequently on 12.8.2004 pointing out that the work certificate issued by NHAI in respect of the Surat-Manor Project ought to be considered and that they were fully qualified and eligible. The NHAI was, Therefore, requested to permit the petitioners to participate further, and proceed to open their financial bid. It is also averred that since no response was forthcoming from NHAI the petitioners extended the validity of bank guarantees (submitted along with the bid) and intimated this move to the NHAI. The petitioners allege that in spite of all these, nothing was heard and eventually they learnt on 30.11.2004 that a contract was being awarded to the Joint Venture (JV) (of respondent Nos. 4 & 5). In these circumstances, they have approached the Court for relief by filing the WP No. 18680-81/2004 (hereinafter called the "Chittorgarh Petition"). The petitioners claim that the action of the NHAI in considering their bid to be non-responsive is arbitrary; it cannot go back upon its own experience certificates, and that the actual work, performed by them under the Surat Contract, which have been duly

certified by NHAI, clinch the issue in their favor.

10. WP No. 18730-31 pertains to the invitation for pre-qualification of contractors in respect of "Widening to 4-laning and strengthening of existing 2-Lane Carriage Way of National Highway Sections in the State of Rajasthan and Uttar Pradesh on East-West Corridor under Phase-II Programme of NHDP" (hereinafter called "East-West Corridor Tender"). Advertisement for this was issued some time in March; the pre-qualification documents were issued between 26.3.2004 and 20.4.2004; here the petitioners submitted the bid on 26.4.2004.

11. The petitioners grievance in these proceedings, (known as the "East-West Corridor Petition" is that like in the other case, their pre-qualification tender though submitted in time has not been considered. Non-consideration of their tender, since it is based on a view that their experience is not as per the tender stipulations, is arbitrary.

12. During the course of proceedings, certain additional materials and documents were placed on record in the Chittorgarh petition. In further pleadings by way of rejoinder, the petitioners have relied upon certain documents and made pleadings in that regard. Apparently, after the petitioners' bid was considered non-responsive in the end of May, and after receipt of its representations, in respect of the Chittorgarh Tender, NHAI sought legal opinion about the experience certificate issued to them. The legal opinion given was that Patel Engineering could be considered for pre-qualification if, otherwise, there was no ground for doing so and that it would be difficult to ignore the experience certificate already granted. It is averred that on 7.7.2004 NHAI addressed a letter to LG seeking confirmation about the supplementary agreement which had been taken over by Patel Engineering to which LG responded on 13.7.2004 confirming execution of the supplementary agreement.

13. The petitioners also relied upon a subsequent letter written by NHAI on 16.11.2004 informing that they had been pre-qualified for tendering in respect of yet another Project namely, Chennai Bye Pass, Phase-II Project for which pre-qualification bids had been called for and where the bid had been submitted on 16.8.2004. The bid submitted in that regard enclosed a certificate where the petitioners had, like in the case of the East-West Corridor Contract, relied upon the experience as a prime contractor in respect of works falling to its share to the extent of Rs.2050 millions.

14. The NHAI in its return has taken the position that in respect of the Chittorgarh Tender 10 bids were received, which were opened on 28.4.2004. It is averred by NHAI that as per clause 27, particularly 27.2 of the Instructions to Bidders, only those bids that conformed to all terms and conditions and specifications of bidding documents would be entertained, clause 27.3 stipulated that bids not substantially responsive were to be rejected. It is further averred that Technical Committee which evaluated the bid of the petitioner as far as the Chittorgarh Tender was concerned, found that they had claimed in the concerned

form namely, 3-A, that they had 25% share in the Surat Contract and what is more, valued or quantified such share at Rs.512.5 millions. It is averred that this was also reflected in the petitioners own understanding that as per the JV with LG they were entitled to claim 25% when they submitted the bids for Chattisgarh Tender on 28.4.2004. It is stated that both the extent of the share that all the three elements namely, (the extent of the share 25%, the quantum of work claimed as having been executed (Rs.512.5 millions) and the status [partner in a Joint Venture]) had been duly indicated in the application form. The application form namely, 3-A, deals with details of works of similar nature and complexity. It is averred that the contract relied upon in that regard was the Surat contract and that all claims of the petitioners were supported by affidavits. In this view, the petitioners failed to qualify upon their own responses. It is averred that Therefore there was no need to proceed further.

15. NHAH also avers that the petitioners gave different responses and made claims that contradicted their position at different points in time. It is averred that in respect of five other contracts including the Chennai Bye Pass Tender and the East-West Corridor Tender, the petitioners in the concerned bids, by Form 3-A claimed, in respect of the very same Surat Project, to be a "Prime Contractor" having 100% share and alleged that they had executed the entire contract namely, 205 cores, in support of the bids. It is averred that Evaluation Committees in each of those causes (including the East-West Corridor Tender, the subject matter of WP No. 18730-31/2004) had

"gone by the responses submitted by him in the Form 3-A and considered him qualified or disqualified depending upon these responses. Therefore, while the petitioner was considered pre-qualified in the case of Chennai Bye Pass Project he was not qualified for the Chittorgarh Bye Pass Project."

In all these projects it has now been revealed that the same certificate has been attached in support of the experience in the petitioners' application; but different qualification claims have been made. Therefore, the petitioner is willfully misrepresenting the facts, and its conduct disentitles it to relief under Article 226 of the Constitution of India.

16. The NHAH has also stated that as on the date of the supplementary agreement between LG and the Petitioner, approximately 35% of the Project was completed. On the assumption that the supplementary agreement was correct, it is pleaded that the share of Patel Engineering, would at best work out to 9% of that quantum and its subsequent completion of the entire 65% enabled it at the highest to claim experience in respect of 74% of the entire Surat Contract and that its claim to have completed 100% of the Project, was not tenable. This conduct too, it is submitted, disentitles it to relief.

17. The NHAH has also averred that after considering all pros and cons after acceptance of the certificate relied upon by the petitioners it was decided not to accept it in the larger interest of the organization as it would result in unfair

advantage to Patel Engineering over other contractors who were similarly situated as the petitioner in terms of experience. It is stated that before this view could be communicated the petitioner moved the Court. As the matter was sub judice, formal communication of the decision had not been made.

18. As far as the East-West Corridor Tender is concerned, (WP No. 18730-31/2004) the NHAH has made averments similar to those relating to the Chittorgarh petition. However, it is also stated that there was certificate of additional parameters in respect of experience in construction of bridges and tunnels. The relevant part of affidavit so far it pertains to experience is contained in paragraphs 6,7 & 8. It is averred that in Para 8 the petitioners did not fulfill the qualification criteria and hence they were not qualified for any of the six Packages forming part of the East-West Corridor Tender. However, their Joint Venture, (M/s Patel-KNR(JV)) which had also bids separately was pre-qualified for three Packages on the basis of responses given in Form 3-A.

By the counter NHAH has made allegations identical to those made in reply to the Chittorgarh petition.

## II The NHAH records

19. The records relating to the two tenders, to examine the manner in which the NHAH considered the bids were requisitioned. They reveal that after submission of the Chittorgarh tender, the relative bids were evaluated by a committee, on 25th May, 2004, and it determined the petitioners' bid to be non-responsive. The petitioners made representations, which led to NHAH seeking legal opinion on 4th June, 2004 from its experts. The opinion given was that having regard to the experience certificate issued by NHAH, it would be difficult to ignore such documents, and hold that the petitioners were not eligible. The opinion was processed. The views of certain officials was that the petitioner ought to be given credit for performing the entire Surat contract and accordingly the experience claimed by them ought to have been admissible; the record discloses that a decision was taken on 6.7.2004 in a meeting held where the Member (Admn.), Member (Technical), General Manager (Finance) were present in the chamber of the Chairman along-with the legal experts, to call for confirmation about the supplementary agreement, from LG; the record also discloses that some meeting was held on 21.7.2004 on the issue of the experience certificate to M/s Patel Engineering. The said meeting has been referred to in the final noting/decision taken by the Chairman of NHAH on 9.8.2004. That decision/noting was to the following effect :-

"1. This was in a weekly meeting held on 21.07.2004 which Member (A), Member (F) and Member (T) were present. It was felt that experience issued to M/s Patel Engineering should be in accordance with the original JV agreement, which formed the basis of PQ of the JV.

2. It was also felt that action should be initiated, after taking legal advice against M/s LGE & C for contravention of the JV agreement."

It was also felt that action should be initiated after taking legal advice against M/s LG, E & C for contravention of the JV agreement.

20. The files in respect of the East-West Corridor tender similarly show that the Evaluation committee, which met on 16th September, 2004 decided that Patel Engineering could not be said to have fulfilled the eligibility criteria, and determined its bid to be non-responsive. The petitioners thereafter represented, and by its meeting dated 1-12-04, the Committee decided that it would not review its decision, since they could correctly lay claim to experience to the extent of Rs. 70 crores, in proportion to their share in the JV arrangement. This amount was, according to the committee, lower than the minimum prescribed for the two packages bid, i.e Rs. 86 crores and Rs. 100 crores, respectively.

21. In order to examine the circumstances under which the certificate dated 19.3.2004 were issued, we required NHAI to produce the relevant records. As per directions, a copy of the said records, available in the Headquarters of NHAI, were produced. The letter actually addressed to the Member (Administration) by the Chief General Manager was not found. However, it was submitted by NHAI that the same was received and that a copy thereof addressed to the team leader bore the endorsement to the effect that approval had been secured for issuance of the certificate from the Member (Administration).

### III Contentions of the Petitioners

22. Mr. Ashok Desai, learned senior counsel appearing for the petitioners in both sets of cases submitted that the NHAI, in not treating the petitioners as pre-qualified for the two tenders, though they were in fact fully qualified -in terms of actual experience- have acted unfairly and arbitrarily. It is submitted that the petitioners have relied upon a certificate issued by the respondent NHAI itself, vis-?-vis experience gained in the performance of a contract awarded by it and that that certificate was never resoled/withdrawn. It is urged that under the circumstances the respondents cannot now insist, upon an interpretation of the original JV proportions, that the petitioners do not have the prescribed experience.

23. Learned counsel has relied upon the letters written on 13.1.2004 by the Team leader in the Surat contract as well as the Chief General Manager of NHAI, to the Member (A) which eventually led to the issuance of the certificate dated 19.3.2004, stating that the petitioners had performed works to the tune of Rs.2050 million and that this certificate was later modified on 13.5.2004 by including additional works (to state that the petitioners had performed works to the tune of Rs.2550 millions). Hence it is stated that the NHAI was in the know of all facts that led to the change in the JV arrangement, take-over of the projects and works of the Surat contract and having been satisfied with the work executed by the petitioner, consciously issued the certificate. That being the case, it is stated that the stand of NHAI in insisting that the petitioners are entitled to claim experience only in respect of their original share in the JV

Agreement with LG (i.e. 25%) is arbitrary; it defeats the purpose of the condition. The relevant condition (for experience) was incorporated in the tender Conditions for examining the levels of actual experience and performance of contracts of such magnitude.

24. Learned counsel submits that the certificate relied upon by the petitioners was correctly issued as it reflected the reality of their having performed the entire obligations under the Surat contract, the responsibility of the execution of which had been shouldered by them exclusively since 2002. It is submitted that the respondents were bound to act on the basis of that certificate and the NHAH could not go back from its representations made and certificates issued. Mr. Desai submits that NHAH neither disputes the certificate nor ever rejected it, as it is seeking to do in these proceedings. For this purpose reliance is placed upon the judgment of the Supreme Court reported as B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others, .

25. Mr. Desai further submits that during the course of proceedings the NHAH has taken no less than four inconsistent positions. He submits that the first version in the counter affidavit in the Chittorgarh Petition is that the bid Evaluation Committee determined the petitioners bid to be non-responsive in view of the claim that the Patel Engineering experience to the tune of Rs.512.5 millions. He urges that the second version belies the first. The fact that opinion was sought on 4.6.2004 on the certificates issued by the NHAH itself shows that there was no final thinking about the petitioners bid being non-responsive; the legal opinion in fact was in petitioners' favor. The third version, he says is to the effect that NHAH decided - without disclosing to the petitioner - that experience would be only in accordance with the original JV. It is submitted this is contrary to the terms of the tender. The fourth and last version, Mr. Desai submits, again contradicts the earlier positions vis-?-vis the certificate issued by NHAH in the manner-in-which the tender of the petitioners to the Chennai Bye Pass Project was considered. The petitioner had relied upon the same certificate dated 19.3.2004 issued in relation to the Surat contract and claimed to be a prime contractor performing 100% of the works. Here, i.e. in the Chennai Bye Pass Tender, the petitioners were informed about their being pre-qualified by the letter of NHAH dated 16.11.2004.

26. It is submitted that the stand of NHAH in considering the bids of the petitioner as not responsive on account of lack of experience is also incorrect, having regard to the relevant qualification criteria namely clause 3.3. which requires substantial completion of works. The following part of the clause is highlighted :-

"The applicant shall provide evidence that it has successfully completed or substantiated/completed at least the following contract/s pertaining to similar highway/Airport Runway(sic)."

The petitioners submit that the emphasis placed by the respondents is upon the later part of the clause which stipulates that in case the project has been

executed is JV by two or more firms, weightage towards experience in the project would be given to the JV partners in proportion to their participation in the Joint Venture. It is urged that this clause would apply when the JV had in fact executed or completed the work; particular emphasis is placed upon the expressions "completed" and "participation" in relation to the work. It is submitted that this condition or stipulation would come into play only if the Joint Venture completes the performance of works in its entirety. The respective JV partners would be treated as having executed their concerned share in the contract, in such eventuality alone. In any other eventuality where the JV does not for some reason complete the project and it is left to one or the other partner to do so, the actual completion of work, by the party who performs it, would be the determinative factor. So viewed, it is submitted that the certificates reflect the correct reality and ought to have been considered in which event the petitioners were eligible, as having the requisite experience for the works of the magnitude indicated in the Clause 3.3.1.

27. The decision of the NHAI in not proceeding further and treating the bids of the petitioners as not responsive is also questioned on the ground that it is based upon irrelevant considerations, has ignored relevant considerations and acted contrary to the terms of the tender documents. Reliance has been placed upon the decision of the Supreme Court in Union of India (UOI) Vs. Tarachand Gupta and Bros, and Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . Learned senior counsel has also relied upon the judgment of the Supreme Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, to the effect that whenever conditions requiring experience are stipulated in tenders issued by Public Corporations, it has to be borne in mind that such requirements are invitations to offer in commercial transactions. Credentials of a bidder, particularly in the context of the claim of experience have to be examined from the commercial point of view.

28. Learned counsel for the petitioners submits that in any event the record discloses that the decision to issue the experience certificates were collectively taken by four senior officials including the Chief General Manager of NHAI and team leader of the Surat Project; the Member (Admn.) of NHAI and Deputy General Manager (Technical). The record also shows that the experience certificate was issued after the approval was sought for in that regard from the Member Administration. None of the said four officials had filed any petition stating that they were incorrectly issued. In the light of these it is stated that the certificates cannot now be discarded.

#### Contentions of Respondents

29. Dr. A.M. Singhvi, learned senior counsel appearing for the NHAI in the Chittorgarh tender submits that the petitioners are not entitled to any relief since they had, in different tenders, made varying claims based upon the experience certificate issued on 19.3.2004. It is submitted that in relation to the Chittorgarh tender, the claim of the petitioners themselves was that they were Joint Venture

partners to the extent of 25% and had experience to the tune of having performed contracts to the tune of Rs.512.5 millions. Hence, their pre-qualification bids were determined to be non-responsive. This decision, he submits was taken on a plain examination of Form 3-A which was submitted along-with an affidavit. Learned counsel submits that if the NHAI had in fact proceeded any further and had processed the tender documents submitted by the petitioners, it would have been exposed to the allegations of arbitrariness. He has relied upon clause 27 which obliges NHAI to reject bids that are determined non-responsive.

30. Dr. Singhvi submits that the petitioner cannot place reliance upon the internal discussion within NHAI that took place after the evaluation of their bid and after submission of the representation by them. The reference of the issues for legal opinion, consideration of such opinion at different quarters and levels of NHAI; the views expressed in the files of NHAI in that duration all reflected the thinking in that regard. It could not in any way alter the decision of the Evaluation Committee to treat the Chittorgarh tender as non-responsive due to the petitioners own showing. Reliance has been placed upon the decision of the Supreme Court in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, .

31. Learned counsel has invited attention of the contents of the relevant documents namely, Form 3-A pertaining to the Chittorgarh tender, which show that the petitioners themselves understood that they were entitled to claim only 25% of the work experience in respect of the Surat contract and said as much. That form, indicates that the petitioners viewed their experience under the Surat contracts as Joint Venture entitled to claim 25% of the work experience to the extent of Rs.512.5 millions. On the face of such clear representation, there was no discretion left with the NHAI to go behind the application so made, seek clarifications from the petitioners, allow it to rectify mistakes, if any, and then reconsider the matter. Apart the decision making process becoming cumbersome and unwieldy, the NHAI's conduct would in such case be open to challenge on the ground of discrimination.

32. Learned counsel also submitted that in different bids such as the Chittorgarh tender, the East-West Corridor tender, The Chennai tender and various other tenders, the petitioner has taken varying stands about its status and whether it was a JV partner or a prime contractor; whether it was entitled to 25% share or 100% or even with regard to the total amount of work claimed to be done. These it is submitted showed that the petitioner made different claims; that its own conducts disentitled it to relief, at least in these proceedings. It is submitted that at no stage could the petitioners claim to be prime contractor; at the highest they could claim to have performed the works of the Surat contract, to the tune of 65%, which was the actual unfinished quantum when the JV arrangement was changed in 2002. Till that date 35% had been factually performed by the JV; of which the petitioners share was 9%. Hence the petitioners could legitimately, if

at all stake a claim for having performed 74% of the Surat - Manor Contract and under no circumstances could they claim to have performed the entire 100%. Learned counsel for the respondent also submitted that apart from the variation in the claims made in different bids, the petitioners have not disclosed that on 3.2.2004 a certificate have been issued, -after the correspondence between the DGM(Technical) and the Member (Administration) on 13.1.2004- to the effect that the ratio of works as per the JV assigned the tenders of LG and Patel Engineering respectively at 75% and 25% and that the work physically executed at site by that JV up to 31.1.2004 was Rs.185 crores.

33. Dr. Singhvi also submitted that letters relied upon by the petitioners dated 13.1.2004 written by the team leader of the Surat contract to the Chief General Manager and the letter written to the Member (Admn.) stating that Patel Engineering ought to be issued the certificate for having completed the entire work were only recommendatory. He also submits that the decision to invite the tenders in respect of the Chittorgarh contract was in fact taken on 9.3.2004 by which time the certificate of February 2004, reflecting the correct position had been issued. Hence the manner-in-which the certificate of 19.3.2004 was issued (the advertisement calling for bids in respect of Chittorgarh tender also being made known on the same date) raises suspicion about the credibility of the certificate. In any case, it is submitted that the issuance of the certificate cannot be a strangle hold on the decision making process of the NHAI which has to be based on the correct interpretation of the eligibility clause.

34. Mr. A.S. Chandiok, learned senior counsel appearing for respondent Nos. 4 & 5 submits that the petitioners were aware of the decision taken by NHAI that their bid was rejected as non-responsive. This he submits is evident from their representations made to the NHAI on 28.5.2004 and 12.8.2004. In spite of this they chose not to approach the Court. Hence, it is submitted that the tendering process having been completed and respondent No. s4 & 5 having been successful, the petitioners cannot be heard to complain. In short, he submits that the petition is liable to be rejected on the ground of delay. It is also submitted by learned counsel that even as per their own representations the petitioners could not claim any benefit for the Surat Contract, irrespective of the experience certificate relied upon by them, as they had themselves clearly stated that default of one or the other partners in the JV rendered each of them (including the petitioners) jointly and severally liable to NHAI.

35. Mr. Parag Tripathi, learned senior counsel for NHAI in WP No. 18730-31/2004 namely, the East-West Corridor petition, submits that the very nomenclature of the supplementary agreement between LG and the petitioners is misleading. Its contents disclose that there was no supplementary agreement; on the contrary document the recorded a parting of ways and payment of large sums of money by the petitioners to LG. This itself, he submits casts considerable doubts on the genuineness and credibility of the JV. It is submitted that the petitioners by themselves were ineligible to secure the Surat contract. Hence, they appear to

have adopted the stratagem of creating a JV knowing fully well that the lead partner would not be in a position to perform its part of the bargain. This in turn would imply that the concerned junior partner, [in this case the petitioners], would have had to shoulder the task of performing nearly the whole of the contract or as much of it as is left unfinished, mid-stream. This, he submitted was with the objective of ultimately being able to show performance at considerable high levels so as to be eligible to bid in high value contracts. It is submitted that NHAH has discovered a pattern of such behavior amongst various other contractors who had initially bid as JV partners and later on proceeded to complete the contract awarded on their own in the pretext of the senior/lead partner having defaulted. Such a malpractice had to be curbed and it was keeping all these factors in mind that the NHAH took a position not to rely upon the certificate issued on 19.3.2004 and the subsequent amended certificate, while considering the petitioners bid.

36. Shri Tripathi also submitted that in fact the certificates in question were not acted upon and that this decision was taken on 9th August, 2004 but it could not be communicated to the petitioner since it had approached the Court, and the matter was pending. In view of this it is submitted that no rights said to have accrued to the petitioner.

37. Lastly, it was submitted by Mr. Tripathi that the grievances of the petitioners pertained to the realm of decision making in the course of commercial contracts. It is submitted that in the absence of any pleading or proof regarding mala fides, discrimination, illegality or manifest arbitrariness, the mere exercise of discretion by opting for a course of action among a range of choices, does not lend itself to interference under Article 226 of the Constitution. He submits that in judicial review, the Court does not act as an appellate Body, reviewing the correctness or otherwise of a decision; its role is restricted. The Court is concerned with the fairness of the decision-making process rather than the decision itself. Analysis of facts emerging from the pleadings and the records of the case.

38. The facts noticed above may be briefly summarized as follows :-

i) A JV was formed in 1999 between LG and Patel Engineering which was awarded the Surat contract in 2000. The ratio in that JV as between LG and Patel Engineering was 75% is 25%; respectively;

ii) The performance levels of LG in the Surat contract were not satisfactory; after negotiations another agreement by which LG opted out of the contract was entered into. The NHAH and the team leader of the Surat contract were notified about this position and a copy of the contract was also furnished to NHAH. This apparently was preceded by correspondence between LG and NHAH (evidenced by letters dated 7.7.2004 written by NHAH to LG and the reply of LG, which are part of the additional documents at pages 166 and 167 of the paper book in WP No. 18680-81/2004);

iii) After the withdrawal of LG from the Surat contract, the works were completed

- by Patel Engineering. Certain additional works were also entrusted to it by NHAI;
- iv) on 13.1.2004 the team leader of the Surat contract recommended to the Chief General Manager that notice of default be issued to LG, who ought not to be given credit for completion of works in the Surat contract and that Patel Engineering ought to be given credit in that regard;
- v) On the same date namely, 13.1.2004 the Chief General Manager addressed a letter to the Member (Admn.) NHAI, recommending that if approved an experience certificate may be issued in favor of M/s Patel Engineering only for successful completion of the Surat contract so that it could be used by Patel Engineering for getting other jobs in NHAI or elsewhere;
- vi) On 3.2.2004 a certificate was issued by the DGM (Technical) reflecting that the respective shares of LG and Patel Engineering were 75% and 25% respectively in the JV in respect of the works including additional works being Rs.205 crores and that the value of the total work done by the said JV till that date was Rs.185 crores;
- vii) a decision to call for tenders in respect of the Chittorgarh contract, was taken on 9.3.2004; on 19.3.2004 the tenders were called for in respect of the Chittorgarh contract. The tenders in respect of the East-West Corridors were also called for in March, 2004. On the same date namely, 19.3.2004 the March certificate was issued in favor of the Patel Engineering to the effect that it had executed the work in respect of the Surat Project for Rs.162.14 millions; the work was substantially completed by 7.2.2004, the value of the entire work including additional work being Rs.2050 millions;
- viii) the petitioners submitted their tender in respect of the East-West Corridor on 26.3.2004. In this the claim put forth was that they were contractors with 100% involvement and they had performed the entire works, quantified at Rs.2050 millions;
- ix) on 28.3.2004 the petitioners tendered for the Chittorgarh contract claiming to be JV partner to the extent of 25% in respect of the Surat contract and represented that the work of such experience was to the extent of Rs.512.5 million or Rs.51.25 crores;
- x) the Evaluation Committee of NHAI determined/decided on 25.05.2004, in the Chittorgarh tender that the petitioners bid was non-responsive due to want of requisite experience. Petitioners apparently knew the senior officials and represented on 28.5.2004;
- xi) legal opinion was sought in the first week of June 2004, by NHAI about the correct stand to be taken vis-a-vis the eligibility certificates. The opinion given was that experience based upon the certificate ought to be reckoned or granted while considering the bid of the petitioners;
- xii) The experience certificates issued to M/s Patel Engineering were not formally

withdrawn. The petitioners" bid for the Chennai Bye-pass contract (in which they had made a claim identical to that made in the East-West Corridor tender, namely for as a prime contractor for 100% of the works performed and quantum of experience claimed to Rs.2050 millions on the basis of the certificates issued by NHAI) , was considered as responsive by the respondents on 16.11.2004;

xiii) The petitioners represented on 29.10.2004, as to the rejection of their application/ bid for the East West Corridor tender. It was considered by the Tender Evaluation Committee on 1.12.2004. It was noted as follows :-

"The Committee noted that it had considered the experience of the petitioners only in proportion to its participation in JV. Accordingly, it decided that Patel Engineering had carried out works pertaining to 70 crores. The requirement for Package RJ-1 and RJ-3 was Rs.86 and Rs.100 crores respectively and it was, Therefore, decided that the petitioners bid could not be considered."

#### Considerations of the issues

39. In our opinion the following two points require consideration in these proceedings :-

- (1) The correct interpretation of the eligibility criteria embodied in Clause 3.1.1;
- (2) The effect, and efficacy of the certificates issued to Patel Engineering by NHAI on 19.3.2004 and 13.5.2004.

40. Before proceeding with the discussion of the relative merits of the positions taken by parties to these proceedings it would be useful to briefly review the scope of proceedings under Article 226 when a court examines decisions of the government or public bodies, particularly in the contractual sphere. Tata Cellular Vs. Union of India, , a judgment of the Supreme Court, re-stated the law of public contracts as well as policies impacting on commercial matters and the scope of judicial review. Relevant portions of the judgment are extracted below :

"(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."

" Wednesbury" unreasonableness or irrationality, was discussed in four paragraphs of Tata Cellular (supra). R. v. Tower Hamlets London Borough Council, exp Chetnik Developments Ltd.1988 (1) All ER 961 dealt with the scope of that principle, and indicated as follows:

"The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account.

Once that question is answered in favor of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere?"

41. This formulation about "Wednesbury" unreasonableness was approved in *Tata Cellular*. The Supreme Court, and other courts, have been consistently following the decision in *Tata Cellular*, in cases involving award of tenders, policy formulation by the State or public agencies, etc. The effect of certain subsequent decisions may, be summarized as follows:

(a) Courts can interfere when the policy or the decision in regard to award of contract is arbitrary, or discriminatory, is mala fide or it has no nexus with the object it seeks to achieve, ( *Ref M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, ; also *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, ;

(b) The power of judicial review has to be used, to interdict state agencies' policies, or actions, in the realm of award of contracts, with great care and circumspection, and not merely because according to courts, the policy or measure is incorrect ( *Ref M.P. Oil Extraction and Another Vs. State of M.P. and Others*, ; *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, .

42. *Monarch Infrastructure (P) Ltd.*, ( *supra*) and *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, are instances where the court intervened, in exercise of judicial review. *Dinesh Engineering Corporation* ( *supra*) held as follows:

"a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution."

In a recent decision, viz *State of U.P. and Another Vs. Johri Mal*, the Supreme Court held as follows :

"where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. For judging the arbitrariness of the order, the test of

unreasonableness may be applied.

Xxx xxx xxx

A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

Re Point No. 1:

43. The relevant clause in question, viz 3.3.1(a) prescribes that the bidder/applicant has to provide proof that it has the requisite qualification, i.e "worked on at least one highway construction project" during the last 7 years in the role of prime contractor/ partner in a joint venture. Clause (b) stipulates the applicant/ bidder "shall provide evidence that it has successfully completed or has substantially completed" contracts in that regard, pertaining to similar highway projects during the last 7 years. The evidence required is that in respect of three similar works of the value not less than Rs. 68 crores (each); two similar completed works of the value not less than Rs. 85 crores (each), and for one similar completed work, of the value not less than Rs. 136 crores. The works can be either as a prime contractor or as a member of joint venture; experience as a sub-contractor is not counted. The last part of the clause, which has generated considerable debate, reads as follows:

"In case a project has been executed as JV by two or more firms, weightage towards experience in the project would be given to the JV partners in proportion to their participation in the Joint Venture"

NHAI's position is that the experience as per JV arrangement has to be reckoned, since that is the basis on which every party holds out to its employer, while entering into and securing contracts. On the other hand the petitioners submit that the actual experience has to be counted, and not a "notional" or "constructive" one, having no co-relation to reality.

44. The document in question here is an invitation to tender; it is neither a contract, nor a statutory provision. Its intention is to define, as accurately as possible the requirements of NHAI, while eliciting responses from various bidders. The purpose of each clause is geared at ensuring that the best available options, having regard to the various technical criteria, enter the zone of consideration. The object of every tendering process is to ensure the availability of the best options, and the elimination of the ineligible or potentially inefficient parties, who might hold up, or worse, not be in a position to execute the contract.

45. If one keeps the considerations mentioned earlier, the spelling out of eligibility criteria, in terms of quantum of performance, for the previous 7 years, is relevant, and in tune with the overall objective of the tender process. The question is, whether in the case of a partner who participates in a previous Joint Venture, that eventually does not perform, or where one partner is left holding the responsibility, what would be the parameters for judging experience.

46. Clause 3.3.1(a) requires that the applicant-bidder should have "worked on" highway projects during the last 7 years. The first part of clause 3.3.1(b) spells out the eligibility criteria, in terms of the quantum of work, to have been "completed" or "substantially completed". Then comes the contentious part; weightage to tendering firms who have "participated" in joint ventures dealing with similar works would be given in "proportion to their participation in the Joint Venture".

47. In *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , while indicating the correct approach in interpreting terms of an invitation to tender, it was held by the Supreme Court (which noticed its earlier decision in *Tata Cellular's* case ) that :

"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."

The court, as is evident, endorsed a purposive approach to the issue, and held that the correct perspective would be to see actual experience of the participating entity, rather than go by labels. In our considered view, that is the approach required to be followed in the present case.

48. The expressions used by clause 3.3.1 are "experience"; "substantially completed" "successfully completed"; "worked on" and "participated" all implying performance, execution or positive achievements/ attainments. These expressions, coupled with the objects of the tender documents, leave no manner of doubt that actual experience gathered by a bidder/ applicant has to be examined. The other interpretation, pressed into service, would result in highly anomalous results; by an odd fiction, a non-existent joint venture would be deemed in existence, and its dead letter would bind an erstwhile partner to a pre-determined fixed share, though the actual, and otherwise satisfactory higher level of performance would be ignored. Such a construction, in our considered view, has no nexus with the object of the relevant condition or indeed the tendering process. Besides it leads to arbitrary results.

49. Another reason why we cannot subscribe to the interpretation canvassed by NHAI is that the clause deals with a working joint venture, and not one that has failed, where the partners go their own ways, leaving one or the other to complete the entire project, as in this case.

50. For the above reasons, we hold against NHAI on the issue of the correct interpretation of clause 3.3.1, and find in favor of the petitioners; they are entitled to reckon actual experience gathered in "the working" of the Surat Manor contract.

Re Point No. 2

51. The facts leading to the issuance of experience certificates relied upon by the petitioners are not disputed. All the circumstances, such as the supplementary agreement of 2002, information about it to NHAI; satisfactory performance by the petitioner; recommendations of 13th January, 2004 that the petitioners ought to be given credit for performing the Surat contract, and that LG ought not to be given that credit, issuance of the certificate dated 19th March, 2004, and later the amended one dated 13th May, 2004, (to incorporate the scope of additional works awarded by NHAI) are matters of record. NHAI, however, contends that these experience certificates cannot conclude the matter as far as its power to decide whether the petitioner is eligible or not. In that respect, it is submitted that the relevant part of clause 3.3.1(b) which deals with what quality and nature of experience is admissible to participants of a joint venture, alone have to be looked into. The experience certificates might have been issued at the behest of certain recommendations of NHAI; however they cannot bind it for all times to come. It has been urged that no reliance can be placed on them, and it is open to NHAI through its evaluation committees to independently determine, in the case of every bid, what would be the quantum of experience admissible to the petitioners in the case of the Surat contract.

52. The issue is whether, in the exercise of its power to enter into contracts, the NHAI can ignore these certificates. As noticed in the narration, as well as analysis of facts, the factum of LG's withdrawing from the JV, and its subsequent performance was made known to NHAI. It accepted that state of affairs, and did not threaten the petitioners with any adverse consequences, or take action in that regard. Performance of the Surat contract was deemed acceptable by NHAI. This factual reality was sought to be reflected in communications, recommending issuance of an appropriate certificate showing credit of such performance, to the petitioners, and at the same time opining that action ought to be taken against LG. Initially, a certificate showing the participation as per the JV ratio was issued (3rd February 2004); later, on 19th March 2004 and 13th May, 2004, certificates were issued reflecting the total quantum of work performed- the last certificate reflecting the additional works performed. Though counsel for NHAI insinuated that these certificates were issued at the behest of the petitioners, no material was forthcoming to show that they were un-authorized issued; or that any action was taken against officials in that regard. No affidavit of any individual officer,

involved in the issuance of the certificates, was filed, discarding, or disowning them. Till conclusion of hearing, no formal order was shown to us, withdrawing, or proposing to withdraw the certificates. We were informed that the decision not to give effect to the certificates had been taken on 9th August, 2004; on the last date of hearing, at the time of closure of arguments, we were informed that a communication had been sent then (10th February 2004) to the petitioners about such decision to withdraw.

53. In *B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others*, , the Supreme Court, dealing with the issue of estoppel, observed, inter alia, that:

"On the whole, an estoppel seems to be when, in consequences of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim *allegans contrarius non est audiendus* (a party is not to be heard to allege the contrary) and is that species of presumption *juries et de jure* (absolute or conclusive or irrebuttable presumption), where the fact presumed is taken to be true, not as against all the world, but against a particular party?"

Here, there is nothing to show that the experience certificates issued by the respondent NHAI are either contrary to their guidelines, or issued without due authority. All materials point at there being some debate in that regard, even though the exact documents by which approval was granted, are absent. No one has come forward to disclaim the legitimacy of those documents. In these circumstances, it would be unfair and arbitrary to permit NHAI to assert that the certificates are not worth anything. To the extent they record a state of affairs, to wit, the extent of performance of the petitioners in the Surat contract, they bind NHAI. No official noting or document has suggested that the contents of the certificate are wrong or incorrect.

54. There is yet another reason to conclude that the NHAI is bound by the principle of non-arbitrariness to honour its certificates, relied upon by the petitioners. In relation to the Chennai Bye-pass tender, it admittedly determined the bid of the petitioners to be responsive, at the pre-qualification stage; the bid/application was based on the claim of being a prime contractor, having performed the Surat contract, for a value of Rs. 2050 million. The certificate dated 19th March, 2004 was relied upon for the purpose. This conduct shows that NHAI itself considered the certificates as reflecting the correct position, and more significantly, also at least while considering the pre-qualification bid, determined that the petitioners were entitled to claim more than the JV share for "participation" in a contract, for purposes of experience.

55. There stand of NHAI is unacceptable for yet another reason. The experience certificate is pre- Chittorgarh tender; it reflects, rightly or wrongly, the performance of another contract and the quantum as well as quality of work in relation to that project. If that employer had not been NHAI, but some other organization, the question would nevertheless have been whether NHAI could

ignore that actual work, and insist, that a lower quantity be deemed to have been performed. The answer would, to our mind, have been in the negative. If such is the position, the NHAI cannot, without valid reasons, ignore the experience certificates in question, issued by itself.

56. It was argued on behalf of NHAI that its decision was part of an overall review, whereby cases of all contractors/ bidders and JV partners in contracts where the senior partner (characterized as a name lender, merely enabling the other partner to secure eligibility to bid in other contracts) indulging in similar malpractice, were to be dealt with, in a uniform manner. The existence of options available to NHAI, as an executive body, to review its policies, is undeniable. Nothing has been suggested here that such a review is impermissible. However, as far as this case is concerned, the question is not one of administrative review; it is whether the decision not to use the certificates is fair and reasonable, and conforms to the Constitutionally imposed standard under Article 14 of the Constitution.

57. The sweep of Article 14 covers all State action. Non-arbitrariness, and fairness, are the two immobile and unalterable cornerstones of a "legal behavioral baseline." Every action, even a change of policy, in any realm of state activity has to be informed, fair, and non-arbitrary. In *Union of India (UOI) and Another Vs. International Trading Co. and Another*, the Supreme Court held that:

"While the discretion to change the policy in exercise of the executive power, when not trammled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play.

58. The discrepant and divergent positions taken by the NHAI impels us to conclude that its insistence in ignoring the experience certificate, is not justified; it is arbitrary. Besides, no rationale for such a decision has been disclosed.

59. We now come to the relief that can be granted in these proceedings. As far as the Chittorgarh tender is concerned, we have noticed earlier that the petitioners themselves claimed that they were JV partners, to an extent of 25%; the level of experience claimed was Rs. 512.5 millions. On the basis of this representation alone, the NHAI was entitled to reject the bid, since the requirement of experience prescribed a performance of contracts of higher value. NHAI did reject the bid as non-responsive. The decision of the Evaluation Committee records as much. The petitioner cannot, in our view, take shelter under the plea that it had mistakenly filled the form, or that there was some error. In a similar context, the Supreme Court had, in *West Bengal State*

Electricity Board Vs. Patel Engineering Co. Ltd. and Others, held that :

"It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favoritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favor of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided."

The petitioners, having bid in the Chittorgarh tenders, and claimed that they were JV partners, having performed their 25% share working out to Rs. 51.25 crores, cannot complain of any mistake or inadvertence on their part. NHAH could not have allowed them to correct the bid, nor could it have accepted it. This position, in our view is no way altered due to the circumstance that, at the behest of the petitioner, opinion was sought about the certificate, and the matter was considered at some length at various levels. No tender condition, empowering NHAH to permit "corrections" or "construe" tenders or bids in conflict with their apparent tenor, was shown to us. We are clear that if such a course were to be adopted, NHAH would have possibly been exposed to a complaint of violation of Article 14 of the Constitution. For this reason, the petitioner cannot succeed in relation to the decision as regards the Chittorgarh tender. We, Therefore, dismiss WP 18680-81/2004.

60. In view of the findings and conclusions reached by us as regards the interpretation of the experience criteria in the tender, as well as the fact that the NHAH cannot refuse to give effect to the certificates issued by it, the petitioners are entitled to relief in WP 18730-31/2004. We accordingly direct the respondents to process the pre-eligibility application/ bid of the petitioners, in relation to the East-West Corridor tender (which is subject matter of these proceedings) by inter alia taking into consideration the experience certificates relied upon by them, and proceed further, if their bids/ applications fulfill other requirements.

61. The writ petitions and all pending interlocutory applications are disposed of in view of the light of the above orders, with no orders as to costs.