

(2020) 10 BOM CK 0059
In the Bombay High Court
Case No : Civil Writ Petition No. 6185 Of 2019

R.K. Chavan Infrastructure Pvt. Ltd

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 28-10-2020

Acts Referred:

Assam Municipal Act, 1957 — Section 298

Citation : (2020) 10 BOM CK 0059

Hon'ble Judges : Sunil B. Shukre, J;Avinash G. Gharote, J

Bench : Division Bench

Advocate : M. G. Bhangde, V.V. Bhangde, N.P. Mehta, A.D. Mohgaonkar, Chaitanya Mohgaonkar, S.P. Bhandarkar, P.P. Deshmukh

Judgement

Avinash G. Gharote, J

1. Heard. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

2. By the present petition challenge is raised (a) to the communication dated 31/8/2019 issued by the respondent no.4 (the letter by which, the offer of the petitioner, which was initially accepted as L-1 is rejected -Annexure-12/pg.191); (b) the communication dated 20/8/2019 issued by the respondent no.5 (Annexure - 9/pg. 182), whereby the work experience certificate issued in favour of the petitioner by the respondent no.6 was canceled); (c) the communication dated 9/8/2019 (Annexure -24-A/ pg.361-C & D), whereby the objection of the petitioner dated 8/8/2019, to the eligibility of the respondent no.7 has been rejected and (d) a further declaration has been sought that the respondent no.7 does not satisfy the technical eligibility criteria of the subject tender process and is as such disqualified to participate therein.

3. The facts leading to the present petition are as under :-

(a) On 29/6/2009, a notice inviting tender (NIT) was published by the respondent no.4, bearing No.86399 for 2019-20 (second call), in the local

newspapers as well as the website of the respondent no.1 inviting offers for the work of "improvement to Chargaon Shirpur Kalmana to Chandrapur District border (Wanoja) in km.182/100 to 204/500, SH-317 (length 16.900 km.) under CRF. Tq. Wani, District : Yavatmal". Approximate value of the work was Rs.47,56,07,119/-. The bid security amount was Rs.23,79,000/-. The period of completion was 18 calendar months including monsoon. The terms of the tender permitted bids from joint ventures.

(b) On 11/7/2009 the petitioner submitted its bid. The respondent no.7 a Joint Venture comprising of Bajoria Construction Company Pvt. Ltd. (BCCPL), the lead partner and Gughane Infrastructure Pvt. Ltd. (GIPL), the junior partner in the JV, also submitted its bid. One SDPL- SGS (JV), Pune also submitted its bid.

(i) To satisfy the qualifying criteria as contained in Clause 4.4 A (a), the petitioner had submitted the certificate of Govind D. Chevale & Associates Chartered Accountants (pg.153).

(ii) To satisfy the qualifying requirement in Clause 4.4 A (b) and (c), the petitioner had submitted a certificate dated 05/12/2018 issued by the Executive Engineer, MSRDC, Pune (pg.154). As this certificate, is the bone of contention, certain factual position leading to the issuance of this certificate, being material, need to be mentioned here :-

1

31/03/17

The MSRDC/respondent no.5, had awarded the work of rehabilitation and upgradation of Khamgaon- Mehkar- Sultanpur- LonarMantha -Vathurphata- Pratur- MazalgaonDharur -Kaij -Kalamb- Barshi- KurudwadiPandharpur- Sangola road connecting NH166, to one Madhucon Projects Ltd., a company having its registered office at Madhu Complex, 1-7-70, Jublipura, Khammam-507003, Telengana, under an agreement dated 31/3/2017. The total cost of the project was Rs.173,60,00,000/- and road length was 34.35 kms.

2

15/02/18

Madhucon Projects Ltd. under an MOU (pg.161) sub-contracted 49% of this work valued at Rs.96,13,11,855/- for a length of road measuring 16.835 kms. to the petitioner .

3

16/08/18

Approval to the sub-contracting was granted by the Executive Engineer, MSRDC/ respondent no.6.

4

01/10/18

Work under the sub-contract was commenced by the petitioner.

5

12/10/18

The sub-contracting was approved by the Competent Authority of the MSRDC/ respondent no.5.

6

30/11/18

Work under sub-contracting was completed by the petitioner.

7

05/12/18

Certificate of successful completion of work under sub-contracting was issued by the respondent no.6 to the petitioner

(c) On 20/7/2019 in the instant matter, the technical bids of all the three bidders were opened. In the process of evaluation, the Tender Evaluation Committee (TEC) held that the bid of SDPL - SGS (JV) was technically disqualified, which decision appears to have been accepted by SDPL-SGS (JV) as the said decision does not appear to have been questioned by it, leaving the petitioner and the respondent no.7 in the fray.

(d) On 26/7/2017 objections were raised by the respondent no.7 as to the eligibility of the petitioner (Annexure -3 /pg. 155) which were of the following nature :-

(i) Expressing doubt as to the completion of the work by the petitioner under the sub-contracting MOU dt. 15/2/2018, within the period of time, as stated in the certificate dt.5/12/2018, it was requested that clarification in this regard, was required to be obtained.

(ii) No work done/work in hand certificate was attached by the petitioner other than the sub-contract certificate issued by the respondent no.6 dated 5/12/2018.

(e) By a letter dated 31/7/2019, of the respondent no.4, addressed to the respondent no.6, verification of the certificate dated 5/12/2018 of the petitioner, was called for, which was duly replied by the respondent no.6 vide its communication dated 6/8/2019 (pg.159), wherein amongst the position, as mentioned in the table above, it was stated that the Competent Authority, had approved the subletting on the basis of the MOU executed as per the provisions of EPC agreement of January 2018. The stage payments certified by the Authority Engineer and approved by MoRTH from the date of MOU execution were also mentioned. Further information elicited by the respondent no.4 by its

letter dated 9/8/2019 from the respondent no.6, was duly replied vide communication dated 13/8/2019 (Annexure-6/pg.160), wherein it was stated that the work sub-contracted to the petitioner valued at Rs.96,13,11,855/- was 100% complete. The photocopy of the MOU dated 15/2/2018 between Madhucon Projects Ltd. and the petitioner, whereunder, sub-contracting was done in respect of the project of rehabilitation and upgradation of Khamgaon- Mehkar-Sultanpur-Lonar-Mantha- Vathurphata- Pratur- Mazalgaon -Dharur- Kaij-Kalamb- Barshi-Kurduwadi -Pandharpur-Sangola road was also supplied.

(f) The objections as raised by the respondent no.7, regarding the petitioner not satisfying the eligibility criteria, were considered and rejected by the Tender Evaluation Committee, and it was held that the petitioner was technically eligible. This is reflected from the pointwise compliance table, placed on record at pages 174 to 180, which is signed by the respondent no.4, the Executive Engineer and Member Secretary of the Tender Evaluation Committee, Public Works Division, Pandharkawada.

(g) On 1/8/2019, a meeting was held for opening the price bid in which the Tender Evaluation Committee (TEC) prepared a comparative sheet of the technical bids submitted by the petitioner and the respondent no.7, whose representatives were present there, who upon being confronted with the comparative sheet and asked whether they had any objections to the technical qualifications of each other, replied in negative and accepted that both of them were technically qualified. An endorsement under their respective signatures to this effect is said to have been made by the representatives of the petitioner as well as the respondent no.7 on the attendance register and the tender scrutiny sheet. Thereafter, the price bid of the petitioner was opened.

(h) Mr. Sumit Bajoriya, the partner of BCCPL, the lead partner of the respondent no.7/J.V., who was present on 1/8/2019, upon the opening of the price bid of the petitioner, whereby the price bid of the petitioner was disclosed, created a ruckus and stated that his objection as to the eligibility of the petitioner continued and insisted for stopping the process of further opening of the price bid of the respondent no.7. In the ruckus created by him, Mr. Sumit Bajoriya the partner of BCCPL, the lead constituent of the respondent no.7 picked up the attendance register from the table and walked out of the room. He, thereafter entered the room of the Assistant Superintending Engineer and requested the Executive Engineer, PWD, Pandharkawada Mr. Boob/respondent no.4 and Divisional Accountant Mr. Rajiv Ranjan, to permit him to have a look at the tender scrutiny sheet for a minute with an assurance to return it, whereupon the tender scrutiny sheet was handed over to him for his perusal. Mr. Sumit Bajoriya, the partner of one of the constituents of JV/the respondent no.7, upon receipt of the tender scrutiny sheet, walked out of the office with the tender scrutiny sheet as well as the attendance register, due to which the further process of opening of the financial bid of the respondent no.7, could not take place. Telephonic entreaties to return the documents, fell on deaf ears. On a telephonic call by the Assistant

Superintending Engineer, Mr. Jagtap to Mr. Sumit Bajoriya on 2/8/2019 between 9:00 to 10:00 a.m., requesting him to return the documents, a reply was given by him, that the documents were with his associate at Wani and would be returned around 3:00 p.m. The Assistant Superintending Engineer Mr. Jagtap is thereafter stated to have telephonically called up Mr. Gughane, the partner of the other constituent of the JV/respondent no.7 and apprised him of the incident of taking away of the documents by Mr. Bajoriya on 1/8/2019 at 5:00 p.m. and had requested him to ensure the return of the documents, indicating that such conduct not only amounted to an act of obstructing the tender process, but also a criminal offence, for which action may be taken. Mr. Gughane thereafter at 3:00 p.m. of 2/8/2019 brought back the documents in the office of Mr. Jagtap, the Assistant Superintending Engineer, in the presence of the respondent no.4 (Mr. Boob), the Assistant Engineer Mr. Chetan Agrawal, the Junior Clerk Mr. Velukar, whereupon a panchanama was drawn. This entire episode is narrated in the pointwise compliance report, at page 174 to 180 of the record.

(i) The petitioner had also raised objections to the eligibility of the respondent no.7, vide its letter dt.8/8/2019 (Annex-24/pg.360), which also were rejected by the TEC, as is evident from the pointwise compliance report at pg.361, which is signed by the Respondent no.4 as Member Secretary of the TEC.

(j) As the objections raised by the respondent no.7 as to the eligibility of the petitioner, were rejected on merits on 1/8/2019, apart from which the petitioner and respondent had accorded their written consent accepting the technical eligibility of each other and the financial bid of the petitioner was already opened on 1/8/2019, the financial bid of the respondent no.7 was opened on 14/8/2019, whereupon the offer of the respondent no.7 was found to be Rs.1,04,00,000/- (Rupees One Crore Four Lacs Only) over and above the offer of the petitioner. The petitioner thus turned out to be L-1. The petitioner thereafter submitted the Additional Performance Security of Rs.48.50 Lakhs in the form of FDR drawn on the Andhra Bank, Pune Branch, to the office of the respondent no.4, which was accepted and expected the further process of awarding the contract to it to commence. The status of the petitioner as the lowest tenderer (L-1) is depicted from the official website of the Public Works Department, dated 1/9/2019 at 20:27:15 IST, copy of which is placed at Annex -8/pg.181.

(k) However, prior to this on 22/8/2019, the petitioner received a show-cause notice (Annex-10/pg.184) from the respondent no.4 - Executive Engineer, PWD, Pandharkawada, which was based upon a letter dated 20/8/2019 (Annex-9/pg.182) by the Chief Engineer, MSRDC, Mumbai, whereby, the experience certificate of having carried out a work of similar nature and size dated 5/12/2018, issued in favour of the petitioner by the Executive Engineer, MSRDC, Pune/Respondent no.6, was stated to have been canceled by the Chief Engineer, MSRDC, Mumbai/Respondent no.5, and the petitioner was called to show cause by 27/8/2019.

(l) The petitioner on 26/8/2019 submitted its reply (Annex-11/pg.186) to the

show-cause dated 22/8/2019 in which it was stated that the certificate dated 5/12/2018 was in fact forwarded by the respondent no.4 to the office of the respondent no.6, for verification and was found to be true and issued by the said office. It was stated that the letter dated 20/8/2019 issued by the Chief Engineer, MSRDC, Mumbai also accepted that the certificate dated 5/12/2018 was genuine, but according to the Chief Engineer, it was incorrect, because the competent authority had accorded approval to the proposal for sub-contracting on 12/10/2018, prior to which the Executive Engineer, had already approved the sub-contracting on 16/8/2018, which according to the Chief Engineer was incorrect, in view of clause 3.2 of the agreement between the MSRDC and the contractor in that case. After quoting clause 3.2 of the relevant agreement, it was submitted that there was no requirement of any approval from the competent authority as per clause 3.2.2 and therefore, the letter dated 20/8/2019, by the Chief Engineer, MSRDC, was clearly uncalled for. It was further stated that the office of Chief Engineer, MSRDC, Mumbai/Respondent no.5, had no call or occasion for issuance of the letter dated 20/8/2019 and the same clearly appeared to be at the behest of somebody, having interest in the present tender, with an intention to play a foul and with a malafide intention. A request for personal hearing was also made, which does not appear to have been given.

(m) The respondent no.4 in his capacity as a Member Secretary of the Tender Evaluation Committee issued a communication dated 31/8/2019 (Annex -12/ pg.191), wherein it was admitted, that written and oral enquires were made with the MSRDC in respect of the certificate dated 5/12/2018 and upon being satisfied by the same, the opening of envelope no.2 (price bid) was completed on 14/8/2019. However, in light of the cancellation of the certificate dated 5/12/2018, by the Chief Engineer, MSRDC, Mumbai, it was stated that the documents filed by the petitioner were misleading and incomplete. It is further stated that the fact of filing false and fabricated documents along with the bid having come to the notice of the TEC after the financial bids were opened and the explanation of the petitioner not being found satisfactory, the same was being rejected and a decision was taken by the bid evaluation committee, to declare the offer of the petitioner as ineligible.

(n) It is in the above background, that the present petition has been filed for the reliefs as claimed therein.

4. Mr. M.G. Bhangde, learned Senior Counsel for the petitioner submits as under :-

(i) The letter dated 20/8/2019, by the Chief Engineer, MSRDC/R-5, (Annex-9/ pg.182), whereby the experience certificate dt.5/12/2018, in favour of the petitioner was canceled, was one, which clearly was issued by the respondent no.5, at the behest of the respondent no.7.

(ii) The letter dt.20/8/2019 though used the expression 'it has come to the notice of the undersigned', did not refer as to how, by whom and in what

manner, any so called anomaly in the work experience certificate dated 5/12/2018, had come to the notice of the respondent no.5, which clearly created doubt regarding the same.

(iii) The letter dt.20/8/2019, did not refer to clause 29 of the MOU between Madhucon Projects Ltd. and the petitioner.

(iv) Clause 3.2.2 of the agreement between MSRDC and Madhucon Projects Ltd., did not require approval for sub-contracting, but only an intimation, on receipt of which, within 15 days, objection, if any, by the MSRDC to the sub-contracting, was to be raised. No objection whatsoever was raised, on the contrary, the competent authority accorded its approval, though belatedly on 12/10/2018 and therefore the reason for canceling the certificate dt.5/12/2018, was absolutely incorrect.

(v) Even presuming otherwise, the approval having once been accorded by the competent authority to the sub-contracting, though later on, on 12/10/2018, as against approval given by the Executive Engineer on 16/8/2018, there was an element of ratification, which could not now, after successful completion of the work, be questioned.

(vi) The requirement under the present NIT, as spelt out by clause 4.4A, was the work experience certificate by the Executive Engineer, from one of the various departments as listed therein, which was clearly satisfied by the work experience certificate dated 5/12/2018 and the respondent nos.1 to 4, thus could not go beyond, that requirement once it stood verified and satisfied.

(vii) Though a requirement of personal hearing was necessary, as requested for in the reply to the show cause, the same was not granted, which vitiates the decision, taken in pursuance to the show cause.

(viii) The respondent no.7, did not satisfy the eligibility criteria, which fact had been ignored by the respondent nos.1 to 4. The requirement as spelt out from the criteria, laid down in clause 4.4.(A) (a) to (c) of the NIT, was that the lead partner of the JV, had to meet 51% of the required qualifying criteria and the qualifications of the junior partner of the JV, could only be considered, if it had done 30% or more of the qualifying work. The pointwise compliance report at pg.361, demonstrated that the lead partner had no experience in respect of two items (a) BM (Bituminous Macadam)/DBM and (b) BC (Bituminous Concrete)/SDBC as required as per term 4.4(A)(c) (1) & (2) of the NIT, which position was supported by the work experience certificates of the respondent no.7 at Annex-23/pg.358 and 359.

(ix) Clause 4.4(A) (b) of the NIT, required that the tenderer ought to have completed at least one similar work not less than 2853.64 lakhs. The certificate dt.12/2/2019 (pg.462) indicated that the work undertaken by BCCPL, the lead partner in the JV/R-7, was not yet completed but was pending, whereas, the requirement was that the work, ought to have been completed.

- (x) Consent accorded by the parties for acceptance of the eligibility of each other.
- (xi) The certificate dated 5/12/2018, as issued could not be attacked on the ground that the same was issued by the In-Charge Executive Engineer, as no distinction could be made on the basis that someone was In-Charge of a post.
- (xii) The respondent nos.5 & 6 in their reply dated 27/1/2020 (rel. pg.432), had admitted that the work experience certificate dt.5/12/2018, was bonafidely issued, thereby admitting that there was nothing fraudulent about its issuance.

5. Miss N.P. Mehta, learned Assistant Government Pleader for the respondent nos.1 to 4, supporting the decision to disqualify the petitioner, has submitted that the reply given by the petitioner to the show-cause-notice issued, was not found satisfactory by the Tender Evaluation Committee and therefore, the status of the petitioner as L-1, was canceled.

She has placed on record the office file of the tender process for our perusal. She therefore submits that no fault could be found with the action and decision of the respondent no.4 and the petition needs to be dismissed.

6. Mr. A.D. Mohgaonkar, learned Counsel for the respondent nos.5 and 6, submits that as per clause 29 in the MOU between Madhucon Projects Ltd. and the petitioner, it was only Madhucon which could have issued a work completion certificate to the petitioner and not the respondent no.6. The work experience certificate dt.5/12/2018, was therefore without authority and thus its cancellation by the respondent no.5 by his letter dt.20/8/2019, was clearly justified. He submits that the In-Charge Executive Engineer, who had issued the work experience certificate dt.5/12/2018, had since been transferred, on 22/8/2019, which according to him, was due to the reason of issuance of the certificate without authority. He further submits that even otherwise the certificate dated 5/12/2018, could not be a work experience certificate, but was only a work completion certificate, as would be evident from the language used in the certificate dt.5/12/2018 as well as the letter of the petitioner dated 1/8/2018, which had requested for issuance of a 'work completion certificate'. He places reliance upon the proforma of the provisional certificate, as per clause 12.2 and 12.4 and as contained in Schedule-I of the EPC agreement between the respondent no.5 and Madhucon Projects Ltd. to support his submissions. He submits that for the above reasons, the cancellation by the respondent no.6 of the certificate dt.5/12/2018, cannot be faulted with.

7. Mr. S.P. Bhandarkar, learned Counsel for the respondent no.7, submits as under :-

(i) That the certificate dt.5/12/2018, as submitted by the petitioner was a fraudulent one, in as much as it has been issued not by a regular Executive Engineer, but one who was In-Charge of the post and therefore, did not have any authority to do so.

(ii) The total value of the contract under the EPC of January, 2017, between the

respondent no.5 and Madhucon Projects Ltd. was Rs.173.60 Crores and the sub-contract in favour of the petitioner being for Rs.96,13,11,855/- was more than 49 % of the total value and therefore was not permissible, due to which the work experience certificate dt.5/12/2018, was clearly not permissible.

(iii) The C. A. certificate as submitted by the petitioner mentioned the date of commencement of the sub-contracted work under the MOU between Madhucon Projects Ltd. and the petitioner as 1/8/2017 and completion on 30/9/2018 and as it did not give any further details, and was also without approval, the same was fraudulent.

(iv) The consent given by the respondent no.7 for accepting the petitioner as complying with the eligibility criteria, was vitiated due to fraud.

(v) The respondent no.4, had forwarded a complaint to the respondent no.6, to which a response was received on 6/8/2019 (pg.408), therefore the respondent no.4, itself was convinced as to the illegality of the work experience certificate dt.5/12/2018, as submitted by the petitioner.

(vi) The petitioner was not entitled for a certificate from the respondent no.6, directly, in view of clause 29 of the MOU between Madhucon Projects Ltd. and the petitioner. Only Madhucon Projects Ltd. was entitled to receive a certificate from the respondent no.5 and only upon receipt of such certificate, would the petitioner become entitled to a certificate from Madhucon Projects Ltd. The certificate dt.5/12/2018, thus having been directly issued by the respondent no.6, was clearly without any authority and could not have been held to have satisfied the eligibility criteria.

(vii) While permitting sub-contracting between Madhucon Projects Ltd. and the petitioner, the credentials of the sub-contractor i.e. petitioner vis-a-vis national security etc. were not examined.

(viii) The length of the work (road) executed by the petitioner under the sub-contract with Madhucon Projects Ltd. did not satisfy the requirement under the present NIT and therefore, the petitioner was not eligible.

(ix) Bogus and fabricated documents have been submitted by the petitioner and therefore its bid was rightly canceled.

(x) On account of the cancellation of the offer of the petitioner, the respondent no.7, in light of the G.R. dt.28/11/2018, being the second lowest, was thereafter called for negotiations and its willingness to perform the work at a rate lesser than that of the petitioner was solicited, by a letter dt.31/8/2019 (Annex-7-E/pg.556), consequent to which a discussion having taken place on 31/8/2019, itself and a reply was given by the respondent no.7 on 31/8/2019, expressing its willingness to grant a rebate of 2.28% on the tender bid price and the condition that the respondent no.7 should not be required to deposit additional Security Deposit (Annex-R-7-F/pg.557). On 31/8/2019, itself the respondent no.4, in his capacity as Executive Engineer, PWD, Pandharkawda, accepted the proposal of

the respondent no.7, and asked it, to deposit the additional security deposit as per clause 4.6.2 of the G.R. dt.27/9/2018 so that the offer of the respondent no.7, could be sent to the Higher Authorities for approval (Annex-R-7-G/pg.558). The respondent no.7, vide its letter dt.3/9/2019,(Annex-R-7-H/pg.559) intimated the respondent no.4, that Bank Guarantee for the additional security deposit was being submitted, alongwith the letter.

(xi) the complaint against Mr. Sumit Bajoriya the partner of the junior Constituent in the JV, was false and had been denied by him.

Shri Bhandarkar, learned Counsel, in support of his arguments, places reliance upon the following judgments :-

(a) Tender Conditions: (i) Tata Cellular Vs. Union of India, 1994 (6) SCC 651, (ii) Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and others, 1999 (1) SCC 492, (iii) M/s. B. Himmatlal Agrawal Vs. Western Coalfields Limited, 2007 (1) ALL MR 255, (iv) Directorate of Education and others Vs. Educomp Datamatics Ltd. and others (2004) 4 SCC 19, (v) Ramana Dayaram Shetty Vs. International Airport Authority of India and others, 1979 (3) SCC 489, (vi) Central Coalfields Limited and another Vs. SLL - SML (Joint Venture Consortium) & Ors. 2016 AIR (SCW) 3814.

(b)- No Approval - (i) M/s. Madhoor Buildwell Pvt. Ltd. Vs. Yeola Municipal Council & Ors., 2019 (9) SCC 350, (ii) V.C., Banaras Hindu University and Ors. Vs. Shrikant, 2006 (11) SCC 42,

(c) - Essential Conditions-Strict Compliance : (i) Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd., & another, 2016 AIR (SC) 4305, (ii) Caretel Infotech Ltd. Vs. Hindustan Petroleum Corporation Limited and others, 2019 AIR (SC) 3327, (iii) Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala, 2019 (2) ALL MR 961, (iv) M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, 1991 (3) SCC 273, (v) Surendra Ramlal Tiwari Vs. State of Maharashtra and others, 2013 (1) BCR 774, (vi) Municipal Corporation, Ujjain and another Vs. BVG India Limited and others, 2018 (5) SCC 462, (vii) M/s. B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Ors., 2006 (11) SCC 548, (viii) Sanjay Kumar Shukla Vs. Bharat Petroleum Corporation Ltd. and others, 2014 (3) SCC 493, (ix) Consortium of Tiragarh Firema Adler Vs. Nagpur Metro Rail Corporation, (2017) 7 SCC 486, (x) Kerala State Electricity Board & another Vs. Kurien E. Kalathil and others, (2001) 1 MLJ 23 (SC), (xi) Jagdish Mandal Vs. State of Orissa and others, (2007) 14 SCC 517.

(d) - Incorrect Certificate : (i) Union of India and others Vs. Deepak Y. Gotefode, 2008 (1) Mh.L.J. 790, (ii) Prakash Jayawant Koli Vs. State of Maharashtra, 2008 (2) Mh.L.J. 511,

(e)- No necessity to give personal hearing :- (i) J.A. Naikastam Vs. Prothonotary & Senior Master, High Court of Bombay and others, 2004 (8) SCC 653, (ii) State of Assam and another Vs. The Gauhati Municipal Board, Gauhati, 1967 AIR (SC)

1398, (iii) M/s. Bharat Barrel and Drum Mft Co. Vs. L.K. Bose and others, 1967 AIR (SC) 361, (iv) Gorkha Security Services Vs. Govt. of NCT of Delhi and others, 2014 AIR (SC) 3371, (v) State Bank of India and others Vs. Atindra Nath Bhattacharyya and another, 2019 AIR (SC) 4777,

(f)- Ratification :- Mr. Pravinkumar R. Salian Vs. Hon'ble Chief Minister and Minister of Co-Operation and others, 2004 (2) Mh.L.J. 12,

(g) - In Charge :- (i) Shivaji University, Kolhapur Vs. Sangameshwar Education Society, 2000 (9) SCC 401, (ii) H.C. Gotla Vs. State, 2001 Cri. L.J. 2695.

8. Mr. Bhangde, learned Senior Counsel, in rebuttal submits as under :-

(i) There was no dispute that the petitioner had completed the work of sub-contracting under the MOU with Madhucon Projects Ltd. and the only objection that the sub-contracting was approved subsequently, did not deter from the efficacy of the work experience certificate dt.5/12/2018.

(ii) That even otherwise, the so called lacuna, if held to be any, already stood rectified by the work experience certificate issued by Madhucon Projects Ltd. (pg.534).

(iii) The ground that the certificate dt.5/12/2018, was rejected on account of approval by incompetent authority was not traceable in the letter dt.20/08/2019.

(iv) Clause 29 of the EPC between respondent no.5 and Madhucon Projects Ltd. had no relevance.

(v) Mention of the date 1/8/2017 for commencement in the certificate of C.A. was in view of the revised sanction by the respondent no.5, vide its letter dt.13/10/2017 (pg.580), which mentioned the appointed date as 1/8/2017, which date was inserted by the C. A. in the certificate. in the matter of sub-contracting between Madhucon Projects Ltd. and the petitioner, and therefore no capital could be made out of it.

(vi) The C.A. certificate (pg.153) submitted by the petitioner, complied with the requirement of clause 4.4(A) (a) of the NIT, in as much as the requirement was of having achieved a maximum annual financial turnover of 2378.03 lakhs, in any one year during the last five years, and the C.A. certificate (pg.153) indicated a turnover of Rs.96.13 Crores for the F.Y.2018-2019, which clearly satisfied the required criteria.

(vii) The format of work completion certificate as indicated by clause 12.2 & 12.4, Schedule-I of the EPA, between Respondent no.5 and Madhucon Projects Ltd. was required only for payment and nothing else. Even otherwise, experience certificate would not be something else than a completion certificate required for payment and the certificate dt.5/12/2018, was an experience certificate.

(viii) In support of his contention that there was no difference in a certificate issued by a regular incumbent and an In-Charge, he placed reliance upon

Sopanrao Onkarrao Sathe .Vs. State of Maharashtra and others, 2010 (6) Mh.L.J. 334, para 8.

(ix) In support of his contention that there was ratification, he placed reliance upon Maharashtra State Mining Corporation .Vs. Sunil s/o Pundlikrao Pathak, (2006) 5 SCC 96. Mr. Bhangde, learned Senior Counsel, in addition to those stated above, has also placed reliance upon, the following judgments :

(a) Opportunity of hearing was necessary - (i) Rampal Vs. State of Haryana and others, (2009) 9 SCC 187,

(ii) Raghunath Thakur Vs. State of Bihar and others (1989) 1 SCC 229, (iii) Asit Kumar Kar Vs. State of West Bengal and others (2009) 2 SCC 703.

(b) Approval to an act or decision can also be subsequent to the act or decision- Bajaj Hindustan Limited Vs. State of Uttar Pradesh and others (2016) 12 SCC 613.

(c) Relaxation of change in condition could not be arbitrary - Filing of a document belatedly was permissible- G.J. Fernandez Vs. State of Karnataka and others, (1990) 2 SCC 488 .

(d) Distinction between a fact and its proof, that what is essential is the fact and what is ancillary is the safe mode of proof, which can be given later on too-Food Corporation of India Vs. Rimjhim, (2019) 5 SCC 793 reiterating the view in Charles K. Skaria / C. Mathew (1980) 2 SCC 752 and Dolly Chhanda / JEE, (2005) 9 SCC 779.

(e) State of Punjab Vs. Bandheep Singh and others, (2016) 1 SCC 724, holding that every decision of an administrative or executive nature must be a composite and self sustaining one, in that, it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion, reiterating the dictum in Mohinder Singh Gill / Chief Election Commr. (1978) 1 SCC 405, that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

(f) Abhishek Kumar Vs. Hindustan Petroleum Corporation Limited and others, (2016) 12 SCC 308 and National Federation of Farmers's Procurement, Processing & Retailing Co-operatives of India (NACOF) Vs. State of Maharashtra, through its Secretary, Department of School Education & Sports, Mantralaya, Mumbai - 32 and others, decided by the Bombay High Court, Nagpur Bench [LD-VC C.W. No.158 of 2020, dated 17.07.2020], reiterate the above position.

9. The present petition, raises a lot many questions, upon the manner which the respondent nos.1 to 4, acted in the matter of opening of tenders.

10. The basic bone of contention, is whether the petitioner and the respondent

no.7 satisfy the qualifying criteria laid down by the terms of the NIT. The relevant clauses of the NIT, namely part of clause 4.3 and clause 4.4 being material are quoted as under :-

"4.3 Bids from Joint ventures are acceptable. Joint Venture :- The copy of Pre Registered consortium issued by Registrar Firm or Acknowledgment of the submission of the Notarized Joint Venture Deed to the office of Registrar of Firms for registration shall be enclosed with the tender in Envelope No.1. The copy of Registration of J.V. shall be submitted prior to the work order, otherwise Earnest Money of concerned J.V. will be forfeited to the Govt. & work order will not be awarded.

(1) Two or more contractors combine and tender for a work costing to the amounts upto which each individual contractor or the higher of two limits if they are of different categories are empowered to tender.

The combination is of the contractor as a whole and not individual partners and

(i) They draw a registered partnership deed and submit a copy thereof to the authority at the time of purchase of the tender forms. Whenever the advantage of such combination of two or more contractors is to be taken for quoting for a work, the registered partnership deed should be irrevocable till the end of Defect Liability Period for which they have combined and till all the liabilities there of are liquidated. The share of contractor of higher financial capacity should not be less than 51%. Further, the percentage share of the contractor of the lower financial capacity in such a partnership/ combination should not be less than 30%.

For financial capacity, Average Annual Turn Over C.A. Certificate of last five years shall be considered.

All online activities of e-tendering shall be performed by the lead partner and in his name. No partition in JV shall be permitted to bid of the same work on the basis of his individual capacity. Such bidding individually as well as in joint venture will disqualify the individual as well as joint venture bidder.

The lead partners shall meet not less than 51% of all qualifying criteria like annual turn over, single work, execution quantifies and Bid capacity etc. The Joint Venture must collectively satisfy 100% criteria of qualifying criteria above. The experience of the other Joint partner shall be considered only if it is not less than 30% of the qualifying criteria as mentioned in the qualifying criteria like Annual Turn Over, Execution of Quantities, Bid Capacity, machinery, technical personnel, financial positions. The qualification regarding similar work must be individually fulfilled by any one partner of JV.

(ii) Grouping of quantifies, plant and machineries of individual contractors executing joint venture will be considered.

(2) All online activities of e-tendering shall be performed by the lead partner in his name.

(3) Bid Security, Additional Performance security in individual capacity of lead partner will be accepted in case of joint venture. Security Deposit in form of Bank guarantees'/FDR issued in the name of Joint Venture Company drawn by the Schedule Bank having branches in Maharashtra and endorsed in the name of concerned Executive Engineer, for a period of one year only be considered.

4.4A. To qualify for award of the contract, each bidder in its name should have in the last Five years as referred to in Appendix.

(a) Achieved a maximum annual financial turnover (in all classes of civil engineering construction works only) of Rs.2378.03 Lakhs in any one year during last Five years & in current year (i.e. 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19) at price level 2018-19 (usually not less than 75% of this annual cost of the project under the contract) : (Amount also indicated in Appendix)

(b) Satisfactorily completed, during the last Five years & in current year (i.e. 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19) as a prime contractor (or as a nominated subcontractor, where the subcontract involved execution of "all main items of work described in the bid document, provided further that all other qualification criteria are satisfied at least one similar work not less than value of Rs.2853.64 Lakhs (Amount also indicated in Appendix) (maximum 60% of estimated value of contract):

(c) executed in any continuous 12 calender months, during the last Five years & in current year (i.e. 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19) the minimum quantities of he following items of work. (Amount also indicated in Appendix).

Sr. No.

Item

Quantity

1

Bituminous Macadam (B.M.)

1528.00 cum

2

Bituminous Concrete (B.C.)

934.00 cum

3

C.C. M-20 & above Grade

6888.00 cum

Dense Bituminous Macadam (D.B.M.)

1534.00 cum

(usually 30% of the expected peak rate of construction)

For (a) above, the tenderer shall provide authenticated proof of information given therein. This shall include a certificate from the Chartered Accountant.

For (b) and (c) above, the criteria mentioned is for works carried out in Gov./Semi Gov. Bodies such as MHADA, MSEDCL, MIDC, CIDCO.

For other than Govt./Semi Govt. works the criteria of amount of Single Similar Work and Quantities above shall be doubled of the mentioned above.

Certificates are required to be obtained from the officers not below the rank of the Executive Engineer (for works carried out in Gov./Semi Gov. Bodies such as MHADA, MSEDCL, MIDC, CIDCO) or equivalent competent authority in case of local bodies.

In case of other than Govt./Semi Govt./ PSU's/Autonomous Bodies etc. certificates are required to be obtained from Director/CEO/or Office in Charge of Project or equivalent."

The following would thus be explicit :-

(i) The lead partner has to meet not less than 51% of all qualifying criteria like annual turnover, single work, execution quantities and bid capacity etc.

(ii) The Joint venture must collectively satisfy 100% of qualifying criteria.

(iii) The experience of the other joint partner (below 51%) shall be considered only if it is not less than 30% of the qualifying criteria.

(iv) The qualification regarding similar work must be individually fulfilled by any one partner of JV.

(v) Grouping of quantities, plant and machineries of individual contractors executing JV were to be considered.

(vi) The qualifying criteria required each bidder to have :-

(a) achieved maximum annual financial turnover (in all cases of civil engineering construction works only) of Rs.2378.03 lacs (23.78 crores), in any one year during last five years and in current year at price level 2018-19.

(b) satisfactorily completed during the last five years and in current year as a prime contractor (or as a nominated sub-contractor) at least one similar work not less than value of Rs.2378.03 lacs (23.78 crores).

(c) executed in any continuous 12 calendar months, during the last five years

and in current year the minimum quantities of the following items of work, as indicated in clause 4.4.A (c), for the execution of which similar work, certificate was required to be obtained from the officers not below the rank of Executive Engineer, for works carried out in Government/Semi Government bodies or equivalent competent authority in case of local bodies. In case of other bodies/institutions, certificates were required to be obtained from the Director/CEO/or officer In-charge of the project or equivalent.

11. In so far as the petitioner is concerned, in compliance with the qualifying requirement as contained in clause 4.4.A (a), of the NIT, it submitted a certificate issued by Govind D. Chevale and Associates Chartered Accountant (pg.153), which certified that the construction work carried out by the petitioner, during the financial year 2018-19, was to the tune of Rs.96.13 crores, which was obviously above the qualifying requirement of a maximum annual financial turnover of Rs.2378.03 lacs. Though it is contended by Mr. Bhandarkar, learned Counsel for the respondent no.7 that the certificate mentions the date of commencement of project as 1/8/2017, whereas the sub-contracting was done under the MOU dated 15/2/2018, and therefore, a doubt is created about the authenticity of the certificate, however, in light of the communication dated 13/10/2017 by the Superintending Engineer, MSRDC, Pune to Madhucon Projects Limited, c/o R.K. Chavan Infrastructure Private Limited, which states that the earlier appointed dates of 16/6/2017 and 1/9/2017 were changed to 1/8/2017 by revised sanction of the Chief Engineer (NH) MSRDC, Mumbai, the mention of the date 1/8/2017 as date of commencement of work in the certificate by the Chartered Accountants (pg. 153) would not deter from its authenticity.

12. In compliance with the requirements of clause 4.4A (b and c) of the NIT, the petitioner submitted the certificate dated 5/12/2018 issued by the Executive Engineer (I/C) MSRDC, Pune. Much has been said, about this certificate being issued by a person who was not a regular incumbent but a person In-charge of the post. It has been contended that since the person issuing the certificate dated 5/12/2018 (pg.154) was merely In-charge of the post, he did not have any authority to issue the said certificate. It is to be noted that the competency of the Executive Engineer to issue the certificate is not in question. What is in question is, whether a person who was temporarily in charge of the post, would have the authority to issue such certificate. Such an argument, necessarily seeks to make a distinction between the powers and authority conferred upon a regular incumbent of a post and that of a person put in charge of the post for the time being. Logically speaking the post and the duties, responsibilities, authority, obligation, liabilities associated with it, remain the same, though the person occupying the post and wielding the duty, responsibilities, authority, obligation, liabilities associated with it, may change from time to time. Thus, merely due to change of an incumbent in a post, there is no according change in the duties and responsibilities associated with it. Whether the person occupying such post, is a regular appointee, or an In-charge, ought not to make any difference to the post and the duties and responsibilities associated with it. In the case of a person

occupying a post, as an In-charge, unless the order authorizing him to occupy the post as an In-charge, curtails or restricts the power and authority to be exercised by him, while occupying such post, such an In-charge person would continue to wield the same power and authority, as would a regular appointee. No such order, curtailing or restricting the power and authority to be exercised by the In-charge Executive Engineer, has been placed on record.

The matter is also covered by the judgment of this Court in *Sopanrao Onkarrao Sathe (Supra)*, relied upon by Mr. Bhangde, learned Senior Counsel, wherein this Court has elucidated the position as under :-

"7. According to learned Counsel for the petitioner since the person who has signed the notice is in fact not appointed as a District Deputy Registrar but is in fact appointed as a Assistant Registrar under the provisions of the Maharashtra Co-operative Societies Act, 1960, he has no authority to issue show-cause-notice. The argument tantamounts to contending that an Assistant Registrar cannot hold charge of the post of a Deputy Registrar because the A.P.M.C. Act defines District Deputy Registrar to mean a District Deputy Registrar appointing under the Maharashtra Co-operative Societies Act.

8. We do not find any merit in this contention since the delegation of powers clearly contemplates that notice should be issued by a District Deputy Registrar and we find that the notice has in fact been issued by a District Deputy Registrar. It does not make any difference to the situation in law that the person who is holding the charge of the post of the District Deputy Registrar is a Assistant Registrar, who under an administrative order dated 25-5-2010 has been appointed to hold the additional charge of the post of the District Deputy Registrar who is on leave. Merely because an officer other than the District Deputy Registrar or lower in rank of the District Deputy Registrar has been empowered by the Government to hold the post of District Deputy Registrar, the action is not vitiated on any count since the impugned action is nonetheless by the District Deputy Registrar. We also note that there is no challenge to the order directing the Assistant Registrar. We also note that there is no challenge to the order directing the Assistant Registrar to hold charge of the post of the District Deputy Registrar." (emphasis supplied)

Mr. Bhangde, learned Senior Counsel also relies upon *Bajaj Hindustan Ltd. (Supra)* delineating the meaning of the word 'approval', which can be post the action, and supports the arguments as canvased by him.

As against this, the reliance by Mr. Bhandarkar learned Counsel for the respondent no.7, on *Sangameshwar Education Society (supra)* is in regard to approval to selection of a person appointed as an In-charge Principal and not to the powers, duties and responsibilities exercised by that post by such In-charge and does not assist him. *H. S. Gotla (Supra)* does not give any reasoning except to note the mandate of the P.C. Act and that the position of the person occupying the post.

Deepak Y. Gotefode (supra) and Prakash Jayawant Koli (supra) relied upon by Mr. Bhandarkar, also do not come to his assistance as they relate to an appointment being obtained on the basis of an incorrect certificate, which is not the matter in the present case.

We, therefore, find that the certificate dated 5/12/2018 (pg.153) cannot be said to have been, one issued without any authority, merely because it has been issued by the Executive Engineer (I/c), MSRDC, Pune. It would not be out of context to point out that the requirement of the NIT as reflected from the later portion of Clause 4.4.A (c) was for such certificate to be obtained from officers not below the rank of the Executive Engineer, which requirement, the certificate dt.5/12/2018, complied with, which position was also accepted by the TEC.

13. The further objection which is raised to this certificate dated 5/12/2018, by Mr. Bhandarkar, learned Counsel for respondent no.7 is that this certificate, stood canceled, in light of the letter dated 20/8/2019 by the respondent no.5 and therefore any claim to satisfying the eligibility as raised earlier by the petitioner, could not now be sustained and therefore, the respondent no.4 was right in rejecting the bid of the petitioner, though accepted being L-1. In this regard, it is material to note, that the letter dated 20/8/2019 by the respondent no.5, itself creates a cloud of suspicion, not only as to its issuance but the timing of its issuance, the purpose of its issuance and what not. In this regard, certain dates being of significance, are enumerated below :-

1

January, 2017

EPC agreement executed between respondent no.5- MSRDC and Madhucon Projects Ltd. for the work of rehabilitation and upgradation of Khamgaon to Sangola.

2

15-17/2/2018

MOU executed between Madhucon Projects Ltd. and petitioner under which work valued at Rs.96,13,11,855/- for length of road admeasuring 16.835 km. was sub-contracted to the petitioner.

3

16/08/18

Approval to sub-contracting was accorded by the Executive Engineer/respondent no.6.

4

01/10/18

The work was commenced by the petitioner.

5

12/10/18

The sub-contracting was approved by the competent authority.

6

30/11/18

The work under sub-contracting was completed by the petitioner.

Thus, though the approval to the sub-contracting was accorded by the Executive Engineer/respondent no.6 on 16/8/2018, it is also a fact that such sub-contracting, was approved by the competent authority on 12/10/2018, which is not a disputed position. It is material to note that it is nobody's case that the work under the sub-contracting was not done by the petitioner, rather it is an admitted position that the work under the sub-contract, was satisfactorily performed by the petitioner. The letter dated 20/8/2019, came into the picture, after the financial bid of the petitioner was opened on 1/8/2019. The letter dated 20/8/2019, by the respondent no.5 does not disclose as to at whose instance the same was issued; who had brought the certificate dated 5/12/2018, to the notice of the respondent no.5; whether any show-cause notice was issued to the petitioner; whether any explanation was called from the authority issuing the same; what documents were considered prior to its issuance. Thus, the very issuance of this letter dated 20/8/2019 by the respondent no.5, is shrouded in mystery. It is further pertinent to note that though the letter dated 20/8/2019, specifically states that the competent authority had accorded approval to the proposal of sub-contracting on 12/10/2018 as per the EPC contract agreement-clause no.32, it cancels the certificate dated 5/12/2018, merely on the specious ground that the approval to the sub-contracting was given by the Executive Engineer, MSRDC, Pune on 16/8/2018 without any authority and before prior approval of the competent authority. The letter, does not take into consideration the effect of the grant of approval by the competent authority on 12/8/2018, to the sub-contracting. In our considered opinion, once this letter dated 20/8/2019 noted that the sub-contracting was approved by the competent authority under the terms of the EPC, though belatedly, the earlier approval by the Executive Engineer, to the sub-contracting, though invalid, stood ratified and specifically in a situation where work under the sub-contract was permitted to be performed to its completion, thereafter. In Maharashtra State Mining Corporation .Vs. Sunil (Supra) upon which reliance has been placed by Mr. Bhangde, learned Senior Counsel, the issue of ratification has been considered as under :-

"7. The High Court was right when it held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently 'rectified' by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The

principle is derived from the latin maxim *ratihabitio mandato aequiparatur*, namely, "a subsequent ratification of an act is equivalent to a prior authority to perform such act". Therefore ratification assumes an invalid act which is retrospectively validated". (emphasis supplied)

It is thus apparent that though the Executive Engineer/respondent no.6 had given approval to the sub-contracting on 16/8/2018, which is claimed to be without any authority, the subsequent approval to the sub-contracting by the competent authority on 12/10/2018, clearly ratified the sub-contract from the date of its execution. However, even this was not required. The letter dated 20/8/2019, makes a mention of clause 32 of the EPC contract - agreement dated January, 2017 between the respondent no.5 and Madhucon Projects Ltd., however, a perusal of the EPC contract of January, 2017, discloses that there is no clause 32. Considering the context of the letter dated 20/8/2019, the reference can only be to clause 3.2 of the EPC agreement dated January, 2017. In order to consider the submission of learned Senior Counsel Mr. Bhangde that clause 3.2 of the EPC agreement dated January, 2017 did not postulate the prior approval of the competent authority for sub-contracting, it is necessary to consider clause 3.2.2, which reads as under :-

"Clause - 3.2.2. In the event any sub-contract for Works, or the aggregate of such sub-contracts with any Sub-contractor, exceeds 5% (five percent) of the Contract Price, the Contractor shall communicate the name and particulars, including the relevant experience of the sub-contractor, to the Authority prior to entering into any such sub-contract. The Authority shall examine the particulars of the sub-contractor from the national security and public interest perspective and may require the Contractor, no later than 15 (fifteen) business days from the date of receiving the communication from the Contractor, not to proceed with the sub-contract, and the Contractor shall comply therewith." (emphasis supplied)

A perusal of clause 3.2.2 therefore would make it clear that there was no requirement of any prior approval of the competent authority, for any sub-contract. The requirement was only to communicate the name and particulars, including the relevant experience of the sub-contractor, to the authority prior to entering into such sub-contract. Once such intimation was given, it was then for the competent authority, within fifteen days of the receipt of such intimation, if it so required, to direct the contractor not to proceed with the sub-contract. It is nobody's case that such an intimation was not given or for that matter, there was any direction from the competent authority to the contractor, not to proceed with the sub-contract. On the contrary, the competent authority on 12/10/2018 had accorded its approval to the sub-contract. Thus, the reason given in the letter dated 20/8/2019, for cancellation of the certificate dated 5/12/2018, is also without any substance whatsoever, as such a stand is not supported by the language of clause 3.2.2 of the EPC agreement dated January, 2017. It was at least expected, for the person issuing the letter dated 20/8/2019 to have perused clause 3.2.2 of the EPC agreement dated January, 2017 prior to its

issuance, as reliance upon the same, was placed, for cancellation of the certificate dated 5/12/2018. In case the same was perused, the letter dated 20/8/2019, could not have been issued as neither clause 3.2.2 nor clause 3.2, required any approval, much less prior approval, of the competent authority before sub-contracting could be done. It is thus apparent that the letter dated 20/8/2019 issued by Mr. A.B. Gaikawad, is clearly contrary to the position as emanating from the language of the EPC contract dated January, 2017, which can only lead to an inference that the issuance of the letter dated 20/8/2019, by Mr. A.B. Gaikawad, was clearly not in pursuance to his duties and responsibilities as imposed upon him by virtue of the post held by him, but was for reasons otherwise.

Reliance by Mr. Bhandarkar on M/s Madhoor Buildwell Pvt. Ltd. (Supra) is clearly misplaced, for the reason that the scheme, therein firstly was not approved at all for want of concurrence by the Finance department, inspite of which the work of sewage system was already carried out by the tenderer, which is not the position in the present matter at all. In fact in para 9 of M/s Madhoor Buildwell Pvt. Ltd. the Apex Court considering that a sewage system was a necessity in any Urban area had directed the State Government to consider it for approval thereof under the state scheme and if it was unable to provide funds in terms of its policy, it was directed to seek funds from the Central Government under the present AMRUT scheme. This in fact to some extent assists the case of the petitioner.

Banaras Hindu University (supra) on which reliance has been placed by Mr. Bhandarkar is also of no assistance to him, as the same relates to an order of termination, passed erroneously by the Vice Chancellor, which was without any authority, the power being that of the Executive Council, in view of which the order of termination being a nullity, any post facto approval by the Executive Committee was held not to cure such defect. In the instant matter, the work under subcontracting in light of the language of clause 3.3.2, did not require any approval at all and therefore the question of its subsequent ratification, due to approval by the Competent Authority did not arise at all. For the same reason, Pravinkumar R. Salian (Supra), relied upon by Mr. Bhandarkar, learned Counsel for respondent no.7, is of no assistance to his case.

14. Issuance of the letter dated 20/8/2019, in view of the above position and the timing of its issuance, clearly raises a presumption that the same must have been issued at the behest of the respondent no.7, as there were only two tenderers remaining in the fray. The petitioner being found L-1, it was only the respondent no.7, who stood to gain from any cancellation of the eligibility certificate of the petitioner and the consequent cancellation of its tender. That it was actually so, is demonstrable from what has happened on 31/8/2019, of the work in question being offered to the respondent no.7, who negotiated for the same and was accepted, subject to approval of the higher ups [para 7(x)] all on 31/8/2019, itself, from what has been submitted by Mr. Bhandarkar learned Counsel for respondent no.7.

15. Though the work under the sub-contract stood completed satisfactorily, as per the certificate dated 5/12/2018, which was not in question altogether, as is reflected from the perusal of the letter dated 20/8/2019, the letter goes on to cancel the certificate dated 5/12/2018, which in itself speaks volumes as to the nature and purpose for which it was issued by Mr. A.B. Gaikawad, who was holding the office of Chief Engineer (NH) MSRDC, Mumbai. The said person, is not a minion but a responsible officer of the MSRDC holding an exalted position of a Chief Engineer, with responsibility to look after the affairs of the MSRDC throughout the State of Maharashtra. In his capacity as a Chief Engineer, Mr. A.B. Gaikawad regularly comes across tenders and work contracts, and cannot be oblivious to the effect of ratification by a subsequent approval to an earlier act, and such a presumption of knowledge to Mr. A.B. Gaikawad is clearly justified by the nature of the post which is held by him. It also cannot be said that Mr. A.B. Gaikawad would have been oblivious to the effect of cancellation of the certificate dated 5/12/2018 and who would be benefited by it, in spite of which, he went on to issue the letter dated 20/8/2019. Though the work of sub-contract under the EPC dated January, 2017 was completed on 30/11/2018, and nothing adversely is mentioned as to the quality and the work, Mr. A.B. Gaikawad, nearly eight months thereafter, without even issuing a show-cause-notice, canceled the certificate dated 5/12/2018. The conduct of Mr. A.B. Gaikawad, the Chief Engineer (NH) of the respondent no.5 therefore in issuing the letter dated 20/8/2019, in the above background is clearly questionable and needs to be enquired into. On the merits of the matter, therefore the letter dated 20/8/2019 issued by Mr. A.B. Gaikawad, Chief Engineer (NH) of the respondent no.5 clearly cannot be sustained on facts as well as in law and needs to be quashed and set aside.

16. The only reason for rejecting the status of the petitioner, as L-1, is the cancellation of the certificate dated 5/12/2018, by the letter dated 20/8/2019, as appears from the show cause notice dated 22/8/2019 and the communication dated 31/8/2019, as the explanation submitted by the petitioner to the show cause was not found to be to the satisfaction of the Tender Evaluation Committee. A typed copy of the letter dated 31/8/2019 has been filed by the petitioner at Annexure-12/Pg.191. Perusal of the letter dated 31/8/2019 did not give any indication that it was the decision of the TEC, except that it was a letter written by the respondent no.6, in his capacity as the Executive Engineer and also as Member Secretary of the TEC. We had asked the Miss Mehta, learned Assistant Government Pleader to hand over the original record to ascertain, whether the decision as indicated to have been taken in the letter dated 31/8/2019 was indeed the decision of the TEC. At this juncture, it is necessary to state that the TEC comprises of five persons, (a) the Superintending Engineer, Public Works Circle, Yavatmal, (b) Assistant Superintending Engineer, PWD, Yavatmal, (c) Executive Engineer, P.W.D., Pandharkawada (d) Dy. Executive Engineer, P.W.D., Pandharkawada and (e) Divisional Accounts Officer (Gr-1), P.W.D., Pandharkawada. The original record was handed over by the learned

Assistant Government Pleader for the respondent nos.1 to 4. A perusal of the record reveals a shocking situation. The entire original record is a collection of loose papers comprising of various letters, evaluation sheets, communications etc. which is neither arrayed date-wise, nor is paginated. There is no order-sheet maintained as to the minutes of the meetings of the Tender Evaluation Committee, at all. The entire record does not disclose as to when and as to on what dates the TEC met, how evaluation was done, what was considered, the reasons for consideration. Nothing is clear. No proper record whatsoever appears to have been maintained by the respondent no.4 who admittedly was also the Member Secretary of the TEC, as in the normal course of conduct would be reasonably expected. The record is merely a hotchpotch of papers with no coherence and logical sequencing at all, either date-wise or for that matter in any manner whatsoever. Nothing can be ascertained from the original record. The original letter dated 31/8/2011 does not make any reference to any meeting of the TEC, or what was considered, nor the reasons for rejection are spelt out from the letter dated 31/8/2011. On the original letter dated 31/8/2019 only the signatures of the other members of the TEC appear to have been obtained, all of which are undated. Thus the contents of the letter dated 31/8/2019, cannot by any stretch of imagination be considered as a decision of the TEC. When a TEC is appointed, it is but natural that it has to meet deliberate and decide, which naturally would mean keeping a record of such meetings, deliberations and decisions. Nothing of this kind appears to have been done in the matter. The respondent no.4 thus clearly appears to have failed in his duty as a Member Secretary of the TEC, and the same could also be said for the other members of the TEC. It is pertinent to note that all the members of the TEC are responsible officers holding high positions and cannot be oblivious to maintaining records as in their official capacity they have been dealing with matters of this nature time and again, in spite of which each one of them failed to ensure that a proper record of the proceedings was maintained, failure to do which makes it unascertainable as to what was considered, in what context or for that matter the reasons for such consideration, which vitiates the entire procedure. This Court in *M/s B. Himmatlal (Supra)* on which reliance has been placed by the respondent no.7, has regarding the decisions of the TEC, held as under :-

"26. It is no doubt true that right to choose a bidder as per conditions and procedure stipulated in the tender document is of the Authority/ Tender Committee and the Court does not sit in appeal on the decision taken by the Authority in this regard. Nevertheless such decision must be free from arbitrariness and favoritism, must be in public interest and must be taken by the Tender Committee after proper application of mind. The decision taken by the Tender Committee, in view of mandatory condition 3.5(b), therefore must demonstrate that the Tender Committee has applied its mind to the contingencies mentioned in the said condition and on the basis thereof, has considered performance of work executed by the bidder on earlier occasion and it must show that it is only thereafter the Tender Committee has concluded the

issue of disqualification. If the decision of the Tender Committee is silent on these aspects, such decision, in our view, undoubtedly would be arbitrary, unjust and no amount of explanation given in the affidavit filed on behalf of the Authority can legitimize such decision, which does not show proper application of mind by the Tender Committee as required in view of the essential conditions of tender. It is the decision, which must show that the same is taken by the Tender Committee after proper application of mind and such inference cannot be drawn on the basis of explanation or justification given by the Authority in the affidavits filed in the Court." (emphasis supplied)

The same position is also spelt out in *Bandeep Singh* (Supra); *Abhishek Kumar* (Supra) and *National Federation of Farmers's Procurement, Processing & Retailing Co-operatives of India (NACOF)* (Supra), relied upon by Mr. Bhandge, learned Counsel for the petitioner.

The factual position narrated above, clearly, indicates to us the lack of orderly manner and intelligible attitude in which important matters such as evaluation and award of tenders running into crores of rupees, which obviously are at the cost of the public exchequer, are being handled and dealt with by such officers. Needless to say that it is because of such callous attitude, the entire process comes into disrepute. Thus after having examined the original record, we are constrained to opine that the decision as reflected from the letter dated 31/8/2019, cannot be said to be a decision of the TEC, as there is nothing on record to indicate that there was any meeting, much less any consideration and deliberation to that effect whatsoever, between the members of the TEC. This is apart from the fact that since the letter dated 31/8/2019, is based solely upon the letter dated 20/8/2019 by Mr. A. B. Gaikwad, which we have held to be illegal and without any effect, the consequent letter dated 31/8/2019 and its contents and effect will also have to be held unsustainable on facts and law.

17. There is another aspect to this too. It is a settled legal position that when an action or status accorded, which has an effect of conferring any benefit or creating any right and the same is to be canceled, it is necessary before doing so, that a personal hearing ought to be accorded. This is the basic gravamen of the principle of natural justice.

17.1. Mr. Bhandarkar, learned Counsel for the respondent no.7, by relying on *J.A. Naiksatam* (Supra); *Gauhati Municipal Board* (Supra); *Bharat Barrel and Drum Manufacturing Co.* (Supra); *Gorkha Security Services* (Supra) and *Atindra Nath Bhattacharyya* (Supra), contends that there was no requirement of a personal hearing, as a show-cause-notice was issued to the petitioner and it was permitted to file a reply, which was duly considered.

17.2. In *J.A. Naiksatam* (supra) it was contended that even though the concerned rule did not contemplate of giving of opportunity, such a provision could be read into the rule, which was rejected by the Court as the copy of the tentative decision of the disciplinary authority, which indicated that the report of

the Enquiry Officer would be reversed, was supplied and a full explanation as furnished by the delinquents, was duly considered.

17.3. In Gauhati Municipal Board (Supra), the Court was considering the issue of grant of personal hearing in the background of a statutory provision as contained in Sec.298 of the Assam Municipal Act, 1957, where the Board was superseded after a show cause notice and a written explanation in reply thereto and held that since the procedure provided in Sec.298 was complied with there was no question of the principles of natural justice being violated.

17.4. In M/s Bharat Barrel and Drum Manufacturing Co. (Supra), a refusal to record oral evidence was held not to mean contravention of the rules of natural justice, based upon the principles that while considering the question of breach of principles of natural justice, the Court should not proceed as if there are any inflexible rules of natural justice of universal application. The Court has to consider in each case whether in the light of facts and circumstances of that case, the nature of issues involved in enquiry, the nature of the order passed and the interests affected thereby a fair and reasonable opportunity of being heard was furnished to the person affected.

17.5. In Gorkha Security Services (Supra), which was a case of blacklisting, it is laid down that a Show Cause notice should meet two requirements viz: ((1) Material / grounds to be stated on which according to the department necessitates an action and (2) particular penalty/action which is proposed to be taken. It was further held that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet the requirement. As the notice did not meet the 2nd requirement the impugned order was held to be contrary to the principles of Natural justice and set aside.

17.6. In Atindra Nath Bhattacharyya (Supra) the petitioner was sent a communication on 24/3/2016, 7/4/2016 and 22/4/2016, by the Bank, calling him for personal hearing, for which he did not appear, in which context it was held that once an opportunity had been granted and was not availed, he would not be entitled to another opportunity.

17.7. None of the judgments relied upon by the learned Counsel for the respondent no.7, are applicable in the factual matrix of the present matter. In the instant matter, the show cause notice was issued, it did not indicate what particular penalty/action which is proposed to be taken, except for a vague statement that action would be taken as per rules. There was no previous enquiry, nor was there any question of any oral evidence being recorded or any statutory provisions governing the field.

17.8. The show-cause-notice in the instant case was replied to, by the petitioner in which a detailed explanation was given and it was stated as to how clause 3.2 of the EPC did not require any approval at all, to demonstrate which personal hearing was demanded, considering that the petitioner was not only declared as

L-1, but had also deposited the additional security deposit by way of an FDR, drawn on the Andhra Bank, Pune in pursuance thereto, an opportunity of hearing ought to have been granted, as consequent to the above position, there was no obstruction in the work being awarded to the petitioner. The record or proceedings do not indicate, one to have been given to the petitioner, in light of which the action of the respondents 1 to 4, in canceling of the tender of the petitioner is also vitiated on this count too. The reliance by Mr. Bhangde learned Senior Counsel therefore, on Rampal (Supra), Raghunath Thakur (Supra) and Asit Kumar (Supra), all of which require that the principles of natural justice to be followed, by granting an opportunity of being heard, before passing of an adverse order or taking adverse action, is well placed.

18. The eligibility or qualifying criteria in any tender, is the basic core of the tender document, and has to be adhered to, scrupulously, tested and satisfied to its fullest extent, on the language used in the terms/clauses embodying the eligibility/qualifying criteria in an NIT. Naturally this is the responsibility of the TEC, if formed for that purpose and if not, then of the authorities. It is only a successful satisfaction of the eligibility/ qualifying criteria, which permits a tenderer, to become entitled to be considered for the further process, by making the bid responsive. In that light of the matter, no consent by any of the tenderers, of whatsoever nature, to the effect that any other participant in the tender process satisfies the eligibility/qualifying criteria in a particular tender, would be acceptable in law, so as to absolve the TEC or the authorities from independently verifying and satisfying itself/himself, that the eligibility/qualifying criteria was met/satisfied/fulfilled by any of the tenderer. The satisfaction of the eligibility/qualifying criteria by all the tenderers, is the independent duty and responsibility of the TEC/Authorities. Thus the contention by learned Senior Counsel Mr. Bhangde, that consent was accorded by the petitioner as well as the respondent no.7, to each other satisfying the eligibility/qualifying criteria is without any merits altogether. Mr. Bhandarkar, the learned Counsel for the respondent no.7 submits that the consent was obtained by fraud and therefore cannot remain valid, which contention also needs to be rejected in light of what has been said above about any consent by any of the tenderers, and the TEC/ Authorities, have to independently satisfy themselves as to the fulfillment of the eligibility/qualifying criteria by all the participating tenderers, as no amount of consent would clothe the tenderer with the qualifying criteria, or any portion thereof.

19. It is a settled position of law, that the words used in the tender document cannot be ignored or treated as redundant or superfluous-they must be given meaning and their necessary significance [Ramana Dayaram Shetty (Supra) and Afcons Infrastructure Ltd. (Supra)]. Also that essential conditions in a tender document and specifically in relation to the eligibility/qualifying criteria must be strictly adhered to [M/s Ganesh Engineering Works (Supra) B.S.N. Joshi & Sons Ltd. / Nair Coal Services Ltd. (Supra); Bakshi Security and Personnel Services Pvt. Ltd. / Devkishan Computed Pvt. Ltd. and ors. (2016)8 SCC 446; S.D.T. &

Construction Co. / Municipal Council Mohpa, 2020(4) Mh.L.J.60]; the Authority inviting the bid has no power to condone an essential condition, [VIDC / M/s Anoj Kumar (Supra)]; when a condition can be considered to be an essential condition [M/s B. Himmatlal (Supra)]; whether tender condition is essential or not has to be viewed from the angle of employer [SLL-SML (JV Consortium) (Supra)]. The power of judicial review is concerned not with the decision but with the decision making process [Tata Cellular (Supra)]; power of judicial review is to be used sparingly and in cases where public interest is involved [Sanjay Kumar Shukla (Supra)] or grant of contract was mala fide [Raunaq international Ltd. (Supra)] or intended to favour someone [Jagdish Mandal (Supra) and Nagpur Metro Rail Corporation (Supra)]; Authorities are the best judges to prescribe the terms and conditions [Educomp Datamatics Ltd. (Supra)] ; Scope of judicial review is very limited [Surendra Ramlal Tiwari (Supra)] ; in absence of any arbitrariness or irrationality- Court not to independently evaluate technical and financial bid of parties [BVG India Limited, (Supra)] ; every small or big tender cannot be sought to be challenged in writ proceedings almost as a matter of routine, [Caretel Infotech Ltd., (Supra)]; interpretation of the provisions of contract is necessarily a job of the Civil Court [Kurien E. Kalathil and ors. (Supra)], relied upon by Mr. Bhandarkar, learned Counsel, spell out the principles to be considered while deciding tender matters.

Mr. Bhangde, learned Senior Counsel, in this regard places reliance upon G.J. Fernandez (Supra) - mandatory per-conditions- non-compliance with minimum qualifying requirements - effect of and Rimjhim (Supra)- distinction between essential requirements and proof/mode thereof.

20. It is in light of the above position that the contention as to whether the petitioner and respondent no.7 have satisfied the qualifying criteria as laid down in clause 4.4.A of the NIT, is to be considered. The objections raised by the respondent no.7 against the petitioner, appear to have been considered and rejected by the TEC which is revealed from two pointwise compliance reports placed on record at pages 174 to 180 and 412 to 415, and the petitioner has been found to be eligible. Similarly the objections raised by the petitioner against the respondent no.7, appear to have been considered and rejected by the TEC, which is revealed from the pointwise compliance report placed on record at pages 361-C and 361-D, and the respondent no.7 is also found eligible.

20.1. On this count the learned Senior Counsel Mr. Bhangde contends that clause 4.3, mandates that the lead partner shall meet not less than 51% of all qualifying criteria like (a) annual turnover, (b) single work, (c) execution quantities and (d) bid capacity etc., and that would mean that in the respondent no.7/JV, i.e., GIPCL-BCCPL, the lead partner being BCCPL would necessarily have to meet 51% of all qualifying criteria, in as much as, it will have to be demonstrated that BCCPL (Bajoria Construction Company Private Ltd.) must have had executed in any continuous 12 calendar months during the last 5 years and in current year, the minimum quantity of the items of work as listed in clause

4.4.A(c) (pg.31), which requires work of (1) Bituminous Macadam (BM) to the extent of 1528.00 cum and (2) Bituminous Concrete (BC) to the extent of 944.00 cum ought to have been done by BCCPL, which has not been so done. To demonstrate that this has not been so done, he invites our attention to the pointwise compliance report by the TEC at record pg.36/ para 2, the chart in 2nd column therein, wherein it has been stated that BCCL, the lead partner in the JV has not done any work of Bituminous Macadam (BM) & Bituminous Concrete (BC). He submits that since the lead partner in the respondent no.7/JV has not executed the works as listed in serial nos.1 and 2 of clause 4.4.A (c) of the NIT, the respondent no.7/JV stood disqualified. He submits that the finding to the contrary by the TEC is clearly not in consonance with the qualifying requirements in clause 4.4.A (c) of the NIT, as the work done by the junior partner of the JV could be considered only as a supplement and not as a replacement to the lead partner having being required to satisfy this criteria.

20.2. Mr. Bhandarkar, the learned Counsel for the respondent no.7 contends that clause 4.3 permits the consideration of the work performed by the junior partner of the JV if the same is not less than 30% of the qualifying criteria and since in this case the work done by GIPL the junior partner of respondent no.7/JV was more than 30% of the quantities as specified in serial nos.1 and 2 of clause 4.4.A (c) of the NIT, the criteria was fulfilled by the JV as what was required was that the JV should collectively satisfy 100% of qualifying criteria and therefore the finding of the TEC in this regard could not be faulted with.

20.3. To consider these rival contentions an analysis of the requirement as mentioned in clause 4.3 and 4.4.A (c) (a) and (2) of the NIT is necessary. The relevant portion of clause 4.3 requires that :-

- (a) The JV collectively must satisfy 100% of all qualifying criteria prescribed
- (b) Out of which the lead partner has to necessarily meet a minimum 51% of all qualifying criteria prescribed.
- (c) The experience of the other partner of the JV shall be considered only if it is not less than 30% of the qualifying criteria.

A prima facie perusal of the above, would demonstrate that it is necessary for the lead partner (in this case BCCPL) to meet a minimum 51% of all qualifying criteria prescribed.

20. 4. The consideration of the experience of the other joint partner (GIPL) would come into play only when (1) its experience is 30% and more of the qualifying criteria and (ii) shall be considered in case of a shortfall on the part of the lead partner, so that the JV as a collective whole could fulfill 100% of the criteria. To hold otherwise would be to render the requirement of the lead partner to meet not less than 51% of the qualifying criteria, redundant. To this extent the contention of Mr. Bhangde, learned Senior Counsel for the petitioner, would be correct.

The relevant portion of clause 4.3 as quoted above, however, makes one exception to this, which is that the qualification regarding similar work must be individually fulfilled by any one partner of JV.

20.5. The expression 'similar work', as occurring in clause 4.4.A (b) of the NIT, would also encompass the items and quantities as delineated in clause 4.4.A (c) (1) to (4) of the NIT, as these are inherently related to the subject work. The TEC has accepted the position that GIPL, the other/junior partner of the respondent no.7/JV has done the work as required in clause 4.4.A (c) (1) & (2) of the NIT, and in quantities which are in excess of those prescribed as minimum therein. It is, however, necessary to consider as to whether this finding is in consonance with the requirements of the tender clauses in this regard. The opening sentence of clause 4.4.A (c) requires that the work as stipulated in the table given therein, ought to have been completed/executed in any continuous 12 calendar months during the last five years and in current year, meaning thereby, that the work and quantities stipulated therein, must have been completed/executed in one single stretch of continuous 12 calendar months and not in parts or in breaks. This naturally has to be read with the concession as enumerated in Clause 4.3, that the qualification regarding similar work must be individually fulfilled by any one partner of JV. Admittedly, BCCPL, the lead partner of respondent no.7/JV has not done any work in respect of item no.(1) Bituminous Macadam (BM) and (2) Bituminous Concrete (BC), as enumerated in clause 4.4.A (c) of the NIT, in light of which, the work done by the other joint/junior partner - GIPL will have to be considered. Since the work done by GIPL, the junior partner to the JV, is to be considered, it will thus have to be seen whether GIPL, individually fulfills the requirement of having performed at least one similar work, which would naturally include all the quantities as enumerated in Clause 4.4.A (c) (1) to (4), within the time period as stipulated in Cl.4.4.A.(c) of the NIT. The work in the present tender is of Improvement to the stated road having a length of 16.900 Kms. and the qualifying criteria includes execution of the minimum quantities of work, within the time as stipulated in Clause 4.4.A(c).

20. 6. The certificates in this regard as submitted by GIPL, junior partner of the respondent no.7/JV have to be considered in the above background.

Six certificates have been placed by the respondent no.7, in support of the plea that its junior partner, GIPL, satisfies the requirement as stipulated in clause 4.4.A (c), which are at pages 464, 465, 466, 468, 469 and 470 of the record. The details given therein as regards the four works and quantities enumerated in clause 4.4.A (c) (1) to (4) are as under :-

Sr. No

Certificate period / page no./ quantity executed by GIPL

Tender Requirements in CUM

Bituminous Macadam (BM)

Bituminous Concrete (BC)

C.C.M.-20 & above grade (Cement Concrete Macadam)

Dense Bituminous Macadam (SDBM)

1528.00 CUM

934.00 Cum

6888.00 Cum

1534.00 Cum

1

21/1/14 to 25/12/14 (pg.466)

BM= 1532.48 Cum BBM=22729.00 sq. Mtr ? (1/4/14 - 25/12/14)

778.243 Cum

2

1/4/14 to 31/3/15 (pg.468)

BM= 414.07 Cum

203.76 Cum

3

12/12/14 to 24/11/15 (pg.646)

BM= 414.07 Cum

203.76 Cum

4

18/3/15 to 17/3/16 (pg. 469)

1132.00 Cum

5

3/12/15 to 2/6/16 (pg.465)

CCM-20 = 64.17 Cum

CCM-25 = 120.06 Cum

184.23 Cum

6

3/11/15 to 2/5/17 (pg.470)

RCC M-25 = 867.65 Cum

RCC M-30 = 1035.93Cum

1903.58Cum

This table demonstrates that the requirement of clause 4.4.A (c) of GIPL, having executed in any continuous 12 calender months, the minimum quantities as enumerated in (1) to (4) appended therein, has not been satisfied, rather on the contrary, the quantities executed for different periods beyond a period of continuous 12 calender months have been clubbed together, in so far as the items and quantities as listed in rows (1) & (2) of Clause 4.4.A. (c) of the NIT, to claim that the requirement thereof has been complied with by GIPL, the other joint/ junior partner of the respondent no.7, which clearly is contrary to what is postulated by the above clause of the NIT. It is thus apparent that this requirement, in so far as that stipulated in Clause 4.4.A(c) items (1) & (2) is clearly not fulfilled by GIPL, as a result of which, the respondent no.7 could not have been held to have satisfied the qualifying criteria, as laid down in clause 4.4.A (c) of the NIT.

20.7. In so far as the requirement as contained in item (3) of having executed work of C.C.M-20 and above grade to the extent of 6888.00 Cum, is concerned, admittedly the table above demonstrates that this also has not been satisfied by GIPL, the other joint partner of the respondent no.7/JV, as even accepting the pointwise compliance report, at pg.361-C, of the TEC at its face value, GIPL, is

said to have done work only to the extent of 4541.21 Cum as against the required quantity of 6888.00 Cum. The TEC, has for holding that this requirement is satisfied has considered the work in this regard having been performed by the lead Partner BCCL of the respondent no.7/JV, which is claimed to have executed work of item no.3 to the extent of 20333.4 Cum by holding that the same could be considered as this quantity was more than 30% of the qualifying criteria of 6888.00 Cum. The TEC, in our considered opinion, has totally failed to understand and grasp the meaning of this phrase in clause 4.3 of the NIT. The relevant portion of clause

4.3, is again enumerated under for a proper analysis of the same :

" 4.3. -----

The lead partners shall meet not less than 51% of all qualifying criteria like annual turn over, single work, execution quantities and Bid capacity etc. The Joint Venture must collectively satisfy 100% criteria of qualifying criteria above. The experience of the other Joint partner shall be considered only if it is not less than 30% of the qualifying criteria as mentioned in the qualifying criteria like Annual Turn Over, Execution of Quantities, Bid Capacity, machinery, technical personnel, financial positions. The qualification regarding similar work must be individually fulfilled by any one partner of JV."

A perusal of the above clause would clearly indicate that the expression "The experience of the other Joint partner shall be considered only if it is not less than 30% of the qualifying criteria", has been used in the context where the lead partner (BCCPL), is unable to meet with 100% of the qualifying criteria and there is a shortfall, only in which case, if the experience of the other joint partner i.e. the junior partner GIPL in this case, is not less than 30% of the qualifying criteria, then its experience would be considered to enable the JV to satisfy 100% of the qualifying criteria. The words 'of the other joint partner', clearly mean the experience of the partner, other than the lead partner. Any other meaning would, render the use of the words 'of the other joint partner', meaningless. The TEC, in clear contradiction to the above, reversed the order of things as contemplated by the above portion of clause 4.3 of the NIT and thus erred in considering the experience of the lead partner, when the 'other joint partner', failed to meet the requirement as stipulated in item (3) of Clause 4.4.A(c) of the NIT, which clearly was not permissible in light of the language of the terms of the NIT.

20.8. The consideration and clubbing by the TEC, of the performance of GIPL as well as BCCPL, i.e. both the constituents of respondent no.7/JV, was also not permissible in light of the specific requirement as postulated by clause 4.3 to the effect that the qualification regarding similar work must be individually fulfilled by any one partner of JV. That clubbing and consideration of the performance of both the constituents of the respondent no.7, contrary to the above, has been done is clearly apparent from the pointwise compliance report placed on record

in respect of respondent no.7 at page 361-C, wherein in response to point no.2, in column no.2, the table enumerated therein, at least in respect of item No.(3) M-20 and above of Cl.4,4,A(c) of the NIT, demonstrates the clubbing of the quantities of GIPL and BCCPL, as the required quantity is 6888 cum., out of which GIPL is said to have performed the work of 4541.21 cum. and BCCPL is said to have performed the work of 20,333.4 cum., which is not permissible, in light of the requirement of clause 4.3 of the NIT, which mandates that the qualification regarding similar work must be individually fulfilled by any one partner of the JV.

20.9. The reliance placed by the respondent no.7, on the certificate dated 12/2/2019 issued by the Executive Engineer, P.W.D., Yavatmal, in favour of BCCPL, the lead partner of the respondent no.7 /JV, in support of it having satisfied the qualifying criteria, as required in clause 4.4.A (b) of the NIT, would also not be justified, as rightly urged by Mr. Bhangde, learned Senior Counsel for the petitioner, for the reason that clause 4.4.A (b) uses the expression "satisfactorily completed", as against which the certificate dated 12/2/2019 categorically states that the work of the road has been completed to the extent of 95%, which would indicate that the work was not fully completed, but was still in progress, taking it out of the meaning of the expression "satisfactorily completed".

20.10. Thus, on both these counts the respondent no.7, fails to satisfy the eligibility/qualifying criteria as laid down in the NIT, which clearly is an essential condition and the contrary decision of the TEC, in this regard cannot be sustained, which has totally failed in reading and applying the qualifying criteria, in this regard.

21. The objection to the eligibility of the petitioner raised by Mr. Bhandarkar, learned Counsel for the respondent no.7, was that the petitioner had not completed one work of a similar nature as required under clause 4.4.A (b) of the NIT as the work done by the petitioner under the sub-contract with M/s Madhucon Projects Ltd., was not of the required length but was of a lesser distance. The argument has some substance to it. Though clause 4.4.A (b) requires the satisfactory completion of at least one similar work not less than value of Rs.2853.64 lacs (29 crores approximately) and the work performed under the sub-contract with Madhucon Projects Ltd. by the petitioner, is valued at Rs.96.13 crores, however, the expression "one similar work not less than value of Rs.2853.64 lacs" has to be construed not only in light of the financial value enumerated in clause 4.4.A (b) but also has to be considered in light of the nature of the work to be performed under the NIT, which would include the size and length of the work, tendered for. This is further substantiated from clause 4.2, the General Instructions to the bidder which reads as under :-

"4.2 All bidders shall include the following information and documents with their bids in Section 2.

(a) ..

(b) Total monetary value of construction work performed for each of the last five years;

(c) Experience in works of a similar nature and size for each of the last Five years and details of works underway or contractually committed and clients who may be contacted for further information on those contracts."

21.1. This position has not been controverted by learned Senior Counsel Mr. Bhangde, on the contrary, he asserts that the petitioner has completed the requirement as per the qualifications enumerated in the NIT, in support of which he places reliance upon the work completion certificate dated 5/12/2018 (pg.152).

21.2. The word 'similar', is defined in the Websters dictionary as under :-

"Sim-i-lar : like, much the same, the two rooms are of similar size II (geom. Of figures), having the same shape."

21.3. The word also means and indicates a resemblance; same kind; features; togetherness; nearest type; The expression 'similar work', is not capable of being defined precisely, and may be said to be a word of ambiguous sense that the mere stipulation in a statute that something should be done similarly is not enough by itself to signify the degree of similarity with which that thing must be done. A thing can be done similarly without its being a slavish copy of the model [CIT/.T.V.S.I. & Sons. AIR 1976 SC 255 (260)].

21.4. The Apex Court in the case of Nat Steel Equipment (P) Ltd. v. Collector of Central Excise, (1988) 1 SCC 605 while considering classification of goods under the provisions of the Central Excises and Salt Act, 1944 under various tariff items, held as under :

"5. It is manifest that these equipments were electrical appliances. There was no dispute on that. It is also clear that these are normally used in household and similar appliances are used in hotels etc. The expression "similar" is a significant expression. It does not mean identical but it means corresponding to or resembling in many respects; somewhat like; or having a general likeness. The statute does not contemplate that goods classed under the words of "similar description" shall be in all respects the same. If it did these words would be unnecessary. These were intended to embrace goods but not identical with those goods. If the items were similar appliances which are normally used in the household, these will be taxable under Tariff Item 33-C." (emphasis supplied)

This indicates the imprecise nature of the word.

21.5. However, in relation to work required to be performed under a tender, the word 'similar' in association with the word 'work', (similar work), in light of the fact that the 'work' required to be performed, is specified, is capable of being defined precisely, in as much as it can be taken to be synonymous with the work

to be performed under the tender and thus would require the compliance with the work, specified. Any other meaning to this expression, would not only render the tender condition requiring a 'similar work' to have been performed as redundant, but also bring in and permit all sorts of variations even of a downward nature to claim to be considered under the expression.

21.6. In this regard it is material to note that the nature of work to be performed as per the NIT is "Improvement to Chargaon Shirpur Kalamna to Chandrapur District border (Wanoja) in KM 182/100 to 204/500 SH-317 (length 16.900 km.) under C.R.F. TQ. Wani, District : Yavatmal". The words in a tender document cannot be ignored or treated as redundant or superfluous- they must be given meaning and their necessary significance [VIDC / Anoj Kumar (Supra)]. Thus, the expression "at least one similar work" has to be necessarily considered in light of the work tendered for, including the length of the work tendered for. In the NIT the length of the work to be tendered for is mentioned as 16.900 km. as against which the certificate dated 5/12/2018, annexed by the petitioner, mentions that the petitioner has successfully completed the work of 16.835 km., which is less than the work to be done under the NIT. Thus, though the petitioner qualifies the financial criteria, in so far as the requirement of having satisfactorily completed at least one similar work, is concerned, the petitioner clearly falls short.

22. The contention of Mr. Mohgaonkar, learned Counsel for the respondent nos.5 and 6, and Mr. Bhandarkar, learned Counsel for the respondent no.7, to the effect that the petitioner was directly not entitled to the certificate dated 5/12/2018, in light of clause 29 of the MOU dated 15-17/2/2018 between the petitioner and Madhucon Projects Ltd. and the format of the certificate having been prescribed in Schedule-I under clause 12.2 and 12.4 of the EPC agreement dated January, 2017. For this consideration of clause 29, of the MOU dated 15-17/2/2018 is necessary, which clause is quoted as under :-

"29. Completion Certificate

29.1 A Completion Certificate will be issued by Madhucon to the RKCPL upon completion of the Scope of Work to the full satisfaction of Madhucon/Employer which shall be only after Madhucon receives a similar Completion Certificate for the portion of work executed by the RKCPL from the Employer/AE after successful completion of all the outstanding works, rectification of Defects as per the checklist of MPL/Employer and site clearance etc., to the satisfaction of Madhucon.

29.2 Full and Final Payment will be released only when the Project Completion Certificate is provided to Madhucon by the Employer, for the portion of work executed by the RKCPL."

22.1. Clause 29.1 speaks about of completion certificate to be issued to the petitioner, upon completion of scope of work to the full satisfaction of Madhucon/employee which would be only after Madhucon receives the similar completion

certificate for the portion of work executed by the petitioner from the employer/AE after successful completion of all the outstanding work, rectification of defects as per the check-list. This is only a modality for issuance of the work completion certificate by M/s Madhucon Projects Ltd. to the petitioner, of having performed the work under the sub-contract. This does not deter from the fact that the work under the sub-contract was indeed completed by the petitioner, to the satisfaction of the respondents 5 & 6. In fact the respondents 5 & 6, in their reply affidavit dt.27/1/2020, in para 8 (pg.433) have categorically stated that they have no difficulty if the certificate is demanded as per the terms and conditions by the petitioner through its principal contractor. Thereafter on a demand so made by M/s Madhucon Projects Ltd. to the respondent no.5 by a letter dt.12/2/2020 (pg.533), a work done certificate has been issued to M/s Madhucon Projects Ltd. by the respondent no.5, on 27/2/2020 (pg.536) on the basis of which M/s Madhucon Projects Ltd. has issued a certificate in favour of the petitioner (pg.534). In this regard what is material to note are two things :

(a) The work done certificate dt.27/2/2020 (pg.536) in favour of M/s Madhucon Projects Ltd. has been issued by none other than Mr. A. B. Gaikwad, the Chief Engineer (NH) MSRDC, Mumbai / respondent no.5, the same person who earlier on 20/8/2019 (pg.182) has issued the letter canceling the experience certificate dt.5/12/2018, issued by the respondent no.6, to the petitioner.

(b) The work done certificate dt.27/2/2020 (pg.536) categorically makes a mention of the sub-contracting in favour of the petitioner and the satisfactory completion of the same. Not only this, the work completion certificate further enumerates that "As per terms and conditions of the sub-contract MOU, a completion certificate has issued by Ms/ Madhucon Projects Ltd. to M/s R.K. Chavan Pvt. Ltd. which may be considered.," which could only be related to the experience certificate dt.5/12/2018 as issued by the respondent no.6 to the petitioner.

This clearly indicates that Mr. A. B. Gaikwad was aware of the satisfactory completion of work under the sub-contract by the petitioner and that the sub-contracting was permissible and within the terms of the EPC dt. January 2017, in spite of which he played into the hands of the respondent no.7, for reasons unsaid, in issuing the letter dt.20/8/2019 (pg.182) canceling the experience certificate dt.5/12/2018, on the ground that the sub-contracting in favour of the petitioner was not in terms of clause 3.2 of the EPC.

22.2. That apart, clause 29, upon which much reliance is being placed, is contained in the MOU dt.15-17/2/2018, between M/s Madhucon Projects Ltd. and the petitioner. The modality of M/s Madhucon Projects Ltd. issuing a completion certificate to the petitioner, has nothing whatsoever to do with the respondent nos. 5 and 6, or for that matter the respondent no.7, as they were never parties to this MOU. It was only M/s Madhucon Projects Ltd. who could insist upon a compliance and adherence with what was stated in clause 29 of the MOU, which as is obvious, it did not.

22.3. A copy of the MOU dt.15-17/2/2018, was already provided by the respondent no.6, to the respondent no.4 under its letter dt.13/8/2019 (pg.160), in spite of which the respondent no.4, did not feel that there was anything amiss with the experience certificate dt.5/12/2018. Thus clause 29 of the MOU dt.15-17/2/2018, does not come to the rescue of the respondents in any manner.

22.4. Mr. Mohgaonkar, learned counsel for the respondent nos.5 and 6, lays much stress on the formats of the provisional certificate and completion certificate by inviting our attention to clauses 12.2 & 12.4 of the EPS dt. January 2017 and submits that the experience certificate dt.5/12/2018, issued by the respondent no.5, was not in the proper form as provided and therefore could not have been considered. There is no merit in this contention as forms and formats can never override the substance. Merely because the certificate was not in proper form, would not mean that the work has not been done at all.

22.5. It is needless to mention that the purpose and requirement of an experience certificate, is to ascertain the capacity and capability of a tenderer to perform the work intended to be done, and any document demonstrating this position, would comply with the requirement of an experience certificate, unless the terms of the NIT specified that an experience certificate in a particular form/format alone would be acceptable to comply with the qualifying criteria, which is not so in the instant matter. As stated above the substance and not the form is material.

22.6. In the present matter it is nobody's case that the petitioner had not satisfactorily performed and completed the work under the sub-contract. The satisfactory completion of work, has been certified by the respondent no.6 under the certificate dt.5/12/2018, who as already held was competent to do so. Such certification was also granted by the respondent no.5, though belatedly. Though a procedure is laid down in clauses 12.2. and 12.4 of the EPA and clause 29 of the MOU, that however, does not prevent the respondent no.6, in issuing the certificate dt.5/12/2018, which only recorded the factual position that the work was satisfactorily completed, the respondent no.6, being the authority under whom and for whom, the work under the sub-contract was done by the petitioner. Holding otherwise, would mean that a sub-contractor, could always be held at ransom by the Contractor, who could refuse to issue an appropriate certificate, though the work stood completed satisfactorily. The contentions are thus rejected.

23. The conduct of the partner of BCCPL, Mr. Sumit Bajoriya, as reflected from the record is clearly deplorable and requires to be deprecated. It tends to criminality. Though Mr. Bhandarkar, learned Counsel for the respondent no.7, submits that the allegations are false and are denied by the respondent no.7, the record speaks otherwise. The entire episode of Mr. Sumit Bajoriya, creating a ruckus and taking away the material documents comprising of the tender scrutiny sheet and the attendance register on 1/8/2019, from the office of the respondent no.4, is recorded in the pointwise compliance report, at page 174 to

180 of the record. The fact of return of these documents on the next date by the other partner of the JV and the receipt of the same under the panchanama drawn in presence of the officers of the respondents 1 to 4, also finds place in the point wise compliance report. Due to this action of Mr. Sumit Bajoriya, the further opening of the envelope 2 containing the financial offer of the respondent no.7, could not be done and the entire tender process was required to be postponed, which ultimately came to be done on 14/8/2019. This being the position, one fails to understand as to why appropriate proceedings under the provisions of I.P.C. were not initiated by the department against Mr. Sumit Bajoriya. Failure to do so, clearly amounts to a dereliction of duty on part of the respondent no.4, as such activities cannot be permitted to be tolerated, for doing so, would not only undermine the entire process, but would also indicate that unscrupulous elements could get away with anything.

24. The speed at which things happened post the communication dt.31/8/2019, canceling the tender of the petitioner, is also stupendous and incomprehensible, which is indicated as follows :-

Sr. no.

Date

Event

1

31/08/19

Tender of petitioner canceled by respondent no.4.

2

31/08/19

Letter is issued by Respondent no.4, calling respondent no.7, for discussion on 31/8/2019 itself.

3

31/08/19

Letter is received by the respondent no.7, however mode is not apparent.

4

31/08/19

Respondent no.7 reports for discussion which is said to have taken place.

5

31/08/19

Reply is given by the respondent no.7 on 31/8/2019, expressing its willingness

to grant a rebate of 2.28% on the tender bid price and the condition that the respondent no.7 should not be required to deposit additional Security Deposit.

6

31/08/19

Respondent no.4, in his capacity as Executive Engineer, PWD, Pandharkawda, accepted the proposal of the respondent no.7, and asks it, to deposit the additional security deposit

7

03/09/19

Bank Guarantee for additional security deposit submitted by Respondent no.7.

It is as if, everything was made ready, awaiting the decision to cancel the tender of the petitioner.

25. The entire situation leading to the present petition, clearly is indicative of the absolutely callous and casual attitude of the respondents and specifically the TEC, constituted for the subject tender. The TEC, has not at all applied its mind to the requirement of the qualifying criteria in the tender conditions vis-a-vis the documents submitted by the respondents to satisfy the same. There is no record maintained even worth the name, which could throw some light on the proceedings. The entire conspectus of facts smacks not only of malafides, but also of favoritism, indulgence, interference, which compels us to hold that the entire tender process is vitiated. Though public interest is involved, that cannot be a ground to countenance, what has happened and the manner in which it has happened, in the present case.

26. For the reasons stated above, we quash the entire tender process and direct the respondents to recommence the process, with a word of caution, that no authority, whomsoever, should permit or tolerate any interference in the entire process, from anyone whomsoever, of any nature whatsoever and the eligibility/qualifying criteria should be scrupulously adhered to, in all aspects.

27. We further direct the initiation of an enquiry into the conduct of Mr. A. B. Gaikwad, the Chief Engineer (NH) of MSRDC, the person issuing the letter dt.20/8/2019 and the certificate dated 27/2/2020 (pg.536-537) in light of what has been stated in this judgment and to submit a report to this Court within a period of one month from today. The enquiry shall be conducted by an officer not below the rank of Secretary in the Ministry of Transport, National Highway Division.

Rule accordingly. In the circumstances, there shall be no order as to costs.