

(2022) 07 BOM CK 0033
In the Bombay High Court
Case No : Writ Petition (L) No. 6731 Of 2022

Sagar Lookouts

APPELLANT

Vs

Maharashtra Housing And Area Development Authority And
Ors

RESPONDENT

Date of Decision : 14-07-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Indian Partnership Act, 1932 — Section 14

Citation : (2022) 07 BOM CK 0033

Hon'ble Judges : Dipankar Datta, CJ; M. S. Karnik, J

Bench : Division Bench

Advocate : Ravi Kadam, Shreeyansh U. Lalit, Nikhil Waje, Vishesh Srivastav, Prem Gada, Shravani Manore, Ashutosh R. Gole, Dr. Milind Sathe, P. G. Lad Sayali, Milind More, Hemant Haryan, Ram S. Apte, Sachin Dhakephalkar

Final Decision : Disposed Of

Judgement

M. S. Karnik, J

1. The petitioner – Sagar Lookouts (hereafter “Sagar Lookouts”, for short), a duly registered partnership firm has filed this writ petition under Article 226 of the Constitution of India for the following substantive reliefs :-

“A. That writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction be issued and the decision dated 17/02/2022 (Exhibit – H) of the respondent No.2 holding the petitioner as ineligible in respect of Tender No.3 dated 01/12/2021 be quashed and set aside and the Respondent No.1 and 2 be directed to hold the Petitioner as eligible and take all further proceedings in the said Tender No.3 in accordance with law.

B. The Respondents be directed to withdraw and cancel the Tender No.4 dated 18/02/2022 (Exhibit – I).

C. In the alternative, the Respondent No.1 and 2 be restrained and prohibited

from rejecting the technical bid of the petitioner in Tender No.4 on the same grounds as mentioned in the declaration of ineligibility (Exhibit – H) in respect of Tender No.3.

C-1. That the record and proceedings the decision of the Respondent No.2 published on 12/04/2022 (Exhibit - L) thereby declaring the Petitioner as ineligible in Tender No.4 dated 18/02/2022 (Exhibit – I), be called for and after examining the legality, validity and propriety thereof, the decision of the Respondent No.2 published on 12/04/2022 (Exhibit – L) thereby declaring the Petitioner as ineligible in Tender No.4 dated 18/02/2022 (Exhibit – I), be quashed and set aside and the Respondents be directed to hold the bid of the Petitioner as eligible and take further proceedings accordingly.”

2. At the outset it is pertinent to mention that by an order dated May 6, 2022, this Court had granted interim relief. The respondent no. 1 - Maharashtra Housing and Area Development Authority (hereafter “MHADA”, for short) was directed not to issue work order for a period of ten days. On May 13, 2022, the coordinate Bench passed the following order protecting the interest of both the parties, the relevant portion of which reads thus :-

“5] In view of the aforesaid, we are of the view that the following order will be protect the interest of both parties :

A] The petitioner shall file an undertaking of its Managing Partner viz. Mr. P.N. Joshi, who shall unconditionally undertake to pay amount as may be determined by this Court. Let such undertaking be filed on 17.05.2022 in the Registry and copy shall be furnished to MHADA forthwith.

B] Since all the financial bids have been opened, if the petitioner’s bid is found to be lower than that of project proponent, Mr. Jagtiani undertakes to withdraw the petition within a week of having been informed to them. That statement is accepted.

C] In view of the above, it will be open for MHADA to open the petitioner financial bid without prejudice to MHADA’s rights and contentions.

D] In view of above, we believe that the interest of MHADA is sufficiently protected. Hence, the ad-interim order dated 06.05.2022 shall continue to operate till 08.06.2022.

E] Stand over to 09.06.2022.”

3. The interim order was continued from time to time.

4. Mr. Ravi Kadam, learned senior advocate appeared for Sagar Lookouts. Dr. Milind Sathe, learned senior advocate appeared on behalf of MHADA and respondent no. 2 - Mumbai Housing and Area Development Board (hereafter “MHADB”, for short). Mr. Ram Apte, learned senior advocate appeared on behalf of respondent no. 4 – M/s. Jupiter Advertisers.

5. The facts are briefly set out. On February 18, 2022, MHADB invited bids for advertisement rights of 106 hoarding sites on its properties in Mumbai for a term of 15 years. By the notice inviting tender dated December 1, 2021, a Request For Proposal (hereafter "RFP", for short) under Swiss challenge came to be issued. Clause 2 of the 'RFP' provides for the request for proposal process. Clause 2.1 which has a bearing on the issue under consideration, provides for consortium conditions stipulating that "Consortium of any kind is not allowed under this RFP."

6. We only refer to the relevant clauses brought to our notice by the arguing counsel, as even the decision in the present case would turn on such clauses. Clause 2.5 relates to pre-bid queries on RFP which reads thus :-

"2.5. Pre-Bid Queries on RFP

The Bidders shall send in their pre-bid queries as prescribed in the format specified in Annexure-1 (in word document format) of this RFP to the e- mail address mentioned in Section 2.4 of this RFP. The response to the queries will be published on www.mahatenders.gov.in. Queries in different format will not be entertained and also no telephonic queries will be entertained. The response to queries from MHADB shall become integral part of RFP document."

7. Clause 3.2 prescribes the eligibility criteria which stipulates thus :-

"3.2. Eligibility Criteria

The Bidder shall fulfill all of the following eligibility criteria independently, as on date of submission of Bid.

SN

Eligibility Criteria

Supporting Documents

1.

The Bidder must be registered as per the relevant Act (e.g. Companies Act or Partnership Act or any other relevant Act) in India.

Copy of Certificate of Incorporation of equivalent.

2.

The Bidder should have average annual turnover of INR 10 Crores for the last 3 (Three) financial years (FY 2017-18, FY 2018-19 & FY

2019-20) from advertising services for the Advertising Media.

Copy of the audited Profit and Loss Statement for each of the last three financial years (FY 2017- 18, FY 2018-19 & FY

2019-20)

And

a letter (on the letter head) from the practicing Chartered Accountant duly signed & stamped and clearly mentioning the turnover details of each year in the last three financial years (FY 2017- 18, FY 2018-19 & FY 2019-20).

3.

The Bidder should have positive net worth as on 31st March 2020

A letter (on the letter head) from the practicing Chartered Accountant duly signed and stamped and clearly mentioning the net worth as on 31st March 2020.

4

The Bidder should have an

License or permit by any

experience of at least 10 (Ten) years in erection & handling of city advertising/ outdoor advertising media of 50 Hoardings each of minimum 450 sq.ft. in corporation/Authority area.

planning authority.

5.

The Bidder should have GST registration

Valid GST registration Certificate

6.

The Bidder must not have

Self-certification signed by

been blacklisted/

the Authorized Signatory

terminated for fraudulent

on the letter head of

practices by any of its

Bidder.

clients including

Central/State UT

Government departments/

Ministries/ Government
undertakings or
Corporations / Government
Bodies and PSUs in India or
abroad, as on the date of
submission of bid.
(emphasis supplied by us)

8. The bid opening and evaluation process is postulated under Clause 4. Clause 4.1.4 provides as under :-

"4.1.4 The Bid Evaluation Committee may ask for meetings with the Bidders to seek clarifications on their Bids. The Bidder shall submit requisite supporting documents/ certificates on the credentials. The committee may visit Bidder's client site to validate the credentials/citations claimed by the Bidder."

9. Clause 4.2 thereunder prescribes for the overall evaluation process. The relevant sub-clauses 2 and 3 of Clause 4.2 read thus :-

"4.2.2] Only those Bidders fully satisfying the Eligibility Criteria shall be considered for further evaluation.

4.2.3] Amongst the Bidders who are considered for financial evaluation, the Bidder with highest financial quote will be adjudged as the "Successful Bidder". If successful bidder is other than original proponent he has to pay the cost of DPR to the original proponent."

10. The MHADB for the purpose of scrutinizing all the documents submitted in the technical bid received from the bidders in E-tender, arranged a meeting on March 21, 2022 for determining the eligibility/non-eligibility of the bidders. Five bidders viz. Wallop Advertising Private Limited, Alakh Advertising and Publicity Private Limited, Global Advertisers, Sagar Lookouts (petitioner) and Signpost India Private Limited were present in the said meeting. The Bid Evaluation Committee (hereafter "Committee", for short) scrutinized the documents submitted by the bidders on March 24, 2022. So far as Alakh Advertising and Publicity Private Limited and Signpost India Private Limited are concerned, on scrutiny of their technical bid, it was seen that these bidders had experience of 50 advertisement boards and hence suitable for eligibility. The Committee found M/s. Global Advertisers and M/s. Wallop Advertising Private Limited ineligible. So far as the petitioner is concerned, it was observed by the Committee as under :-

"Similarly, when the documents submitted by M/s. Sagar Lookout were scrutinized, they have submitted a list of 96 advertisement in the documents submitted with the bid. Some advertisements in that, have no objection certificates, of Satara C.H.S. Limited, Consent Advertisement Pvt. Ltd. M/s. Urja

Developers

& Beautifications, Chiplun Municipal Corporation, Grampanchayat Savroli, Palidevde, village Panchayat Devnhal, and the no objection certificate of Forest Conservator Alibag was also seen. However, as the said bidder was not seen to have experience of erecting 50 advertisement boards, when they were told to be non-eligible, M/s. Sagar Lookout when requested that they may be given time to submit their explanation, the committee gave them time to submit the explanation upto 3.00 p.m. on 25.03.2022. Similarly, when the other bidders Alakh, Signpost and Jupiter Advertisers (original indicator) also when requested that they may be given time to submit their objections, the Committee gave time to them also till 3.00 p.m. on 25.03.2022 for submitting their objections and the transaction of the meeting was completed.”

11. Sagar Lookouts thereupon submitted its explanation vide its letter dated March 25, 2022 which is reflected in the report of the Committee in the meeting held on March 25, 2022. The explanation of Sagar Lookouts is reproduced in the report dated March 25, 2022 of the Evaluation Committee and the same reads thus :-

“M/s. Sagar Lookout vide its letter dated 25.03.2022 submitted the following explanation.

1. Sagar Lookout has given the list of 96 advertisement boards. As they are all eligible and legal, they should be considered valid.
2. The definition of authority is given in the tender documents, which is as follows.

“Authority means any agency, legislative, judicial or executive authority, public or statutory person, whether autonomous or not, of the GOI (Government of India) or GOM (Government of Maharashtra) or any local authority including MHADA, its division or any other sub-division or instrumentality or any thereof”.

As per above definition, the advertisement company M/s. Sagar Lookout has been given permission by the Government of India/Forest Department of Environment Department to erect advertisement boards and there are such 9 advertisement boards.

3. Various gram panchayats in Raigad District have given no objection certificates regarding a total 16 advertisement boards to the advertisement company M/s. Sagar Lookout. Gram Panchayat is a part of local autonomous body. As per Government of India Act, 1935, the Gram Panchayat as has been given the autonomous status, Gram Panchayat falls under the definition of Authority.

4. M/s. Sagar Lookout has been given permission by the society Satara Housing Society, Chunabhatti, Mumbai to erect advertisement board in its premises.

5. The total 45 advertisement boards of the advertisement company M/s. Sagar Lookout, total 8 advertisement boards of M/s. Urja Developers & Beautification

Pvt. Ltd., total 1 advertisement board of M/s. Concept Advertisement Pvt. Ltd., total 8 advertisement boards of M/s. Mystical Polyplast, total 6 advertisement boards of M/s. Mystical Technoplast, total 9 advertisement boards as per permission given by the Forest Department, the total 16 advertisement boards erected as per the no objection certificates issued by various gram panchayats in Raigad district, total 2 advertisement boards erected as per no objection certificate issued by Chiplun Municipal Council, and similarly, 1 advertisement board erected in the premises of Satara Housing Society, Chunabhatti, thus total 96 advertisement boards are considered eligible.

6. M/s. Sagar Lookout being a partnership firm, its partners are Mr. Prashant Nishikant Joshi and Mrs. Shubhadra Nishikant Joshi. The directors of company M/s. Urja Developers & Beautification Pvt. Ltd. are Mr. Prashant Nishikant Joshi, Mrs. Ashwini Prashant Joshi and Mrs. Shubhadra Nishikant Joshi. M/s. Mystical Polyplast being a proprietorship firm, its proprietor is Mr. Prashant Nishikant Joshi, the directors of the company M/s. Mystical Technoplast Pvt. Ltd. are Mr. Prashant Nishikant Joshi, Mrs. Ashwini Prashant Joshi and Mrs. Shubhadra Nishikant Joshi and the directors of the company M/s. Concept Advertising Pvt. Ltd. are Mr. Prashant Nishikant Joshi, Mrs. Ashwini Prashant Joshi. That is, in all the companies, son, mother and wife being from the same family, Mr. Prashant Nishikant Joshi is the partner in most of all companies. The license holder of all the advertisement boards being Mr. Prashant Nishikant Joshi, the income of the said advertisement business comes into M/s. Sagar Lookout only. As per the guidelines of Municipal Corpn. of Greater Mumbai, the analysis of agency, gantry and hoardings is given. In all the licenses of M.C.G.M. the name of Mr. Prashant Nishikant Joshi only is given as license holder and in all the licenses the type of advertisements is mentioned as Hoardings. Therefore, all the hoardings are eligible and legal. Similarly, as per the definition of Authority in the R.F.P. in tender document, an agency is also an Authority and as per the definition of Agency as per the guidelines of M.C.G.M., the partnership organization, company/firm is included in agency.

7. The procedure of various authorities regarding permission for hoarding are different. Therefore, the licenses are issued by the municipal corporation. But no objection certificates are issued by the Gram Panchayats. Permission is issued by the municipal councils and forest department; and organizations such as MSRDC issue LOA and approved lay out. The said procedure is as per the rules of Government of India and State Government. As per Hon. High Court, the own experience of a person is considered valid for the work of the said person, partner/director of the industry or of the organization. (Case No.20130/2020 and also Case No.4447/2015).

8. The Railways and Airport Authority (MIHAN) are not planning authorities but, Government authorities. After considering all the above points, our hoardings are eligibility as per the guidelines of Central Vigilance Commission, Compaction Commission of India (GOI).

12. The report records the objections of the other bidders Alakh, Signpost and Jupiter Advertisers vide letters dated 23.03.2022 and 25.03.2022 in respect of the tender documents submitted by M/s. Sagar Lookout. The objections are :-

1. Even after raising objections before the Scrutiny Committee by our letter dtd. 23.03.2022, by neglecting it, the Scrutiny Committee is assisting the other bidder for accepting their technical bid even when it is not eligible technically.

2. The bidders who have submitted the experience in their own name should be taken into consideration. Therefore, the documents of M/s. Urja Developers and Beautification Pvt. Ltd. and Satara Housing Society should not be considered.

3. As the tender has been published by MHADA for advertisement boards, as Gantry Display is in FOB, as it does not fit the definition of advertisement board, it should not be taken into consideration.

4. As the tender for advertisement board is for Mumbai, for that experience of Gram Panchayat, Forest Department and other organizations as are not planning authority, the certificates given by them should not be considered.

5. M/s. Sagar Lookout has submitted in their documents, the letter of the Thane Municipal Corporation for erection of hoarding. After the said letter, the erection of hoarding is done and then the license is given. Therefore, that should not be taken into consideration.

6. The Acceptance Letter of MSRDC is attached. It cannot be said to be license.

From the discussion in the meeting held on 24.03.2022 and explanation submitted by Sagar Lookout, objections of Alakh, Signpost and Jupiter Advertisers and from the documents in the file, the report of the Scrutiny Committee is as follows -

1. From the documents submitted by M/s. Wallop Advertising Pvt. Ltd. it is seen that the company has been registered on 29.06.2013. Therefore, as the criteria of minimum 10 years experience is not fulfilled, their tender is considered non-eligible.

2. Out of the 88 hoardings submitted by Global Advertising Pvt. Ltd. there are only 9 hoardings in their name, out of them 5 hoardings are more than 450 sq. mtrs. area. As the condition of minimum 50 hoardings is not complied, their tender is considered non-eligible.

3. From the documents submitted by Alakh Advertising and Publicity Pvt. Ltd. it is seen that the company is registered on 28.03.2010. Also, as the eligibility criteria is fulfilled their tender is considered eligible. The full details regarding the criteria is attached.

4. From the documents submitted by M/s. Signpost Indian Pvt. Ltd. it is seen that the said company is registered on 19.02.2008. Also, as the eligibility criteria is fulfilled their tender is considered eligible. The full details regarding the criteria

is attached.”

13. The findings/observations of the Committee, declaring Sagar Lookouts ineligible in the meeting held on March 25, 2022, are found in paragraph 5 of the report which reads thus :-

“5. It is seen from the documents submitted by Sagar Lookout that the company was registered on 19.12.2007. When the list submitted by Sagar Lookout is perused, it is seen that Sagar Lookout has 47 advertisement hoardings in its own name. The remaining advertisements as are in the names of Satara C.H.S., Urja Developer & Beautification, Mystical Polyplast, M/s. Mystical Technoplast, they have not been taken into consideration. Also, as there is no mention of size in the memo issued by the Forest Conservator Alibag, regarding erection of advertisement board, it has not been taken into consideration. Similarly, as there is no mention of size in the hoarding given by Municipal Council, Chiplun, that has not been taken into consideration.

The no objection certificates of Sarpanch and Gramsevak of Gram panchayat Savroli, Palidevadh, Devnavhe and others has been given. However, as the Gram Panchayat is not a Local Authority under the provisions of MRTP Act – 1966, the said no objection certificates are not been taken into consideration.

Therefore, as per the eligibility criteria, as the number of hoardings of Sagar Lookout being less than the eligibility criteria, their tender is considered non-eligible.”

(emphasis supplied by us)

14. The summary of the above report which is at Exhibit ‘L’ and a subject matter of challenge in this writ petition holding the petitioner ineligible provides for a reason thus :-

“Submitted list of 96 hoarding out of which only 47 hoarding are in the name of sagar lookouts. 1) The remaining hoarding are in the name of other firm/agency. 2) NOC given by Grampanchayat are not considered as Grampanchayats are not local authorities (as per MRTP Act 1966) 3) NOC given by Chiplun Corporation and Forest Department are not considered as there are no size mentioned. Eligible Hoarding are only 47.”

15. Assailing the impugned decision (Exhibit ‘L’) holding the petitioner ineligible, Mr. Ravi Kadam submitted that the decision making process of the MHADB is challenged on the ground that relevant materials [experience of Sagar Lookouts partner in Urja Developers and Beautifications Private Limited (hereafter “Urja”, for short)] are excluded from consideration arbitrarily. It is submitted that the partners of Sagar Lookouts viz. Mr. Prashant Nishikant Joshi and Mrs. Shubhada Nishikant Josh are also shareholders of Urja, hence, the experience of Sagar Lookouts partner i.e. Mr. Prashant Joshi in Urja must count for determining eligibility. Mr. Ravi Kadam submitted that he does not press into service the experience of Mystical Polyplast and Mystical Technoplast Private Limited of which

Mr. Prashant Joshi is a proprietor/partner, but his emphasis is only as regards Mr. Prashant Joshi's experience with Urja which has set up 8 hoardings. It is submitted that if Mr. Prashant Joshi's experience in Urja is taken into consideration, Sagar Lookouts then fulfils the eligibility requirement of erecting and handling 50 hoardings. Mr. Ravi Kadam submitted that the Committee as well as the decision making authority erred in excluding these 8 hoardings erected by Urja, as Mr. Prashant Joshi being the person in charge of Urja, it is this experience which he brought in Sagar Lookouts which has to be regarded as the experience of Sagar Lookouts. Mr. Ravi Kadam invited our attention to the Agreement for the assignment of the rights of marketing for the advertisement display sites executed on May 1, 2011 between Urja and Sagar Lookouts. He then invited our attention to the Agreement for construction, erection and maintenance of various advertisement sites dated May 1, 2012 entered into between Urja and Sagar Lookouts. It is submitted that these two documents are more than sufficient to indicate that Mr. Prashant Joshi as a partner of Sagar Lookouts, has not only marketed, but even constructed, erected and maintained these 8 hoardings for Urja. Mr. Ravi Kadam urged that Sagar Lookouts never bid as a consortium. It only claims that Mr. Prashant Joshi's experience in Urja be regarded as the experience of Sagar Lookouts, in which case there is no breach of the condition no. 2.1 relating to 'consortium of any kind not allowed' under the RFP. In support of his submission that experience of the partner of Sagar Lookouts has to be taken into consideration, Mr. Ravi Kadam relied on the following decisions :-

(1) New Horizons Limited and another Vs. Union of India and others(1995) 1 SCC 478.

(2) M/s. Maa Nabadurga Construction vs. Saroj Kumar Jena and ors. Civil Appeal No. 5935 of 2015 of Supreme Court of India.

(3) IMS Bhatia Transport Contractor vs. Union of India and others 2021 (4) Mh.L.J. 233.

(4) Jai Bholenath Construction vs. The Chief Executive Officer, Zilla Parishad, Nanded and ors. 2022 LiveLaw (SC) 542

16. On the other hand, Dr. Milind Sathe, learned senior advocate appearing on behalf of the MHADB supported the impugned order. He invited our attention to the minutes of the meeting dated March 25, 2022 which resulted in Sagar Lookouts being declared ineligible. He submits that admittedly Sagar Lookouts did not fulfil the experience criteria of erecting 50 hoardings of the stipulated size. In his submission, upon considering the relevant materials, the Committee found that Sagar Lookouts which has the experience of erecting 47 hoardings, falls short of the eligibility criteria of 50 prescribed by the RFP. Dr. Milind Sathe submitted that Clause 2 of the tender condition clearly prohibits consortium of any kind bidding under the RFP. In his submission, what Sagar Lookouts wants, is to indirectly qualify as a consortium by insisting the experience of the

shareholder in Urja be taken into consideration, which is impermissible. Dr. Milind Sathe submitted that the law is well settled that it is in the absolute discretion of the tendering authority to prescribe conditions to suit its requirement. In his submission, there is nothing arbitrary or irrational in prescribing an experience criteria of erecting 50 hoardings to satisfy the eligibility criteria which Sagar Lookouts does not fulfil. According to Dr. Milind Sathe, Sagar Lookouts was given an opportunity by the Committee to submit its explanation which was not accepted for valid and cogent reasons. In support of his submissions, Dr. Milind Sathe placed reliance on the following decisions :-

1. Ramana Dayaram Shetty vs. International Airport Authority of India and others(1979) 3 SCC 489.

2. N.G. Projects Limited vs. Vinod Kumar Jain and others2022 SCC OnLine SC 336.

3. Adani Ports and Special Economic Zone Limited vs. The Board of Trustees of Jawaharlal Nehru Port Authority and ors. Writ Petition (L) No. 14657 of 2022 of Bombay High Court

17. Mr. Ram Apte appearing on behalf of the project proponent respondent no. 4 - M/s. Jupiter Advertisers argued on lines similar to the one canvassed by Dr. Milind Sathe. Mr. Ram Apte submitted that Sagar Lookouts does not fulfil the experience criteria of erecting 50 hoardings and hence MHADB is justified in declaring Sagar Lookouts ineligible. Mr. Ram Apte further submitted that Sagar Lookouts is not justified in contending that the experience of Mr. Prashant Joshi in Urja be taken into consideration for satisfying the experience criteria of 50 hoardings. In support of his submissions, Mr. Ram Apte relied upon the following decisions :-

1. SILPPI Constructions Contractors vs. Union of India and another (2020) 16 SCC 489.

2. Municipal Corporation, Ujjain and another vs. BVG India Limited and others (2018) 5 SCC 462.

3. N. Ramachandra Reddy vs. State of Telangana and others(2020) 16 SCC 478.

4. BVG India Limited vs. State of Maharashtra and others2021 DGLS (Bom.) 392, Bombay High Court.

5. Tata Cellular vs. Union of India(1994) 6 SCC 651.

6. M/s. Gupta Freight Carrier vs. State of Maharashtra and others Writ Petition No. 2065 of 2022 Nagpur Bench of High Court of Bombay.

18. We have pondered over the erudite submissions canvassed on behalf of the contesting parties by learned senior advocates. There is no disputing the proposition that unless the eligibility criteria prescribed in Clause 3.2 of the RFP is satisfied by the bidder, the bid cannot be held eligible. The condition which

Sagar Lookouts does not fulfil, according to the tendering authority, is the experience of at least 10 (Ten) years in erection and handling of city advertising/ outdoor advertising media of 50 Hoardings each of minimum 450 sq.ft. in corporation/Authority area. The Committee found that Sagar Lookouts has the requisite experience of 10 years of erecting and handling hoardings but that it has put up 47 hoardings only. Sagar Lookouts as a partnership firm, per se, i.e. without considering the partners experience, does not satisfy the eligibility condition of erecting and handling 50 hoardings. This standard or norm of eligibility laid down by MHADB cannot be faulted nor is it the contention of Sagar Lookouts that the said eligibility condition is arbitrary or unreasonable. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Viteralli v. Seaton*³⁵⁹ U.S. 535 where the learned Judge said that "An executive agency must be rigorously held to the standards by which it professes its action to be judged.... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword." Their Lordships in *Ramana Dayaram Shetty (supra)* observed that this rule was accepted as valid and applicable in India. In *A. S. Ahuwalia v. Punjab*(1975) 3 SCC 503, 504 and in subsequent decision given in *Sukhdev v. Bhagatram*(1975) 1 SCC 421, His Lordship Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority.

19. In *V. Punnan Thomas v. State of Kerala*(1975) 1 SCC 421 , it is observed that "The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal".

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

21. In a decision of recent origin rendered by this Court in *Adani Ports and Special Economic Zone Limited (supra)*, upon considering a plethora of decisions

of the Supreme Court in relation to tender matters which rules the field, the following observations in paragraph 43 which are relevant reads thus :-

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

necessary concomitant for an agency working in the administrative sphere as in the present case.”

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

23. Let us consider the objection of Dr. Milind Sathe that considering the experience of the bidder firm’s partner in some other enterprise, as the experience of the bidder, for the purpose of eligibility, would virtually be permitting a consortium to participate which is in the teeth of Clause

2.1. The argument of Mr. Milind Sathe at first blush sounds attractive. There is no dispute that the bidder in the present case is Sagar Lookouts. It is not as if Sagar Lookouts, along with Urja, has submitted its bid as a consortium. The concise Oxford English Dictionary defines ‘consortium’ as an association, typically of several companies. Black’s Law Dictionary assigns a historical meaning to the word ‘consortium’ as a group of companies that join or associate in an enterprise. Such is not a case here, as Sagar Lookouts and Urja have not joined or associated as an enterprise for the purpose of the RFP, to bid as a consortium. The point is, whether the experience of the partner of the firm in Urja, can be considered as the experience of the bidder firm, for the purpose of the present RFP, to qualify the eligibility criteria of experience or will it tantamount to mean a bid by a consortium.

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

25. Let us notice some facts in *New Horizons Limited and another* (supra). The advertisement stipulated that “The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephone systems with the capacity of more than 50,000 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in this field.” The tendering authority did not consider the offer of *New Horizons Limited* because it did not submit any evidence to show that they have in their name undertaken compiling, printing and supply of telephone directories to the large telephone systems with the capacity of more than 50,000 lines. In the tender offer *New Horizons Limited* mentioned that it is a joint venture company

established by Thomson Press (India) Limited (TPI), Living Media (India) Limited (LMI), World Media Limited (WML) and Integrated Information Pvt. Ltd, (IIPL) and the shareholding. An overview of each of the parent companies, namely, TPI, LMI, WML and IIPL was also given in the tender offer. Before the High Court it was urged on behalf of New Horizons Limited that it was fully eligible and met the criteria as laid down and was competent to compile, print and supply telephone directories as per the invitation of tender and in this connection reliance was placed on the experience of the foreign collaborator/equity-holder and the experience of the major Indian equity shareholders, viz., TPI and LMI. The Delhi High Court while dismissing the writ petition proceeded on the assumption that the shareholders of New Horizons Limited have all the experience in compiling and printing the telephone directories but observed that that it is not at all job requirement. According to the High Court, it is one thing to say that shareholders of a company have vast experience in the publication of telephone directories with yellow pages and it is entirely another thing if the company itself has that experience. The approach of the High Court was that a company is an independent person distinct from its members and that New Horizons Limited is carrying on its business independently from that of the shareholders. The High Court therefore held that the experience of a shareholder cannot be the experience of the company nor is New Horizons Limited the agent of its shareholders.

26. We may now set out paragraph 23 of the decision in New Horizons Limited and another (supra) which reads thus :-

"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company

having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4 - 1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr. Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India."

(emphasis supplied by us)

27. We may then refer to paragraph 40 of the decision in *New Horizons Limited and another* (supra) which reads thus :-

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

(emphasis supplied by us)

28. Dr. Milind Sathe, however, wanted us to notice paragraph 24 of the judgment in *New Horizons Limited and another* (supra). In his submission, it is in the context of a joint venture that the issue under consideration was decided by the Supreme Court. He submitted that in the present tender there is no question of permitting a consortium and hence, there is no gainsay in the contention of Mr. Ravi Kadam that the documents relied upon in respect of Urja are wrongly discarded/ignored by the Committee. Paragraph 24 of the decision in *New Horizons Limited and another* (supra) reads thus :-

"24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to

Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart : Joint Ventures in East Asia Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court."

29. Their Lordships in *M/s. Maa Nabadurga Construction* (supra) followed the law laid down in *New Horizons Limited* and another (supra) and observed that the matter is no more res-integra. Before we advert to the relevant observations in *M/s. Maa Nabadurga Construction* (supra), it would be apposite to refer to a few facts therein. The State of Orissa issued notice inviting tenders through e-procurement for construction of model school building. The appellant before the Supreme Court and respondent no. 1 submitted their bids. On opening of the technical bids, the bid of respondent No.1 was rejected. The Evaluation Committee was of the view that respondent No.1's bid was accompanied by joint venture agreement instead of a sub-contract. Since this was expressly barred, the bid was rejected. The appellant's bid was found to be in compliance and accordingly the final bid was opened. The main contention against the appellant was that the appellant firm did not have the necessary experience of five financial years in the past period in its own name. According to the respondent, the experience claimed by the appellant was the experience of one of its partners who had adequate experience to the extent of five years. This according to the respondent, could not be taken as the experience of the partnership firm. This contention apparently found favour with the High Court. Clause 111(g) of the Detailed Tender Call Notice (DTCN) prescribed the following requirement or experience as follows :-

"111(g). The intending tenderer(s) should have executed similar nature of work worth 40% of the estimated cost put to tender during any three financial years of the last preceding five years. In case of contract spanning for more than one financial year, the break up of execution of work in each of financial year should be furnished need to be furnished by the bidder as per Schedule D. (Similar nature of works means construction of buildings inclusive of electrical

installations and P.H. works.)”

30. The Supreme Court noted the contention of learned advocate for the respondent no. 1 that a partnership firm cannot be said to acquire the experience of any of its partners. The appeal was allowed on the following considerations reproduced below which reads thus :-

“We find that the matter is no more res- integra and is covered by the decision of this Court in *New Horizons Limited and Anr. (supra)* . In that case, the Court was considering whether the joint venture firm which had submitted a tender was entitled to have the experience of one of its constituents counted as the necessary experience required by the tenderer. The Tender Evaluation Committee had ignored the experience on the ground that the said experience was not in the name of Nabadurga Construction Limited but of its constituents and, therefore, *New Horizons Limited and Anr. (supra)* did not fulfill the conditions about the eligibility of the award for the contract. This Court in para 23 of *New Horizons Limited and Anr. (supra)* observed as follows:

“Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22 -4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.”

This Court further observed that:-

“Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents, namely, TPI, LMI and WML as well as IIPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman.”

This Court was of the view that the experience of a joint venture is akin to the experience of a partnership and further observed as under:

“The expression “joint venture” is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.

Having regard to the decision, we find that the Tender Evaluation Committee had

rightly decided to take into account the experience of Shri Ramesh Das one of the partners of the appellant firm and on that basis held the appellant to be eligible.

Black's Law Dictionary, relied on by the learned counsel for the appellant gives the following meaning of "experience" as follows:

"Experience. - A state, extent, or duration of be-ing engaged in a particular study or work; the real life as contrasted with the ideal or imaginary. A word im-plying skill, facility, or practical wisdom gained by per-sonal knowledge, feeling and action, and also the course or process by which one attains knowledge or wisdom.

It is clear that the view of the High Court that 'experience' is something which cannot be an asset of the firm and, therefore, not capable of being attributed to a firm is not correct. It is settled law that a partner-ship has been held to be a compendious name for its partners and that experience is a human attribute which does not form part of the assets or property of the firm in the usual sense. This is also obvious since it is not, and in any case not capable of, distribution as assets; on the dissolution of the firm. This Court in *New Horizons Limited and Anr.* (supra) considered the extent of experience in a partnership as follows:

"While considering the requirement regarding ex-perience it has to be borne in mind that the said re-quirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a busi-nessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a com-pany he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the person behind the company. While keeping in view the past experi-ence he would also take note of the present state of affairs and the equipment and resources at the dis-posal of the company.

In this view of the matter, we are of the view that the appeal must be allowed. The learned counsel for the appellant also raised the issue about the ineligi-bility of the respondent No.1. In the view we have taken we see no reason to decide the same. In the re-sult, the appeal is allowed. The impugned order dated 17.07.2012 passed by the High Court in Writ Petition (C) No.6135 of 2012 is set aside. There shall be no or-der as to costs."

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

"19. It has been held by the Apex Court in the aforesaid case that the person

having past experience enters into the partnership and the tender is submitted in the name of partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.

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

32. In the present case, undoubtedly, the eligibility criteria provides for the experience which the bidder must possess is of erecting and handling 50 hoardings. The bidder Sagar Lookouts is a partnership firm registered under the provisions of the Indian Partnership Act, 1932. Though documents were produced about the partner's experience in Urja, the Committee refused to look into these documents as the same were not in the name of the bidder - Sagar Lookouts. It is pertinent to note that the partners of Sagar Lookouts are Mr. Prashant Joshi and his mother Mrs. Shubhada Nishikant Joshi. Urja is a private limited company of which the only shareholders/Directors/Stakeholders are Mr. Prashant Joshi, Mrs. Shubhada Nishikant Joshi and Mrs. Ashwini Prashant Joshi. Thus, two of the shareholders of Urja are partners of Sagar Lookouts. We are not considering the documents pertaining to Mystical Polyplast and Mystical Technoplast private Limited in view of the contention of Mr. Ravi Kadam, that the experience of the partner in Urja itself is sufficient to satisfy the requirement of fulfilling the eligibility criteria of 50 hoardings. There are on record, documents in the nature of agreements between Sagar Lookouts and Urja, which though produced, were not considered by the Committee. At Exhibit 'N' is an agreement for the assignment of the rights of marketing for the advertisement Display sites dated May 1, 2011 between Urja and Sagar Lookouts. The said agreement pertains to the assignment of the marketing rights by Urja to Sagar Lookouts in respect of 7 number of hoardings allotted by MSRDC and other private entities Ltd. At page 433 of the paper book is an agreement dated May 1, 2012 for construction, erection and maintenance of various advertisement sites between Urja and Sagar Lookouts. These agreements are signed by Mrs. Ashwini Prashant Joshi as a Director of Urja and Mr. Prashant Joshi in his capacity as a partner of Sagar Lookouts. The said agreement for construction, erection and maintenance inter alia provided that Sagar Lookouts agreed to conduct fabrication, erection, maintenance of the hoarding sites according to the norms of government and other authorities. The details of the advertisement sites are listed in Schedule I. Exhibit 'M' at page 421 of the paper book is a chart pertaining to Urja in respect of these 8 hoardings. These 8 hoardings which have valid MCGM permits are of dimension more than 450 sq.ft. and situated within the city limits of Bombay. The MCGM permits, at least in respect of 6 hoardings are on record, enclosed from page nos. 422 to

427. Even on as many as five permits, the name of the firm is indicated as Urja and the name of permit holder is recorded as Mr. Prashant Joshi. There are thus

overwhelming documents on record to demonstrate that the partner of Sagar Lookouts, apart from being a shareholder of Urja, has actually the experience of erecting and handling the hoardings of the stipulated dimensions to fulfil the eligibility criteria of experience. The authenticity of these documents is not in dispute nor is it the case of any of the parties that the said hoardings have not been fabricated or erected at the sites mentioned in the agreement. The Committee simply refused to look into these documents on the ground that these documents do not pertain to Sagar Lookouts.

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

34. In the present case, the partner (Prashant Joshi) of Sagar Lookouts has the experience, but the firm itself does not have the experience. The approach of the tendering authority is that the firm - Sagar Lookouts - is an independent person distinct from its partners and that the firm is carrying on the business independently from that of the partners. On behalf of the tendering authority, the submission is that the experience of the partner cannot be the experience of the partnership firm. Their Lordships in *New Horizons Limited* and another (*supra*) have observed in paragraph 23 quoted hereinabove, that it is possible to visualise a situation where a person having past experience has entered into a partnership and a tender has been submitted in the name of the partnership firm which may not have any past experience in its own name; that does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. The bidder - Sagar Lookouts - has experience of erecting 47 hoardings, 3 short of the eligibility. The partner of Sagar Lookouts as a shareholder of Urja has the experience of erecting 8 hoardings. While considering the requirement regarding the experience, it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the stand point of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed, he seeks to assure himself about the credentials of the person who is entrusted with the work. He would not go by the name of the firm but the persons behind the firm. Had the Committee examined the tender of Sagar Lookouts in this perspective, it would have found from the documents, that the bidder - Sagar Lookouts - fulfilled the experience criteria. Their Lordship in *M/s. Maa Nabadurga Construction* (*supra*) referred to the meaning of the word 'experience' given in *Black's Law Dictionary*. It is a settled law that a partnership has been held to be a compendious name for its partners and that the experience is a human attribute which does not form part

of the property or the assets of the firm in the usual sense. It is the experience of the persons executing the work that will have to be considered. This is our understanding of what Their Lordships observed in New Horizons Limited and another (supra).

35. Looking at the issue from another angle, will a prudent businessman like MHADB hand over a tender in favour of a firm of which partners do not have the requisite experience stipulated? As a prudent businessman, it is of course best left to MHADB to look after its business interest and the scope of interference in such decisions is extremely limited. But to allow MHADB to construe the term 'Bidder' in a literal manner, that it is the firm's experience itself will qualify, is something which does not commend to us. It is here that the observations of His Lordship Mathew J. in V. Punnan Thomas (supra) which we have quoted in paragraph 19 of this judgment assume significance. There is no provision in the RFP that the Bidder is given a restricted meaning to mean the firm itself and not the person in charge of it. The Bidder has to be understood to mean the person in charge of the firm, though the bid is by or on behalf of the firm. The notice inviting tender does not preclude adoption of this course of action. If the contention of MHADB is to be accepted, then once a bid is by a firm having experience, irrespective of whether the person in charge is experienced or not, the firm's bid will have to be held eligible for consideration.

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

37. The writ petition, therefore, deserves to be allowed in the following terms :-

(i) The impugned decision dated April 12, 2022 (Exhibit 'L') thereby declaring the petitioner as ineligible in Tender No. 4 dated February 18, 2022 is quashed and set aside.

(ii) The respondent no. 2 is directed to reconsider the petitioner's bid in the light of what we have observed hereinabove and thereafter proceed in respect of the tender which is the subject matter of this writ petition.

38. The writ petition is disposed of in the above terms. There shall be no order as

to costs.