IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Shampa Sarkar

W.P. No.1591 (W) of 2019

Medium Packaging Pvt. Ltd.

Versus

Indian Oil Corporation Limited & Ors.

For the petitioner	: Mr. Mainak Bose, Mr. Suvadeep Sen, Mr. Sumit Mondal,
For the respondent No.2	: Mr. S.N. Mookherjee, Mr. Soumya Mazumdar, Ms. Sharmistha Ghosh, Mr. S. Bhattacharya, Mr. V. Chatterjee
For the respondent No.6	: Mr. Joydeep Kar, Mr. Lokenath Chatterjee, Mr. Jaydeb Ghorai, Mr. Suman Chatterjee

Heard on : 31/07/2019, 26/08/2019, 28/08/2019, 02/09/2019, 05/09/2019, 09/09/2019 & 24/09/2019

Judgment on: 01/10/2019

Shampa Sarkar, J. :

The petitioner is a company incorporated under the Companies Act, 1956. The petitioner carries on business of fabrication, manufacturing

and supply of iron and steel drums/barrels. The petitioner was supplying drums to Haldia Refinery of the Indian Oil Corporation Limited (hereinafter referred to as IOCL). The said contract was valid till May 2019. The IOCL issued a Notice Inviting e-Tender (hereinafter referred to as the NIT), on July 24, 2018. The last date for submission was September 12, 2018. The techno commercial bid was opened on September 15, 2018. The list of bidders who were successful in the techno commercial bid was uploaded on December 19, 2018. They were the petitioner, one M/s. Zetadel Technology Private Limited, Steel Barrel Private Limited, the respondent No.6 and Pearson Drums and Barrels Private Limited, the respondent No.7. The financial bid/price bids were opened on December 20, 2018 and the L-1 price was Rs.5,25,21,000/-. Consequent, a reverse auction was carried out on December 24, 2018. The petitioner's name was not included in the list of qualified bidders eligible to participate in the reverse auction. The petitioner was auto rejected by the system being the H-1 bidder. The respondent No.6 was the L-1, the respondent NO.7 was L-2 and M/s. Zetadel Technology Private Limited was L-3, even after the reverse auction.

2. Aggrieved by non-consideration of the petitioner at the reverse auction stage, and further aggrieved by the decision of the IOCL in considering the respondent No.6, technically eligible to participate in the tender process, this writ petition has been filed.

3. By an order dated February 19, 2019, the writ petition was admitted for hearing with a direction for exchange of affidavits. As no interim order was passed, an appeal was preferred by the petitioner, being

MAT 331 of 2019 along with CAN 2347 of 2019. By judgment and order dated March 7, 2019 the Hon'ble Division Bench disposed of the appeal and application with the following order:-

> *"Considering the respective contentions of the parties, we are of the view that since the subject-matter of challenge before the writ Court is a tender process based on which the work order has been issued, such issuance of the work order in favour of the private respondent no.6 shall abide by the result of the writ petition. The respondent Indian Oil Corporation Limited shall disclose before the First Court, in its affidavit, the reason(s) as to why the private respondent no.6 was considered to be qualified for the purpose of issuance of the work order. It shall also disclose before the First Court the reason(s) as to why the appellant/writ petitioner was considered as not being qualified for the reverse auction.*
>
> *We also propose to modify the directions for exchange of affidavits in the manner as indicated hereinbelow.*
>
> *Let affidavit-in-opposition be filed within a period of three weeks from date. Reply thereto, if any, be filed a week thereafter.*
>
> *Immediately upon exchange of affidavits, the appellant/writ petitioner will be at liberty to mention for early hearing of the matter before the First Court having appropriate determination.*
>
> *With the above observations/directions, the appeal and the application for appropriate order stand disposed of."*

4. During the pendency of the appeal the respondent No.6 was issued the work order on March 5, 2019. Thereafter the parties exchanged their affidavits and the matter has now come up for final hearing.

5. The first contention of Mr. Mainak Bose, learned Advocate appearing on behalf of the petitioner is that, the respondent No.6 did not have the requisite qualifications to qualify at the technical bidding stage. IOCL with *mala fide* intention and in order to favour the respondent No.6, had relaxed the terms and conditions of the NIT. According to Mr. Bose, the requisite qualifications laid down in serial No.10, 17 and 20 of the NIT

was not fulfilled by the respondent No.6. Thus, in order to favour the respondent No.6 with the particular contract, IOCL in a discriminatory and unfair manner transferred all existing contracts in the name of Bharat Barrels & Drum Manufacturing Company Pvt. Ltd. (hereinafter referred to Bharat Barrels) in favour of the respondent No.6. This way IOCL ensured that the respondent No.6 met the pre-qualification criteria of having executed similar kind of work as mentioned in Clauses 10.2 and 20 of the NIT. The tax invoices raised in the name of Bharat Barrels on July 6, 2018 and thereafter in the name of respondent No.6 on December 25, 2018, for the same contract would prove such allegation. It was next contended by Mr. Bose that the scheme of demerger took effect on and from November 29, 2016, that is, the date of the order of the Bombay High Court and as such the respondent No.6 could not have used the past experience of Bharat Barrels prior to the effective date. According to Mr. Bose, the said scheme did not provide for transfer of past experience and technological knowhow of Bharat Barrels in favour of the respondent No.6. Mr. Bose urged that even after 2016, Bharat Barrels was continuing business of manufacturing independently and as such, despite the demerger, Steel Barrels could not take advantage of the experience of Bharat Barrels as its own experience. IOCL also could not give the respondent No.6 the advantage of the past experience of Bharat Barrels while considering its techno-commercial eligibility.

6. Mr. Bose further contented, that IOCL did not consciously respond to the complain made by the petitioner with regard to the eligibility of the respondent No.6 which was sent on August 21, 2018.

Instead, after the reverse auction was over and the respondent No.6 was accepted as the L-1, IOCL made enquiries with Hindustan Petroleum Corporation Limited and Bharat Petroleum Corporation Limited with regard to their decision to transfer the existing contracts awarded to Bharat Barrels, to the respondent No.6. This according to Mr. Bose, was just to cover up the arbitrary, discriminatory and unfair decision to allow the respondent No.6 to participate in the tender process by using the technical qualifications of Bharat Barrels.

7. Mr. Bose lastly contended that, despite the order of the Hon'ble Division Bench, IOCL failed to disclose the reasons as to how the respondent No.6 was found to be qualified to participate in the tender. According to Mr. Bose, the contract was awarded to the respondent No.6 without any formation of opinion about its eligibility and such a decision was arbitrary, irrational, unreasonable, biased and smacked of *mala fide.*

8. Mr. S.N. Mookherjee, learned Senior Advocate appearing on behalf of IOCL submitted that, even if the respondent No.6 was disqualified at the technical bidding stage, the petitioner would not have qualified for reverse auction, as the highest bidder would be auto rejected by the system and, IOCL did not have any role to play at that stage. Mr. Mookherjee next contended that the petitioner quoted a price 79.26% more than the tender price but, the respondent No.6 quoted a price which was 39% below the tender estimate. According to Mr. Mookherjee, the technical evaluation was done between September 15, 2018 to December 19, 2018. He referred to the column relating to the technical bid opening summary (TBOS). The technical bid was opened on September 15, 2018 at

9.19 a.m. and the same was under evaluation till the names of the successful bidders at the techno-commercial round were uploaded on December 19, 2018. According to Mr. Mookherjee, the evaluation committee, during the intervening period was evaluating the tender documents submitted by the bidders. As such, the allegation of the petitioner that the authority did not apply its mind and did not form an opinion with regard to the eligibility of the respondent No.6 was baseless.

9. Referring to the scheme of demerger, Mr. Mookherjee next submitted that the manufacturing units of Bharat Barrels in Haldia, Mangalore, Faridabad and Kolkata were transferred to the respondent No.6. By the said demerger all assets, liabilities, staffs, workmen, employees, certificates, credentials, licences, contracts, etc. of Bharat Barrels had been transferred to the respondent No.6. The other entities of Bharat Barrels still existed and Bharat Barrels and the respondent No.6 functioned as two separate entities. It was contended that the respondent No.6, who participated in the tender process had specifically mentioned that pursuant to the scheme of demerger, which was approved by the Hon'ble High Court of Judicature at Bombay, all the four units of Bharat Barrels stood transferred to the respondent No.6 along with land, building, plant, machinery, workmen, staffs, commercial licence, contracts, etc. By a letter dated September 4, 2018 all the documents relating to the demerger and also other relevant documents showing that the experience of Bharat Barrels had been transferred to the respondent No.6 was submitted to IOCL. Bharat Barrels continued their manufacturing enterprise in the other units.

10. According to Mr. Mookherjee, the authenticity of the documents submitted by the respondent No.6 was also verified by Hindustan Petroleum Corporation Limited and Bharat Petroleum Corporation. These companies via e-mails informed IOCL, that their existing contracts with Bharat Barrels had been changed in the name of the respondent No.6. Bharat Petroleum Corporation Limited further informed IOCL that the respondent No.6 had also participated in the tenders floated by Bharat Petroleum Corporation Limited and claimed similar benefit on the basis of the scheme of demerger. According to Mr. Mookherjee, the scheme of demerger permitted the respondent No.6 to use the credentials, certificates, licences and work experience of Bharat Barrels.

11. Mr. Mookherjee further submitted that, as the appointed date as per the scheme of demerger was April 1, 2013, all the contracts executed and all works done by Bharat Barrels after April 1, 2013 and upto the effective date that is, November 29, 2016, was done by Bharat Barrels as a custodian of the respondent No.6 and the respondent No.6 was entitled to claim the benefit of the work executed by Bharat Barrels after April 1, 2013 as its own credentials and experience.

12. Mr. Mookherjee placed reliance on Clauses 1.4, 1.6, 1.8, 3.2, 3.2, 5.1.1, 5.4, 5.6, 6, 7, 10 and 12 of the scheme of demerger in support of his contention that the respondent No.6 was entitled to claim the work experience of Bharat Barrels as its own experience in this tender process.

13. Mr. Mookherjee relied on the following judgments:- **New Horizons Limited & Anr. vs. Union of India & Ors.**, reported in **(1995) 1 SCC 478**, **Afcons Infrastructure Limited vs. Nagpur Metro Rail**

Corporation Limited & Anr., reported in **(2016) 16 SCC 818**, **Jagdish Mandal vs. State of Orissa & Ors.**, reported in **(2007) 14 SCC 517**, **Marshall Sons & Co. (India) Ltd. vs. Income Tax Officer**, reported in **(1997) 2 SCC 302**, **Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.**, reported in **(2005) 6 SCC 138**

14. Mr. Joydeep Kar, learned Senior Advocate appearing on behalf of the respondent No.6 submitted that the judgment of the Bombay High Court was a judgment *in rem* and the benefit granted to the respondent No.6 by the scheme of merger was binding on all.

15. Mr. Kar relied on Sections 391, 392 and 394 of the Companies Act, 1956, in order to demonstrate that companies could always reorganize themselves. Bharat Barrels and the respondent No.6 were two companies managed by the same directors and group of shareholders. According to Mr. Kar, four units of Bharat Barrels was demerged from Bharat Barrels and attached to the respondent No.6. This was not an amalgamation and as such both these companies had separate identities and could continue their separate manufacturing work.

16. According to Mr. Kar, till the process of transfer and change of name was going on, by HPCL and IOCL, certain invoices were raised in the name of Bharat Barrels. Once the name was changed, invoices were raised in the name of the respondent No.6 and returns to that effect were also submitted with the taxing authorities. Mr. Kar also relied on several clauses of the scheme of demerger. The attention of the Court was drawn to the annexures to the affidavit-in-opposition of the respondent No.6 which were orders of assessment issued by the Income Tax Authorities on

the returns incorporating the income and expenditure arising out of the contracts which were transferred to the respondent No.6. Mr. Kar contented, that the licences in the name of Bharat Barrels stood transferred to the respondent No.6 by an order issued by Bureau of Indian Standards. Mr. Kar referred to the documents at pages 222 to 224 of the said affidavit in opposition to show that IOCL had accepted the demerger of Bharat Barrels with Steel Barrels and had endorsed that the past experience of Bharat Barrels in execution of the contracts held good for the respondent No.6, consequent to the demerger.

17. Mr. Kar next, referred to the documents at pages 229 to 232 of the said affidavit to show that in other tender processes initiated by the Digboi refinery of the IOCL, Kochi refinery of BPCL and IOCL, the respondent No.6 as also the petitioner were participants but, the petitioner did not raise any objection with regard to the eligibility of the respondent No.6 to participate in those tenders, on the basis of the work experience of Bharat Barrels. According to Mr. Kar, in one such tender the respondent No.6 was also the successful bidder. Mr. Kar submitted, that the petitioner was resisting the award of the present contract to the respondent No.6, inasmuch as, the petitioner would be compelled to vacate the land allotted by the Haldia refinery to the petitioner which had been used by the petitioner for executing the earlier contract. Now that the contract was over and the petitioner was unsuccessful in the present tendering process, the petitioner would be compelled to vacate the land and that was the only reason why the petitioner had filed the writ petition.

18. On the question of judicial review in contractual matters, Mr.

Kar submitted that in the instant case, the petitioner had failed to show any illegality, arbitrariness, favoritism on the part of IOCL and as such no interference was called for. On this proposition of law, Mr. Kar relied on the decision of **Montecarlo Limited vs. National Thermal Power Corporation Limited,** reported in **(2016) 15 SCC 272**.

19. Heard the respective parties. The moot points to be decided in this case is whether the respondent No.6 was entitled to claim the credentials and work experience of Bharat Barrels as their own, while participating in the tender process and whether the award of the contract was irregular, arbitrary, unfair and biased.

20. For convenience the relevant portions of the scheme of demerger is quoted below:-

> ***1.4***. *The Transferor/Demerged Company has four branches located at Kolkata, Haldia, Faridabad and Mangalore.*
>
> ***1.6***. *The object of the Transferee/Resulting Company is similar to that as of the Transferor/Demerged Company.*
>
> ***1.8***. *The transferee/resulting Company is empowered by clause III (B) 7 of its Memorandum of Association to sell or dispose of the undertaking or any thereof to any other Company.*
>
> ***2.1.1***. *The Demerger will result into the following benefits under the Income Tax Act, 1961:*
>
> *a) Utilisation of Unabsorbed depreciation available to the Transferor Company in respect of the Demerged Undertaking by the Transferee Company.*
>
> *b) Deduction of Bad Debts available to the Transferee Company subsequently becoming bad.*
>
> *c) Amortization of expenses of demerger equally over five years period to the Transferor Company.*
>
> ***2.2***. *According this scheme (as hereafter defined) provides for transfer by way of a Demerger of the Demerged Undertaking (as defined hereinafter) to the Transferee Company and the consequent issue of equity shares by the Transferee Company and the shareholders of the Transferor Company under Section 391 to 394 and other relevant provisions of the Act and various other matters consequential to or otherwise integrally connected with the above in the manner provided for in the Scheme.*
>
> ***Definitions***
>
> ***3.2***. ***"Appointed Date"*** *For the purpose of this Scheme and for Income Tax Act, 1961, the "Appointed Date" means 1st April, 2013 or such other date as may be approved by the High Court of Bombay.*

3.4. ***"Demerged Undertaking"*** *means and includes the branches of the Transferor/Demerged Company located at Mangalore, Haldia, Kolkata and Faridabad respectively, as a going concern and without prejudice and limitation of the generality of the above, shall mean and include:-*

. . . . . .

3.5. ***"Effective Date"*** *means the date on which authenticate/certified copies of the Order of the High Court of Judicature at Bombay sanctioning the Scheme of Arrangement has been filed with the Registrar of Companies, Mumbai, Maharashtra.*

3.8. ***"Remaining Business"*** *means all the undertakings, businesses, activities and operations of the Transferor Company other than the Demerged Undertaking.*

5.1.1. *With effect from the Appointed Date the whole of the businesses of the Demerged Undertaking of the Transferor Company and all the assets, estate, properties, rights, claims, title, interest and authorities including accretions and appurtenances comprised in the Demerged Undertaking of whatsoever nature and where so ever situated shall, except for such of the Assets as specified in Clause 5.2.2 and Clause 5.2.3, under the provisions of Sections 391 to 394 and all other applicable provisions, if any of the Act, without any further act or deed be transferred to and vested in and deemed to be transferred to and vested in the Transferee Company as a going concern so as to become, as from the Appointed Date, the Assets and Liabilities of the Transferee Company and to vest all the assets, estate, properties, rights, claims, title, interest and authorities therein to the Transferee Company.*

5.3. *The transfer and or vesting of the properties of the Demerged Undertaking as aforesaid shall be subject to the existing charges, hypothecation and mortgages, if any, over or in respect of all the aforesaid Assets or any part thereof of the Transferor Company.*

Provided however, that any reference in any security documents or arrangements, to which a Transferor Company is a party, to the Assets of the Demerged Undertaking which it has offered or agreed to be offered as security for any financial assistance or obligations, to any secured creditors of the Transferor Company, shall be construed as reference only to the Assets of the Demerged Undertaking as are vested in the Transferee Company by virtue of the aforesaid Clause, to the end and intent that such security, mortgage and charge shall not extend or be deemed to extend, to any of the Assets or to any of the other units or divisions of the Transferee Company, unless specifically agreed to by the Transferee Company with such secured creditors.

Provided that the Scheme shall not operate to enlarge the security of any loan, deposit or facility created by or available to the Transferor Company in respect of the Demerged undertaking which shall vest in the Transferee Company by virtue of the Scheme.

5.4. *All licenses, entitlements, quotas, incentives, tax deferrals franchises, alliances, partnerships, approvals, permits, registration, exemptions & benefits, leases, tenancy rights, special status and other benefits or privileges enjoyed or conferred upon or held or availed off in respect of the Demerged Undertaking of the Transferor Company of any governmental or regulatory agencies including Reserve Bank of India, any trade associations, chambers of commerce or any charitable or other trusts as trustee or beneficiary shall be transferred to and*

vested in and become the licenses, approvals, permits and registration and membership of the Transferee Company, and the Transferee Company shall continue to enjoy the benefits, rights and be liable for all obligations and liabilities as are available to or binding upon the Transferee Company in whose favour such licenses, etc. have been issued or granted and the name of the Transferor shall be deemed to have been substituted by the name of the Transferee Company.

***5.6**. The Transferor Company shall carry on the **Remaining Business (as defined herein)** All the assets, liabilities and obligations pertaining to the remaining business arising prior to, on or after the Appointed Date shall continue to belong to, be vested in and be managed by the Transferor Company.*

6**. **Contracts Deeds and other instruments

***6.1**. Upon the coming into effect of this scheme and subject to the provisions of this Scheme all contracts, deeds, bonds, agreements, arrangements and other instruments of whatsoever nature and subsisting or having effect on the Effective Date and relating to the Demerged Undertaking shall continue in full force and effect against or in favour of the Transferee Company, and may be enforced effectively by or against the Transferee Company as fully and effectually as if, instead of Transferor Company, the Transferee Company had been a party thereto from inception.*

7**. **Staff, workmen and employees of the demerged undertaking

***7.1**. All staff, workmen and employees of the Demerged Undertaking in permanent service of the Transferor Company on the Effective Data shall become the staff, workmen and employees of the Transferee Company on such date without any break or interruption in service and on the terms and conditions not in any way less favourable to them than those subsisting with reference to the Transferor Company as the case may be on the said date. The Board of Directors of the Transferor Company shall have the power to decide any Question that may arise as to whether any employee belongs or does not belong to the Transferee Company pursuant to the scheme of Demerger.*

***7.2**. It is expressly provided that as far as the Provident Fund, Gratuity Fund, Superannuation Fund or any other Special Fund or Schemes created or existing for the benefit of the staff, workmen and employees of the Demerged Undertaking are concerned, upon the Scheme becoming effective, the Transferee Company shall stand substituted for the Transferor Company for all purposes whatsoever related to the administration or operation of such schemers or Funds or in relation to the obligation to make contributions to the said Funds in accordance with provisions of such schemes and Funds as per the terms provided in the respective Trust Deeds/other documents. It is the end and intent that all the rights, duties, powers and obligations of the Transferor Company in relation to such Funds/Schemes of the employees or staff of the Demerged Undertaking shall become those of the Transferee Company. It is clarified that the services of the staff, workmen and employees of the Demerged Undertaking will be treated as having been continuous for the purpose of the aforesaid Funds or provisions.*

10. Business and property of the Transferor Company to be held in trust for the transferee company.

> *For the period beginning on and from the Appointed Date and ending on the Effective Date:*
>
> ***10.1**. The Transferor Company shall carry on and be deemed to have carried on all its business and activities relating to the Demerged Undertaking and shall be deemed to have held and stand possessed of and shall continue to hold and stand possessed of all the Assets, Properties, Liabilities, Rights, Titles and Interests in the Demerged Undertaking for and on account of and in trust for the Transferee Company. The Transferor Company hereby undertakes to hold the Assets, Properties, Liabilities, Rights, Titles and Interests in the Demerged Undertaking with utmost prudence until the Effective Date.*
>
> ***10.4**. Any of the rights, powers, authorities or privileges exercised by the Transferor Company in relation to the operations or activities of the Demerged Undertaking from the Appointed Date till the Effective Date shall be deemed to have been exercised by the Transferee Company for and on behalf of, and in trust for and as an agent of the Transferee Company. Similarly, any of the obligations, duties and commitments that have been undertaken or discharged by the Transferor Company in relation to the operations or activities of the Demerged Undertaking from the Appointed Date till the Effective Date shall be deemed to have been undertaken for and on behalf of Transferee Company and as an agent for the Transferee Company.*

21. Upon appreciation of the above clauses, it is clear that on and from the appointed date, that is, April 1, 2013 all assets, estates, properties, rights, claims, titles, interests and authorities of the demerged undertaking stood transferred and vested in the transferor company. Though the effective date was the date of the judgment of Bombay High Court, that is, November 29, 2016 but, in terms of the scheme of demerger, the transferor company held its business and property in trust for respondent No.6. Thus, between the appointed date and the effective date all operations, rights, powers, authorities or privileges exercised by the transferor company in relation to the activities and operations of the demerged undertaking was deemed to have been exercised by the transferor company for and on behalf of, and in trust for and as an agent of the transferee company. Clause 6 of the scheme provides that with the coming into effect of the scheme, all contracts, deeds, bonds, agreements,

arrangements and other instruments of whatsoever nature and subsisting or having effect on the effective date and relating to the demerged undertaking shall continue in full force and effect against or in favour of the transferee company and may be enforced effectively by or against the transferee company.

22. Similarly, with effect from the appointed date all consents, permission, licenses, certificates, clearances, authorities, power of attorney given by, issued to or executed in favour of the demerged undertaking shall stand transferred to the transferee company. Clause 7 provides that all staff, workmen and employees of the demerged undertaking in permanent service of the transferor company on the effective date shall become the staff, workmen and employees of the company. A conjoint reading of the provisions of the scheme quoted hereinabove clearly show that that existing contracts staff, machinery, land, incentive, tax benefits, workers of the transferor company that is, Bharat Barrels were transferred and vested in the respondent No.6. On and from the appointed dated that is, April 1, 2013 to the date of the order of the Bombay High Court, that is, November 29, 2016 all business activities and other works was executed by Bharat Barrels as a trustee for the respondent No.6 and such business activities would be deemed to be activities carried on by the respondent No.6. All profits and income accruing or arising to the transferor company during the said period and all costs, charges, expenditure, taxes or losses arising or incurred by the transferor company in relation the operation/business carried on by the demerged undertaking was deemed to be and accrued as profits, income,

costs, charges, expenditure, taxes or losses as the case may be of the respondent No.6. The date of transfer in this case would be April 1, 2013, that is, the appointed date as the Bombay High Court did not mention any particular date. Revised returns to that effect were also submitted before the Income Tax authorities.

23. In **Marshall Sons & Co. (India) Ltd.** (**supra**), the Hon'ble Apex Court explained the proposition, that the date specified in the scheme should be taken as a date of transfer and not the date of the order of the High Court approving a scheme. The relevant portion of the above decision is quoted below:-

> ***"14.*** *Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz. 1-1-1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it — as has happened in this case — it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the Court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer/amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition)*

were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the Court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the Court before the Registrar of Companies, the allotment of shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be 1-1-1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. Bank of Upper India Ltd."

24. With regard to the proposition of law as to whether the respondent No.6 could use the past experience of Bharat barrel as its own, the decision of **New Horizons Ltd.** (**supra**) is relevant. It was held that while judging the credentials of a tenderer, the tender evaluation committee should lift the veil, go behind the corporate personality and look into the result of the reorganizations of the company, which was functioning as a joint venture. It was further held that the experience of a company would mean the experience of the constituent of the joint venture. In that case, the Hon'ble Apex Court held that the decision of the tender evaluation committee was erroneous in view of the fact that the committee ignored the past experience of one of the companies which was a constituent of the joint venture. Paragraph 23 of the said judgment is relevant in this context and the same is quoted below:-

*"**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."*

25. Thus, IOCL did not commit any error in accepting the past experience of Bharat Barrels as the experience of the respondent No.6 while evaluating the documents filed by the respondent No.6. Admittedly, the records reveal that the tender evaluation committee had the occasion to consider all the documents of Bharat Barrels along with the scheme of demerger before taking the decision with regard to the eligibility of the respondent No.6. Moreover, the tender evaluation committee comprised of experts having technical knowledge and as such their decision cannot be faulted except, when there is blatant arbitrariness, favoritism or *mala fide* intention. The writ court is not a court of appeal. It can merely review the manner in which the decision to award the contract in favour of the respondent No.6 was taken. The court cannot substitute its decision for the decision of experts. IOCL must have the freedom to enter into a contract by setting its terms and there must be enough opportunity to play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere. The decision must be tested on the principles of Wednesbury reasonableness and also whether the decision was free from arbitrariness, not affected by bias or actuated by *mala fide*. Reference is made to the decision of **Master Marine Services (P) Ltd.** (**supra**).

26. In **Afcons Infrastructure Limited** (**supra**), the Hon'ble Apex Court held that the owner or the employer of a project, having authored

the tender documents would be the best person to understand and appreciate its requirements and interpret its documents. The relevant portion of the decision is quoted below:-

> ***"15.*** *We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."*

27. A similar view was taken by the Hon'ble Apex Court in **Jagdish Mandal** (**supra**), wherein it was held that the power of judicial review in matters relating to tenders or award of contracts should be tested only to the extent that the decision relating to the award of the contract was *bona fide* and was in public interest. Judicial review should not be exercised to protect private interest or to decide contractual disputes. The tenderer or a contractor with a grievance could always seek damages in a Civil Court. Paragraph 22 of the said decision is relevant in this regard and the same is quoted below:-

> *"**22.** Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride*

> *and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*
>
> *(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*
>
> *OR*
>
> *Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";*
>
> *(ii) Whether public interest is affected.*
>
> *If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."*

28. In the decision of **Caretel Infotech Ltd.** (**supra**), the Hon'ble Apex Court has once again reiterated that unnecessary and close scrutiny of minute details with regard to award of contracts, makes awarding of contracts by government and public sector undertakings a cumbersome exercise and interference would be permissible only if, the decision making process was arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law should have reached such a decision. It was also emphasized once again, that the author of the tender documents was the best person to understand and appreciate its requirement and interpret the documents filed by the bidders, while assessing the eligibility of the bidders.

29. In **Montecarlo Limited** (**supra**), it has been held that the tender inviting authority was the best person to understand and appreciate the requirement. The bidder's expertise, technical capability

and capacity must be assessed by experts and judicial review was permissible only if the decision making process clearly showed *mala fide*, arbitrariness or favoritism. The principles of equity and natural justice were rarely applicable as, evaluation of tenders was essentially a commercial function. A procedural aberration or error in assessment or prejudice to a tenderer would not be the test to determine the legality of a decision.

30. In the instant case, the tender evaluation committee of IOCL was best equipped to test the eligibility of the respondent No.6. The law is settled that the tender evaluation committee is empowered to lift the veil, go behind the facade of the company and see who are the persons responsible for the execution of the work. In the instant case, all contracts, machines, workmen of Bharat Barrels who had past experience in executing tenders of similar nature stood transferred to the respondent No.6. On the factual aspect, it has also been noted that in at least three similar tender processes the petitioner and the respondent No.6 have participated but the petitioner did not challenge the eligibility of the respondent No.6 in those tenders on the ground of lack of past experience.

31. I do not find any illegality or arbitrariness on the part of the IOCL to have found the respondent No.6 eligible at the stage of techno commercial bid. I also do not find any favoritism in the decision of IOCL to award the contract to the respondent No.6 who admittedly was the lowest bidder.

32. Under such circumstances the writ petition is dismissed.

33. There will be, however, no order as to costs.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the parties, on priority basis.

(Shampa Sarkar, J.)