



GAHC010082132022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2871/2022

PRISM LOGISTICS PRIVATE LTD. AND ANR.
A COMPANY WITHIN THE MEANING OF THE COMPANIES ACT, 2013
HAVING ITS REGISTERED OFFICE AT 33A, JAWAHARLAL NEHRU ROAD
4TH FLOOR CHATTERJEE INTERNATIONAL SUITE NO. 3 KOLKATA-700071

2: ANSHUMAN BANKA
DIRECTOR OF PRISM LOGISTICS PRIVATE LIMITED
WORKING FOR GAIN AT 33A
JAWAHARLAL NEHRU ROAD 4TH FLOOR CHATTERJEE INTERNATIONAL
SUITE NO. 3 KOLKATA-70007

VERSUS

UNION OF INDIA AND 6 ORS.
SERVICE THROUGH THE PRINCIPAL SECRETARY, MINISTRY OF MICRO,
SMALL AND MEDIUM ENTERPRISES, HAVING ITS OFFICE AT A-WING, 7TH
FLOOR, NIRMAN BHAWAN, MOULANA AZAD ROAD, NEW DELHI-110108

2: UNION OF INDIA
SERVICE THROUGH THE PRINCIPAL SECRETARY
MINISTRY OF PETROLEUM AND NATURAL GAS HAVING ITS OFFICE AT A-
WING
SHASTRI RAJENDRA PRASAD ROAD
NEW DELHI-110001

3: NUMALIGARH REFINERY LIMITED
A GOVERNMENT COMPANY HAVING ITS REGISTERED OFFICE AT 122A
G.S. ROAD
CHRISTIAN BASTI
GUWAHATI
ASSAM-781005

4: TECHNIP INDIA LIMITED
A COMPANY WITHIN THE MEANING OF COMPANIES ACT



2013 HAVING ITS REGISTERED OFFICE AT 19
VELACHERY MAIN ROAD
GUINDY
CHENNAI-600032

5:CENTRAL VIGILANCE COMMISSION
GOVERNMENT OF INDIA
HAVING ITS OFFICE AT SATARKATA BHAWAN
BLOCK-A
GPO COMPLEX
INA
NEW DELHI-110022

6:ABC INDIA LIMITED
A COMPANY WITHIN THE MEANING OF COMPANIES ACT
2013 HAVING ITS REGISTERED OFFICE AT P-10
NEW C.I.T. ROAD KOLKATA-700073

7:ALL CARGO LOGISTICS LIMITED
A COMPANY WITHIN THE MEANING OF COMPANIES ACT
2013 HAVING ITS REGISTERED OFFICE AT 6TH FLOOR
AVASHYA HOUSE
CST ROAD
KALINA SANTACRUZ (EAST)
MUMBAI-40009

Advocate for the Petitioner : MS N RAHMAN

Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : I.A.(Civil)/1628/2022

ABC INDIA LIMITED
A COMPANY WITHIN THE MEANING OF COMPANIES ACT
2013 HAVING ITS REGISTERED OFFICE AT P-10
NEW C.I.T. ROAD KOLKATA-700073

VERSUS

UNION OF INDIA AND 7 ORS.
SERVICE THROUGH THE PRINCIPAL SECRETARY
MINISTRY OF MICRO SMALL AND MEDIUM ENTERPRISE
HAVING ITS OFFICE AT A-WING
7TH FLOOR
NIRMAN BHAVAN
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NEW DELHI-110108.

2:UNION OF INDIA

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4:TECHNIP INDIA LIMITED

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5:CENTRAL VIGILANCE COMMISSION

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6:PRISM LOGISTICS PRIVATE LIMITED

A COMPANY WITHIN THE MEANING OF THE COMPANIES ACT
2013 HAVING ITS REGISTERED OFFICE AT 33A
JAWAHARLAL NEHRU ROAD
4TH FLOOR CHATTERJEE INTERNATIONAL SUITE NO.3
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7:ANSHUMAN BANKA

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8:ALL CARGO LOGISTICS LIMITED

A COMPANY WITHIN HE MEANING OF COMPANIES ACT



2013
HAVING ITS REGISTERED OFFICE AT 6TH FLOOR
AVASHYA HOUSE
CST ROAD
KALINA SANTACRUZ(EAST)
MUMBAI-400098.

Advocate for the Petitioners : Mr. I. Choudhury, Senior Advocate.
Mr. N. R. Surana, Advocate

Advocate for the Respondents : Mr. D. Das, Senior Advocate
Mr. D. Agarwal, Advocate
Mr. N. Deka, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 06.12.2022

Date of Judgment : 22.12.2022

JUDGMENT AND ORDER (CAV)

Heard Mr. I. Choudhury, the learned senior counsel assisted by Mr. N. R. Surana, the learned counsel for the petitioners and Mr. D. Das, the learned senior counsel assisted by Mr. D. Agarwal, the learned counsel for the respondent Nos.6. Also heard Mr. N. Deka, the learned counsel appearing on behalf of the respondent Nos.3 & 4.

2. The petitioners herein have filed the instant writ petition seeking a direction upon the respondent No.3 to forthwith rescind and/or withdraw and/or cancel the bid of the Respondent No.6 and all steps taken in pursuance of the acceptance of the bid of the Respondent No.6 including the purported declaration of the Respondent No.6 as L1 and the work order granted in favour of the Respondent No.6; for a direction upon the respondent No.3 to forthwith declare the petitioner No.1-consortium as the highest

bidder (L1) and to grant the job work in Part-A of the tender bearing No.TP/LG/NRL/082176C/001 to the petitioner No.1-consortium ; for setting aside and quashing the bid of the Respondent No.6 and all steps taken in pursuance of the acceptance of the bid of the Respondent No.6 including the purported declaration of the respondent No. 6 as L1 and the work order granted in favour of the Respondent No.6; for setting aside and quashing the modified notice inviting tender dated 12.06.2012 and in the alternative for quashing and setting aside the entire tender process relating to Part-A of the tender No.TP/LG/NRL/082176C/001; for a direction upon the respondent Nos.3 & 4 to call for a fresh tender in respect to Part-A of the tender No.TP/LG/NRL/082176C/001, etc.

3. The Respondent No.6 who was awarded the tender by issuance of the Letter of Intent dated 29.10.2021 had filed an application before this Court challenging the maintainability of the writ petition which has been registered and numbered as I.A.(C) No.1628/2022. In the said application so filed by the Respondent No.6 as applicant, it was contended that the writ petition was not maintainable on the ground that only one of the Consortium partners has approached this Court by filing a writ petition whereas the other consortium partner has been arrayed as proforma respondent No.7. It has been further mentioned that the Petitioner No.1 alone cannot be termed to be a bidder in the tender process sans the proforma respondent No.7 in as much as without the proforma respondent No.7, the Petitioner No.1 alone is not eligible to submit the bid. It was further contended that even prior to filing of the writ petition by the petitioners, the proforma respondent No.7 has already transferred its project logistic business division on the basis of a business transfer agreement with one J. M. Baxi Heavy Private Limited for a consideration of Rs.98.64 crores which was duly informed to the Bombay Stock Exchange Limited as well as the National Stock Exchange of India Limited vide a regulatory communication dated 30.03.2022, and as such, the instant writ petition is not only suffers from suppression of material facts but also not maintainable as the

consortium of the Petitioner No.1 and the proforma respondent No.7 is no longer technically qualified in terms of the notice inviting tender, and as such at the instance of the petitioner, the question of invoking jurisdiction under Article 226 of the Constitution of India do not arise in the facts and circumstances of the instant case.

4. It further appears from the records that the petitioners had filed an affidavit-in-opposition to the said Interlocutory Application filed by the Respondent No.6. In the said affidavit-in-opposition, on the question of non-maintainability of the writ petition as only the Petitioner No.1 who was one of the members of the consortium had challenged the tender conditions as well as the decision of the respondent authorities, it was mentioned that the primary role of the proforma respondent No.7 was to add the experience to the Petitioner No.1 as well as to add Order executed by the petitioner No.1, the financial value of the order executed by it. It was mentioned that the bulk of the work under the contract was to be performed by the petitioner No.1 as the prime bidder with the role of the proforma respondent No.7 being confined to only minor jobs which did not require employment of any equipment of its Project Logistic Division. It was further mentioned that the bid documents submitted by the consortium contained amongst others a Memorandum of Understanding (for short, MoU) entered into between the Petitioner No.1 and the proforma respondent No.7 and also a declaration made by the Petitioner No.1 as the prime bidder, which inter-alia, proceeded to state in very clear terms the single point responsibility of executing the work under the contract would be that of the petitioner No.1 and that the petitioner No.1 has been expressly authorized by the proforma respondent No.7 to perform, if necessary, even the obligation undertaken by the proforma respondent No.7 vis-à-vis the performance of the contract. It was further mentioned that the petitioner No.1 had accepted the single point responsibility to perform the contract and had made a representation to that effect in its bid. Further to that, the Petitioner No.1, while not denying to the fact that the proforma respondent No.7 had sold its Project Logistic Division, had stated in the said affidavit-in-opposition that

the sale of the project division of the proforma respondent No.7 was neither relevant nor a material fact in as much as for performance of the scope of the work there was no requirement of deployment of any equipment of machinery of the Project Logistic Division of the Proforma Respondent No.7 as the Petitioner No.1 can very conveniently perform the same. It was further mentioned that the consortium of the Petitioner No.1 and the Proforma Respondent No.7 was still intact irrespective of the sale of the Project Logistic Division by the Proforma Respondent No.7

5. This Court, after hearing the learned counsel for the parties on the preliminary objections taken by the Respondent No.6 as regards the maintainability of the writ petition on 15.11.2022, granted the liberty to the petitioners to transpose the Proforma Respondent No.7 as a co-petitioner or a separate application can be filed by the Proforma Respondent No.7 challenging the action of the respondent authorities by an order dated 15.11.2022 and thereby fixed the matter on 06.12.2022 for further consideration. The petitioners neither in coordination with the Proforma Respondent No.7 filed any application seeking transposition of the Proforma Respondent No.7 as a co-petitioner nor any application was filed by the Proforma Respondent No.7. On the other hand, an additional affidavit was filed by the petitioners whereby a letter addressed to the Petitioner No.1 by the Proforma Respondent No.7 dated 01.12.2022 was enclosed. In terms with the said letter dated 01.12.2022 enclosed to the said additional affidavit, it transpires that the authorized signatory of the Proforma Respondent No.7 stated that the Proforma Respondent No. 7 acted as a consortium member to the tender of the respondent No.4 for the respondent No.3 and the Petitioner No.1 acted as a lead bidder for the consortium in the tender. It was reconfirmed that the Proforma Respondent No.7 is an entity in itself and is fully functional as straight forwarding and logistic service provider as on the date of the letter and fully capable to perform the scope outlined in the referred MoU.

6. In the backdrop of the above, this Court is of the opinion that before entering into

the merits as to whether the action of the respondent authorities in awarding the contract to the Respondent No.6 requires interference under Article 226 of the Constitution, it is required to look into as to whether the petitioners have the locus standi to file the writ petition challenging the award of the contract. A second question also arises as to whether the Proforma Respondent No.7 having already transferred their Project Logistic Division prior to even filing the writ petition and the same having not been disclosed whether the writ petition which was filed on 27.04.2022 is liable to be dismissed on the ground of suppression of material facts as well as also whether the bid so submitted by the Petitioner No.1 along with the Proforma Respondent No.7 survives pursuant to the Proforma Respondent No.7 selling of the project logistic business division thereby to be entitled to the relief sought for in the writ petition.

7. Mr. I. Choudhury, the learned senior counsel for the petitioner submitted that the consortium comprising of the Petitioner No.1 and the Proforma Respondent No.7 is not a joint venture but only a consortium whereby the Petitioner No.1, in order to be eligible, has taken the credentials of the Proforma Respondent No.7 for fulfilling the commercial criteria, the technical criteria as well as the financial criteria enumerated in Clause 3.2, 3.5.6 d (ii) & 3.5.6 (iii) respectively. The learned senior counsel for the petitioners submitted that in terms with Clause 3.5.6 of the Notice Inviting Tender various conditions have been mentioned as regards the consortium formation. The learned senior counsel for the petitioners submitted that Sub-Clause (c) of Clause 3.5.6 stipulates that consortium must be valid for a minimum period of 12 months after the completion of the contract and the termination of the consortium agreement or any material change in the consortium agreement before the minimum period of 12 months shall be considered as the breach of the contract agreement and the legal action would be initiated. Referring to Clause 3.5.6 (d) (v), the learned senior counsel for the petitioners submitted that in case of a consortium bidding by Indian bidders either one of the bidders can be a Prime Member of the consortium while for the Consortium bidding by

Indian and foreign bidders, the Indian bidder shall be the Prime Member. The learned senior counsel for the petitioner submitted that in terms with Clause 3.5.6 (i), one member of the consortium bidders shall be identified as the Prime Member and the Prime Member shall be authorized to incur liabilities and receive instructions for and on behalf of all the partners of the consortium and the entire execution of the contract including receipt of the payment shall be done exclusively through the Prime Member. He further submitted that such authorization has to be given by all the partners of the consortium by submitting a Power of Attorney and the Prime Member shall be responsible for timely completion of the project. Further referring to Clause 3.5.6 (j), the learned senior counsel submitted that the Prime Member of the consortium should confirm unconditional acceptance of full responsibility of executing the entire scope of the work of the tender and the member of the consortium may sign the bid provided a Power of Attorney from other member authorizing the Prime Member for signing and submission of the bid on behalf of the individual member must accompany the techno-commercial bid. Further to that, in the said clause it has been mentioned that the other members of the consortium may participate in the techno-commercial discussion and also sign the minutes of such discussion/meeting along with the prime members of the consortium. However, the integrity pact will have to be signed by all the constituents of the consortium. He further drawing the attention of this Court to Clause 3.5.6 (e), submitted that the bid shall contain the copy of the original MoU between the consortium /joint venture members and the said MoU shall be converted as a definitive agreement between the parties after the award of the job and before signing of the contract which shall be done before 15 (fifteen) days from the date of issue of Letter of Acceptance. On the basis of the above Clauses, the learned senior counsel for the petitioners, therefore, submitted that the entire duty and responsibility towards the performance of the work is upon the prime member and it is the prime member who shall be authorized to incur liabilities and receive instructions for and on behalf of all partners of the consortium and the entire execution of the contract including receipt of

payment shall be done exclusively through the prime member.

8. Referring to the MoU entered into between the Petitioner No.1 with the Proforma Respondent No.7, the learned senior counsel for the petitioners had drawn the attention to Clause No.3 which stipulates that the Petitioner No.1 shall act as the leader of the consortium and shall have the authority to bind each of the consortium partners. He further submitted that in terms with Clause 3 of the MoU, it is the Petitioner No.1 who would be responsible for doing the needful as stated in the sub-clauses of Clause 3 of the MoU. Further referring to Clause No.7, the learned senior counsel submitted that the leader of the consortium shall be liable for performance of the equipment/system on behalf of the Consortium.

9. Drawing attention of this Court to the various Clauses of the tender documents as well as the MoU, the learned senior counsel submitted that there is difference between the terms “consortium” and “joint venture”. Inviting the attention of this Court to the judgment of the Supreme Court of India in the case of *New Horizons Limited and Another vs. Union of India and Others*, reported in (1995) 1 SCC 478, the learned senior counsel submitted that while in the case of a joint venture, a separate and distinct entity gets created whereas in the case of a consortium, since there is no sharing of profit and losses, the lead partner continues to retain its individual character and the other partner merely plays the supporting role for the purpose of executing certain aspects of the contract in question, and therefore, the lead partner, who is the Petitioner No.1 in the instant case, being aggrieved can maintain a writ petition challenging the illegal actions of the respondent authorities. The learned senior counsel further submitted that the Power of Attorneys so given by the Proforma Respondent No.7 in favour of the Executive Director, the Business Head, sales and Marketing and the Deputy General Manager of the Petitioner No.1 continues to remain valid in spite of the fact that the tender was not awarded to the Proforma Respondent No.7 in as much as the awarding of the contract in favour of the Respondent No.6 was illegal, arbitrary as well as

unreasonable for which the same is nonest in law. Such award being made in favour of the Respondent No.6 is no award in the eye of law, and accordingly, the said Power of Attorneys dated 21st of June, 2021 and 23rd June, 2021 given by the Proforma Respondent No.7 still holds the field.

10. The learned senior counsel for the petitioner further on the question of sale of the Project Logistic Division by the Proforma Respondent No.7 submitted that this Court is examining the decision making process leading to the impugned decision which is much prior in time to the sale of the Project Logistic Division by the Proforma Respondent No.7, and as such, the sale by the Proforma Respondent No.7 of its Project Logistic Business Division is not a material fact for the purpose of adjudication of the writ petition and non-disclosure of the same would not amount to suppression of material facts. The learned senior counsel further submitted that if the contract work is awarded to the consortium of the Petitioner No. 1 and the Proforma Respondent No.7, the Petitioner No.1 has the competence and ability to undertake the contract and the extent of the commitment in so far as the proforma respondent No.7 is concerned would continue to exist as is evident from the MoU between the Petitioner No.1 and the Proforma Respondent No.7. It is under such circumstances that the learned senior counsel submitted that the writ petition is maintainable, and therefore, the writ petition requires to be heard on merit.

11. Mr. D. Das, the learned Senior Counsel for the Respondent No.6 submitted that the writ petition is required to be dismissed on the ground that the petitioners do not have the locus-standi to challenge the decision of the respondent Nos.3 & 4 to award the contract to the Respondent No.6 alone without making the Proforma Respondent No.7, He further submitted that the releifs sought for by the petitioners apart from challenging the decision to award the contract to the Respondent No.6 relates to granting of the contract to the consortium of the Petitioner No.1 and Proforma Respondent No.7 as well as challenging the terms of the Notice Inviting Tender in the alternative. Referring to the

offer submitted by the petitioner No.1 dated 14th of July, 2021, the learned senior counsel for the Respondent No.6 submitted that the Executive Director of the Petitioner No.1 had submitted the said technical offer and thereby mentioned that it meets the commercial criteria laid down in Clause 3.2 of the bidder qualification requirement in view of the credentials of the proforma respondent No.7; the technical criteria mentioned in Clause 3.5.d (ii) on account of the credentials of the Proforma Respondent No.7 and the financial criteria in terms with Clause 3.5 (iii) on the ground that the Proforma Respondent No.7 satisfies the said criteria. The learned senior counsel referring to the MoU dated 14th of July 2021 between the Petitioner No.1 and the Proforma Respondent No.7 submitted that the wording used in the said MoU would clearly show that as per the tender condition, a consortium formed amongst individual entities were allowed to qualify and participate as a bidder and towards that purpose of the Petitioner No.1 and Proforma Respondent No.7 have joined together to form a consortium and the MoU was entered into by the Petitioner No.1 and the Proforma Respondent No.7 for the purpose of submitting the bid against the said tender *jointly as a bidder* to meet the qualifying requirement of the tender, towards execution of the contract in case of an award of the contract by the purchaser and furnish performance towards equipment/system as per the condition of the contract. He, therefore, submitted that by the said MoU, both the Petitioner No.1 as well as the Proforma Respondent No.7 joined together to be a bidder and sans the Proforma Respondent No.7 being a co-petitioner, the Petitioner No. 1 alone cannot be said to be a bidder. Further, the learned senior counsel has drawn the attention of Clause 4 of the said MoU and submitted that it is only in the case the contract was awarded by the respondent Nos.3 & 4, the Petitioner No.1 as well as the Proforma Respondent No.7 agreed to furnish the contract performance guarantee from the bank as per the said tender conditions for a value stipulated in the contract award. Clause No.5, as per the learned senior counsel for the Respondent No.6 stipulates that each of the consortium member shall be jointly and severely responsible for

performance of the contract and the consortium members shall be jointly and severely responsible for discharging all the obligations of the contract, and therefore, submitted that the submission made by the learned counsel for the petitioners that the Petitioner No.1 alone shall do the work and only the help of the Proforma Respondent No.7 was taken to meet certain criteria is incorrect and misconceived. In support of the said submission, the learned senior counsel for the Respondent No.6 has also drawn the attention of this Court to the Declaration given by the Petitioner No.1 as well as the Proforma Respondent No.7 on distribution of the work amongst the consortium members which was in terms with Clause 3.5.6(x) of the tender documents. The learned counsel submitted that the Declaration which would clearly show that both the Petitioner No.1 as well as the Proforma Respondent No.7 undertook to jointly and severely to be liable for execution of the contract if awarded in accordance with its terms and to jointly and severely assumed responsibility for all obligations and liabilities under the contract. The learned senior counsel further drawing the attention to the said Declaration stated that the responsibility of the petitioner No.1 was only in respect to the work:-

1. Barging from Haldia/Kolkata to NRL Jetty-Jointly;
2. Designing the most suitable Axel configuration for transportation;
3. Road transportation from Jetty till erection location or location indentified by the client at the respective NREP Unit using Axles and
4. Custom clearance.

Whereas the responsibilities in respect to the Proforma Respondent No.7 were:-

1. Barging from Haldia/Kolkata to NRL Jetty-Jointly;
2. Jetty Development works;
3. Ramp preparation for load out operation from Barge to Jetty;
4. Construction of bye passes en-route, if required;

5. Supply, erection and dismantling of bridges and

6. Re-erection and dismantling of bridges.

The learned senior counsel for the Respondent No.6, therefore, submitted that from the said Declaration it was apparently clear that the Proforma Respondent No.7 had equal or more responsibility in performing the contract in question and in terms with Clause 3.5.6(x), the constitution of the consortium or the relative distribution of the works and/or activities amongst the consortium members cannot be altered or assigned except with the prior written consent of the owner and any contrary authorization or reassignment shall be deemed to be an unauthorized assignment of the contract with attendant liability including termination of the contract. The learned senior counsel, therefore, submitted that the Proforma Respondent No.7 whose responsibility was equal or more has not approached this Court challenging the decision of the respondent Nos.3 & 4 to award the contract to the Respondent No.6. He further submitted that the submission made by the counsel for the petitioner that the petitioner is capable of doing the said work if the contract is awarded is therefore completely misconceived in view of the Clause 3.5.6(x). The learned senior counsel further drawing the attention to the Power of Attorneys dated 21.06.2021 and 23.06.2021 executed by the Proforma Respondent No.7 in favour of the officials of the Petitioner No.1 submitted that the said Power of Attorneys were contingent and limited to remain valid until Respondent Authorities received a written notice from the Company, i.e. the Proforma Respondent No.7 withdrawing its authorization or the Company, i.e. the Proforma Respondent No.7 comes to know that the tender is not awarded to the Proforma Respondent No.7. As in the instant case, award has been made in favour of the Respondent No.6 and the Proforma Respondent No.7 is in know of the same, the said Power of Attorneys dated 21.06.2021 and 23.06.2021 are no longer valid upon the contract being awarded in favour of the Respondent No.6. The learned senior counsel also submitted that the contention made by the learned counsel for the petitioners to the effect that the said

Power of Attorney continues to hold the field as the award of the contract to the Respondent No.6 was illegal and as such nonest is completely misconceived in as much as without the Proforma Respondent No.7 challenging the said award of the contract it cannot be said that the Proforma Respondent No.7 has not accepted the decision of the Respondents to award the contract to Respondent No.6. The learned senior counsel further submitted that the contention made by the learned counsel for the petitioner that as the bid submitted by the petitioner along with the Proforma Respondent No.7 was not as a joint venture but in the form of a consortium, the lead partner can very well still retain the individual character and can maintain the writ petition is totally misconceived in as much as a consortium is not a legal entity and as such all the partners of the consortium have to join together to file the writ petition or for that matter, the Proforma Respondent No.7, who was the other consortium member had to authorize the petitioner No.1 to challenge the award of the contract made in favour of the Respondent No.6. He further submitted that the instant writ petition is not only limited to challenging the decision to award the contract to the Respondent No.6 but also seeks for award of the contract to the consortium of the Petitioner No.1 and Proforma Respondent No.7 and in the alternative for annulling the entire tender process. Therefore, the learned senior counsel submitted that the instant writ petition is not maintainable at the instance of only the Petitioner No.1 having approached the Court.

12. The learned senior counsel further submitted that the Project Logistic Division of the Proforma Respondent No.7 was one of the most important criteria for technically qualifying the consortium of the Petitioner No.1 and the Proforma Respondent No.7 and this very aspect of the matter can be seen from the technical offer submitted by the Petitioner No.1 by its communication dated 14.07.2021 as well as from the self admission of the petitioner No.1 and the Proforma Respondent No.7 in the Memorandum of Understanding dated 14.07.2021. In that view of the matter, without the project logistic division being there admittedly, the consortium of the petitioner No.1 is

not technically qualified and as such the writ petition cannot be maintained at the behest of a consortium which as on the date of the filing of the petition was not technically qualified.

13. The learned senior counsel further submitted that the petitioners knew very well that the Proforma Respondent No.7 has sold its project logistic division even prior to the filing of the writ petition but have suppressed this material aspect which on the face of it is a complete abuse of the process of the Court, and therefore, the writ petition is liable to be dismissed on that ground alone.

14. Mr. N. Deka, the learned counsel appearing on behalf of the respondent Nos.3 & 4 adopting the submission made by the learned senior counsel for the Respondent No.6 further submitted that the entire edifice of the case of the petitioner is totally misconceived in as much as when two natural or juristic persons join together and form an entity and such entity is known as a joint venture and as has been held by the Supreme Court in the case of *New Horizons* (supra) as well as in the subsequent decision in the case of *Gammon India Limited vs. Commissioner of Customs, Mumbai*, reported in (2011) 12 SCC 499, the said entity would be a legal entity in the nature of partnership and as such could maintain a writ petition. Mr. Deka, the learned counsel further submitted that from a perusal of the MoU dated 14.07.2021, it would be seen that it is not a joint venture agreement but is an agreement of formation of a consortium between two juristic persons for the purpose of submitting the bid. The learned counsel for the respondent No.3 & 4 submitted that a further perusal of the MoU would clearly show that except stating about sharing of the responsibilities and others there is no mention whatsoever that the said would lead to a formation of an entity in the form of a joint venture. The said MoU would clearly show that both the Petitioner No.1 and the Proforma Respondent No.7 would retain its existence separately and have only joined together for the purpose of this particular contract to submit the bid. Under such circumstances, both the Petitioner No.1 as well as the Proforma Respondent No.7 would come within the

ambit of the term ‘bidder’ together and the Petitioner No.1 alone cannot be termed to be the ‘bidder’. Therefore, without the Proforma Respondent No.7 assailing the tender process as well as the award of the tender made in favour of the Respondent No.6, the Petitioner No.1 alone cannot maintain the writ petition. He further submitted that the principles of Order XXX of the Code of Civil Procedure, 1908 shall apply.

15. On the basis of the above mentioned contentions made by the respective counsel, this Court is of the opinion that two broad question arises for consideration, which are as under:-

(a) Whether the Petitioner No.1 alone can be said to be “person aggrieved” to maintain the writ petition?

(b) Whether the non-disclosure of sale of the Project Logistic Division of the Proforma Respondent No.7 amounts to suppression of material facts?

16. Let this Court first take into consideration as to whether the Petitioner No.1 can be termed as “person aggrieved”. The Supreme Court in the case of *Ayaaubkhan Nooorkhan Pathan vs. State of Madhya Pradesh & Others*, reported in (2013) 4 SCC 465 observed that the stranger cannot be permitted to meddle in any proceedings, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons. It is only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a Court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right or when there is a complaint by a person that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. It was also observed that the Court can, of course, enforce the performance of a statutory duty by a public body, exercising writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It

was categorically observed that it is implicit in the exercise of such extraordinary jurisdiction that the relief prayed for must be one to enforce a legal right and the existence of such right is a sine-qua non for exercise of jurisdiction by the Court. It was also emphasized that the legal right that can be enforced must ordinarily be the right of the person himself, who complains of infraction of such right and approaches the Court for relief as regards the same. Further, the Supreme Court in the said judgment further defined the term “legal right” to mean an entitlement arising out of legal rules. It was observed that the term “legal right” connotes an advantage, or a benefit conferred upon a person by the Rule of law. It was observed that the expression, “person aggrieved” does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardized. Paragraph Nos. 9, 10, 11 & 12, being relevant, are quoted herein below:-

“9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the authority/court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from *legal injury* can challenge the act/action/order, etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can, of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that the relief prayed for must be one to *enforce a legal right*. In fact, the *existence of such right, is the foundation of the exercise of the said jurisdiction by the Court*. The *legal right that can be enforced* must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same.

10. A “legal right”, means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, “person aggrieved” does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one whose right or interest has been adversely affected or jeopardised.

11. In *Anand Sharadchandra Oka v. University of Mumbai*, a similar view was taken by this Court, observing that, if a person claiming relief is not eligible as per requirement, then he cannot be said to be a person aggrieved regarding the election or the selection of other persons.

12. In *A. Subash Babu v. State of A.P.*, this Court held:

“25. ... The expression ‘aggrieved person’ denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which the contravention is alleged, the specific circumstances of the case, the nature and extent of the complainant’s interest and the nature and the extent of the prejudice or injury suffered by the complainant.”

17. In the backdrop of the above, let this Court take into consideration as to whether the Petitioner No.1 herein would come within the ambit of “person aggrieved”. For understanding the same, it would be relevant to take note of some of the relevant documents as well as the various tender conditions. In view of the fact that the learned counsel appearing on behalf of the petitioner submitted that the bid submitted by the Petitioner No.1 along with the Proforma Respondent No.7 is not a bid submitted as a joint venture, but a bid submitted as consortium of bidders, let this Court first analyze as to whether the bid submitted by the Petitioner No.1 along with Proforma Respondent No.7 in the instant case to the respondent Nos.3 & 4 was a bid as a joint venture or a bid as a consortium of bidders. To analyze the said aspect, it is relevant also to take note of as to what is a joint venture in contradistinction to a bid submitted by a consortium of bidders. The term “joint venture has been defined in *American Jurisprudence* (Second Edition, Vol.46, PP 19, 22 & 23) as under:-

“A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that *there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise.*

Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships.

A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation.”

18. To the same effect, the term “joint venture” has been defined in *Corpus Juris Secundum* (Vol. 48-A, pp. 314-15) as herein under:-

“ ‘Joint venture’, a term used interchangeably and synonymous with ‘joint adventure’, or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single

business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) *sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings*; (3) *community of control over, and active participation in, management and direction of business enterprise*; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement.”

"Joint venture," a term used interchangeably and synonymous with 'joint adventure', or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge..... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement."

19. The term “joint venture” has also been defined in the Black’s Law Dictionary, 11th edition, Page 1003 as thus:-

Joint Venture. A business undertaking by two or more persons engaged in a single defined project. The necessary elements are (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member’s equal voice in controlling the project.—Also termed joint adventure; joint enterprise.

20. The Supreme Court had the occasion to consider the nature of a joint venture in the

case of **New Horizons Limited** (supra). Paragraph No.24 of the said judgment is reproduced herein below:-

“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. 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.”

21. Subsequent thereto, the Supreme Court in the case of **Gammon India Limited** (supra) observed that the Supreme Court in the case of **New Horizons Limited** (supra) the Supreme Court recognized that a joint venture to be a legal entity in the nature of partnership of the constituent Companies. The necessary corollary flowing from the said decision in **New Horizons Limited** (supra) wherein partnership concept in relation to a joint venture has

been accepted, the Supreme Court in the said judgment in **Gammon India Limited** (supra) observed that joint venture could be treated as a legal entity with a character of partnership in which **Gammon India Limited** was one of the constituents. The Supreme Court thereupon taking into account that joint venture is a legal entity, i.e. a juridical person went further to consider as to whether the joint venture would also be “a person” for the purpose of condition No.38 of the Exemption Notification stipulating that the goods should be imported by "a person" who had been awarded a contract for construction of goods in India by NHAI. Paragraph Nos. 25 to 28 of the said judgment, being relevant, is quoted herein below:-

“25. In New Horizons, a joint venture company, consisting of a few Indian companies (with 60% share capital) and a Singapore-based company (with 40% share capital), had participated in tender proceedings floated by the Department of Telecommunications for printing and binding of the telephone directories of Delhi and Bombay. The tender submitted by New Horizons Ltd. (for short “NHL”) was not accepted by the Tender Evaluation Committee, apparently, on the basis of the fact that the successful party had more technical experience than any one of the constituent companies of NHL. Aggrieved by the said decision, NHL filed a writ petition in the Delhi High Court against the decision of the Department of Telecommunications. The said writ petition was dismissed rejecting the plea of NHL that the technical experience of the constituents of the joint venture was liable to be treated as that of the joint venture. NHL brought the matter to this Court.

26. Explaining the concept of joint venture in detail, it was held in New Horizons case that a joint venture is 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 was observed that a joint venture could take the form of a corporation wherein two or more persons or companies might join together. Accordingly, the appeal of NHL was allowed and it was held that it was a joint venture company in the nature of a partnership between the Indian group of companies and Singapore-based company which had jointly undertaken the commercial venture by

contributing assets and sharing risks.

27. Applying the principle of “lifting the corporate veil”, it was held in New Horizons case that the joint venture companies’ technical experience could only be the experience of the partnering companies and the technical experience of all constituents of NHL was liable to be cumulatively reckoned in the tender proceedings and any one of the constituents was competent to act on behalf of the joint venture company. Highlighting the concept of joint venture, the Court observed 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.”

28. In short, New Horizons recognises a joint venture to be a legal entity in the nature of a partnership of the constituent companies. Thus, the necessary corollary flowing from the decision in New Horizons, wherein the partnership concept in relation to a joint venture has been accepted, would be that M/s Gammon-Atlanta JV, the joint venture could be treated as a “legal entity”, with the character of a partnership in which Gammon was one of the constituents. In that view of the matter, the next question for consideration is: whether being a legal entity i.e. a juridical person, the joint venture is also a “person” for the purpose of Condition 38 of the exemption notification, stipulating that the goods should be imported by “a person” who had been awarded a contract for construction of goods in India by NHAI?

22. Thus, from the above it can be summarized that the joint venture is a special combination of two or more persons in some specific venture, a profit is jointly sought without any actual partnership or corporate designation. The joint venture involves the factors like:-

- (i) Contribution by the parties of money, effort, knowledge and other assets to the common undertaking;
- (ii) Joint property interest in the subject matter of the venture;
- (iii) Right of mutual control of management of the enterprise;
- (iv) Expectation of profit;
- (v) Right to participate in the profit; and
- (vi) Limitation of the objective to a single undertaking.

23. In all the above definitions as well as the observations made by the Supreme Court in various judgments, one aspect is clear that sharing of a profit is one of the pre-conditions to hold that the said combination of persons, natural or juristic to be a joint venture. The Supreme Court in the case of *Faqir Chand Gulati vs. Uppal Agencies Private Limited And Another*, reported in (2008) 10 SCC 345 while considering the concept of a joint venture by taking into consideration the various definitions as well as the observations made by the Supreme Court in *New Horizons Limited* (supra) had given an illustration in paragraph No.25 thereby explaining the concept of joint venture. Paragraph No.25 of the said judgment is reproduced herein below:-

“25. An illustration of joint venture may be of some assistance. An agreement between the owner of a land and a builder, for construction of apartments and sale of those apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project.”

24. The above quoted paragraph would also show that to be a joint venture there has to be an understanding reached as regards the sharing of the profits. This is so because, a joint venture is, in general, governed by the same rules as partnership and the relationship of the parties to a joint venture and the nature of association are so similar and closely akin to partnership that their rights, duties and liabilities are generally tested by the rules which are closely analogues to and substantially the same, if not exactly the same as those which govern partnership. It is also pertinent herein to take note that a joint venture by itself has been recognized to be a legal entity as observed by the Supreme Court in the case of *New Horizons Limited* (supra) as well as *Gammon India Limited* (supra), and as such, the joint venture can very well maintain a writ petition provided it has a legal right to do so.

25. In the backdrop of the above, let this Court now consider as to what is a “consortium of bidders”. The term “consortium” literally means companionship. However, when used in a commercial context, it would mean a group of shipping lines or a group of Companies or an association of several commercial enterprises or for that matter, joining of several parties to one action. Therefore, a consortium of bidders would also come within the ambit of a joint venture provided it satisfies the requirement as is necessary to constitute a joint venture which, as already observed herein above, involves factors such as contribution by the parties of money, effort, knowledge and other assets to common undertaking; joint property interest in the subject matter of the venture; right of mutual control of management of the enterprise; expectation of profit and right to participate in the profit. As already observed sharing profits in a particular ratio is one of the most essential requirements for distinguishing a consortium of bidders from a joint venture.

26. This Court would also like to observe that in the American Jurisprudence, the relevant portion which has been quoted herein above clearly distinguishes a joint venture from a relationship of independent contract. It was explained that the relationship of an

independent contractor is one who exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work. In other word, a consortium of bidders which do not fulfill the requirement of a joint venture, the consortium partners may independently or jointly carry out their works within their respective fields having no relationship with the sharing of the profits. In such case, each consortium would be entitled to the profits on the basis of the work carried out either jointly or separately by them.

27. Let this Court, therefore, analyze in the above perspective as to whether the Petitioner No.1 can be held to be a joint venture or a consortium of bidder. For the said purpose it would be relevant to analyze some of the relevant documents enclosed to the tender by the Petitioner No.1-consortium with specific reference to the terms and conditions of the tender documents. A perusal of the terms of the Notice Inviting Tender (for short, NIT) do not define the term “bidder”. However, Clause 3 of the NIT stipulates that the bidder(s) who meet all the criteria as specified in the Clauses shall be qualified for participating in the tender and shall submit supporting documents as detailed in the NIT. Clause 3.1 relates to Technical Criteria; Clause 3.2 relates to Commercial Criteria; Clause 3.3 pertains to Financial Criteria. Clause 3.5 is in relation to General Notes on Bidder’s Qualification Criteria (BQC).

28. In Clause 3.5.6, it has been mentioned that the consortium formation shall be allowed subject to meeting conditions mentioned in sub-clauses (a) to (x). Therefore, in view of Clause 3.5.6, a consortium can very well submit the tender subject to the conditions mentioned in Clause 3.5.6. It has been mentioned in sub-clause (a) of Clause 3.5.6 that bidders are allowed to form consortium for bidding against the Part-A or for bidding against Part-A and Part-B together. In sub-clause (c) of Clause 3.5.6, it is mentioned that the consortium must be valid for minimum period of 12 months after completion of the contract. The termination of the consortium agreement or any material

change in the consortium agreement before minimum period of 12 months shall be considered as breach of the contract agreement and legal action would be initiated. Sub-clause (d) of Clause 3.5.6 stipulates that either one or both the consortium partners shall have to meet the criteria specified in Clause 3.1 (technical criteria) and Clause 3.2 (commercial criteria) individually or jointly subject to the sub-sub-clauses (i) to (v).

29. At this stage it is also relevant to take note of Clause 3.5.6 (d) (iii) which stipulates that any one of the members of the consortium shall meet the complete financial criteria (annual turnover/net worth/working capital) as per Clause 3.3 of the NIT (financial criteria) and that the net worth of both the consortium partners shall be positive. Sub-Clause (e) of Clause 3.5.6 stipulates that the bid shall contain copy of the original MoU between the consortium/joint venture members. The Memorandum of Understanding shall be converted to a definitive agreement between the parties after award of the job and before signing of the contract which shall be done within 15 days from the date of issue of Letter of Acceptance. The agreement must remain in force at least 12 months till the pendency of the contract. Sub-clause (h) of Clause 3.5.6 stipulates that there shall be no alteration or modification in the constituents or composition of consortium after submission of the bid and also during the pendency of the contract. The constituent of the consortium shall be allowed to undertake and carry out only that activity for which that constituent had been evaluated and qualified technically. Sub-clause (i) of Clause 3.5.6 stipulates that one participating members of the consortium shall be identified as the prime bidder and has to be an India bidder or an Indian subsidiary of a foreign Company. It is stipulated that the prime member shall be authorized to incur liabilities and receive instructions for and on behalf of all the partners of the consortium and the entire execution of the contract including receipt of the payment shall be done exclusively through the prime member. The authorization shall be evidenced by submitting a Power of Attorney signed by a legally authorized signatory of all partners and the prime member will be responsible for timely completion of the project. Sub-

Clause (l) of Clause 3.5.6 stipulates that the prime member and the distribution of works amongst the consortium members shall be identified and submitted along with the bid and shall not be changed thereafter. In terms with sub-clause (p) of Clause 3.5.6, in the event of the award of the contract to the consortium, the contract shall be signed by each constituent of the consortium. Alternatively, the prime member of the consortium may sign the contract subject to the submission of Power of Attorney from each constituent authorizing the prime members of the consortium to sign the contract on behalf of the individual members of the consortium. Sub-clause(s) of Clause 3.5.6 stipulates that all members of the consortium/joint venture shall be jointly or severally responsible for the performance of the contract in accordance with its terms as well as in the bid and shall be specifically included in the form of the contract (in the case of successful bid). Sub-clause (x) of Clause 3.5.6 stipulates that the constitution of consortium or the relative distribution of the work and/or the activities amongst the consortium members shall not be altered or assigned, as the case may be, except with the prior written consent of the owner and any contrary authorization or reassignment shall be deemed to be and unauthorized assignment of the contract with attendant liabilities including termination of the contract.

30. From the above Clause 3.5.6 of the NIT, it is clear that every consortium member would be jointly and severally responsible when a bid is submitted as a consortium. The Prime Member concept is only brought into the fold for the purpose of convenience of the Respondent Authorities so that while executing the contract the Respondent Authorities need not correspond to each and every member of the consortium. This aspect of the matter is clear from the fact that each of the consortium members have to sign the documents and for the purpose of convenience the consortium members can allow the Prime member to sign by specifically authorizing the Prime Member by a Power of Attorney.

31. Clause 3.5.8 is in relation to the Clauses of the MoU. In terms with sub-clause (a)

of Clause 3.5.8 that the bidder shall submit with the bid the MoU between the Primary and the consortium members in connection with executing the scope of the work of Part-A or for both scope the work of Part-A and Part-B as defined in the bidding documents elsewhere. The MoU shall be binding on the bidder and not to be changed thereafter without the prior approval of the owner/consultant and shall remain in force at least till the pendency of the contract including defect liability period. Sub-clause (b) of Clause 3.5.8 stipulates that the members of the consortium shall submit the MoU along with the techno-commercial bid clearly defining the role and responsibility of each consortium member. Thereupon, the members of consortium shall enter into a legally enforceable detail agreement within one month after the award of the project through issue of Letter of Acceptance. It has been mentioned that the detail agreement must remain in force at least till the pendency of the contract including the defect liability period as set out in the tender. It was also clarified that the detailed agreement will be in conformity with the MoU including with the provisions of liability and the inter-se role and responsibility of the consortium members and the MoU shall remain valid and shall be binding till such time detailed agreement is executed by the consortium members. In sub-clause (d) to Clause 3.5.8, it has been mentioned that the consortium members whose technical/commercial experience criteria is being used shall also submit an undertaking and Corporate Guarantee as per format enclosed to the Instruction to the Bidders (ITB).

32. In the backdrop of the above, let this Court take into consideration the documents which were submitted by the petitioner No.1 along with the Proforma Respondent No.7 which are relevant for the purpose of deciding the present lis. Annexure-49 to the bid submitted by the petitioner No.1 along with Proforma Respondent No.7 was the MoU dated 14.07.2021. It has been mentioned in the said MoU that it was entered into by the petitioner No.1 along with the Proforma Respondent No.7 for the purpose of submitting the bid against the tender as a bidder to meet the qualifying requirement of the tender, towards execution of the contract in case of the award of the contract by the purchaser

and further performance towards equipment/system as per the conditions of the contract. From a further perusal of the said MoU it transpires that the petitioner No.1 was agreed to be the leader of the consortium who shall have the authority to bind each of the consortium partners. It was further mentioned that the leader of the consortium shall be responsible for preparation and submission of the bid on behalf of the consortium; to negotiate with the respondent No.4; to accept the contract on behalf of the consortium; to issue correspondence with the parties; coordination between the respondent No.4, the consortium members and other agencies concerned; to submit invoice and other documents and receive the payment; to ensure performance of the equipment/system as the case may be. In Clause 12 of the said MoU, it has been mentioned the responsibility for performing the execution of the contract by each consortium member is indicated in Annexure-I to the said MoU and it was agreed by the consortium members that the above sharing of responsibility and obligations shall not in any way be a limitation of joint and several responsibilities of the members under the agreement. It is, however, relevant to take note of that in the said MoU there is no mention whatsoever as regards the sharing of profits or that each of the consortium member shall have an equal voice in controlling the project. However, in terms with Clause 5 of the said MoU which is in terms with Clause 3.5.6 (s), each of the consortium members shall be jointly and severally responsible for the performance of the contract and the consortium members shall be jointly and severally responsible for discharging all obligations of the contract. Annexure-I to the said MoU clearly demarcates the responsibility between the petitioner No.1 and the Proforma Respondent No.7 except one activity, i.e. Barging from Haldia/Kolkata to NRL Jetty which is jointly shared by the both the petitioner No.1 and the proforma respondent No.7.

33. Therefore, a perusal of the MoU entered between the petitioner No.1 and the proforma respondent No.7 it cannot be said that the consortium so formed is a joint venture. It is also clear from Clause 3.5.6 (l) and Clause 3.5.6 (x) read with Annexure-I



to the MoU that the relative distribution of the work or activities amongst the consortium members shall not be altered or assigned as the case may be except with the prior written consent of the owner and any contrary authorization or reassignment shall be deemed to be an unauthorized assignment of the contract with attendant liability including termination of the contract. It is also relevant herein to take note of that in terms with Clause 3.5.6 (l), the distribution of work amongst the consortium members shall be identified and submitted along with the bid and shall not be changed thereafter. The Declaration in this connection has to be submitted in the format attached with the ITB.

34. In compliance to the said Clause 3.5.6 (1), a declaration of the distribution of work amongst the consortium members was submitted as Annexure-48 to the bid of the petitioner No.1 and the Proforma Respondent No.7. Paragraph No.5 of the said Declaration stipulates that the petitioner No.1 shall assume direct responsibility for performing the erection/installation/ODC/OWC including multi-model transpiration from Haldia Port/Kolkata Port from NRL site for “Numaligarh Refinery Extension Project” on lump sum basis with single point responsibility and shall be directly responsible for managing the critical activities of the work, i.e. (1) barging from Haldia/Kolkata to NRL Jetty-jointly with the Proforma Respondent No.7; (2) designing the most suitable Axles configuration for transportation; (3) road transportation from Jetty till erection location or location indentified by the client at the respective NREP Unit using Axles and (4) Custom clearance. On the other hand, the Proforma Respondent No.7 was directly responsible for performing the work, i.e. (1) barging from Haldia/Kolkata to NRL Jetty-jointly with the petitioner No.1; (2) Jetty development works; (3) ramp preparation for load out operation from Barge to Jetty; (4) construction of bye passes en-route, if required; (5) supply, erection and dismantling of bridges and (6) re-erection and dismantling of bridges.

35. Two other documents which are very relevant for the purpose of the instant case are the Power of Attorneys dated 21.06.2021 and 23.06.2021 which were submitted in



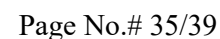
terms with Clause 3.5.6 (i). It appears from the records that two Power of Attorneys were submitted as Annexure-4.1 and Annexure-4.2 to the bid submitted by the consortium of petitioner No.1 and the Proforma Respondent No.7. In terms with the Power of Attorney dated 21.06.2021, the proforma respondent No.7 appointed one Mr. H. S. Acharyya, Executive Director of Prism Logistics Private Limited as the through and lawful attorney to represent the Proforma Respondent No.7 in the tender bearing invitation No.TP/LG/NRL/082176C/001 dated 26.03.2021 to discuss, negotiate and finalize the terms and conditions with respect to the said bid process and to sign, execute and deliver the tender related documents, applications agreements, deeds, declarations, undertaking and such are the documents as may be required and to do such acts, deeds, matters and things as may be considered necessary in that regard. It is also relevant to take note of that in the said Power of Attorney it has been mentioned that the Power of Attorney shall remain valid until NRL receives a written notice from the Proforma Respondent No.7 withdrawing the authorization or NRL, i.e. the respondent No.3 communicates or the Company, i.e. the Proforma Respondent No.7 comes to know that tender is not awarded to the Proforma Respondent No.7. The second Power of Attorney dated 23.06.2021 is in similar terms except the fact that by the said Power of Attorney, Mr. Rahul Rai as well as Mr. Deepak Sangley were appointed to represent the Proforma Respondent No.7 in the said tender. There is no denial to the fact that the Proforma Respondent No.7 is in know that the tender had not been awarded to the Proforma Respondent No.7, and as such, as on the date of filing of the writ petition, the said Power of Attorneys ceased to exist.

36. At this stage, this Court would also like to take into account the submission made by the learned counsel for the petitioner to the effect that the said Power of Attorneys continued to remain in force in as much as the tender has been illegally awarded to the Respondent No.6 and as such the same being a nonest and *void ab initio*, the Power of Attorneys continues to hold the field. In the opinion of this Court, the said submission is

totally misconceived, more so, when the Proforma Respondent No.7, having not assailed the action of the respondents Nos.3 & 4 to award the contract to the Respondent No.6 thereby accepting that the said tender has not been awarded to the Proforma Respondent No.7. Under such circumstances, the said Power of Attorneys enclosed as Annexure-4.1 and 4.2 to the bid submitted by the consortium of the Petitioner No.1 and the Proforma Respondent No.7 cannot be construed to exist as on the filing of the writ petition. Furthermore, there is no power given to initiate proceedings assailing the tender process as well as allotment of the contract to the Respondent No.6.

37. In the backdrop of the above, it is clear that the bid submitted by the petitioner No.1 and the Proforma Respondents No.7 as a consortium is not a bid as a joint venture and it is merely a bid as a consortium of bidders. The materials on record shows that both the Petitioner No.1 and the Proforma Respondent No.7 are jointly and severally responsible. It is only for the sake of convenience as could be seen from Clause 3.5.6 that the Prime Member has been obligated with additional responsibility. However, each of the consortium members continues to be responsible. The MoU do not specify anything about sharing of profits and in terms with Clause 3.5.8, the definitive agreement to be entered into has to be in consonance with the MoU. It would be seen that as there is no participation of profits mentioned, therefore, each of the consortium members as per the MoU would be entitled to their respective profits in terms with the distribution of works as mentioned in Annexure-I to the MoU. Therefore, as per the MoU each of the consortium members would act as independent contractors while executing the contract if awarded.

38. Now let this Court take into consideration Clause 3 of the NIT. It would be seen that Bidders who meet the criterion stipulated in Clauses 3.1, 3.2 & 3.3 of the NIT shall be qualified for participating in the tender. It has also been mentioned that proposal submitted by the bidders who qualify the criterion laid down shall be technically and commercially evaluated. Admittedly as could be seen from the proposal so submitted by



the consortium of the Petitioner No.1 and the Proforma Respondent No.7 through the Petitioner No.1 on 14th of July, 2021 it has been mentioned that the Petitioner No.1 satisfies the technical criteria as mentioned in Clause 3.1 having the experience of 450 metric tons as well as having transported generator stator of 326 metric tons from Kolkata/Haldia to 3 X 606 MW Unit-I and II Barasite. It has also been mentioned that the Petitioner No.1 satisfies the technical criteria of having transported two numbers of transformers of 228 MT each from Karjan Boroda Gujarat to PGCIL, Mariyani, Assam thereby meeting the criteria of Clause 3.1. It is also apparent from the said communication that the Petitioner No.1 further satisfies the financial criteria of Clause 3.3 (d) of having working capital of Rs.10.13 crores. However, as regards the technical criteria as mentioned in Clause 3.5.6 (d) (i) is satisfied by the Proforma Respondent No.7 as it had transported equipments weighing 466 MT from BHEL, Haridwar to Vijayawada and North Chennai Project Site on point to point basis. Again, it is the Proforma Respondent No.7 who has satisfied the commercial criteria of Clause 3.2 as it has transported project cargo from JNPT, Mundra, Kolkata/Haldia, Maneja, BHEL, Bhopal to the project site of Agra, Alipurduwar and Biswanath Chariali. Similarly, the financial criteria as mentioned in Clause 3.5.6 (d) (iii) is only satisfied by the Proforma Respondent No.7 as it satisfies the complete financial criteria (annual turnover/net worth/working capital in terms with Clause 3.3). Therefore, in the opinion of this Court, the Petitioner No.1 cannot be said to be an eligible tenderer alone. But, it shall only be eligible to submit the tender provided the Proforma Respondent No.7's credentials are also taken which would also be evident from the MoU dated 14.07.2021 itself wherein it has been mentioned that both the Petitioner No.1 as well as the Proforma Respondent No.7 had joined together as a bidder to meet the qualifying requirement of the tender amongst others. At this juncture, it is relevant to take note of that the Authority Incorporating the terms and conditions of the NIT have done so taking into account the requirements. The said Authority as per the well settled principles of law is the best

person to understand and appreciate its requirements. The criterion so specified in Clauses 3.1, 3.2 & 3.3 are to be fulfilled by the bidder in order that the bidder's bid is technically and commercially evaluated. The Petitioner No.1 cannot be said to be a bidder or tenderer alone. It is only when the Petitioner No.1 joins with the Proforma Respondent No.7 then only the said combination/consortium can be said to be a bidder for the project in question.

39. The natural corollary to the above is that the Petitioner No.1 alone does not have a legal right to challenge the tender process, the tender conditions as well as the award of the contract. At the cost of repetition, it is reiterated that the Petitioner No.1 along with the Proforma Respondent No.7 can only be regarded as a bidder. Under such circumstances, the Petitioner No.1 alone cannot be a person aggrieved to maintain the present writ petition. At this stage, this Court finds it relevant to take note of a judgment of this Court rendered in the case of *Merolyn Engineering Works (P) Ltd. & Another vs. State of Assam* reported in (2022) 1 GLR 715. In the said case, one of the constituents of a Joint Venture but not the Joint Venture filed a writ petition challenging the allotment of the contract. This Court dismissed the writ petition inter-alia on the ground of maintainability. Paragraph Nos.40 & 41 being relevant are quoted herein below:-

“40. A preliminary objection was raised by Mr. Das, learned senior counsel for the respondent No. 5 in respect of locus standi of the petitioner to file the writ petition challenging the tender evaluation process wherein the petitioner was not the participant as a single entity rather it participated as a joint venture along with M/s. Ananda Shipyard and Slipways Ltd. the other constituent.

41. On perusal of the writ petition it is found that the petitioner No. 1 is M/s. Merolyn Engineering Works (P.) Ltd., a limited company and lead partner in Merolyn Ananda Joint Venture and it is stated in the writ petition that petitioner No. 1 authorised the petitioner No. 2, the executive officer to represent the company, petitioner No. 1. I have perused the joint venture agreement of the petitioner No. 1 and the other constituent, M/s. Ananda Shipyard and Slipways Ltd. which is enclosed to the writ petition and

therein under the heading “validity of said agreement” it is stipulated that the joint venture shall be automatically terminated in case the contract in terms of said tender was not awarded. From the affidavit in opposition by the private respondent No. 5 it is seen that vide letter dated 29.5.2020 it was notified to the said respondent No. 5 that its bid dated 21.2.2020 for execution of the work under the said notice inviting bid dated 29.5.2020 was accepted by respondent-ATDCL. In terms of the said letter dated 29.5.2020 and pursuant to the signing of the contract, notice to proceed with the work was issued to respondent No. 5. Now if we consider the validity of the joint venture agreement entered into by the petitioner with its other constituent, M/s. Ananda Shipyard and Slipways Ltd. the said joint venture agreement on the basis of which a jural relationship developed between the petitioner No. 1 and the other constituent of the joint venture came to an end “automatically” after awarding of the contract to the respondent No. 5. Once the validity of said agreement stood terminated “automatically” as such the power of attorney authorizing the present petitioner No. 1 to act on behalf of M/s. Ananda Shipyard and Slipways (P.) Ltd. had also lost its validity. In view of the same, the petitioner under its sole entity without the authority of the other constituent M/s. Ananda Shipyard & Slipways Ltd. has no locus standi to file this writ petition, more so when the petitioner No. 1 sought to be declared as the selected bidder with all consequential reliefs and admittedly the petitioner No. 1 solely does not fall within the definition of “bidder” under clause 1(i)(b) of the General Conditions of Contract. The relief even if the writ petition is allowed, cannot be granted to the petitioner No. 1 alone. Accordingly this writ petition stands dismissed. No cost. Send back the records.”

40. The records would reveal that this Court vide an order dated 15.11.2022 had given an opportunity to the Petitioner No.1 either to transpose the Proforma Respondent No.7 as a co-petitioner in coordination with the Proforma Respondent No.7 or the Proforma Respondent No.7 to file an application in the instant proceedings to be a co-petitioner. The learned counsel for the petitioner fairly submitted that for business reasons, the Proforma Respondent No.7 do not want to be involved in the instant litigation thereby challenging the decision of the respondent Nos.3 & 4.

41. In view of the above analysis, this Court is, therefore, of the opinion that the Petitioner No.1 cannot claim itself to be a “person aggrieved” as the Petitioner No.1 did not have the eligibility to submit the tender. Being not eligible alone to submit the tender, it renders the status of the Petitioner No.1 as a stranger to the tender proceedings, and therefore, this Court is of the opinion that the Petitioner No.1 alone cannot maintain the instant writ petition.

42. The second broad question involves two sub-questions as to whether the selling of the Project Logistic Division which is an admitted fact has any nexus with the bid submitted the consortium of the Petitioner No.1 and the Proforma Respondents No.7 and the second sub-question is whether the said is a materials fact which would entail the consequence of dismissal of the writ petition for suppression of material facts. The present writ petition has been filed challenging the tender process, the terms of the NIT as well as the decision making process of the respondent Nos.3 & 4 to award the contract to the Respondent No.6. It is well settled that in a proceedings under Article 226 of the Constitution, this Court cannot sit as an Appellate Authority over the decision taken by the respondent No.3 & 4. The pleadings in the Interlocutory Application is not clear as to whether the sale made to the Project Logistic Business Division of the Proforma Respondent No.7 would impact upon the eligibility of the Proforma Respondent No.7 to fulfill the technical, commercial as well as financial criteria as mentioned in Clause 3.1, 3.2 & 3.3 of the tender documents. Such aspect of the matter can only be looked into by the respondent Nos.3 & 4. The respondent Nos.3 & 4 in spite of having the knowledge about the sale have not filed any affidavit stating about the impact of the sale of the Project Logistic Division by the Proforma Respondent No.7 on the eligibility of the bid submitted by the consortium of the Petitioner No.1 and the Proforam Respondent No.7.

43. Under such circumstances, this Court is not in a position to hold that the sale made by the Proforma Respondent No.7 of its Project Logistic Business Division had any



impact on the eligibility of the bid submitted by the consortium of the Petitioner No.1 and the Proforma Respondent No.7. Having said so, the said aspect of the matter cannot also be said to be a material fact involved in the instant proceedings, more so, when this Court is only to consider the decision making process of the respondent Nos.3 & 4 to award the contract to the Respondent No.6. Under such circumstances, this Court is further of the opinion that the same cannot be said that suppression of the said fact amounts to suppression of material fact thereby to dismiss the writ petition on that ground.

44. In view of the above decision in question No.1, holding inter-alia that the Petitioner No.1 alone cannot maintain the instant writ petition, this Court allows the I.A. (C) No.1628/2022 thereby dismissing the instant writ petition as not maintainable.

45. In view of the above, the instant writ petition stands dismissed. However, no costs on the present facts.

JUDGE

Comparing Assistant