

Before S.J. Vazifdar, ACJ & Arun Palli, J.
HDPL INFRASTRUCTURE LTD.—Petitioner

versus

STATE OF PUNJAB AND OTHERS —Respondents

CWP No. 7021 of 2016

June 06, 2016

*Constitution of India, 1950—Art.226—Tender—Eligibility —
In absence of provision to contrary—Experience of one of members
of joint venture to be relied upon to establish eligibility of joint
venture—Joint venture akin to partnership—Ingredients of
partnership including of agency ought to be presumed.*

Held, that in the absence of a provision to the contrary, the experience of one of the members of the joint venture can be relied upon to establish the eligibility of the joint venture. A joint venture is and, in any event, is akin to partnership. There can even be a single venture partnership. Absent a provision to the contrary in cases such as this, the ingredients of a partnership including of agency ought to be presumed.

(Para 15)

Akshay Bhan, Senior Advocate with Amandeep Singh,
Advocate, *for the petitioner*

Alok Jain, Addl. Advocate General, Punjab.

Kamal Sehgal, Advocate for respondent No.5

S.J. VAZIFDAR, ACTING CHIEF JUSTICE, J.

(1) The petitioner has challenged the eligibility of respondent Nos.4 and 5 in respect of the tenders invited by the official respondents.

As recorded in our order dated 24.05.2016, respondent No.4 stated that it was not entitled to be awarded the contract and desired, therefore, to be deleted from the array of parties. Respondent No.4 was accordingly deleted from the array of parties.

(2) Respondent No.2 is the Chief Engineer, Punjab PWD (B&R). Respondent No.3 is the Punjab Road and Bridges Development Board. Respondent No.4 is RI PL -CEI GALL (JV) and respondent

No.5 is MG-MC- BSB-Joint Venture.

(3) Respondent No.3 -Punjab Road and Bridges Development Board received a loan from the World Bank towards the cost of the Punjab State Road Sector Project , a part of which it intends applying to payments under the Procurement of Works for Improvement of Black Spots on Core Road Network of Punjab (hereinafter to be referred to as “the said work”). Respondent No.3, as the implementing agency of the project, on 10th November, 2015, invited sealed bids from the eligible bidders in respect of the said work. The relevant provisions of the invitation for bids read as under:

“Eligibility and Qualification Criteria			Compliance Requirements				Documentation
No.	Subject	Requirement	Single Entry	Joint Venture (existing or intended)			Submission Requirements
				All parties combined	Each Member	One Member	
4. Experience							
4.1 (a)	General Construction Experience	Experience of general construction work in the role of prime contractor, JV member, sub - contractor, or management contractor for at least the last 5 years, starting Ist April 2010	Must meet requirement	N/A	Must meet requirement	N/A	Form EXP - 4.1
4.2 (a)	Specific Road safety works and Construction	(i) A minimum number of Road safety works and/or Road	Must meet requirement	Must meet requirement 11	N/A	N/A	Form EXP 4.2(a)

	&Contract Management Experience	construction contracts with road safety component specified below that have been satisfactory and substantially completed as a prime contractor, joint venture member, management contractor or sub-contractor between 1 st April 2010 and application submission deadline: (i) One (1) contract, of minimum value Rs. 600 Million or Two (2) contracts, each of minimum value Rs.375 million or Three (3) contracts, each of minimum value Rs. 300 million, Note: For evaluation purposes, the work carried out during each of last 5				

		completed years shall be increased at the simple rate of 5% per annum to account for inflation. For part of the year proportionate increase shall be carried out.					
4.2 (b)		For the above and any other contracts completed and under implementation as prime contractor, joint venture member, management contractor or subcontractor on or after the first day of the calendar year during the period	Must meet requirement	Must meet requirement	N/A	Must meet the following requirements for the key activities listed	Form EXP - 4.2(b)

		<p>Stipulated in 4.2(a) above, a minimum construction experience in the following key activities successfully completed: Should have executed in any one year out of last three years preceding 1st April, 2015, the following minimum quantities of work:</p> <p>i) Metal Beam crash Barrier: 4,000 m</p> <p>ii) Reflective pavement marker: 40,000 no.</p> <p>iii) Road marking with hot applied thermoplastic compound: 10,000 sqm</p>				
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11. In the case of JV, the value of contracts completed by its members shall not be aggregated to determine whether the requirement of the minimum value of a single contract has been met. Instead, each contract performed by each member

shall satisfy the minimum value of a single contract as required for single entity. In determining whether the JV meets the requirement of total number of contracts, only the number of contracts completed by all members each of value equal or more than the minimum value required shall be aggregated. ”

(4) Respondent No.4 -RIPL –CEIGALL (JV) is a consortium comprising M/s Rajinder Infrastructure Pvt. Ltd., M/s CEI GALL India Ltd. and M/s Dhingra Brothers (India) Ltd. Respondent No.5 -MG-MC- BSB is a joint venture comprising of M/s M.G. Contractor, M/s Milestone Company and M/s B.S. Builder There is a dispute as to the components of the works relied upon by the parties to establish their eligibility .

(5) The dispute is as to whether the works relied upon by respondent No. 5 which fall under Clause 4.2(a) al so involve the works mentioned in Clause 4.2(b) or not. It was rightly agreed that this is an aspect which must be considered by the official respondents for it would require a study of the contracts performed by respondent No.5. We intend construing the clauses, the interpretation of which is also seriously dispute d by the parties. The official respondents shall, in accordance with this judgment, re-evaluate the eligibility of the bids submitted by respondent No.5.

(6) It was submitted on behalf of the petitioner that a bidder, to be eligible, should have undertaken road safety works and/or road construction contracts of the value stipulated in Clause 4.2(a) and that such works ought to have included the works mentioned in Clause 4.2(b) and of the quantum specified therein. I n other words, according to the petitioner, the bidders road safety works and/or road construction contracts for the relevant period ought t o have been of the value of Rs.600 million for one contract or Rs.375 million for two contracts or three contracts each of a minimum value of Rs.300 million and that such works ought to have included Metal Beam Crash Barrier: 4,000 m, Reflective Pavement Marker: 40,000 No. and road marking with hot applied thermoplastic compound: 10,000 sqm.

(7) In support of its contention, the petitioner places reliance upon the word “with” in Clause 4.2(a) (i). The question , however, is whether the words in Clause 4.2(a) (i) “*with road safety component specified belo*” are in relation to the value of the contract stipulated in that clause or to the three works mentioned in Clause 4.2(b), namely,

Metal Beam Crash Barrier, Reflective Pavement Marker and Road marking with hot applied thermoplastic compound. The words in Clause 4.2(a) are not “with financial component specified below”, but “with road safety component specified below” which would indicate that the term “component” refers to the works referred to in Clause 4.2(b) and not to the value of the contracts referred to in Clause 4.2(a). If it were otherwise, the words “road safety” in that expression would be redundant.

(8) It was contended on behalf of the petitioner that the words “specified below” in Clause 4.2(a) refer to the works specified in Clause 4.2(a) itself and not to the works referred to in Clause 4.2(b) . The error in this submission arises on account of considering sub - clauses (a) and (b) to be independent of each other. Sub-clauses (a) and (b) of Clause 4.2(b) must be read together. They are not separate clauses. The subject of the clause is stipulated only once – in clause (a) but it obviously applies to the entire clause 4.2 i.e. to sub -clause (b) as well.

(9) However, the value of the road safety component is not specified in Clause 4.2(a). Even the quantum of the three works mentioned in Clause 4.2(b) is not specified in Clause 4.2 (a). Thus, all that is required for Clause 4.2(a) is that the said work relating to the three components mentioned in sub -clause (b) of any quantity ought to have been performed in respect of the road safety works and/or road construction contracts of the value stipulated in Clause 4.2(a) which are relied upon by the bidder to establish its identity .

Thus, in our view, Clause 4.2(a) requires a minimum number of road safety works and/or road construction contracts of the value stipulated there in. It further requires such contracts to include the road safety component, *i.e.*, the works referred to in Clause 4.2(b) , namely, Metal Beam Crash Barrier, Reflective Pavement Marker and Road marking with hot applied thermoplastic compound of any quantity.

(10) It did occur to us that on this interpretation of sub- clause (a) a bidder could theoretically have, as a part of the road safety works and/or road construction contracts, done only a rupee’s worth of the works relating to the safety component mentioned in sub-clause (b) . That, however, is purely theoretical and does not persuade us to take a different view. A party inviting tenders does not frame the terms and conditions merely on a hypothetical or a purely theoretical basis. They must have presumed that a reasonable amount of the work pertaining to

the safety components referred to in sub -clause (b) would have been performed when included in a road safety work and/or road construction contract of the value stipulated in sub -clause (a) . With their experience and knowledge of such works, they would know this and be satisfied that if such safety components are a part of the road safety works or road construction contracts they would be to a n acceptable extent. This, in addition to the requirement of such safety component s being of the requisite quantities stipulated in sub-clause (b) is considered sufficient to meet the test of eligibility. This is for the party inviting tenders to decide.

(11) In addition to this, to be eligible, the bidder must also have executed the three works mentioned in sub -clause (b) of the quantum stipulated there in and during the period mentioned. It is not necessary that these works of the quantum stipulated in clause (b) ought to have been performed as a part of the road safety works and/or road construction contracts referred to in sub- clause (a). The three road safety works mentioned in clause (b) of the quantity stipulated therein may have been performed in respect of any other contract, to with, a contract other than the road safety works and/or road construction contracts referred to in sub- clause (a) . This is clear from the words “For the above and any other contracts” (*emphasis supplied*). A view to the contrary would render the words “any other contracts” in sub-clause (b) redundant.

(12) In the result , a bidder would satisfy the eligibility and qualification criteria stipulated in Clauses 4.2 (a) and (b), if it *inter – alia* satisfies the following requirements:-

(i) The bidder should have performed the road safety works and/or road construction on contracts of the monetary value stipulated in sub-clause (a), namely, one contract of a minimum value of Rs.600 million or two contracts each of a minimum value of Rs.375 million or three contracts each of a minimum value of Rs.300 million;

(ii) The above works must include the road safety components specified in sub clause (b), namely, Metal Beam Crash Barrier, Reflective Pavement Marker and Road marking with hot applied thermoplastic compound, of any quantity;

(iii) All three road safety components mentioned in sub-clause (b), namely, Metal Beam Crash Barrier,

Reflective Pavement Marker and Road marking with hot applied thermoplastic compound should have been executed during the stipulated period;

(iv) The road safety contracts of the quantity stipulated in sub-clause (b) may be a part of the road safety works and/or road construction contracts referred to in clause (a) or in any other contract. In other words, if the three road safety components of the quantities stipulated in sub-clause (b) are a part of the road safety works and/or road construction contracts referred to in sub-clause (a) that is sufficient. If, however, the three road safety components mentioned in sub-clause (b) which are part of the road safety works and/or road construction contracts mentioned in sub-clause (a) are not of the quantities in sub-clause (b), the eligibility and qualification criteria would still be met if the bidder has done the work equivalent to the road safety components mentioned in sub-clause (b) as part of any other contract.

(13) The petitioner contends that the three works mentioned in sub-clause (b) must be executed by the same entity. According to the petitioner, it is not sufficient if each of the works in sub-clause (b) is done by a different entity even if it is a part of a joint venture.

(14) The bar contained in footnote 11 of Clause 4.2 (a) does not operate in respect of Clause 4.2 (b). In the case of a joint venture, it is not necessary that any particular member of the joint venture executes the three works referred to in sub-clause (b). Each of them may be performed by one or more of the members of the joint venture. Clause 4.2 relates to experience. In *M/s New Horizons Limited and another versus Union of India and others*¹ the Supreme Court held as under :-

“23. The requirement with regard to experience, as stated in the advertisement dated 22-4-1993 for inviting tenders, as noticed earlier was in the following terms:

“The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephone systems with the capacity of more than 50,000 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in

¹ 1995(1) SCC 478

this field.”

The requirement of experience was, however, differently worded in the notice for inviting sealed tenders dated 26-4-1993 which was attached to the tender documents which prescribes the conditions to be fulfilled for submission of tenders and wherein it was stated as under:

“The successful tenderer will also submit copies of telephone directories printed and supplied by them to the telephone systems of capacity more than 50,000 lines as credentials of his past experience.”

25. Even if it be assumed that the requirement regarding experience as set out in the z 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 visualize 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 reorganization 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 reorganized company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganized 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 reorganized 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 where under 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 reorganization 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 I IPL 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 I IPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.”

(emphasis supplied)

(15) In our view, the judgment and in particular the observations emphasized by us apply equally to the case of a joint venture. In the absence of a provision to the contrary, the experience of one of the members of the joint venture can be relied upon to establish the eligibility of the joint venture. A joint venture is and, in any event, is akin to a partnership. There can even be a single venture partnership. Absent a provision to the contrary in cases such as this, the ingredients of a partnership including of agency ought to be presumed. Our attention has not been invited to anything that would militate against the same. It can hardly be doubted that the purpose of the joint venture was to do business.

(16) The official respondents shall evaluate the bids in accordance with what we have held above.

The writ petition is accordingly disposed of .

Shubreet Kaur