

Before S.J. Vazifdar, C.J. & Arun Palli, J.

M/S DANIAL MASIH SATPRIT SINGH BEDI — Petitioner

versus

STATE OF PUNJAB AND OTHERS — Respondents

CWP No. 7073 of 2016

May 17, 2016

Constitution of India, 1950 — Arts.14, 226 & 299 — Government Contracts — Eligibility criteria of experience — Partnership firm — Award of contract challenged primarily on the ground that the bid was submitted by the firm and it did not have requisite experience — Partnership firm does not have a separate independent legal existence — It is only a compendious method of describing the partners — There is no reason why the experience of a partner ought not to be taken into consideration to be the experience of the firm for the purpose of evaluating the experience of a firm that bids for the contract — Such an interpretation gives the terms and conditions of the tender commercial efficacy.

Held, that a partnership firm does not have a separate independent legal existence. The firm name is only a compendious method of describing the partner. The experience and expertise of a partner is, in a broad sense, an asset, albeit an intangible one. He may bring to bear his expertise and experience in connection with and in relation to the business of the firm and thereby for the benefit of the firm. There is no reason then why the experience of a partner ought not to be taken into consideration to be the experience of the firm for the purpose of evaluating the experience of a firm that bids for the contract. Such an interpretation gives the terms and conditions of the tender commercial efficacy.

(Para 10)

Further held, that unless the notice inviting tenders specifies otherwise, the exclusion of the firm from the tender process on the ground that the firm does not have the requisite experience, although one or more partners of the firm has the requisite experience, would not be justified. If we were to interpret the terms strictly, it is possible that only individuals would be entitled to bid for the contract for the opening sentence of the policy requires the tenderer to hold in “his” name the requisite experience. The term “his” would not in the strict

sense include companies and firms. This is not even the respondents' case. Admittedly, partnership firms and companies are also included in the tender process.

(Paras 11 and 12)

G.C. Dhuriwala, Advocate with Gaurav Chopra and Anurag Chopra, Advocates, *for the petitioner*.

Alok Jain, A.A.G., Punjab.

Charanjit Singh Bakshi, Advocate, for respondent No.s 3 to 5.

Sanjay Kaushal, Senior Advocate with Arjun Shukla, Advocate, for the respondent No. 6 and 7.

S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

(1) The petitioner, a partnership firm, has sought a writ of certiorari to quash the official respondents' decision dated 01.04.2016 rejecting their tender. The petitioner has also sought an order declaring Clause-24 of a policy, issued by the official respondents, as null and void. Lastly, contending that its bid was the most competitive, the petitioner has sought the consequential relief directing the respondents to allot it the work in question.

(2) The petitioner is a partnership firm. The respondents invited tenders. Clause-24 of the policy stipulates that to qualify for the technical bid, the tenderer must have in his name experience of two years in transportation of food-grains. The question that falls for consideration is whether the experience of a partner of the petitioner-firm can be considered to be the experience of the firm. We have answered the question in the affirmative both on principal and on precedent. The judgment of the Supreme Court in *M/s New Horizons Limited and another versus Union of India and others*¹, in our opinion, answers the question conclusively in favour of the petitioner.

(3) The petitioner is a partnership firm registered on 21.01.2016 under the Indian Partnership Act, 1932. The petitioner's partners are one Danial Masih and one Satprit Singh Bedi. Respondent No.2, on 11.03.2016, issued a tender notice regarding the work of all the purchase agencies of the State of Punjab, such as, PUNGRAIN, MARKFED, PUNSUP, Punjab State Warehousing Corporation, Punjab Agro Foodgrains Corporation and FCI for the contract period

¹ 1995(1) SCC 478

01.04.2016 to 31.03.2017 (Rabi and Kharid Season) involving the transportation of products and stock articles and labour for storage centers/cartage and labour for the godown of P.E.G. E-tenders were invited for the said work. Clause-5 of the tender notice provided that the contractor must fulfil the technical qualifications as per the technical bid policy.

(4) Respondent No.2 had published, on 24.03.2016, a similar tender notice for the same work and for the same period.

(5) The dispute in this writ petition concerns the interpretation of Clause-24 of the policy which, admittedly, governs the rights of the parties. The translation of Clause-24, as accepted by the parties, in so far as it is relevant, reads as under:-

"24- The qualifications for the Technical Bid of a Transport Contractors in of all (sic) the districts shall be as follows:-

(iii) The tenderer must hold in his name an experience of two years in transportation of food grains and the experience certificate must be in the format as annexed as Annexure 'B' which must be certified by the District Manager of the concerned Agency. In respect of the above mentioned experience, the tenderer shall present before the District Tender Allotment Committee proof of Turnover in one year that shall be based on last year's actual arrival of food grains in the cluster of Mandis.

(6) The petitioner alleges that although its bid was the lowest, the contract was wrongly awarded in favour of respondents No.5 and 6-private respondents. The Tender Evaluation Committee rejected the petitioner's technical bid for the reasons recorded in the proceedings of 01.04.2016. The minutes record that the tenders were opened in the presence of the Deputy Director, the District Manager of the agency, other members of the Tender Committee and the bidders. The minutes of the proceedings record that the Tender Committee rejected the petitioner's bid on the ground that there were four shortcomings. We will now deal with each of them.

(7) The first and the main ground for rejecting the petitioner's tender was that the petitioner-firm was constituted only on 04.01.2016 and could not, therefore, have fulfilled the mandatory eligibility criteria stipulated in the policy which requires two years experience in the work of transportation of food-grains.

(8) It is true that the petitioner-firm was constituted only on 04.01.2016 and was registered on 21.01.2016. The petitioner, however, relies upon the experience of one of its partner, namely, the said Danial Masih, who, according to petitioner, had more than two years experience in the said work. The respondents contended that the experience of the partner is irrelevant and it is only the experience of the firm that is relevant. The petitioner's contention is supported by the judgment of the Supreme Court in the case of *M/s New Horizons Limited and another versus Union of India and others* (*supra*). Paragraphs 23 and 25 of the judgment read 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 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 advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the

earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment

and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India." (emphasis supplied)

(9) The judgment squarely covers the case in favour of the petitioner. In the sentence emphasised by us, the Supreme Court has clearly held that 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 past experience in its name, the experience of the partner must be taken into consideration.

(10) Mr. Bakshi, the learned counsel appearing on behalf of the official respondents, sought to distinguish the judgment of the Supreme Court contending that the language of the terms and conditions in that case and in the case before us is entirely different. We do not agree. The ratio of the judgment of the Supreme Court is clear. It requires the experience of the partner to be taken into consideration while determining the eligibility of a bid submitted by a firm. We set out the eligibility conditions in that case. There is nothing therein that persuades us to distinguish the judgment from the case before us.

(11) A partnership firm does not have a separate independent legal existence. The firm name is only a compendious method of describing the partners. The experience and expertise of a partner is, in a broad sense, an asset, albeit an intangible one. He may bring to bear his expertise and experience in connection with and in relation to the business of the firm and thereby for the benefit of the firm. There is no reason then why the experience of a partner ought not to be taken into consideration to be the experience of the firm for the purpose of evaluating the experience of a firm that bids for the contract. Such an interpretation gives the terms and conditions of the tender commercial efficacy.

(12) A view to the contrary would be devoid of any commercial efficacy. All the partners of a firm do not necessarily have the same qualifications even where the firm engages in only a single venture. The single venture or a particular type of enterprise may well require persons with different expertise. For instance, the work of construction does not require only engineers. It would also require accountants, financial analysts and labour and legal consultants. If the respondents' view were to be accepted, it would require every partner in the firm to have the experience stipulated in the notice inviting tenders. The firms would then be eligible only if every partner has the requisite experience. Even where all the partners belong to the same profession, they may not have experience of the same kind. Take, for instance, a case where the notice inviting tenders requires the bidders to have experience in a particular type of engineering contract. All the partners of the firm may be engineers but with experience in different fields of engineering. This is often the case when the firm wishes to diversify. Large law firms are known to have partners with expertise in different branches of law. Unless the notice inviting tenders specifies otherwise, the exclusion of the firm from the tender process on the ground that the

firm does not have the requisite experience, although one or more partners of the firm has the requisite experience, would not be justified.

(13) If we were to interpret the terms strictly, it is possible that only individuals would be entitled to bid for the contract for the opening sentence of the policy requires the tenderer to hold in "his" name the requisite experience. The term "his" would not in the strict sense include companies and firms. This is not even the respondents' case. Admittedly, partnership firms and companies are also included in the tender process.

(14) The second ground on which the petitioner was considered ineligible was that the petitioner uploaded the income-tax returns of the partner and not of the firm. Further, the petitioner had uploaded the audit reports and balance-sheets of the partner and not of the firm. Clause-24(i), however, only provides that a PAN number shall be mandatory for a transport contractor. Clause-24(ii) requires the bidder to upload, inter alia, the PAN number. It does not require the firm to upload its income-tax returns, audit reports and balance-sheets. Thus, even assuming that this record of the partner was uploaded, it would make no difference for the firm was not required to do so. These records were uploaded obviously to establish the experience of the partner.

(15) The third reason is that the income-tax returns for the Assessment Years 2014-15 and 2015-16, audit reports and balance sheets pertaining to another firm have been uploaded. This objection cannot be sustained for the same reason that the second objection cannot be sustained. This record was relied upon to show the turnover of the firm in which the partner of the petitioner- firm was also a partner in other firms. Having come to the conclusion that the experience of the partner is relevant, the reliance upon these documents was also relevant.

(16) The fourth and the last ground on which the petitioner's bid was rejected was that the other documents uploaded also did not pertain to the petitioner-firm but to another firm. For the same reason, this objection is also not well-founded.

(17) Faced with this, the learned counsel appearing on behalf of the private respondents and the official respondents contended that Clause-24(iii) stipulated that the experience required was in transportation of food-grains. They contended that the petitioner did not have the requisite experience in transportation of food- grains. They

relied upon documents to contend that the petitioner had experience only in loading/unloading of wheat and paddy and transportation /loading/unloading/labour. They contended that the financial component of transport was minimum and would not meet the specified experience required.

(18) The petitioner's bid was not rejected on this ground. It would be unfair at this stage to dismiss the petition on this ground especially as the relevant computation in this regard is not available. If the respondents now seek to challenge or reject the bid on this ground, it is a different matter. We express no opinion as to the validity of such an action, if taken.

(19) The contract is for a period of one year. The learned counsel appearing on behalf of the respondents submitted that more than 80 per cent of the work in respect of the first season is over. In that event, it would not be appropriate to direct the respondents to permit the petitioner to carry out the balance work for this season. The ends of justice would be met by directing the official respondents to permit the petitioner to complete the remaining work except in respect of the transportation work pertaining to the first season.

(20) The petition is, therefore, disposed of by quashing the impugned order by which the petitioner's bid was considered ineligible. The private respondents shall, however, be permitted to complete the balance work pertaining only to the first rabi season. The petitioner shall be entitled to carry out the remaining work.

V. Suri