

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ LETTERS PATENT APPEAL NO. 509/2011

Date of order: 30th May, 2011

**DELHI JAL BOARD CONTRACTORS
WELFARE ASSOCIATION**

..... Appellant

**Through, Mr. Chetan Sharma, Sr.
Advocate with Mr. Peeyoosh Kalra,
Advocate.**

versus

DELHI JAL BOARD & ORS.

..... Respondents

Through

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

- | | |
|--|-----|
| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

DIPAK MISRA, C.J.:

C.M.No.10875/2011

This is an application for condonation of 72 days delay in preferring the appeal. We have heard Mr. Chetan Sharma, learned senior counsel along with Mr. Peeyoosh Kalra, learned counsel for the petitioner on the question of condonation of delay.

2. Before issuing notice on the question of condonation of delay, we think it appropriate to address whether there is justification, warrant or merit in the appeal to issue notice. Thus, we proceed to deal with the appeal on merits.

3. Questioning the legal substantiality of the order dated 16th December, 2010 passed by the learned single Judge in W.P.(C) No.8052/2010, the present intra-Court appeal has been preferred. The appellant, namely, Delhi Jal Board Contractors Welfare Association (Regd.), members of which are class-I contractors, preferred the writ petition under Article 226 of the Constitution of India assailing the empanelment and enlistment of fifth respondent, namely, M/s Vishal Nimriti Pvt. Ltd. as a contractor under Delhi Jal Board (for short, 'DJB') on the ground that it did not meet the eligibility criteria under Rule 11.1 and 14.0 of Rules for Enlistment of Contractors in DJB (for brevity, 'Rules'). It was contended before the learned single Judge that the said company was a new contractor, which did not have the requisite experience since it had not executed necessary number and magnitude of works as fixed under the eligibility criteria for registration as a class-I contractor.

4. The said stand and stance was controverted by the fifth respondent on the ground that a scheme of amalgamation has been approved by the Bombay High Court under Sections 391 and 392 of the Indian Companies Act, 1956 and as per which all contracts, agreements, arrangements of whatsoever nature to which M/s Permanent Prestress Pvt. Ltd. was a party or had benefit of, stood transferred to the new entity and, therefore, there was no error in its

empanelment. To bolster the said submission, reliance was placed on the decision in *New Horizons Ltd. Vs. Union of India* (1995) 1 SCC 478, where the issue of past experience was the subject matter of lis before the Apex Court. That apart, inspiration was drawn from the decision in the case of *Ganpati RV-Talleres Alegria Track Pvt. Ltd. Vs. Union of India* (2009) 1 SCC 589. On behalf of the present appellant, an effort was made to distinguish the said decision before the learned single Judge, but he has placed reliance on *New Horizons Ltd.* (supra) and expressed the view that the writ petition was without any substance and the nature of litigation was against the spirit of Indian Competition Act, 2002. Being of this view, he dismissed the writ petition.

5. Mr. Chetan Sharma, learned senior counsel appearing for the appellant-association has raised the following contentions:-

(i) The Rule 11.1 has been erroneously interpreted by the learned single Judge inasmuch as the experience that is envisaged under the said Rule has to be satisfied by the contractor, but not by the amalgamated entity.

(ii) The single Judge has totally lost sight of Rule 14.0, which clearly lays a postulate that there cannot be a change in constitution of a firm without prior approval of DJB. In the present case, such a thing

has happened thereby disentitling the fifth respondent from being enlisted.

(iii) The reliance placed on *New Horizons Ltd.* (supra) by the learned single Judge is totally incorrect, for in the said decision their Lordships have fairly stated that in the absence of experience by all the constituents, experience of a newly emerged entity cannot be taken into consideration.

(iv) DJB in pursuance of an application preferred by the petitioner under the Right to Information Act, 2005 had clearly stated that the respondent No.5 was not eligible for entitlement, but thereafter reviewed the same in a laconic manner, which defies the basic ingredients of administrative law inasmuch as it is incumbent on any authority reviewing an order to ascribe reasons.

6. To appreciate the aforesaid submissions raised by the learned senior counsel for the appellant, it is imperative to note that the fifth respondent, namely, M/s Vishal Nimriti Pvt. Ltd., got a scheme of amalgamation accepted by the Bombay High Court under the Companies Act, 1956. As is perceptible, a stand was taken before the learned single Judge that all contracts, agreements, arrangements, which were granted in favour of M/s Permanent Prestress Pvt. Ltd. would stand transferred to the new contractor i.e. the new amalgamated entity. The said stand of the fifth respondent has not been negated on

facts. Thus, the question, which arises, is whether in view of this fact, Rule 11.1 and Rule 14.0 would defeat the benefit of empanelment.

7. First we shall proceed to deal with the applicability of Rule 14.0 to the facts of the present case. Rule 14.0 deals with change in constitution of a firm after it is registered. As Mr. Sharma, learned senior counsel has laid enormous emphasis on the said clause, we think it seemly to reproduce the same;

“Change in Constitution of Firm- The contractor/firm shall not modify the existing partnership or enter into any fresh partnership or change the name of firm without the prior approval of the enlistment authority. Such proposal, if any, shall be submitted in advance giving full details of the intended partnership/sole proprietorship along with the draft partnership deed/affidavit and documents as per Annexure-VI. Any change in status of the contractor as an ‘individual’ or in constitution of the firm or change in the name of firm without prior approval of the enlistment authority will render the contractor/firm liable to be removed from the approved list of contractors.”

On a perusal of Rule 14.0, we have no iota of doubt that the same really gets applicable once a firm or company is registered. Unless there is registration or empanelment, the said Rule is not attracted.

8. Rule 11.1 of the Rules reads as under:-

“The criteria for experience, in case of enlistment, shall be the completion of requisite number of

works, as the case may be, or prescribed nature of magnitude executed on independent contract basis or as a builder during the last five years. The works should have been executed in the same name and style in which the enlistment is sought. Enlistment of an individual in corresponding category may also be done based on his technical qualification in lieu of experience of completion of works in last 5 years if provision exists in Table 1 of the Rules but other eligibility criteria remaining the same.”

9. On a plain reading of the aforesaid Rule, it is quite clear that the experience of the requisite number of works is a condition precedent. Thus, the only clause attracted to the field of empanelment is clause 11.1. Learned senior counsel has drawn our attention to certain aspects which relate to the facts which he has obtained by way of information under the RTI Act, 2005. Mr. Sharma, learned senior counsel has drawn our attention to paragraph 49 of Annexure A-5 of the paper book, specially, questions 3.1 and 3.2, which read as follow:-

“3.1 Whether M/s Vishal Nirmati registered enlisted under category-I fulfills conditions as mentioned at S.No.2.

3.2 Whether the firm submitted the details of executed works, having been executed in the same name and style in which the enlistment was sought i.e. M/s Vishal Nirmal Pvt. Ltd.”

10. Thereafter, learned senior counsel has drawn our attention to Annexure A-7, which is the reply, given by the competent authority

under the RTI Act. Reply given to questions 3.1 and 3.2 reads as under:-

“M/s Vishal Nirmiti has been enlisted in class-I. As per documents of the said firm, it was revealed that three firms were amalgamated with M/s Vishal Nirmiti Pvt. Ltd. by the order of Hon’ble High Court, Bombay dated 23-11-2007 and the work experience of one of the amalgamated firm i.e. M/s Permanent Prestress Pvt. Ltd. has been considered by the Sub-Committee as well as Enlistment Committee and the same was approved by the competent authority (Copy enclosed). Now as per CPWD/DJB norms, the enlistment case of the above firms has been moved for review of the competent authority.”

11. Be it noted, thereafter an appeal was preferred and the competent authority had passed the following order:-

“The above case was taken up for hearing today i.e. on 17.5.2010. Appellant was present. From Deptt. Side Sh. Harish Chander EO to CE(Dr.) Proj-I was present. After carefully going through the RTI application and the reply furnished by the deptt. and hearing both sides, I direct that specific reply in respect of Q No.3.1, 3.2 and 3.3(i) of original RTI application may be provided to the appellant within a week’s time.”

12. After the appellate authority passed the order, the DJB proceeded to inform the petitioner in the form of reply as follows:-

“No. Further, the case was reviewed by the competent authority after receipt of letter from DJB Contractors Welfare Association (Regd.) (copy attached).”

13. Learned senior counsel has also invited our attention to the meeting of DJB held on 23rd August, 2010. For the sake of completeness, we think it appropriate to reproduce the same.

“In the last Board meeting held on 12.08.2010, one of the Members raised the issue of registration of M/s Vishal Nimriti Pvt. Ltd. as Class-I contractor. The issue arose in respect of a preamble for the award of work of Shifting of water mains falling in the alignment of proposed Master Plan Road from Narela flyover to Western Jamuna Canal (WJC) to the firm. Though the Board finally agreed to award the work, yet it was decided that the work order should only be issued after completing the review of the enlistment of the firm by the Enlistment Committee. Accordingly, it would be prudent that the firm is not considered for further participation in the tenders till a final decision is taken in respect of the enlistment of the firm as Class-I contractor.”

14. Thereafter, vide Annexure A-11 dated 12th October, 2010, the following order came to be passed:-

“ It is in continuation to communication from Member (WS) issued vide No.F-53/DJB/M(WS)/2010-2304 dated 23.8.10 directing that M/s Vishal Nirmiti Pvt. Ltd. be not considered for participation in the tenders till a final decision is taken in respect of enlistment of the firm as Class-I contractor.

On review of the matter by the Enlistment Committee and as approved by the competent authority, since the initial enlistment of the firm; namely, M/s Vishal Nirmriti Pvt. Ltd. as Class I contractor has been found in order, the communication as referred to above is withdrawn.

This is being issued with the approval of competent authority.”

15. Learned senior counsel would contend that the application of the fifth respondent has been treated to be an order by the reviewing authority, but no reasons have been given. There is no adjudication of a lis or adjudication of disputes between two parties, but this was a case for determining the eligibility criteria for empanelment. It does not necessarily grant or award contract. That apart, it clearly states that enlistment committee has reviewed the matter and has been approved by the competent authority. In certain cases ascribing of reasons may be the necessity, but if the reasons are perceptible from the factual matrix that is available to the Court on that score, the order is not to be axed. We are inclined to think as we find, when the new entity came into existence and the company namely, M/s Permanent Prestress Pvt. Ltd. had the requisite experience which has not been disputed either in facts or law, the same can be taken into consideration. In this connection, we may refer with profit to paragraph 39 of *New Horizons* (supra), which reads as follows:-

“39. On behalf of the respondents reliance has been placed on the decision of the Delhi High Court in *Paharpur Cooling Towers Ltd., v. Banbaigon Refinery and Petrochemicals Ltd.* wherein it has been held that the expression “tenderer should possess such experience” would mean the experience of the tenderer itself and not that of its collaborator. It has been pointed out that SLP (C) No. 1484 of 1994 filed against the said judgment has been dismissed by this Court by order dated 28-1-1994. It has been urged that on the same logic the experience of a shareholder would not be included within the expression “experience of the tenderer”. We fail to appreciate the relevance of this judgment. There can be no

comparison between a collaborator who has no stake in the business of the company and a constituent of a company, such as NHL, constituted as a joint venture, wherein the constituents in the joint venture have a substantial stake in the success of the venture.”

16. On a perusal of the aforesaid paragraph, it is clear as day that what is required is the stake of the joint venture company. In the said case, the Apex Court was dealing with the concept of joint ventures and in the present case when there is amalgamation of the two entities which have merged with each other and become one, we are disposed to think that the entire conception as enshrined and engrafted under Sections 391 and 392 of the Companies Act come into play. It cannot be said that both the companies should have experience. It cannot be said that M/s Permanent Prestress Pvt. Ltd. has no stakes. In fact the stakes have been unified into one and that is also stated in paragraph 23 of the decision in the case of *New Horizon* (supra). The said paragraph reads as follows:-

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

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

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

17. In view of the aforesaid, we are of the considered opinion that eligibility criteria as enumerated under Rule 11.1 of the Rules stands satisfied.

18. We will be failing in our duty, if we do not take note of the submission of Mr. Sharma that the learned single Judge should not have referred to the Competition Act and certain historical statements made by great protagonists in the field of Economics and Industry with regard to competition and that has influenced the order. In our considered opinion, such references in the present case do not vitiate the order. It is the economic philosophy which has been brought into the legal philosophy as the single Judge had felt that the petitioner though claims to be an association of 160 members is scared of including any other member and possibly wants to shy away to compete with the fifth respondent. The purpose of reference to this statement has to be understood in this way and not in the manner Mr. Sharma has appreciated. Hence, said submission of Mr. Sharma leaves us totally unimpressed.

19. In view of the aforesaid, we do not perceive any reason to issue notice on the question of condonation of delay and accordingly the application for condonation of delay stands rejected and as a natural corollary, the appeal stands dismissed *in limine*.

CHIEF JUSTICE

SANJIV KHANNA, J.

MAY 30, 2011
NA