

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3400 OF 2016

JMK Infosoft Co. Ltd.,
Through its Director,
Shri Mukund Prabhakar Rao Mangulkar,
E-10/12, STPI Area,
MIDC Industrial Area, Chikhalthana,
Aurangabad

.. **Petitioner**

Versus

1. The State of Maharashtra,
Through General Administration Department,
Mantralaya, Mumbai
2. District Setu Society, Aurangabad,
Through, President @ Collector,
Aurangabad
3. Gujrat Infotech Ltd.,
Having its Registered Office at
Naranpura, Ahmedabad,
Through, Authorized Project Manager,
Mr. Mangesh Parlhadrarao Kale,
Age : 37 Years, Occu. : Service,
R/o. : Vakil Colony, Parbhani,
Dist. : Parbhani

.. **Respondents**

Shri V. D. Sapkal h/f Shri Jiwan J. Patil, Advocate for the
Petitioner.

Shri A. B. Girase, Government Pleader for Respondent Nos. 1
and 2.

Shri A. S. Bajaj h/f Shri D. P. Palodkar, Advocate for the
Respondent No. 3.

CORAM : S. V. GANGAPURWALA AND
K. K. SONAWANE, JJ.

CLOSED FOR JUDGMENT ON : 26.04.2016
JUDGMENT PRONOUNCED ON : 06.05.2016

JUDGMENT (Per S. V. Gangapurwala, J.) :-

1. The respondent No. 2 issued e-tender inviting offers for running the Setu Suvidha Kendra in Aurangabad district. Pursuant to the said tender the petitioner and the respondent No. 3 amongst others filled in the tender. The tenders were opened. The respondent No. 2 and its committee evaluated the tenders and allotted marks to all the bidders. The petitioner secured the highest marks and was at serial No. 1. The respondent No. 3 was at serial No. 2. The respondent No. 3 filed a complaint. The respondent No. 3 had also filed writ petition in this Court bearing Writ Petition No. 10308 of 2015, the said writ petition was disposed of as the Government Pleader had made a statement that pursuant to the complaint of respondent No. 3 enquiry is being made. Thereafter, upon enquiry and investigation the respondent No. 2 vide order dated 17.03.2016 held that the petitioner company does not fulfill the criteria of possessing necessary experience as contemplated in the tender form and as such has rejected the tender. The petitioner has assailed the same in the present writ petition.

2. Mr. Sapkal, the learned counsel for the petitioner submits that, the tender of the present petitioner was accepted after considering the fact that the petitioner is eligible and complies with all the terms and conditions of the tender. Even, the respondent No. 3 in writing had accepted that the petitioner

qualifies and has no objection for opening the commercial bid. The same was given by the respondent at the time of evaluating the technical bid as such has waived his right to take any objection. It is not open for the respondent No. 3 now to turn around and take objection. The learned relies on the judgment of the Apex Court in a case of **State of Panjab V/s. Davinder Pal Singh Bhullar and others** reported in **2012 ALL SCR 27.**

3. The learned counsel further submits that, the petitioner is a limited company. It had taken over JMK Infotech a proprietary concern vide agreement dated 01.04.2015. The 90% share in the petitioner company is held by the Director who is also the proprietor of JMK Infotech which is taken over by the petitioner company vide agreement dated 01.04.2015. According to the learned counsel, the agreement is dated 01.04.2015, prior to that Resolution was passed on 13.03.2015 for taking over the said proprietary concern. Thereafter, application was made to the Registrar of Companies by the petitioner about the said taking over on 16.10.2015. The Registrar of companies vide its order dated 09.11.2015 issued the necessary certificate regarding the said take over. The learned counsel submits that, the take over of the proprietary concern by the petitioner company is vide agreement dated 01.04.2015 i.e. much prior to the date of filling the tender and the said date would be the relevant date. Only because the same is recorded with the Registrar of Companies at the later point of time would not make any difference. According to the learned counsel, Section 61 of the Companies Act would be relevant and not Section 13 of the Companies Act as is relied by the respondents. The take

over would take effect from the date of agreement and not from the date of the order of the Registrar of Companies. The take over is vide agreement and by passing the Ordinary Resolution and not Special Resolution. Section 13 itself lays down that, save as provided under Section 61, meaning thereby that, for the Resolutions governed by Section 61 Section 13 would not apply. The learned counsel relies on the judgment of the Apex Court in a case of **Marshall Sons and Co. [India] Ltd. V/s. Income Tax officer** dated **27th November, 1996.** In the said case two companies had amalgamated and it was held that as no date was specified by the Court the amalgamation would take place from the date of its agreement to amalgamate and not from the later date when the said amalgamation is accepted by the Court.

4. The learned counsel further submits that, the Director of the Company Mr. Mangulkar holds 90% share in the petitioner company and he was the proprietor of JMK Infotech which is taken over by the company. As such, it should be held that the petitioner possesses the necessary experience. It is not disputed that the proprietary concern possesses the necessary experience. 90% share holding of the petitioner company is held by the Director who is a proprietor of JMK Infotech i.e. the concern which is taken over by the petitioner company. The learned counsel relies on the judgment of the Apex Court in a case of **New Horizons Ltd. and another V/s. Union Of India and others reported in (1995) 1 SCC 478.**

5. The learned counsel further submits that, the validity of the agreement was never a subject matter of challenge before

the respondent No. 2. Only the grounds which were considered while rejecting the tender of the petitioner will have to be considered. Additional grounds for rejection of tender cannot be supplemented by way of affidavit subsequently. The learned counsel relies on the judgment of the Apex Court in a case of **Mohinder Singh Gill and another V/s. The Chief Election Commissioner, New Delhi and others** reported in **AIR 1978 SC 851 (1)**.

6. According to the learned counsel, when it is not disputed that the proprietor of proprietary concern which is taken over by the petitioner company prior to the filling in the tender possesses the necessary experience as required by the terms of the tender then the rejection only on the ground that the petitioner company in its own name does not possess the necessary experience is illegal and the impugned order as such deserves to be set aside and as the petitioner is at serial No. 1 be issued tender and the letter of intent issued in favour of the respondent No. 2 be set aside.

7. Mr. Girase, the learned Government Pleader for respondent Nos. 1 and 2 submits that the petitioner is a company and the experience of a Director cannot be considered. It is the experience of the petitioner company which will have to be considered. The learned Government Pleader relies on the judgment of the Division Bench of Punjab and Haryana High Court in a case of **M/s Adesh Logistics Private Ltd. and another V/s. Food Corporation of India and another dated 14.08.2012**. According to the learned Government Pleader, the personal experience of the Director of

the company cannot enure to the benefit of the company. The petitioner company was not eligible and did not fulfill the conditions laid down in the tender. The learned Government Pleader further submits that, the company is a separate juristic person and is not on the similar footing as that of a partnership firm. It is a separate juristic entity distinct from the shareholders. The Government Pleader relies on the judgment of the Apex Court in a case of **Bacha F. Guzdar, Bomay V/s. Commissioner of Income Tax, Bombay** reported in **1955 AIR (SC) 74.**

8. The learned Government Pleader submits that, upon enquiry being conducted it was found that the Registration Certificate of the proprietary firm namely JMK Infotech issued by the Shop Inspector, Aurangabad has been renewed up to March, 2016. The petitioner company had informed about the take over of JMK Infotech to the Registrar of Companies on 17.10.2015 and the same was approved by the Registrar of the Company on 09.11.2015. The equity shares allotted to the proprietor of JMK Infotech was made by the petitioner company on 16.10.2015. According to the learned Government Pleader, as per Section 13 of the Companies Act more particularly Section 13 (10) any change in the memorandum of association would take place only after the order is passed by the Registrar of Companies. In light of above, the date on which the tender was filled in by the petitioner, the petitioner was not fulfilling the experience criteria.

9. The learned Government Pleader further submits that, the petitioner company was not having experience of running

and operating at least 10 ICT Centres every year for the previous 3 years and the experience of JMK Infotech a proprietary concern of operating 10 ICT Centres every year for the last 3 years cannot be considered as that of the petitioner company.

10. Mr. Bajaj, the learned counsel for the respondent No. 3 submits that, at the time of the technical bid the objection was not raised by the respondent No. 3 however subsequently the respondent No. 3 got the knowledge of the fraud and misrepresentation on the part of the petitioner and as such the complaint was filed. According to the learned counsel, the petitioner misrepresented the facts before the respondent No. 2. According to the learned counsel, the question of waiver would not arise when the fraud and misrepresentation on the part of the petitioner is noticed subsequently. The learned counsel adopts the arguments of learned Government Pleader and submits that the petitioner alongwith tender document had annexed only one Board Resolution dated 13.03.2015 and neither the alleged agreement dated 01.04.2015 nor any other documents of the Government Authority were annexed alongwith tender document. Only on the basis of resolution dated 13.03.2015 it was suggested that the petitioner company has taken over M/s. JMK Infotech. The said Resolution is invalid as per Section 188 of the Companies Act. The said Resolution is not presented nor submitted to the Registrar of Companies. The learned counsel submits that, as per Section 188 (1) (b) of the Companies Act no Member of the company shall vote on a Special Resolution to approve any contract or arrangement which may be entered into by the company, if, such Member is

a related party. As this mandate of law is violated the petitioner has come with the theory of take over agreement dated 01.04.2015 without referring to the Resolution dated 13.03.2015. According to the learned counsel Resolution dated 13.03.2015 is a fraud, similar types of Resolutions were passed in the past only for purpose of securing tenders, such as the Resolution dated 01.09.2011. The said Resolution was submitted for participating in the tender at Thane / Sholapur and subsequently now the fresh Resolution is shown to have been passed on 13.03.2015 for the same purpose.

11. According to the learned counsel, marks were given under different heads and initially the marks were given to the petitioner company on the basis of the misrepresentation on the part of the petitioner company which tantamounts to fraud. Even, on factual count about the number of I.T. Employees etc. the petitioner is not qualified. The learned counsel submits that, as per Clause No. 3.2 (d) it is mandatory to produce latest P. F. / T. D. S. statement and salary pay outs. The salary statement submitted was not reflecting the P. F. Account Numbers etc. The learned counsel submits that, the order is rightly passed. In spite of the alleged theory of taking over, the proprietary concern continued to operate. The learned counsel submits that, inspite of the complaint by the respondent No. 3, the respondent No. 2 was proceeding ahead to award contract to the petitioner, the respondent No. 3 filed a Writ Petition bearing No. 10308 of 2015 on various grounds. This Court on the basis of the statement made by the Government Pleader that the respondent No. 2 herein is investigating the matter on the basis of the complaint of the respondent No. 3 disposed of

the writ petition as premature. The learned counsel submits that, Aurangabad Setu Suvidha Centre was earlier allotted to the JMK Infotech proprietary concern. The contract period came to an end on 31.03.2015. The respondent No. 2 granted extension of 4 months to the said proprietary concern and the proprietary concern continued the contract for further 4 months from 01.04.2015. If, the said proprietary concern had been taken over by the petitioner company vide agreement dated 01.04.2015 and with effect from 01.04.2015 then, the said proprietary concern could not have continued the contract for further 4 months from 01.04.2015. This itself shows that the agreement dated 01.04.2015 is a sham document. The learned counsel submits that, as per Clause 3.2 and Clause 3.3 of the tender the petitioner is ineligible as the petitioner company in its name does not own or manage 10 Setu Suvidha Centres for previous 3 years. The learned counsel submits that, even as per Section 179 (3) of the Companies Act the Resolution passed in the meeting for take over has to be filed under Section 117 (3) (g) of the Companies Act within 30 days of it being passed.

12. We have considered the submissions canvassed by the learned counsel for the respective parties.

13. As far as the ground of waiver raised by the petitioner is concerned the same may not detain us. Though after the technical bid objection was not raised by the respondent No. 3 and the commercial bids of all the 4 tenderers were opened. However, subsequently a complaint was lodged by respondent No. 3. The Respondent No. 3 had filed writ petition before this Court wherein statement was made by the Government that it

is investigating the said complaint and relying upon the same the Court disposed of the writ petition as pre-mature.

14. There is no bar for the respondent Nos. 1 and 2 to investigate the matter on the basis of the complaint received. As such, the ground of waiver raised by the petitioner is not sustainable. The Apex Court in the case of **State of Panjab V/s. Davinder Pal Singh Bhullar and others** referred to supra has held that waiver is an intentional relinquishment of right. Apex Court further held that there can be no waiver unless the person who is said to have waived is fully informed as to his rights and with full knowledge about the same he intentionally abandons them. If, the party knows the material facts and is conscious of his legal rights in that matter fails to take plea at the earlier stage of the proceeding it creates an effective bar of waiver against him. As such it is necessary that the party should be aware of the material facts at the relevant time. As is clear the petitioner had only annexed the Resolution dated 13.03.2015 relating to taking over of the JMK Infotech a proprietary concern and the other documents were brought to the light subsequently the ground of waiver would not be tenable.

15. The aspect to be considered is whether the experience of the Director who is holding 90% of the shares of the petitioner company and was also the proprietor of JMK Infotech can be considered for the benefit of the petitioner company. It is not disputed that Mr. Mangulkar the Director of the petitioner company holds 90% share holding and he is also the proprietor of JMK Infotech the proprietary concern which is said to have

been taken over by the petitioner company. It is not disputed that JMK Infotech a proprietary concern has the necessary experience and qualification as per the tender. The Apex Court in a case of **New Horizons Ltd. and another V/s. Union Of India and others** referred to supra has observed as under -

“Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-04-1993 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 it has experience in its name though it does not have experienced person 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.”

16. Reading the said observations of the Apex Court it is manifest that, 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 commercial transaction. The terms and conditions of such document have to be construed from the view point of a prudent businessman. The credentials are to be examined from commercial point of view which means that, if, a contract is to be entered with the company he will look into the document 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.

17. It was also discussed by the Apex Court in the said judgment that, there may be a split in the company and the persons looking after a particular field of 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, the original company has experience in its name but 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.

18. Considering the said judgment of the Apex Court and the facts of the present case that the Director holding 90% share of the petitioner company is / was the proprietor of JMK Infotech which had the necessary experience as per the tender, it will have to be held that the petitioner was possessing the necessary experience. In light of the same it would be redundant to enter into the debate as to the date when the take over can be said to have effectuated. It would not be relevant to discuss the applicability of Section 13 (10) of the companies Act or otherwise so also the other provisions relied by the learned counsel for respective parties.

19. Having held that the petitioner would pass the test of experience the impugned order passed by the respondent No. 2 only on the ground of experience will have to be set aside. The next question would be about evaluation of the marks as per the terms of the tender. While evaluating the marks various aspects are required to be considered such as the number of employees on its Pay Roll, turn over, I. T. man power etc. as laid down in the clauses of the tender. For the same the factual matrix as is placed by the parties before the Authority will have to be considered. It is for the respondent No. 2 to consider about JMK Infotech a proprietary concern having been given extension of 4 months from 01.04.2015 and doing the said work in the name of the proprietary concern up to August, 2015, though, it is stated that the agreement is executed on 01st April, 2015 wherein the said proprietary concern is taken over by the petitioner company from 01.04.2015. It would also have to consider the I. T. man power of the petitioner company and the date from which the said persons are working with the

petitioner company. All the said relevant aspects in that regard will have to be considered by the respondent No. 2 while finalising the tender. The tender is filed on 02nd September, 2015, whether on the said date the petitioner company was possessing the necessary I. T. personnel and other requirements as laid down in the tender will have to be considered by the respondent No. 2 as prescribed for the same.

20. As such, the impugned order dated 17.03.2016 and the letter of intent dated 17.03.2016 are hereby quashed and set aside. We have only held that as far as the experience of the petitioner company is concerned it will have to be held that the petitioner is possessing the necessary experience but in respect of other criteria about giving the marks etc. the respondent No. 2 shall consider the actual factual matrix placed before it on behalf of both the parties and thereafter shall finalise its decision of allotting the tender to a particular party.

21. The Writ Petition is accordingly partly allowed. No costs.

[K. K. SONAWANE, J.] [S. V. GANGAPURWALA, J.]

22. At this stage Mr. Bajaj, the learned counsel seeks stay of this order. The work order was not issued as yet in view of the interim orders . At the request of the respondent the present judgment is stayed for a period of three (3) weeks from today. However, it is made clear that, for this period of three (3)

weeks no work order should be issued to any party.

[K. K. SONAWANE, J.] [S. V. GANGAPURWALA, J.]

sam/April.16