<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY</u>
<u>BENCH AT AURANGABAD</u>

<u>WRIT PETITION NO. 6725 OF 2016</u>

M/s Arde Electricals, Engineers
& Contractors,
Registered Govt. Contractor
through its Proprietor
Sachin s/o Zumber Arde,
Age : 38 years, Occu. Business,
R/o Ujwal Complex,
Opp. Old S.T. Stand, Ahmednagar,
District Ahmednagar **PETITIONER**

VERSUS

1. The State of Maharashtra,
through Secretary,
Water Conservation Department,
Mantralaya, Mumbai – 32

2. The Superintending Engineer,
Small Scale Irrigation
(Water Conservation),
Circle Nashik

3. The Executive Engineer,
Small Scale Irrigation
(Water Conservation),
Division Ahmednagar

4. M/s Jain Irrigation Systems Ltd.,
Jain Fields, National Highway No. 6,
Bambhori Tq. Dharangaon,
District Jalgaon – 425 001 **RESPONDENTS**

Mr. Girish K. Thigale (Naik), Advocate for
the Petitioner
Mr. S.B. Yawalkar, A.G.P. for respondent Nos. 1 to 3

CORAM : R.M. BORDE AND
SANGITRAO S. PATIL, JJ.

DATE : 20^{th} DECEMBER, 2016

JUDGMENT (PER : SANGITRAO S. PATIL, J.) :

Rule, returnable forthwith. With the consent of the learned counsel for the petitioner and the learned A.G.P., heard finally.

2. Respondent No. 3 – the Executive Engineer, Small Scale Irrigation (Water Conservation), Division Ahmednagar issued e-Tender Notice No. 6 of 2016-17, inviting sealed online tenders from registered contractors of appropriate class with Public Works Department, Government of Maharashtra for the strengthening work at Shri Sant Yadavbaba Water Shed Area Recharge Scheme (Stage-II) Ralegansiddhi, Taluka Parner, District Ahmednagar. As per condition No. 3.1 (G) of the tender document, for determining the minimum bid capacity in case of joint venture partnership or a partnership, yearly turnover to bid capacity and quantities of main items executed of prime and sub-contractors have to be added together. However, no

addition would be permitted for working out the minimum cost of similar type of work executed. The term "Experience of similar type of work" has been clarified in condition No. 3.3.1 as under :-

> "**3.3.1 Experience of similar type of work**
> The contractor should have successfully completed at least one similar type of work i.e. construction of Pump house, Rising Main, Delivery Chamber etc in a single work having similar nature and complexity also having cost not less than Rs. 235.00 lacs at price level of 2015-16, and having executed main item of works 3.3.2 during last five years. (The works should have been commissioned and completed during last five years i.e. 2014-15, 2013-14, 2012-13, 2011-12, 2010-11). A weightage of 10% compound annually shall be given for equating the cost of work of the year, previous to current year 2014-15."

3. According to the learned counsel for the petitioner, the above referred terms provide that the capacity of joint venture partners collectively has to be considered while evaluating the tender submitted by them. He submits that the petitioner is a joint venture

comprising of M/s Arde Electricals and Sanket Enterprises. They have executed a Joint Venture Agreement on 15th June, 2016. As per condition 3.3.1 of the tender document, the value of the work of similar nature completed by both the members of the petitioner – joint venture was required to be considered which was to the tune of Rs. 4,68,62,588/-, i.e. double of the prescribed minimum that has been contained in condition 3.3.1 i.e. Rs. 2,35,00,000/-. However, while evaluating the post-qualification of the petitioner, respondent No. 3 showed the work experience value of M/s Arde Electricals only for Rs. 59,16,000/- and did not consider the work experience value of the other member of the joint venture namely Sanket Enterprises. The learned counsel for the petitioner submits that respondent No.3 misread the above referred conditions of the tender document and by adopting unfair, illegal, arbitrary and malafide approach, disqualified the petitioner from participating the tender process. He submits that this was done with the sole object to facilitate respondent No. 4 to get qualified for participating the tender process and for allotment of the tender work to respondent No. 4 only. He, therefore, submits that the impugned decision dated 22nd June, 2016 disqualifying the petitioner and selecting respondent No. 4 only for participating the tender process may be quashed and set aside and the petitioner may be permitted to participate the tender process.

4. Reply came to be filed on behalf of respondent Nos. 1 and 2 to oppose the petition. Based on the contentions raised in the said reply, the learned A.G.P. submits that in order to ensure high quality of the proposed work and the requisite capability to undertake the job of construction of Shri Yadav Baba Water Shed Area Recharge Scheme, estimated cost whereof is Rs. 2,34,94,566/-, eligibility criteria have been incorporated in the tender document. Accordingly, condition Nos. 3.1 (G) and 3.3.1, referred to above, were required to be fulfilled by joint venture partnership in order to exhibit its capacity and capability to execute the tender work within the scheduled time maintaining the high quality. As per the Joint Venture Agreement of the petitioner, the share and participation of M/s Arde Electricals and Sanket Enterprises is shown as 90% and 10%, respectively.

Therefore, the net cost of the works executed by Sanket Enterprises was not liable to be considered for holding the joint venture of the petitioner eligible for participating the tender process. The net cost of the similar type of works completed by M/s Arde Electricals, having share and participation in the joint venture to the extent of 90%, alone was liable to be considered, which was to the tune of Rs. 59,16,000/-. The net cost of the works performed by Sanket Enterprises and that of M/s Arde Electricals was not liable to be considered together in view of condition No. 3.1 (G) of the tender document. According to the learned A.G.P., the petitioner was not eligible to participate the tender process and consequently, respondent No. 3 rightly disqualified the petitioner.

5. The learned A.G.P. submits that the petitioner has no legal right to claim participation in the tender process since it does not fulfill the terms and conditions of the tender document, more particularly the cost condition which was expected to be more than Rs. 2,35,00,000/- in a single work of similar nature and complexity at price level of 2015-16 and having executed

main item of works described in condition No. 3.3.2 during last five years. The allegation that the decision to disqualify the petitioner has been taken by adopting arbitrary, unreasonable, illegal and malafide attitude with a view to facilitate respondent No. 4 to participate the tender process and to get the tender work, is wrong. The learned A.G.P., therefore, submits that the petition may be dismissed.

6. In order to appreciate the controversy between the parties, it would be worthwhile here to reproduce paragraph No. 24 of the judgment in ***New Horizons Limited and another Vs. Union of India and others (1995) 1 S.C.C. 478***, cited by the learned counsel for the petitioner, wherein the expression "j*oint venture*" has been clarified as under :-

> *"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 maybe altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6^{th} 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, automic fields. (Black's Law Dictionary, 6^{th} 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. [See Jacques Buhart : Joint Ventures in East Asia – Legal Issues (1991).] 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."

7. As seen from the Joint Venture Agreement executed by the members of the petitioner i.e. M/s Arde Electricals and Sanket Enterprises, it was specifically executed for the tender work namely, "Construction of Shri Sant Yadavbaba Water Shed Area Recharge Scheme (Stage-II)Ralegansiddhi, Taluka Parner, District Ahmednagar". There are number of terms and conditions

incorporated in the said Agreement, including the share and participation of the members of the petitioner in respect of all the rights, interests, liabilities, obligations, work experience and risks (and all net profit and losses) arising out of the contract, to be shared or borne by them in proportion of 90% and 10% respectively. The petitioner has produced a certificate, issued by the Executive Engineer, Rural Water Supply Division, Zilla Parishad, Ahmednagar, showing that Sanket Enterprises has completed the works, having total net cost of Rs. 4,68,62,588/- satisfactorily and is possessing professional capacity and good experience in execution of the works. Since M/s Arde Electricals and Sanket Enterprises entered into the Joint Venture Agreement, the petitioner would assume the character of legal entity undertaking to execute the tender work for mutual profit, wherein both of them would contribute their assets and share risks. They would have a community of interest for the purpose of the tender work. If that be so, in view of condition No. 3.1 (G), the net cost of the works performed by Sanket Enterprises certainly was liable to be considered together with the net cost of the works performed by M/s

Arde Electricals for the purpose of evaluating the bid capacity.

8. The contention of the learned A.G.P. that the share and participation of Sanket Enterprises in the joint venture is 10% only and therefore, the net cost of the works performed by Sanket Enterprises was not liable to be considered while evaluating the bid capacity of the petitioner, cannot at all be accepted. None of the terms/conditions of the tender document prescribe any particular percentage of sharing between or amongst the members of the joint venture. If that be so, the petitioner, which is a product of the Joint Venture Agreement, would be a separate legal entity and the financial capacity of both of its members would be required to be considered together for evaluating the bid capacity of the petitioner.

9. The learned A.G.P. cited the judgment in the case of ***Central Coalfields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others AIR 2016 S.C. 3814***, wherein submission of bank guarantee in the format prescribed in the bid document was an essential

requirement. The respondent – Joint Venture Consortium (JVC) did not submit the bank guarantee as required. Therefore, the bid of JVC was rejected. It was observed that the process by which the decision was taken by the petitioner - Central Coalfields Ltd (CCL) that the bank guarantee furnished by JVC ought to be rejected, did not indicate that it was flawed in any manner whatsoever. It was further observed that the decision taken by CCL to reject the bank guarantee furnished by JVC, was not arbitrary or unreasonable or perverse. Considering the distinguishing facts of the above-cited case, we do not find that it would be of any help to respondent nos. 1 and 2 to substantiate the decision to disqualify the petitioner. In the present case, there is no breach on the part of the petitioner of condition No. 3.1 (G) of the tender document. On the contrary, the said condition itself provided that in case of Joint Venture partnership, yearly turnover to bid capacity and quantities of main items executed of prime and sub-contractors shall be added together, for determining the minimum criteria of bid capacity. Respondent No.3, therefore, ought to have considered the cost of works performed by both the members of the petitioner, as furnished by them, together for determining the minimum criteria of bid capacity of the petitioner. If the cost of works completed by both the members of the petitioner is considered together, it would certainly be above Rs. 2,35,00,000/- as required by condition No. 3.3.1 of the tender document. In the circumstances, the decision to disqualify the petitioner merely considering the cost of works completed by one of the members of the petitioner, i.e. M/s Arde Electricals, ignoring the cost of works of the another member of the petitioner, i.e. Sanket Enterprises, cannot be said to be fair, reasonable and legal.

10. Considering the above facts and circumstances of the case, we hold that the decision rendered by respondent No. 3 disqualifying the petitioner from the tender process being not fair, reasonable and legal, is liable to be quashed and set aside and accordingly, quashed and set aside. We direct respondent No. 3 to allow the petitioner to participate the tender process and proceed with the said process afresh from the stage where the petitioner was declared as disqualified. Respondent No. 3 would be at liberty to evaluate the

financial bids of the qualified bidders and take appropriate decision for allotting the tender work on its own merits.

12. Rule is made absolute in the above terms. The Writ Petition is accordingly allowed with no order as to costs.

[**SANGITRAO S. PATIL**]	**[R.M. BORDE]**
JUDGE	**JUDGE**

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