HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP Nos.5845, 6671, 22311 & 13365 of 2015

COMMON ORDER ::

In all in these writ petitions, the petitioner assails the action of the respondents in not accepting the tender schedules submitted by him and not entering into agreement with him and further in seeking to cancel tenders submitted by him, in spite of fulfilling the tender conditions, in respect of minor irrigation works under Mission Kakatiya, as being illegal, arbitrary and violative of Article 14 and 19 of the Constitution and consequently direct the respondents to accept the tender schedules submitted by him and allow him to execute the works in case of becoming successful bidder in respect of the notified works. Since the issue and parties in all these writ petitions being same, suffice it to note the facts in Writ Petition No.5845 of 2015.

2. The case of the petitioner is that he is the managing partner of M/s.Tulsi Constructions, a firm, and executed number of works by and in the name of the firm being the managing partner of the firm. Pursuant to the tender notification dated 12-02-2015, the petitioner submitted his

tender schedule for the minor irrigation works under Mission Kakatiya, in his individual capacity, but not in the name of the firm. When the respondents took objection on the ground that the experience of the firm and cannot be treated, as the experience of the individual contractor, the petitioner approached this Court by way of filing a writ petition being WP No.34336 of 2012 and this Court relying on the decisions in S.Kireetendranath Reddy vs. AP Transco & M.V.V. Satyanarayana vs. Egineer-in-Chief, R & B, Hyderabad, observed that the experience of the firm, *i.e.* M/s.Tulsi Constructions, of which the petitioner is partner, may be considered as petitioner's experience. Pursuant thereto, the tenders of the petitioner were received for consideration. The grievance of the petitioner is that though he is eligible to execute the tender works notified, the respondents rejected the tender schedules submitted by the petitioner. Hence these writ petitions.

3. Counter affidavit is filed by the 2nd respondent-Superintending Engineer, Irrigation Circle, wherein *inter alia* it is stated that in order to qualify for the price bid, one has

to fulfil; *i)* bid capacity; *ii)* similar nature of work & *iii)* prime quantities. As regards the bid capacity, it is assessed through formula called 2-ANB *i.e.* A-Maximum value of civil works executed in any one financial year during the last ten years, updated to price level; N-Number of years prescribed for completion of work; B-Value of existing commitments and ongoing works to be completed during the period of completion of works for which tenders are invited. It is stated that the petitioner in support of 'A' uploaded documents pertaining to experience of the works executed in the individual capacity and works executed in the name of the partnership firm, in which his share was to the extent of 30%. The value of the experience certificate submitted in individual capacity is Rs.3.26 lacs peak year (maximum value). The value of the experience certificate submitted in the name of the partnership firm for the peak year (maximum value) is Rs.275.70 lacs and 30 % of it comes to Rs.82.793 lacs. But, whereas the total value of the works considered for peak year is Rs.86.053 lacs and when assessed with 'N' and & 'B' formula, it comes to Rs.137.046 lacs. It is also stated that the value of the works notified is more than the bid capacity of the petitioner. That the petitioner is supposed to enclose certificate showing the value of the civil works and in the absence of it, the value of the works of the petitioner is considered at 30%, for the works executed by him in the partnership firm, and the total value of the works executed by the petitioner in the firm cannot be treated as 100% value of the works executed in his individual capacity. That there are no grounds in the writ petition and it is liable to be dismissed.

4. Sri Kuna Reddy Anji Reddy, learned counsel for the petitioner strenuously contended that the petitioner has been singled out without assigning any plausible reasons though he is eligible to execute to works notified. He further contended that the value of the works executed by the petitioner in the partnership firm shall have to be considered as 100% value of the works executed in his individual capacity and the authorities erred in restricting the value of the works executed by him in the firm to 30%.

5. On the other hand, learned Government Pleader for Irrigation & CAD appearing for the respondents submitted that pursuant to the directions of this Court in WP No.34336 of

2012, the tender schedule of the petitioner was received for consideration. Learned Government Pleader submits that this Court directed to treat the experience of the firm as the experience of the petitioner, but experience of the petitioner, as a partner, in the firm cannot be construed as execution of 100% of value of works in his individual capacity. It is also stated that value of works executed in the firm will be assessed as per his share in the firm and as the share of the petitioner in the firm is 30%, the same is less than the bid value and, therefore, the petitioner became ineligible for award of contract. Reliance is placed on the decision of this Court in ***M. RAVINDER REDDY vs. UNION OF INDIA.***[1]

6. Having noted the pleadings and having heard the learned counsel for the parties, it is understood that the value of the civil works executed by the petitioner in the firm is taken at 30%, which is less than the value of the bid notice, instead of 100% on the ground that his share of contribution in the firm is only to the extent of 30%. The total value of the works considered for the peak year is Rs.86.053 lacs. The total value of the works executed in the name of the firm for the

[1] 2008 (1) ALD 685

peak year is Rs.275.70 lacs and 30% of it comes to Rs.82.793 lacs, which is less than the value of the bid notice. It is the contention of the petitioner's counsel that the value of the works executed by and in the name of the firm, by the petitioner, being lead partner, has to be treated as 100% value of the works.

7. Now the question would be whether the criterion adopted by the respondents to take the experience of execution of civil works by the petitioner to the extent of his share of investment in the partnership firm, who is a lead partner of the firm, suffers from any infirmity.

8. In ***NEW HORIZONS LIMITED vs. UNION OF INDIA's***[2] case the award of contract was for printing, binding and supply of specified number of telephone directories. The tender offered by the New Horizons Limited was considered by the Telecom Department. When that action was assailed before the Delhi High Court, it was contended by the Telecom Department that the tender of New Horizons Limited was not considered because the New Horizons

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[2] 1995 (1) SCC 478

Limited did not submit any evidence to show that they have in their name works of compiling, printing and supply of telephone directories for large telephone systems with the capacity of more than 50,000 lines and they have no experience whatsoever in their own name. Whereas, on behalf of New Horizons Limited, it was urged that New Horizons Limited was fully eligible and met the criteria as laid down in the tender document and was competent to compile, print and supply telephone directories as per the invitation of tender and in that connection New Horizons Limited placed reliance on the experience of foreign collaborator/equity-holder and the experience of the major Indian equity share-holders, viz., TPI and LMI who owned the most well-equipped modern printing and binding facilities and had executed the work for the parties who had been awarded contract earlier for telephone directories for metropolitan cities of Delhi and Bombay.

9. The Delhi High Court in the light of the rival contentions, observed that the share-holders of New Horizons Limited have all the experience in compiling and

printing telephone directories, but observed that it is not at all the job requirement. It was further held that the experience of a share-holder cannot be the experience of the Company. The Delhi High Court ultimately dismissed the writ petition filed by New Horizons Limited. The matter was carried to the Supreme Court by New Horizons Limited. The observations made by the Supreme Court reads like this:-

"....... requirement regarding experience cannot be construed to mean that the experience should be of the tenderer in his name only. It is possible to visualise the 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 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 filed 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 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.........The terms and conditions of a document have to be construed from the stand point 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".

10. Following the ratio laid down in ***New Horizons Limited's case*** (2 supra), this Court in

S. KIREETENDRANATH REDDY vs. AP TRANSCO[3] having extensively dealt with the status of a partnership firm in law *vis-a-vis* its partners and held that a firm is neither a legal entity nor a person; that it has no legal existence apart from its partners; that a firm's name is merely a description of the individuals who composed it; that the essential characteristic of a firm is that each partner is a representative of the other partners; and that each of the partners is an agent and a principal. At paras 18, 24, 25 and 32, of the order observed thus:-

"It is well settled that a firm is not a legal entity, but is only a collective or compendious name for all partners. It is neither a legal entity nor a person. A firm has no legal existence apart from its partners. A firm name is really a description of the individuals who compose it. The essential characteristic of a firm is that each partner is a representative of the other partners. Each of the partners is an agent and a principal. He is an agent in so far as he can bind the other partners by his acts within the scope of the partnership business and he is principal to the extent that he is bound by the acts of the other partners. The liabilities of the firm can be enforced against each of the partners personally. An examination of the above propositions of law and the authorities

3 1999 (5) ALD 398

clearly goes to show that a partner when he acts in all matters which are within the scope and objects of the partnership, he steps into the shoes of the firm, which is a personified person but not a legal person in popular language, and binds all other partners, who compose it by his acts. Since a firm does not have its own distinct and separate personality apart from the personality of partners who compose it, no experience can be attributed to it in law, and the so called personified experience of a firm, in reality, is nothing but the experience of the partners who compose it...."

11. This Court in ***M.V.V. SATYANARAYANA vs. ENGINEER IN CHIEF, R & B, HYDERABAD***[4], had an occasion to deal with a similar issue and while reiterating the ratio laid down in ***New Horizons Limited's case*** (2 supra) and in ***S. Kireetendranath Reddy's case*** (3 supra), this Court made the following observations:-

"When a firm is represented by its partner, there is nothing in law which separates him from the firm which he represents, as the firm has no legal entity. In this perspective the name which does not spell any magic is not so much material, but it is the composition of the firm which is material for, the partner of a firm steps into the shoes of the firm."

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[4] 2008 (1) ALT 715

12. In the instant case, following the formula called 2-ANB, the tender schedules offered by the petitioner were rejected on the ground that the uploaded documents which pertains to the experience of the works executed by the petitioner in the individual capacity and delineated to the extent of his share in the partnership firm i.e. 30%. Refuting similar contention, the Supreme Court in ***New Horizons Limited's case*** (2 supra) held thus:-

"Even if it be assumed that the requirement regarding experience as set out in the advertisement dated April 22, 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..."

13. I am also fortified with the view expressed by his Lordship SR Nayak in ***S. Kireetendranth Reddy's case*** (3

supra) that experience of a firm, in reality is nothing but the experience of the partners who compose it. It is worthwhile to reproduced the observation made in that behalf, which reads thus:-

"Experience is something personal, concrete, permanent and it goes with the experienced man, wherever he is. Experience gained in particular relation is not and cannot be lost with the cessation of the said relationship, and even after the cessation of the relationship, the experience will remain with the experienced man. Any contrary view will be against humanity and reality and it will defeat both logic and reason. If at all experience can be lost, it can be lost only by the experienced man himself, of course, involuntarily, due to his physical and mental deterioration and imbalances. Experience cannot be snatched away by anyone else. Experience of the experienced man disappears with the extinction of the experienced man, and not before that. It may also be relevant to notice that from the same subject of experience, more than one can gain experience. For example, if a particular work-contract involving application of technology and science is executed jointly by a group often technocrats/scientists, each one of them acquires the experience. In such case, though in popular language, the experience is attributed to the personified group of technocrats/scientists, in reality, that experience is the experience of the technocrats/scientists who composed the group, and that

experience is the individual experience of each member of the group."

14. There may arise a situation, where a firm, though having persons with experience in the field, has no experience in its name while the firm having experience in its name may lack partners with experience. In this case, the value of the experience certificate submitted in the name of the partnership firm for the peak year (maximum value) is Rs.275.70 lacs and total value of the works considered for peak year is Rs.86.053 lacs and when assessed with formula 'N' and 'B' it comes to Rs.137.046 lacs, meaning thereby, if the experience of the firm is taken at a peak year, the petitioners are entitled for consideration for award of contract even applying 2-ANB formula.

15. This Court in ***M. RAVINDER REDDY's case*** (1 supra) has referred to the case law on the scope of judicial review of administrative decisions. In ***TATA CELLULAR vs. UNION OF INDIA***[5], the Supreme Court has enunciated the principles that have to be followed in judicial review of administrative

[5] 1994 (6) SCC 651

decisions, especially those relating to tenders and award of contracts. It was observed by the Supreme Court that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

16. In ***STERLING COMPUTERS LIMITED vs. M & N PUBLICATIONS LIMITED***[6]**,** the Supreme Court held as under:

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[6] AIR 1996 51

“18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the ‘decision making process'. By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at same time, the Courts can certainly examine whether 'decision-making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.”

17. This Court for the moment is not analysing the correctness or otherwise of the decision in rejecting the tender schedules of the petitioner, but only weighing the decision making process in rejecting the tenders. It is settled proposition of law referred to in a catena of decisions of the Supreme Court as well as this Court and, it is time and again held that this Court can examine the correctness or otherwise of the decision making process and not the merits of the decision.

18. It is stated that as per Rule (v) of GO Ms.NO.94, dated 01-07-2003 prohibits the individual contractor from applying for registration in his individual capacity as also in the name

of the firm. In this case, the petitioner uploaded both the experience certificate for the works in his individual capacity as also in the name of the firm. The respondents though worked out the individual experience at 100%, but restricted the experience of execution of civil works to the extent of his share in the firm i.e. 30%. This approach of the respondents is bad in law in view of the law laid down by the Supreme Court in ***New Horizons Limited's*** case (2 supra) and this Court in ***S. Kireetendranth Reddy's*** case (3 supra). In view of the pedantic approach adopted by the respondents, the petitioner stood excluded from consideration for award of the contract for the works notified, the same being totally irrational and arbitrary itself constitutes a ground for interference by this Court in exercise of jurisdiction under Article 226 of the Constitution. But, learned Government Pleader for Irrigation and CAD during the course of the arguments submitted that the works in question have been awarded to third party-Contractor and the work has also been completed. The third party-Contractor in whose favour the work is awarded is not a party to these proceedings. In view of the above subsequent events, writ petitions as prayed for cannot be allowed.

19. Since this Court is of the view that only due the lapse of the respondents the case of the petitioner stood excluded from the consideration for award of the contract, in the facts and circumstances, deprecating the practice adopted by them, the respondents are imposed costs of Rs.1 Lac (One Lac) payable to the petitioner.

20. In result, the writ petitions are disposed of directing the respondents to pay costs of Rs.1 Lac (One Lac) to the petitioner within a period of six weeks from the date of receipt of a copy of this order. Miscellaneous petitions, if any pending in these cases are also disposed of. There shall be no order as to costs.

A. RAJASHEKER REDDY, J

Dated: 14-11-2017
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HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP Nos.5845, 6671, 22311 & 13365 of 2015

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Dated: 14-11-2017

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