IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No.12425 of 2017.
Date of decision:01.06.2017

Sh. Subhash Kashyap ... Petitioner

Vs.

State of Punjab and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Arjun Shukla, Advocate
for the petitioner.

Mr. Amandeep Singh Talwar, Advocate
for the caveator/respondent No.5.

AMIT RAWAL J.

The petitioner has approached this Court seeking a direction to the police to investigate the affairs of respondent No.5 -M/s Triveni AMR Joint Venture and its consortium members alleging that respondent No.5, while submitting the bid on 15.12.2015, had resorted to misrepresentation and suppression with a malafide intention in the global tender inquiry dated 31.08.2015 floated by respondent No.4 - Punjab State Power Corporation Limited through its Managing Director having its registered office and in view of the breach of the terms and conditions of Clause No.6.4.2 of the bid document, which tantamounts to commission of cognizable offences under Sections 420 and 120-B IPC.

There is a caveat on behalf of respondent No.5. This Court had issued notice to the State. Mr.Yatinder Sharma, Additional Advocate General, Punjab accepted the notice on behalf of the respondents-State.

Mr.Amandeep Singh, learned counsel for the caveator/ respondent No.5 opposed the maintainability of the writ petition on the ground that Clause 6.4.6 of the Bid Document envisages that the nomenclature/expression used in the Clause aforementioned is bidder which is joint venture of bidder, but respondent no.5, being a joint venture of two companies, has separate legal entity. In support of his contention relied upon the ratio decidendi culled out by the Hon'ble Supreme Court in **M/s Gammon India Limited vs. Commissioner of Customs, Mumbai 2011 (12) SCC 499,** particularly paragraphs 2, 8, 11, 17 and 18.

He further submitted that there is no merit in the alleged allegation of deliberately and intentionally concealing its bid that it is a consortium member of M/s AMR India Limited. As per the facts, on 05.01.2016, respondent No.4 was called upon to furnish separate undertaking by each of its two consortium members and on 09.01.2016, one of the consortium members, i.e., AMR India Limited, informed respondent No.4 that it had previously been disqualified from the Government Project. However, on 05.02.2016, respondent No.4 opened the price bid and vide e-mail dated 08.02.2016 informed respondent No.5 that it was disqualified from the tender for not fulfilling the eligibility criteria as per Clause 6.2.4 of the Bid Document, thus, respondent No.5 and its constituent, at any point of time, never violated the terms and conditions of the tender nor are liable for penal action.

I have heard learned counsel for the parties and appraised the paper book.

Clause 6.4.6 of the Bid Document reads as under:-

"6.4.6 The bidder shall furnish a self-undertaking to support that the bidder has not been terminated or blacklisted from any Mining contracts or any other contract in the last 7 years due to its incapacity to perform the tender Milestones for Projects awarded from Government Undertakings."

The language used in the Clause 6.4.6 does not lead any different interpretation in view of the simple and plain language of the expression "bidder". The bidder in the instant case is joint venture and it is not the case of the petitioner or the State that joint venture at any point of time terminated or blacklisted. The Hon'ble Supreme Court in the judgment aforementioned had considered the joint venture as different entity, i.e. consortium member and its companies. For the sake of brevity, paragraphs 2, 8, 11, 17 and 18 read as under:-

"2. Briefly stated, the facts, material for adjudication of the issue arising in this appeal, are as follows:-

The appellant namely, M/s Gammon India Ltd. (for short "Gam- mon") and one M/s Atlanta Infrastructure Ltd., Mumbai, (for short "At- lanta") both incorporated as Public Limited Companies, entered into a joint venture agreement on 18th September, 2000. The joint venture was named and styled as "Gammon Atlanta JV". The agreement was entered into for the purpose of submitting a bid to the National Highways Author- ity of India (for short "NHAI") for award of a contract for construction of 31.40 Kilometers of road on National

Highway-5. The terms of the agreement, inter-alia, provided that: each of the said parties would share financial responsibilities in the form of guarantees, securities etc. to the extent of 50% of the project value; the venture would be managed by setting up of a management board consisting of a Chairman and one Director to be nominated by Gammon and a Joint Chairman and another Director to be nominated by Atlanta. Although Gammon was to be designated as the lead partner to the venture but both the companies were to be jointly and severally liable to NHAI for due execution of the contract.

8. Being dissatisfied with the decision of the Commissioner (Appeals), the revenue carried the matter in further appeal to the Tribunal. As aforestated, by the impugned order the Tribunal has allowed the said appeal. Distinguishing the case of New Horizons Limited & Anr. Vs. Union of India & Ors.1, relied on behalf of the importer, the Tribunal 1 (1995) 1 SCC 478 has come to the conclusion that the benefit of Exemption Notification cannot be availed of by a joint venture because it is nothing more than an association of two persons, having no identity in law. The Tribunal has gone on to observe that had such a bill of entry been filed even by a joint venture, the department would have been justified in rejecting it on the ground that the identity of the real importer was not known. Aggrieved, Gammon is before us in this appeal.

11. Per contra, Mr. Harish Chander, learned senior counsel appearing on behalf of the revenue, supporting the decision of the Tribunal, submitted that the joint venture and Gammon being two independent entities, the eligibility certificate dated 3rd August, 2001 issued in favour of the latter was of no consequence in so far as the Exemption Notification was concerned because the contract for construction of roads had not been awarded to Gammon, who had imported the machine but to the joint venture. It was stressed that Gammon, on their own, were not entitled to import any goods for the execution of road works under the contract awarded to the joint venture by NHAI. Placing reliance on the decision of this Court in Novopan India Ltd., Hyderabad Vs. Collector of Central Excise & Customs, Hyderabad, 1994 Supp (3) SCC 606, learned counsel contended that the Exemption Notification has to be construed strictly. Responding to the allegation of pick and choose policy adopted by the revenue, learned counsel urged that non-filing of an appeal in a similar case does not operate as a bar for the revenue to prefer an appeal in another case. In support, learned counsel commended us to the decision of this Court in C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin 2008(8) SCC 739. It was thus, asserted that the decision of the Tribunal did not warrant any interference and the appeal deserved to be dismissed.

17. In New Horizons (supra), a joint venture company, consisting of a few Indian companies (with 60% share capital) and a Singapore based company (with 40% share capital), had participated in tender proceedings floated by the Department of Telecommunications for printing and binding of telephone directories of Delhi and Bombay. The tender submitted by New Horizons Ltd; (for short "NHL") was not accepted by the tender evaluation committee, apparently, on the basis of the fact that the successful party had more technical experience than any one of the constituent companies of NHL. Aggrieved by the said decision, NHL filed a writ petition in the Delhi High Court against the decision of the Department of Tele-communications. The said writ petition was dismissed rejecting the plea of the NHL that the technical experience of the constituents of the joint venture was liable to be treated as that of the joint venture. NHL brought the matter to this Court. Explaining the concept of joint venture in detail, it was held that a joint venture is 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 contributed assets and shared risks. It was observed that a joint venture could take the form of a Corporation wherein two or more persons or companies might join together. Accordingly, the appeal of NHL was allowed and *it was held that it was a joint venture company in the nature of a partnership between the Indian group of companies and Singapore based company which had jointly undertaken the commercial venture by contributing assets and sharing risks. Applying the principle of "lifting the corporate veil", it was held that the joint venture companies' technical experience could only be the experience of the partnering companies and the technical experience of all constituents of NHL was liable to be cumulatively reckoned in the tender proceedings and any one of the constituents was competent to act on behalf of the joint venture company. Highlighting the concept of joint venture, the Court observed thus:*

> *"24. 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 may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839)*
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> *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, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342)..................."

18. In short, New Horizons (supra) recognises a joint venture to be a legal entity in the nature of a partnership of the constituent companies. Thus, the necessary corollary flowing from the decision in New Horizons (supra), wherein the partnership concept in relation to a joint venture has been accepted, would be that M/s Gammon-Atlanta JV, the joint venture could be treated as a `legal entity', with the character of a partnership in which Gammon was one of the constituents. In that view of the matter, the next question for consideration is whether being a legal entity i.e. a juridical person, the joint venture is also a "person" for the purpose of Condition No.38 of the Exemption Notification, stipulating that the goods should be imported by "a person" who had been awarded a contract for construction of goods in India by NHAI?"

In my view, apprehension of the petitioner is totally misplaced and does not call for any interference. Vis-a-vis, applying the ratio decidendi culled out by the Hon'ble Supreme Court in M/s Gammon India Ltd. (supra), I am of the view that identity of the joint venture Triveni AMR is different than its consortium members, Triveni and AMR. As such, on plain reading of Clause 6.4.6 of the Bid Document, it requires submission of undertaking only by joint venture and not by its consortium member.

On the contrary, it is admitted position on record that when called upon one of the two consortium members, M/s AMR India Limited, immediately without any hitch, informed the department of its disqualification, therefore, there is no prima facie case of any breach or willful suppression and misrepresentation. Finding no merit in the writ petition, I am of the view that contents of the writ petition, much less, submissions of the counsel for the petitioner do not have any basis to substantiate the allegations. Resultantly, the same is not sustainable and devoid of merit.

Accordingly, the writ petition is dismissed.

(AMIT RAWAL)
JUDGE

June 01, 2017
savita

Whether Speaking/Reasoned Yes/No

Whether Reportable Yes/No