

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8450 OF 2021

Shaikh Wasim Shaikh Firozlala Tamboli

.. Petitioner

Versus

The Food Corporation of India
Through its General Manager

.. Respondent

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Mr R.N. Dhorde, Senior Advocate i/by Mr V.R. Dhorde,
Advocate for the Petitioner
Mr Milind Patil, Advocate for the Respondent

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CORAM : S. V. GANGAPURWALA
AND
R.N. LADDHA, JJ.

DATE : 01-09-2021

PER COURT : -

1. The respondent issued e-tender notice for appointment of Handling and Transport Contractor. Pursuant to the tender notice, the petitioner filled in the tender. On or about 19-07-2021 the respondent rejected the technical bid of the petitioner on the ground that the petitioner does not possess the experience and also on the ground that point no.6 of the undertaking is incomplete. The said order is assailed in the present petition.

2. Mr Dhorde, learned Senior Advocate for the petitioner submits that the petitioner possesses the necessary experience as per the

tender condition. The petitioner had entered into a Memorandum of Understanding (hereinafter, in short 'MoU') with Durga Trading Company and one Yusuf Khan s/o. Mansoor Khan for execution of the work of Maharashtra State Warehousing Corporation (hereinafter referred to as the 'MSWC') concerning unloading / loading of food grain bags and transportation of food grains. The said MoU is entered into on 27-05-2019. Pursuant to the said MoU, the work was completed by the petitioner. The Experience Certificate to that effect is issued by MSWC through its Storage Superintendent on 26-03-2021. It is clarified that handling work of Rs.5,19,58,821/- and transportation work of Rs.2,67,28,271/- have been done by the petitioner and M/s Durga Trading Company and that the work has been done upto 28-02-2021 satisfactorily. The said experience certificate satisfies the experience required for being qualified for the tender. The learned Senior Advocate further submits that an experience of an individual is required to be considered. Even if a partner of partnership firm or a Director of the Company has an experience in his individual capacity, that experience has to be considered while filling in the tender may be either in the name of the partnership or in the name of the Company. The individual experience is paramount to be considered.

3. To buttress his submission, the learned Senior Advocate relies upon the judgment of the Hon'ble Apex Court in the case of **New Horizons Limited and another Vs Union of India and others reported in (1995) 1 SCC 478**. According to the learned Senior Advocate the said judgment would squarely apply to the present matter. The experience certificate has been issued holding that the petitioner has a necessary experience. The learned Senior Advocate also relies upon the judgment of the Division Bench of this Court in **Writ Petition No.8503 of 2020 dated 19.03.2021**, wherein this Court held that, 'experience of a partner can be considered as an experience of the partnership firm.'

4. The learned Senior Advocate further submits that, inadvertently, Clause No.6 of the undertaking could not be marked properly and the narration that the petitioner is not related to any officer of the Corporation remained to be scored off. The same is too technical ground to reject the technical bid. The learned Senior Advocate relies upon the judgment of the Hon'ble Apex Court in the case of **Rashmi Metaliks Limited and Another Vs. Kolkata Metropolitan Development Authority and Others** reported in (2013) 10 SCC 95.

5. Mr Patil, learned Advocate for the respondent submits that the

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terms of the tender are sacrosanct. They cannot be deviated with. The terms of the tender are required to be complied scrupulously. The learned Counsel further submits that it has been specifically mentioned in the tender condition that if the firm has to apply the experience of the firm alone would be considered and of no other.

6. In the case of **New Horizons Ltd** (supra) relied by the learned Counsel for the petitioner, such a condition did not exist in the tender document. So also, in the order passed by the Division Bench of this Court in **Writ Petition No.8503 of 2020 dated 19-03-2021**, the similar tender condition was not a part of the tender document. In the present case the tender condition specifically provides that the experience should be of the person applying the tender.

7. The learned Counsel for the respondent to substantiate his submissions relies upon the judgment of the Punjab & Haryana High Court in the case of **Food Corporation of India and another Vs. M/s. Deaniel Masih Satprit Singh Bedi decided on 05-04-2017**. The Court in the said case also considered the judgment of the Hon'ble Apex Court in the case of **New Horizons Ltd** (supra) and after considering the judgment of the Hon'ble Apex Court in the case of **New Horizons Ltd** (supra) concluded that if the terms of the tender provide that the

experience should be in the name of the party applying, the same has to be complied. The said Judgment is also confirmed by the Hon'ble Apex Court.

8. The learned Counsel for the respondent further submits that the undertaking was given by the petitioner and the petitioner in point no.6 of the undertaking has scored off the narration (he is not related). The part is scored off meaning thereby that the petitioner is related with the Officers of the Corporation.

9. Mr Dhorde, learned Senior Counsel for the petitioner submits that the petitioner had not scored off any part of point no.6 of the undertaking. The copy filed on record mistakenly shows that some portion is scored off at point no.6 of the undertaking. The copy of the said undertaking is filed at page no.64 and no part of clause no.6 has been scored off.

10. We have considered the submissions canvassed by the learned Counsel for the respective parties. This Court under its jurisdiction under Article 226 of the Constitution of India cannot rewrite the terms of the tender. The terms of the tender are binding on both the parties. The terms of the tender relied by the respondent while

disqualifying the petitioner from the technical bid reads as under :-

“3. Qualification conditions for Tender :

(I) Tenderer should have experience of Rake Handling and / or Transportation (transportation shall be related to Rake Movement only) duly obtained from Manufacturer / PSU / Govt. Dept. / Public Ltd. Company / Private Limited Company dealing in the field of Fertilizer, Food grains, Cement, Sugar, Coarse grains or any other commodity. Tenderer should have executed in any of the immediate preceding five years the work of value:

- (a) At least 25% of the estimated value of the contract to be awarded, in one single contract:
- OR
- (b) 50% of the estimated value of the contract to be awarded, in different contracts.

In case of Partnership, only the experience of the Firm will be reckoned and for the purpose the experience of the Individual partners will not be counted.

(II) Experience details in the proforma prescribed at Appendix VI shall be furnished by the tenderer. The information furnished in Appendix – VI shall be supported by experience certificate issued by client(s) on their letter head.

(III) Whether the estimated contract value of Handling & Transport Contract, is less than Rupees Seven Crores and Fifty Lakhs, Tenderer without the requisite experience as mentioned above may also participate subject to providing an undertaking that an additional Performance Guarantee in the form of Bank Guarantee of 10% of the contract value from Commercial Bank notified by RBI (excluding all Urban/ Rural / State Co-operative banks and Gramin Banks) will be given, if selected. The format of the Bank Guarantee to be provided in such cases is at Appendix-V of Annexure-I.

(IV) If the Tenderer is a partnership firm, there shall not be any re-constitution of the partnership without the prior written consent of the Corporation till the satisfactory completion of the contract.

Note: The year for the purpose of experience will be taken as Financial Year (1st April to 31st March) excluding the financial year in which tender enquiry is floated.”

11. The petitioner is relying upon the certificate issued by MSCW to the petitioner having performed the work. The certificate dated 26-03-2021, after giving the details of the experience for handling and transportation reads as under :-

“This is Certify that H&T Contractor M/S. Durga Trading Company, 1) Mr DINESH JAYPRAKASH BAHETI, 2) Mr. SHAIKH WASIM SHAIKH FEROUZ LALA TAMBOLI (MOU) for the MSWC JALNA BORKHEDI. Till 28-2-2021 They have done the above mention work satisfactorily.

Hence this Certificate is issued on request of the party.”

12. It appears that MSWC had published a tender notice for appointment of Handling and Transport Contractor at MSWC, Jalna for a period of two years. M/s. Durga Trading Company through its partner applied for the said tender. The tender of M/s. Durga Trading Company was accepted and the work order was issued to M/s. Durga Trading Company on 07-05-2019. It further appears as per the MoU that M/s. Durga Trading Company entered into a MoU on 27-05-2019 with the present petitioner and one Yusuf Khan Mansoor Khan wherein it was agreed that the petitioner and Mr Yusuf Khan Mansoor Khan would carry out the work. It was an agreement *inter se* between the present petitioner, M/s. Durga Trading Company and Mr Yusuf Khan Mansoor Khan. The profit sharing ratio pursuant to the MoU was also mentioned. The petitioner was having 30% of the share as per the MoU. It is not

disputed that the petitioner is not the partner of M/s. Durga Trading Company and had no relation with the partnership firm M/s. Durga Trading Company. The work order was issued to M/s. Durga Trading Company. There appears to be internal agreement between the petitioner and Yusuf Khan Mansoor Khan on or about 27-05-2019 about the petitioner being transferred the share of said Yusuf Khan Mansoor Khan.

13. Be that as it may, the petitioner was not allotted with the work at any material point of time. The work was allotted to M/s. Durga Trading Company. Only on the basis of the certificate issued by the Storage Superintendent in the name of M/s. Durga Trading Company and the petitioner, the petitioner is contending of possessing the experience.

14. We could have considered the case of the petitioner had the work been allotted to the petitioner. The petitioner, admittedly, did not have any relation with M/s. Durga Trading Company. The petitioner was neither the partner of the said firm nor he was individually allotted the earlier work.

15. In light of that, it was reasonable for the respondent not to repose confidence in the petitioner having performed the work earlier

as the work was never given to the petitioner in his own name in the earlier contract with MSWC.

16. As on the first ground itself we are not convinced with the submissions made by the learned Senior Counsel for the petitioner, we are not required to go into the second ground for the rejection of the tender.

17. In light of that, the Writ Petition is dismissed. No costs.

[R.N. LADDHA]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

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