

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8503 OF 2020
WITH
CIVIL APPLICATION NO. 952 OF 2021

M/s IMS Bhatia Transport Contractor,
Through its Partner
Amrik Singh Jernal Singh Bal

...Petitioner

Versus

Union of India,
Through its Secretary,
Ministry of Chemical and Fertilizer,
New Delhi and others

...Respondents

Mr V.R. Dhorde, Advocate for the petitioner
Mr D.G. Nagode, Standing Counsel for Respondent No. 1
Mr V.D. Sapkal, Senior Counsel i/by
Mr D.S. Manorkar, Advocate for Respondent Nos. 2 and 3
Mr A.B. Kadethankar, Advocate holding for
Mr S.S. Rath, Advocate for Applicant in C.A. No. 952/2021

**CORAM : S.V. GANGAPURWALA AND
SHRIKANT D. KULKARNI, JJ.**

DATE : 19th MARCH, 2021

ORDER :

1. The respondent Nos. 2 and 3 issued an on-line tender notice for transportation and rake handling of fertilizers to its dealers from Nanded Maltekadi Rake Point to different dealers in Nanded District.
2. Pursuant to the tender notice, the petitioner along with others filled in the tender. The petitioner's technical bid is rejected on the ground that the petitioner does not possess the experience of rake

handling and transportation as per NIT requirements. The same is assailed in the present writ petition.

3. The work experience required by the tenderer as per the clause in the tender reads thus -

III – CRITERIA FOR TECHNICAL EXPERTISE

WORK EXPERIENCE: The Tenderer should have work experience of having successfully completed RAKE HANDLING & TRANSPORTATION WORKS OF BAGGED MATERIAL. The Tenderer should submit the Work Orders and the corresponding Work Completion certificates/ Experience certificate, duly obtained from Manufacturer/Handling agency Govt. Dept./PSU/Public Ltd. Company dealing in Fertilizers, Food Grains, Cement or similar products. Such work experience should be during last 7 years ending last day of month previous to the one in which applications are invited.

4. The petitioner is a partnership firm. Initially, the partnership consisted of three partners. On or about 14th day of August, 2020, one Trilochansingh s/o Mohansingh Bhatiya is added as a 4th partner. The said partnership is deemed to have commenced on 14th day of August, 2020.

5. The newly added partner namely, Trilochansingh is also the proprietor of Raja Transport Company. The petitioner filled in the tender on 9th September, 2020. The tender is floated by the respondent on 26th

August, 2020. The last date for submission of tender was 12th September, 2020. The petitioner is informed that the bid of the petitioner is rejected during technical evaluation by the duly constituted Committee for the reason "Technically not pre-qualified due to non-submission of work experience as per NIT requirement".

6. The parties are *ad idem* that if the experience of the 4th partner is considered to be the experience of the petitioner partnership firm, then the petitioner partnership firm possesses the necessary experience, but according to the respondents, the experience of the newly added 4th partner cannot be considered as the experience of the partnership firm.

7. The *prima dona* dispute is whether the experience of the 4th partner can be considered for the benefit of the firm.

8. Mr Dhorde, the learned counsel for the petitioner submits that the newly added partner has brought with him required experience. The experience of the partner of the firm can be considered to be the experience of the firm for all purposes. To substantiate his contention, the learned counsel relies on the judgment of the Apex Court in the case of ***New Horizon Limited and Anr. Vs. Union of India and Ors. reported in (1995) 1 SCC 478***. According to the learned counsel, the person possessing past experience enters into the partnership and the tender is submitted in the name of partnership firm the earlier experience of one of the partners of the firm can be taken into

consideration. The date of joining of the partnership firm by a partner would be immaterial.

9. Mr Sapkal, the learned senior counsel for the respondents strenuously contends that as per the clause in the tender, the work experience should be during last seven years, ending last day of month previous to the one in which applications are invited. The tender is floated on 26th August, 2020. The experience should be for last seven months prior to 31st July, 2020. The 4th partner Trilochansingh is added as a partner to the partnership firm on 14th day of August, 2020. In view of that, his experience prior to 31st July, 2020 cannot be considered to be the experience of the partnership firm. The learned senior counsel relies upon section 14 of the Partnership Act. According to the learned senior counsel, the property of the firm includes all property, rights and interest in the property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

10. In the present case, the deed of partnership nowhere suggests that the experience of the newly added partner is brought as a property of the firm. The experience is a property and in view of that, the experience of the newly added partner cannot be considered to be the experience of the partnership firm.

11. To buttress his submission, the learned **senior** counsel relies on the judgment of the Orissa High Court in case of ***D.R. Associates Vs. General Manager, East Coast reported in (2004) CLT 109*** and also on the another judgment of the Orissa High Court in the case of ***Saroj kumar Jena Vs. Unknown dated 17.07.2012***. In the said case, the judgment of the Apex Court in case of ***New Horizon Limited (supra)*** was considered and was distinguished. It is submitted that in the case of *New Horizon Limited*, the Apex Court was considering the joint stock company from joint venture to which Partnership Act does not apply wherein in the present matter, the Partnership Act applies. Any property held by partner cannot be the property of the partnership firm unless contrary intention appears.

12. The learned senior counsel further submits that the Orissa High Court unequivocally held that the experience of one partner is also an asset and it can be termed as a property. So, his property cannot be taken to be the property of the partnership firm in view of section 14 of the Partnership Act.

13. We have considered the submissions canvassed by the learned counsel for the parties. The only issue debatable between the parties is whether the experience of newly added partner Trilochansingh can be considered as the experience of the partnership firm vis a vis the clause of experience in the tender.

14. The factual matrix as is placed before us is undisputed.

15. Trilochansingh was included as a partner of the petitioner firm on 14th August, 2020 viz precise to the tender floated on 26.08.2020 The tender was filled in by the petitioner on 3rd September, 2020.

16. There cannot be any dispute that partner can individually hold his property and the individual property of partner would not *ipso facto* become the property of the partnership firm unless the contrary intention appears from covenants of the partnership or agreement between the partners thereto.

17. In the present case, the agreement admitting the new partner in the existing partnership firm enumerates details of the shares of the partners in the partnership firm. The added partner has subsequently given affidavit. In the affidavit, executed on 8th September, 2020, he has agreed for use of his experience for the partnership firm.

18. The issue whether the experience of the partner can be considered as experience of the partnership firm is discussed by the Apex Court in the judgment in the case of ***New Horizon Ltd. (supra)***. In para No. 23 of the judgment, the Apex Court has observed thus -

23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 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 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. While considering the requirement

regarding experience it has to be home 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 tile 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. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach

and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by I IPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that I IPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.

19. It has been held by the Apex Court in the aforesaid case that the person having past experience enters into the partnership and the tender is submitted in the name of 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.

Experience is intangible. It cannot be computed in monetary terms. The experience is not a property as contemplated under Section 14 of the Partnership Act.

20. The judgment in case of **Saroj Kumar Jena** (*supra*) of the Orissa High Court, relied by the learned senior counsel for the respondent is overruled by the Apex Court in a case of **Maa Nabadurga Construction Vs. Saroj Kumar Jena and Ors. reported in 2015 (ii) OLR 610**. In the said case, the Apex Court while reversing judgment of the Orissa High Court in *Saroj Kumar* case observed that a partnership has been held to be compendious name for its partners and that experience is a human attribute which does not form part of the assets or property of the firm in usual sense. This is also obvious since it is not, and in any case not capable of, distribution as assets; on the dissolution of the firm. The Apex Court further relied on the observations of its judgment in case of **New Horizons Limited and Anr.** (*supra*).

21. Reading clause of experience in the tender document, the past seven years experience ending last day of the month previous to in which the applications are invited is sufficient.

22. Once the partner has entered into the partnership firm before the submission of the tender document, then it is immaterial as to the date on which he has entered into the partnership for the purpose of experience as contemplated in the afore mentioned clause of experience. We cannot comprehend the argument on behalf of the respondents that if the newly added partner would have entered into the partnership prior to 31st July, then his experience could have been

counted and only because he has entered into the partnership firm on 14th August, 2020, his experience prior to 31st July cannot be counted. The same does not appear to be purport of the clause of experience.

23. The Apex Court in case of ***New Horizon Limited*** (supra) has also observed that the expression “joint venture” 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.

24. In light of all the aforesaid facts, we have no hesitation to conclude that the experience of the 4th partner admitted to the partnership on 14th August, 2020 has to be considered while considering the experience of the petitioner partnership firm.

25. The impugned communication rejecting the technical bid of the petitioner on the ground of experience is quashed and set aside. As is accepted by respondents that if the experience of the added partner is included, then the petitioner would satisfy the criteria of experience, we direct the respondents to open the financial bid of the petitioner for competing with the other tenderers.

26. Mr Kadethankar, the learned counsel submits that the financial bids were opened and the intervenor is held to be the lowest bidder. If the petitioner's financial bid is opened, then e-reverse process will have to be undertaken. The procedure as is required to be followed

shall be adhered to. The process as is required shall be applied fairly to all the tenderers.

27. The writ petition is allowed accordingly in above terms.

28. In view of disposal of writ petition, civil application also stands disposed of.

[SHRIKANT D. KULKARNI, J.]

[S.V. GANGAPURWALA, J.]

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