IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.2682 OF 2022

Petitioner : M/s. P.M.S. and S.T.C.JV,
Through its authorized power of attorney,
Mr. Harish Madanlal Sahani,
Aged about 52 Yrs., Occ. Business,
Office at Bapat Nagar, Nagpur Road, Chandrapur.

– Versus –

Respondents : **1.** Western Coal Fields Ltd.
Office of the General Manager (CMC),
Coal Estate, Civil Lines, Nagpur.

2. M/s. Ganga Transport,
Through its Partner/General Manager,
having its Office at Shetkari Mandir Road,
Tal. Wani, Dist. Yavatmal.

=-=
Mr. Ankit Shrivastava, Advocate for the Petitioner.
Mr. Atul Pande, Advocate for Respondent No.1.
Mr. S.S. Dewani, Advocate for Respondent No.2.
=-=

CORAM : **ROHIT B. DEO AND Y.G. KHOBRAGADE, JJ.**
DATE : **17th JANUARY, 2023.**

J U D G M E N T : ***(Per Y.G. Khobragade, J.)***

Rule. Rule made returnable forthwith. Heard finally by consent of the learned Counsel for the parties.

02] In the present petition, the petitioner has questioned communication dated 12/05/2022 issued by respondent No.1-W.C.L., thereby

disqualifying the tender bid of the present petitioner for not fulfilling the criteria of experience as per Notice Inviting e-Tender (NIT)

03] It is not in dispute that on 17/12/2021, respondent No.1-WCL published e-tender notice No.47/2021-22 for loading and transporting of coal from Ghonsa OCM of Wani North Area. As per the tender notice, on fulfilling of required criteria, the bidders had to submit their tender bids till 01/01/2022 up to 5:00 p.m. Thereafter, the said bids were to be opened on 03/01/2022.

04] As per the tender form, the successful bidders were to execute job as described in Part-A and Part-B as under :

> ***Part -A*** *:*
>
> *Job-1 : Transportation of coal, loaded by hired pay loader, from coal stock yard, Heap No.3 of Ghonsa OC Mines to CHP Feeder breaker of Ghonsa OCM and unloading the same at CHP/fidder breaker by hired tippers.*
>
> *Job-2 : Transportation of crush coal from CHP/fidder breaker of Ghonsa OCM to Wani Railway siding by hired tippers, loaded under gravity via Ghonsa OCM way bridge (for vayment) and waybridge of Wani railway siding (for wayment) and unloading the same at Wani Railway Siding of Wani north area.*

Part -B *:*

Job–3 : Loading of mix coal into tippers/truck from New Coal Stock Yard, Heep No.3 of Ghonsa OC Mine by hired pay loaders.

05] The learned Counsel appearing for the petitioner submitted that the petitioner firm submitted its tender form along with all required documents and on fulfilling of essential conditions. Thereafter the said bid was to be opened on 03/01/2022. Accordingly, the petitioner along with other 15 bidders submitted their bids. The period of opening of technical bid was extended up to 30/06/2022. The petitioner also sent email communication to respondent No.1 and prayed for extension of bid validity by email dated 28/04/2022. However, on 26/04/2022, respondent No.1 issued communication through email and informed the petitioner about rejection of his bid on the ground of non-fulfillment of terms and conditions. Thereafter, on 12/05/2022, the petitioner received communication by email that on scrutiny of technical bid of the petitioner, it found non-fulfillment of work experience criteria a per the NIT, though the petitioner met essential criteria in respect of work experience by executing work in joint venture. The petitioner contended about successfully execution of the work in Kolar Pipri Mines, WCL Wani, North Area in the year 2021 and as per clause 6 of the tender condition,

the bidders were required to have minimum work experience estimated to the value of work of Rs.20,90,95,598.25 in 38 months, which comes to Rs.55,02,515/- per month, and Rs.6,60,30,188.00 for 12 months. As per Step No.2, the bidder were required experience in annualizing value of work of Rs.3,30,15,094/- in any financial year within last seven years of the last date of submission of bid and though the petitioner submitted the relevant documents about fulfillment of essential criteria of experience of work under joint venture agreement. However, respondent No.1 illegally and arbitrarily refused to open technical bid of the petitioner on the ground that the petitioner is not having sufficient essential experience of work. Therefore, action on the part of respondent No.1 for refusing to open technical bid of the petitioner is illegal, bad in law. It is, therefore, prayed for quashing and setting aside the same.

06] *Per contra*, the learned Counsel appearing for respondent No.1 submitted that as per the terms and conditions of the tender notice, successful bidders were required to undertake the work pertaining to 50% of the annualized estimated value of the tender for a period of one year and 50% of the estimated value of the work during one year. Though, the petitioner claimed about completion of work to the cost of Rs.4,76,50,078.76 in past seven years, it does not meet the essential requirement of work experience

provided under clause 6(a) of the tender notice. So also, the petitioner claimed about execution of work in joint venture with two proprietorship firms M/s. P.M. Sahani, through its Proprietor Shri Prennath Madanlal Sahani and M/s. Shree Transport Company through its Proprietor Smt. Shyama Satish Totawar. However, the petitioner admitted that initially M/s. Shree Transport Company was the proprietorship concern of Satish Odelu Totawar, who expired on 27/08/2021 and said proprietorship concern was taken over by his wife Smt. Shayam Satish Totawar. Therefore, the petitioner failed to meet the essential criteria of tender.

07] The learned Counsel for respondent No.1 further canvassed that as per clause 6(a)(vii) of the tender notice, it provides that, in case the bidder is a joint venture, the work experience of any one, two or three of the individual partners of joint venture or the joint venture itself may furnish the work experience of the bidder. However, the petitioner submitted documents pertaining to the work experience for the joint venture partners M/s. Shree Transport Company for the period with effect from 01/04/2015 to 31/03/2016, in which period said M/s. Shree Transport Company was under proprietorship. The proprietorship concern is not a legal person, therefore, the petitioner does not fulfill the essential criteria of the work experience. So also, the certificate, which has been furnished by the petitioner in joint

venture partnership i.e. M/s. Shree Transport Company, which has been assigned to new proprietor in the year 2015-2016, does not fulfil the work experience criteria. Therefore, respondent No.1 rightly refused to open new bid of the petitioner for non-fulfillment of essential criteria of experience of work. In support of this submission, the learned Counsel appearing for the respondent No.1 placed reliance on the following case laws.

i. Silppi Constructions Contractors vs. Union of India – AIRONLINE 2019 SC 2766.

ii. Afcona Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. - AIR 2016 SC 4305.

iii. New Horizons Limited and another vs. Union of India and others – [1995] 1 SCC 478.

iv. Siddhi Vinayak Transport Corporation, through it's Partners vs. Western Coal Fields Ltd. and another in Writ Petition No.2745/2022.

08] Since the petitioner claimed that respondent No.1 illegally and arbitrarily refused to open his technical bid on the ground of non-fulfillment of essential criteria of experience of work as per clause 6 of the tender form, therefore, it would be proper to reproduce clause 6 of the tender formm, which reads as under :

> *6. Eligibility Criteria*
>
> *a Work Experience : The bidder must have experience of works (includes*

completed / Ongoing) of similar nature (such as Transportation / Removal of Coal / Overburden /Shale / Extraneous materials / Sand / etc.) valuing 50% of the annualized estimated value of the work put to tender (for period of completion over 1 year) / 50% of the estimated value of the work (for completion period up to one year) put to Tender in any year (consecutive 365 days) during last 7 (seven) years ending last day of month previous to the one in which bid applications are invited.

"Annualised value" of the work shall be calculated as the "Estimated value/Period of completion in Days x 365".

The value of executed works shall be given a simple weightage to bring them at current price level by adding 5% for each completed year (total number of days/365) after the end date of experience ***till the last day of month*** *previous to one in which e-Tender has been invited.*

The above qualification criteria shall be met collectively by JV partners or JV itself.

The qualifying criteria parameter e.g. experience of the individual partners of the JV will be added together towards fulfilment of qualification criteria related to experience.

However, the participating share of JV Partners shall be as below :

1) Lead partner shall have at least 50% participating share in JV.
2) Other partner(s) shall have at least 20% participating share in JV.

Date to be furnished by Bidder on-line:

i. *Start date of the year for which work experience of bidder is to be considered for eligibility.*

ii. *Start date & end date of each qualifying experience (similar nature).*

iii. *Work Order Number/Agreement Number of each experience.*

iv. *Name & address of Employer/Work Order Issuing authority of each experience.*

v. *Percentage (%) share of each experience (100% in case of an individual/proprietorship firm or the actual % of share in case of a Joint Venture / Partnership firm).*

vi. *Executed Value of work against each experience.*

vii. *In case the bidder is a Joint Venture, the work experience of any one, two or three of the individual partners of JV or the JV itself may be furnished as the work experience of the bidder.*

If the Bidder participates as a Joint Venture (JV) the benefits as per Public Procurement Policy for MSEs Order-2012 shall not be applicable for them.

09] The petitioner firm itself made averments in the petition that in one year, he is having experience of execution of work to the tune of Rs.47650078.76 in joint venture i.e. the proprietor firm M/s. Shree Transport Company of which earlier Shri Satish Odalu Totawar was proprietor, who expired on 27/08/2021 and thereafter Smt. Sharma Satish Tpotwar, the wife of Shree Transport proprietary firm incorporated as proprietor. However, as per clause 6(A)(vii) in case the bidder is a joint venture, the work experience of any one, two or three of the individual partners of joint venture or the joint venture itself may be furnished as a work experience of the bidder. In the case in hand, the petitioner does not appear to be the partner of joint venture. So also, Smt. Shyama Totawar does not appear the partner of M/s. Shree Transport Company, but it is a proprietorship firm. Though, the petitioner

submitted documents pertaining to the work experience for the joint venture partner of M/s. Shree Transport Company with effect from 01/04/2015 to 31/03/2016, said transport company was under the proprietorship firm.

10] In the case of *New Harizon Limited,* cited supra, it has been held that the requirement regarding the 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 it's name, though, it has persons having experience in the field. While considering the requirement regarding experience, it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transactions. The terms and conditions of such a document have to be constructed from the stand point of a prudent businessman. When a businessman enters into contract were under work is to be performed he seeks to assure himself about the credentials of the person who is be entrusted with the performance the work. Such credentials are to be examined from a commercial point of view which mean that if the contract is to be entered with a company, he will look into background of the company and 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.

11] In the case of *Silppi Constructions,* cited supra, the Hon'ble Supreme Court has held that the eligibility criteria provided in the tender lays down that there should be no adverse remarks in the WLR of the competent engineering authority. Admittedly, there are adverse remarks in Work Load Return (WLR) of the sister company. It is obvious that the sister company having realised that it would not be awarded any contract neither got its enlistment renewed nor tried to submit the tender. The directors of the sister company tried to get over these insurmountable objections by applying for the tender in the name of the petitioner firm. Not only are the names similar but as pointed above, all the directors of the sister company are partners in the petitioner firm. Therefore, these adverse remarks passed against the sister company could not be ignored. A bare reading of the eligibility criteria would clearly show that as far as MES enlisted contractors are concerned, they should be enlisted in "SS" Category a(i) and secondly, they should not carry adverse remarks in WLR of competent engineer authority. As far as other contractors are concerned, they are required to meet the same criteria as "SS" MES contractors category a(i) and these contractors was specifically told that they could see enlistment criteria in the MES Manual Contracts. Therefore, only companies incorporated under the Companies Act, 1956, are eligible to be enlisted as 'SS' Class Contractors. Only limited companies can be enlisted

in 'SS' Class. The Manual deals with enlistment of contractors in various classes. 'SS' is the highest class and for that only incorporated companies an apply.

12] In the case of *Siddhi Vinayak Transport Corporation,* cited supra, the coordinate bench of this Court has passed judgment in Writ Petition No.2745/2022 holding that when the bidder/tenderer does not fulfill essential conditions of the tender and the offer of further tenderer, who fulfilled the essential conditions of the tenders executed in that event, the Court would not interfere in the matter.

13] Similarly, in the case in hand, it *prima facie* appears that the work experience certificate submitted by the petitioner along with tender does not fulfill clause 6(a)(vii). Therefore, respondent No.1 declined to open the technical bid of the petitioner, which is not arbitrary, illegal and bad in law.

14] In view of the above discussions, the petition deserves to be dismissed. Accordingly, the petition is dismissed. Rule is discharged with no order as to costs.

(Y.G. KHOBRAGADE, J.) **(ROHIT B. DEO, J.)**

**sandesh*

Signed by:SANDESH DAULATRAO WAGHMARE
Private Secretary to the Hon'ble Judge
Date :28.02.2023 11:40