

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2008
(Arising out of SLP (C) No. 19607 of 2008)

M/s Ganpati RV-Talleres Alegria Track
Pvt. Ltd.

...Appellant

Versus

Union of India and Anr.

...Respondents

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Leave granted.
2. Challenge in this appeal is to the judgment of a Division Bench of the Delhi High Court dismissing the writ petition filed by the appellant. The writ petition was filed challenging the order dated 7.3.2008 issued by the

respondents by which the appellant was communicated that he had not met the eligibility criteria of the tender quoted by the respondents and, therefore, its commercial bid will not be considered.

3. Background facts in a nutshell are as follows:

On 7.11.2007 a tender for thick web switches was invited by the Ministry of Railways. The details of the tender items were given in the Schedule of Quantities. As per Clause 2.8 of the terms and instructions mentioned in the tender document, the tender was to be in two packets systems i.e. (i) Technical Bid (ii) Commercial Bid, and that the commercial bid will be opened subsequently only for those tenderers who have been found successful in the technical bid as per clause 4.0.

As per Clause 4.1.1 of the tender document the tenderer must be ISO 9001 certified, RDSO approved, for 1 in 12 curved switch manufacturers on the date of opening of tender.

The Executive Director Track (P) Railway Board, Delhi, vide his letter dated 14.11.2007 sought for various clarifications and document from the appellants. The reply to aforesaid letter was given by the appellant along with relevant documents on 22.11.2007. The appellant pursuant to

telephonic conversation on 21.1.2008 submitted a copy of inspection certificate of RDSO and also certified about its composition i.e. joint venture (in short 'JV') partners. Another representation was made on 31.1.2008. The appellant received a letter dated 7.2.2008 intimating that in terms of para 2.8 the appellant's commercial bid will be opened on 22.2.2008. The respondents vide its letter dated 13.2.08 informed the three of the other bidders whose technical bids were dis-approved and they were requested to collect their unopened commercial bids and bid guarantee bonds amounting to rupees one crore. In continuation of the aforesaid letter another letter dated 20.02.2008 was received by the appellant informing that the opening of commercial bid stands postponed to 03.03.2008 due to administrative reasons. Again a similar letter dated 28.02.08 was received by the appellant intimating that the commercial bid which was scheduled for opening on 03.03.08 is postponed till further notice. The respondents vide letter dated 07.03.2008 stated that appellant's offer does not meet the eligibility criteria and hence the commercial bid could not be opened. Therefore, office letter of even no. dated 07.02.2008 issued by the respondents earlier stands cancelled. No reason for rejection was specified. The appellant filed the Writ Petition before the High Court on 11.3.2008 and the court issued notice and stayed the supply of order on 12.3.2008. On

28.3.2008 the counter affidavit was filed by the respondents stating therein the false and unbelievable story of misrepresentation made by the appellant. The respondents' contention was that the case of the appellant was wrongly approved by the respondents in the first chance due to misrepresentation made by the appellant and only later on was mistake corrected. According to the appellant, respondents have not disclosed anywhere in the counter affidavit as to what was misrepresented and what was false in the appellant's representations which was only made pursuant to the telephonic discussion with the respondents. The appellant brought to the notice of the High Court the cartel formation by filing the rejoinder affidavit on 7.4.2008. The appellant also stated before the High Court about the various gross irregularities overlooked by the respondents by filing CM Application no. 5639 Of 2008. The High Court did not consider them holding that these allegations are not part of pleading.

The High Court accepted the stand of the respondents that the appellant does not meet the eligibility criteria indicated in the tender. With reference to Clause 2.8, 4.1.1, 4.1.2, 4.2 and 4.3 it was held that the view of the respondents that the appellant did not fulfil the eligibility criteria cannot be faulted. Accordingly, the writ petition was dismissed.

4. In support of the appeal, learned counsel for the appellants submitted as follows:

The appellant is the pioneer in manufacturing of tendered item which is a modern technology item. The appellant's manufacturing facility and prototype sample of the thick web switches have been approved by RDSO as intimated by the RDSO vide their letter dated 23.10.2007. The said letter was annexed with tender offer and was also subsequently supplied again. It is a practice that the firm can proceed for bulk production only after prototype samples are approved. In the instant case subsequently RDSO, Lucknow has carried out the inspection of more than 350 sets of thick web switches.

Moreover, as per clause 1.5 of the tender document, those successful bidders who will install CNC machine and will produce at least 75 Thick Web Switches will qualify to be in the approved list of vendors for future tenders. Therefore, it clearly implies that the appellant is RDSO approved manufacturer on two fronts i.e. for Conventional curved switches in the

name of the JV partner and for the Thick Web Switches (new technology) in the tendered item.

It is not out of place to mention that material produced for RVNI, as per their specification was exactly the same as instant tender specification.

The appellant has a CNC Plano-milling machine at its premises. CNC Machine is must for manufacturing of TWS and it involves investment of about Rs. 5-6 crores. As per respondents' admission only two other bidders have CNC Machine. All other bidders have not even set up this machine. As per Clause 4.1.4 (c) the government has given 270 days time to them. Thus the bids of those bidders who have not even produced a single TWS have been approved and bid of the appellant has been rejected.

The action of the respondents in subsequently rejecting the duly approved technical bid of the appellant without assigning any reasons is highly illegal, malicious, arbitrary, irrational and unjustified.

It is pointed out that the bid was initially accepted, but on the basis of the representation of two of the competitive bidders, totally different views were taken. It is pointed out that in view of what has been stated by this

Court in New Horizons Ltd. and Anr. v. Union of India and Ors. (1995 (1) SCC 478) the view taken by the respondents is erroneous.

5. Learned counsel for the Union of India, on the other hand, submitted that New Horizon's case (supra) related to the experience of the joint venture partners and that logic cannot be applied to the present case where the parameters are different. So far as the factual position is concerned, it is to be noted that the appellant annexed ISO 9001 certification of joint venture partners with the tender offer. Though the ISO 9001 certification of the joint venture company prior to the date of opening of tender existed, the same was not annexed with the tender as the appellant was under the impression that submission of certificate in the name of individual partners is sufficient and the respondents had also never demanded the same. In respect of RDSO approval it was pointed out that one of the joint venture partners i.e. M/s R.V. Rail Products Pvt. Ltd. is also an existing RDSO approved manufacturer of conventional curved switches i.e. 1 in 12 curved switches. The said certificate was enclosed with the appellant's offer.

6. The concept of joint venture has been highlighted in paras 21, 22, 23, 24, 25 and 41 of New Horizon's case (supra) as follows:

“21. The requirement with regard to experience, as stated in the advertisement dated 22-4-1993 for inviting tenders, as noticed earlier was in the following terms :

“The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephone systems with the capacity of more than 50,000 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in this field.”

The requirement of experience was, however, differently worded in the notice for inviting sealed tenders dated 26-4-1993 which was attached to the tender documents which prescribes the conditions to be fulfilled for submission of tenders and wherein it was stated as under :

“The successful tenderer will also submit copies of telephone directories printed and supplied by them to the telephone systems of capacity more than 50,000 lines as credentials of his past experience.”

22. In the said notice the expressions ‘tenderer’ and “successful tenderer” have been used. While the expression ‘tenderer’ has been used in paragraphs 5, 7, 11 and 14, the expression “successful tenderer” is used in paragraphs 7, 9(a), 10 and 12. Since paragraph 10 provides for execution of the agreement by the successful tenderer, the said expression is intended to mean the tenderer whose tender has been found suitable for acceptance. The use of the expression “successful tenderer” instead of the expression ‘tenderer’ in paragraph 12, therefore, indicates that the documentary proof, by way of credentials of past experience, has to be submitted after the tender has been considered and is found suitable for acceptance by the concerned authorities. This would mean that the past experience is a matter which is to be considered after the tender has been examined and evaluated and the tenderer whose tender is found acceptable is required to submit documentary proof regarding his past experience. In other words, a tender is not liable to be excluded from consideration on the ground of non-eligibility on account of lack of past experience.

This inference is strengthened by paragraphs 8 and 11 of the notice dated 26-4-1993. In paragraph 8 it is provided that a tender is liable for summary rejection if it is submitted without the Demand Draft of Rs 5,00,000. Similarly in paragraph 11 it is provided that tender is liable to be excluded from consideration if the income tax clearance certificate is not furnished with the tender. There is no similar provision for excluding from consideration a tender on the ground of failure to furnish with the tender the required material by way of credentials of past experience. It means that the matter of past experience has to be considered after the tender has otherwise been found to be suitable for acceptance and a tender is not liable to be rejected at the threshold without consideration on the ground that the tenderer lacks experience. The decision of the Tender Evaluation Committee to exclude the tender of NHL from consideration was, therefore, not warranted by the terms and conditions for submission of tender as contained in the notice for inviting sealed tenders dated 26-4-1993.

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 borne 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 the 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.

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) 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) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart : *Joint Ventures in East Asia — Legal Issues* (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression “joint venture”. But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.

25. As noticed earlier, in its tender NHL had stated that it is a joint venture company established by TPI, LMI and WML and IIPL wherein TPI, LMI and WML and other companies in the same group as well as Mr Aroon Purie own 60% shares and IIPL owns 40% shares. It was also stated that the joint venture has received approval of the Government of India and is currently in operation and that the promoter will increase their capital/contribution to commensurate with the project need and that the company has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information. In the tender it is also stated that as a joint venture in the true sense of the phrase, the company will have access to expertise in database management, sales and publishing of its parent group companies. It would thus appear that the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL) have pooled together their

resources in the sense that TPI, LMI and WML have made available their equipment and organisation at various places in the country while IPL has made available its wide experience in the field as well as the expertise of its managerial staff. All the constituents of NHL have thus contributed to the resources of the Company (NHL). This shows that NHL is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest. We are, therefore, of the view that NHL has been constituted as a joint venture by the group of Indian companies and IPL, the Singapore-based company and it would not be correct to say that IPL which has a substantial stake in the success of the venture, having 40% of shareholding, is a mere shareholder in NHL.

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41. We have been informed that while the matter was pending in the High Court and in this Court the telephone directory for the year 1993 has been printed and supplied to the Department by Respondent 4 as per terms of the contract. Insofar as the directory for the year 1994 is concerned we find that, as per the terms of the contract, the process for preparation of the telephone directory has already commenced. We cannot lose sight of the fact that as a result of quashing of the contract in respect of the directory for 1994 fresh steps will have to be taken to award a fresh contract and the said process would take some time and thereafter the contractor will require time to print and publish the telephone directory. It would, therefore, not be feasible to bring out the directory for 1994 before the close of the year. As a result, the Department would suffer loss of revenue which it would otherwise earn by way of royalty from Respondent 4 for the directory for the year 1994. Insofar as the contract in respect of the year 1995 is concerned there is sufficient time for the Department to award a fresh contract if the contract awarded to Respondent 4 is cancelled and the new contractor will have sufficient time at his disposal to print and deliver the directory as per the time schedule. Moreover, in respect of the directory for the year 1995 the amount of royalty that is payable by Respondent 4 is Rs 45 lakhs and the amount of royalty offered by NHL for the directory for the said

year was Rs .291.6 lakhs. Keeping in view the circumstances referred to above, the course that commends us is that, while maintaining the contract awarded to Respondent 4 in respect of the directories for the years 1993 and 1994, the said contract may be set aside insofar as it relates to the directory for the year 1995 and fresh tenders may be invited for award of the contract for the directory for the year 1995. The appeal filed against the judgment and order of the Delhi High Court dismissing the writ petition of the appellants must therefore, be allowed in the above terms. The other appeal has been filed by the appellants against the order of the Delhi High Court dismissing CM No. 6120 of 1993 which was an application for an interim relief during the pendency of the writ petition in the High Court. In view of the final order that is being passed in the writ petition the application for interim relief has become infructuous and the appeal against the order dismissing CM No. 6120 of 1993 must, therefore, be dismissed as infructuous.”

7. Though the aforesaid case related to experience, the other essential characteristic of a joint venture has also been highlighted.

8. In that view of the matter the inevitable conclusion is that the view taken by the High Court that the appellant did not fulfil the eligibility criteria was not correct. The High Court was not justified in dismissing the writ petition. We direct the Evaluation Committee to consider the bid of the appellant alongwith two persons who had been selected and take a final decision.

9. The appeal is allowed to the aforesaid extent.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
December 8, 2008