



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

WRIT PETITION No. 3863 OF 2015.

1. M/s. Komal Construction,
a proprietorship firm duly represented
through its Proprietor Shri Rajendra
s/o Chunnilal Somani, aged about
52 years, having office at Varsha
Apartment, Mitra Nagar,
Aurangabad.
2. M/s. Dewashish Constructions
Company, a Proprietorship Firm
duly represented through its Proprietor
Shri Ashish Shriniwas Zawar
aged about 34 years, having office at 47
Jai Vishwabharti Coloney,
Aurangabad.
3. N.P. Bridge Infrastructure Pvt. Ltd.,
A company incorporated under
Indian Companies Act,
duly represented through its
Director Shri Nitin P. Tapadia,
aged about 42 years, having office at
E-6, Royale Arcade, Satara Road,
Pune.

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PETITIONERS.

VERSUS

1. The State of Maharashtra,
through its Principal Secretary,
Public Works Department,
Mantralay, Mumbai – 32.
2. The Chief Engineer,
Public Works Department,
Regional Office, Amravati.
3. The Superintending Engineer,
Public Works Circle,
Akola.
4. The Executive Engineer,
Public Works Division,
Akola.
5. Sharda Construction and Per
Corporation Pvt. Ltd., Sharda
Tower, Plot No.72, Ashok Nagar,
Nanded, through its Power of
Attorney Holder Shri Madhav
Ramrao Eklare.

....RESPONDENTS.

Mr. S.P. Dharmadhikari, Senior Advocate with Shri S.A. Dharmadhikari,
Advocate for Petitioners.

Mr. N.S. Rao, Asstt. Govt. Pleader for Respondent Nos. 1 to 4.
Mr. H.D. Dangre, Advocate for Respondent No.5.

CORAM : B.P. DHARMADHIKARI &
KUM. INDIRA JAIN , JJ.

Date of Reserving the Judgment : 19.07.2016.

Date of Pronouncement : 08.08.2016.

JUDGMENT. (Per B.P. Dharmadhikari, J)

By this petition filed under Article 226 of the Constitution of India, 3 petitioners, all artificial persons, question the action of respondent nos. 1 to 4 in rejecting their tender at the stage of opening of Envelope No.1 and to set aside the communication dated 29.06.2015 informing them about it. A further direction is sought by them to consider its price bid together with other price bids. This Court has issued notice in the matter on 09.07.2015. It appears that work order was issued on 21.07.2015 in favour of respondent no.5. Petition was allowed to be amended on 20.04.2016 and on 05.05.2016, upon grievance that filing of reply by respondents was being deliberately delayed, we stayed the work order.

2. The tender No. 27254 floated by respondents inviting bids for construction of approach road to a Major Bridge across Purna River Ch. 106/400 near Gandhigram village and construction of slab drain at Ch. 105/00 to 108/00 on Akot- Akola road, State Highway No.204 in Akola District, forms subject matter of the petition.

3. Shri S.P. Dharmadhikari, learned Senior Counsel has pointed out that both the envelopes were to be opened together and hence, on such technical grounds rejection could not have been ordered. Effort should have been made by the respondents to secure lowest offer and hence, financial bid of petitioner which is lowest, ought to have been looked into. To explain that the alleged lapses do not constitute violation of essential terms and conditions of tender, he has invited our attention to a judgment of Hon'ble Supreme Court reported at (1991) 3 SCC 273 (Poddar Steel Corporation .vrs. Ganesh Engineering Works and others) and judgment of Division Bench of this Court dated 05.12.2014 in Writ Petition No. 5919/2014 (Khare and Tarkunde Infrastructure Private Limited .vrs. The State of Maharashtra and others).

4. "Contractor" as defined in Clause 3[e] of additional general conditions and specifications includes not only an Individual, but, a Firm or Company, whether incorporated or not. Learned Senior Counsel in this background submits that e-tender notice was published on 24.04.2015 and it was to be downloaded upto 12.05.2015. 3 petitioners entered into a Joint Venture Agreement and it was submitted for registration to Registrar functioning under Partnership Act at Aurangabad on 12.05.2015. Necessary

proof of its submission was enclosed and process of formal registration itself takes some time. In this position it was not possible to submit Registered Partnership Deed of Joint Venture, on the date of submission of tender i.e. 14.05.2015. He contends that this compliance was substantial compliance and looking to the above definition of Contractor, submission of registered deed of Partnership is only an ancillary condition.

5. About Self-propelled Mechanical Sprayer ownership, learned Senior Counsel submits that the petitioners submitted invoice of a sprayer and consolidated hire agreement regarding it. This also sufficiently satisfied the stipulation in tender notice. On 3rd reason, he submitted that the reason of non-submission of ownership/hire document of Rotavator is unsustainable and hyper technical. It is a small machine costing about Rs.85,000/- and used mainly for agricultural purposes. Petitioners had submitted a document of a better or superior machine known as “Bathching Plant”, which serves the very same purpose of mixing of granules GSB. The respondents, therefore, could not have declared the Joint Venture of petitioners disqualified. He has also taken us through the relevant documents for this purpose. Though learned Senior Counsel also pointed out how 4th and 5th reason assigned for rejection of tender of petitioners are incorrect, in view of the acceptance of error in relation to these reasons by

respondents, it is not necessary for us to consider the said aspect.

6. Shri Dangre, learned Counsel appearing on behalf of respondent no.5 has invited our attention to the Division Bench judgment of Gujarat High Court reported at **AIR 1986 Guj. 186 (Asia Foundations and Constructions Ltd. .vrs. State of Gujarat and another)**, with a view to demonstrate what is meant by Joint Venture, and how judicially this concept is understood. According to him, the tender conditions did not require a partnership deed of a firm registered with the office of the Registrar of Firms under the Partnership Act. He is placing reliance upon the language of Clause 3.7 of the tender condition to submit that where Firm is registered under Partnership Act, the respondent nos. 1 to 4 have insisted for submission of Firm Registration Certificate. Otherwise, insistence is only on Registered Partnership Deed i.e. registered agreement between the parties constituting a Joint Venture, which is executed and registered under Indian Registration Act, with the Sub-Registrar of Documents. He contends that petitioners could have registered their agreement within no time and supply that copy to the respondents. He points out that till the filing of the writ petition and thereafter, till date petitioners have not pointed out that their Firm is registered under the Partnership Act.

7. Inviting attention to Clause 3.7.5 dealing with Equipment Capability, he submits that as per sub-clause [1] Machines at Sr. Nos. 4 and 5 are separately treated. In respect of Rotavator, at Sr.No.5 tender condition point out need of one such machine for GSB mixing with further rider that it may be owned or procured on hire. In relation to all other machines/equipments, the requirement is of ownership only. He contends that it is not an error and assurance sought by the respondents about their availability and document of proof of ownership, make it an essential condition.

8. In case of second reason regarding ownership of Self-propelled Mechanical Sprayer, ownership documents were must and documents filed by the petitioners show that such Mechanical Sprayer does not belong to them, but, is made available by some body else on hire for work at Pune, as per the agreement dated 09.03.2015, and that agreement continues till completion of the work as envisaged therein or 6 months from the date of hire, which ever period expires later. This agreement therefore, cannot be made use of here to demonstrate ownership of Self-propelled Mechanical Sprayer.

9. About 3rd reason, learned Counsel states that the petitioners have not placed any data showing that Bathching Plant with it is superior in

quality then Rotavator, and it can be used for very same work for which Rotavator can be employed. He invites attention to assertion in reply-affidavit that Rotavator is used for spreading and leveling material, where as batching plant is used for mixing of concrete etc. He contends that despite this specific averment in its additional submission by respondent no.5, though petitioners have filed their additional affidavit thereafter, they have not denied it. He therefore, prays for dismissal of the writ petition.

10. Shri Rao, learned A.G.P. appearing on behalf of respondent nos. 1 to 4, relies upon the arguments of Shri Dangre. He submits that three petitioners before this Court are themselves artificial persons and on last date i.e. 12.05.2015, they have submitted alleged Deed of Partnership for registration under Partnership Act. He contends that thus, they do not have any registered document to show formation of joint venture before submission of the tender. No such documents have been placed on record even thereafter.

11. Shri Dharmadhikari, learned Senior Counsel in reply submits that Rotavator is used for mixing i.e. the purpose for which batching plant is also used. He further states that the joint venture must be essentially a Partnership Firm constituted as per the Partnership Act and registration

under Section 17 of the Indian Registration Act, is not necessary. He further states that once the Firm is registered, that registration relates back to the date of execution of the Partnership Deed. He has invited our attention to paragraph no.9 of the reply/affidavit filed by the respondent no.4 to urge that said respondents also accepted registration of a Firm as per the provisions of Partnership Act only.

12. Format of agreement of hire of machinery given in Form-II and forming part of the tender document is pressed into service by him to urge that the machinery needs to be hired from the date of commencement of work and the hire agreement has to remain in force till completion of work or 6 months from the date of hire, which ever period expires later. Agreement of petitioners in relation to Self-propelled Mechanical Sprayer satisfied this condition. Our attention is invited to additional affidavit by the petitioners on 01.07.2016 to show that the hire agreement in relation to Self-propelled Mechanical Sprayer, is sufficient, to demonstrate that such machines available to petitioners on hire for completing work of Pune Division can be used for present work. He contends that this agreement at Pune shows assured ownership of Mechanical Sprayer and objection raised by respondents is unsustainable.

13. The judgment of Hon'ble Supreme Court reported in case of *Poddar Steel Corporation .vrs. Ganesh Engineering Works and others* (supra), shows that as per Clause 6 of the tender notice there, earnest money needed to be deposited in Cash or by a Demand Draft on State Bank of India. Appellant before it sent a Cheque of Union Bank of India and not of State Bank of India. Tender Floating Authority did not accept this and rejected the tender. Allahabad High Court upheld this reason. Hon'ble Supreme Court allowed the appeal and in paragraph no.6 of the judgment observed that literal obedience of Clause 6 was not expected. Thus, there was sufficient compliance on facts before the Hon'ble Supreme Court as the instrument was drawn of other Nationalized Bank.

14. Division Bench of this Court on 05.12.2014 while deciding Writ Petition No.5919/2014, has taken note of the fact that when envelope no.1 was opened on 21.10.2014, petitioner – Khare and Tarkunde Infrastructure were not informed anything. On 04.11.2014, the reason of rejection communicated was that said Infrastructure Company did not upload scanned copy of the Firm Registration Form in original. This Court in paragraph no.11 took note of the requirement in this respect as contained in tender notice and then definition of 'Contractor' is reproduced in paragraph no.12. In paragraph no. 13 a finding is reached that an Individual or a Firm or a

Company whether incorporated or not, undertaking the work falls within that definition. In paragraph no.16, it has then proceeded to examine whether submission of such Firm Registration form in original could have been construed as an essential condition. In paragraph nos. 17 and 18, it has attempted to find out purpose behind submission of such document and concluded that it could not have been constituted as an essential condition. Petitioner Khare and Tarkunde Infrastructure had described itself in that matter as Khare and Tarkunde Infrastructure Private Limited, a Company Registered under the Companies Act, 1956. Thus, it was not a Firm registered under Partnership Act.

15. In *Asia Foundations and Constructions Ltd. .vrs. State of Gujarat and others* (supra), Division Bench of Gujarat High Court has explained what phrase 'Joint Venture' means. Discussion therein shows that it can be group of Firms or of different entities. The common law did not recognize relationship of co-adventures, but, with passage of time, judicial decisions recognized such adventures, where two or more persons undertake to combine, their property or labour in conduct of a particular line of Trade or a joint business for joint profits. Though it may be similar to a partnership, law courts, do not treat such joint adventure as Firm. In Joint Venture, there must be community of interest and right to joint control. In present

matter, where petitioners before this Court have expressly submitted their agreement for registration to Registrar of Firms under Partnership Act, it is not necessary for us to go into more details.

16. As per clause 3.6(vii), which reads as under -

“3.6.(vii) Registered Partnership Deed, Memorandum of Articles of Association, if the tenderer is a Partnership Firm, Joint Stock Company and Power of Attorney and Firm Registration Certificate, if any”

Thus, a Registered Partnership Deed ought to have been provided. If a Firm Registration Certificate was available, that also needed to be provided. This Sub-clause (vii) does not expressly mention joint venture, but, then petitioners have attempted to constitute a Firm and made effort in that direction on 12.05.2015. The terms and conditions of tender do not allow un-registered Partnership Firm to tender. If petitioners wanted to tender as Joint Venture, they should have placed on record a document duly registered so as to enable the parties dealing with such Joint Venture to reach its constituents, if occasion therefor arise. Clause 3.7.10 is about Joint Venture. In case of a Joint Venture scanned and digitally signed copy of Registered Partnership Deed is to be placed in envelope no.1. Thus, a Joint Venture, envisaged by respondent nos. 1 to 4 is also a Partnership.

Whether registered Partnership Deed of such Joint Venture must be registered under the Partnership Act or then with Sub Registrar of Documents under Indian Registration Act, is the issue which need not detain us. Petitioners themselves have made effort to obtain registration as Firm under Partnership Act. They have not registered their agreement with any other authority including the Sub Registrar of Documents.

17. There are three petitioners before this Court. Petitioner no.1 M/s. Komal Constructions has described itself to be a Proprietary Firm; Petitioner no.2 M/s. Dewashish Construction Company has described itself to be a Proprietary Firm. Petitioner no.3 N.P. Bridge Infrastructure Private Limited states that it is a Company incorporated under the Indian Companies Act. Thus, two Proprietary concern and a Private Limited Company attempted to obtain registration as Firm under Partnership Act on 12.05.2015, which happened to be the last date of downloading of tender document. The Joint Venture agreement states that it is made on 08.05.2015. Name of the Joint Venture appears to be “Komal Constructions Joint Venture” as per Clause 1. Date on which it comes into effect is not expressly mentioned anywhere. However, Nitin P. Tapadia, as Director of Petitioner no.3 Private Limited Company, Rajendra Somani, as Proprietor of Petitioner no.1 and Ashish Shrinivas Zanwar as Proprietor of petitioner no.2 have signed the

agreement on 08.05.2015. On last page above three signatories, the terms and conditions are described as “Memorandum of Association”. Apart from above referred three persons, on next page of this agreement, on a stamp paper of Rs. 500/-, again Sr. No.3 has been repeated with name M/s. Dewashish Construction Company, Proprietor Ashish S. Zanwar. Thus, Sr. No.3 has been repeated twice.

18. When Clause No. 3.6(vii) reproduced supra is read along with Clause 3.7.10 dealing with Joint Venture, it is apparent that respondent nos. 1 to 4 have not accepted any un-registered Joint Venture as tenderer for the purpose of this contract. Sub- clause [i] and [ii] of Clause 3.7.10 reads as under -

“3.7.10. Joint Venture.

(i) In case of Joint Venture the scanned and digitally signed copy of registered partnership deed shall be submitted in Envelope No.1.

(ii) Two or more contractors of any class may combine and tender for a work costing to the amounts upto which each individual contractor or the higher of two limits if they are of different categories are empowered to tender as per the original registration provided.

(i) The combination is of the contractor as a whole and not individual

partners and,

- (ii) They draw a registered partnership deed and submit a copy thereof to the authority at the time of purchase of the tender forms.

Whenever the advantage of such combination of two or more contractors is to be taken for quoting for a work, the registered partnership deed should be irrevocable till the completion of the work for which they have combined and till all the liabilities there of are liquidated and the share of contractor of higher category should not be less than 50%. Further, the percentage share of the contractor of the lower category in such a partnership/combination should not be more than this limit of eligibility to quote for works divided by the estimated cost of work put to tender (i.e. when such a percentage is applied to the cost of the work, his share of cost should not exceed his own eligibility limit of tendering for works.) The lead partners shall meet not less than 50% of all qualifying without like annual turn over, single work, quantities of items and bid capacity of above. The Joint Venture must collectively satisfy the criteria of para annual turn over single work', quantities of items and Bid capacity above. The experience of the other Joint partner shall be considered if it is not less than 30% of

the qualifying criteria like annual turn over, single work, quantities of items and Bid capacity of above.”

Language of this Clause therefore clearly shows that a registered Partnership Deed is must and a Joint Venture with un-registered Partnership Deed is not legally recognized. Respondents wanted to be certain that in case of any legal dispute, Partnership Firm must be registered and therefore, demanded its registration certificate. In case of a Joint Venture also, to get rid of the technical lacunae or defences, they envisage that a Partnership amongst its constituents should be registered. Petitioners before us do not have registration certificate, either as a Firm or then as a Joint Venture. They do not have even a registered agreement.

19. This condition of eligibility which has got bearing on relationship of parties and legal implications flowing therefrom, clearly show that it cannot be viewed as a ancillary condition. Though contractor has been defined widely to include even a un-incorporated company, in case of Firm or Joint Venture, there is insistence on registration of a Firm or of a agreement. This insistence by the respondents cannot be said to be misconceived or arbitrary. Petitioners do not satisfy this condition.

20. Equipments to be made available by petitioners are dealt with in paragraph no.3.7.5. Chart in that clause contains names of 12 equipments/machineries. In last column number thereof or capacity of such machine is stipulated. Thereafter in bracket word “own” appears against column nos. 1 to 4, 6 to 8 and 10 to 12. Against entry no.9, dealing with Steel centering plate, there is no mention. Words “Own/Hire” are used only against entry no.5 i.e. Rotavator for GSB Mixing. Thus, when entire chart is construed in this backdrop, it only permits Rotavator required for GSB mixing to be hired. Rest of the equipments must be owned by the tenderer. Clause 3.6 (ix) require tenderer to give list of modern machinery and plants immediately available with it for use on tendered work as also list of machinery proposed to be used therefor, but, not immediately available and manner in which it is proposed to be procured. This therefore shows precaution taken by the respondents to obtain in different list of machineries, which can be immediately used by the tenderer. Simultaneously, he is also obliged to give a list of machineries which he can make available later on, but, then he has to disclose how he proposes to procure it. Petitioners, therefore, must show that Self-propelled Mechanical Sprayer owned by them. It is available to them at Pune and there they have taken it on hire from M/s. Shree Associates, vide agreement dated 09.03.2015. This does not meet the stipulation in the tender document

which is an essential condition.

21. In so far as the Rotavator is concerned, though the petitioners claim that they have offered a better machine, according to the respondents, said machine i.e. Batching Plant is not substitute for Rotavator. Respondent no.5 has come up with a specific case in this respect in paragraph no.7. This assertion on these lines in affidavit are not rebutted by the petitioners. Even otherwise, burden to show that Batching Plant is a better machine was upon the petitioners and they have failed to discharge the same.

22. Insistence that Joint Venture must be registered in notice inviting tender or then insistence upon ownership of machinery is not shown to be arbitrary. When respondents permit only Rotavator to be made available on hire, in absence of express challenge to requirement of ownership, the contention that ownership of other machineries should also be viewed as only an ancillary requirement, cannot be accepted. Respondents can always take necessary precaution and prescribe safeguards to protect its own interest in contract matters. It is in absolute discretion of tender inviting authority to formulate reasonable terms and conditions in advance, and to act accordingly uniformly. A tenderer can complain of the deviation, arbitrariness or discrimination. In this situation, in the light of the

arguments advanced, we find that the respondent nos. 1 to 4 have rightly disqualified the petitioners for first three reasons on 29.06.2015. There is no jurisdictional error or perversity. No case is made out warranting intervention in writ jurisdiction.

23. Writ petition is, therefore, dismissed. Rule discharged. No costs.

JUDGE

JUDGE

Rgd.

CERTIFICATE

I certify that this judgment/order uploaded is a true and correct copy of original signed judgment/order.

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