IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CA-CWP-5 of 2017 (O&M)

Date of Decision: 5th April, 2017

Food Corporation of India and another

…Appellants

versus

M/s Daniel Masih Satprit Singh Bedi

…Respondent

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL, JUDGE.

Present : Mr. Sumeet Goyal, Advocate and
Mr. Samir Rathaur, Advocate, for the appellants.
Mr. Anurag Chopra, Advocate, for the respondent.

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S.J.VAZIFDAR, CHIEF JUSTICE

This is an appeal against the order and judgment of the learned Single Judge allowing the respondent's petition by declaring a term in the tender that in case of a partnership firm, only the experience of the firm would be reckoned and the experience of the individual partners would not be counted as the experience of the partnership firm to be arbitrary, illegal and contrary to the law laid down by the Supreme Court of India in *M/s New Horizons Ltd. and another v. Union of India and others (1995) 1 SCC 478.*

2. On 11.11.2016 the appellant issued a notice inviting (NIT) e-tenders under a two bids system for the appointment of handling and transport contractors for a period of two years. The note at the end of the instructions to the bidders stated "*For detailed terms and conditions, MTF applicable may be referred*". The appellant had on 11.04.2016 modified clause 3(i) of the MTF.

(A) It is common ground that the following term applies to the present case:-

"Modified Clause No.3(i) of the HTC MTF	Modified Clause 3(i) of the RTC MTF
Tenderer should have experience of Rake handling and or Transportation Duly obtained from Manufacturer/PSU/Public Ltd. Company/Private Limited Company dealing in the field of Fertilizer, Foodgrains cement, sugar, Coarse grains or any other commodity. Tenderer should executed in any of the immediate preceding five years the work of value. a) Atleast 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.	Tenderer should have experience duly obtained from Manufacturer/PSU/Govt. Dept/Public Ltd. Company Private Limited 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 work of value. a) Atleast 25% of the estimated contract value in one single contract: OR b) 50% of the estimates contract value in different contracts.
In case of partnership, only the experience of the Firm will be reckoned and for the purpose of the experience of the individual partners will not be counted.	**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."**

(B) As noted in the impugned judgment Appendix II and III, the MTF and HTC and RTC were also modified as under:-

> "Duly audited P&L account and balance sheet of relevant completed years for which experience certificate has been submitted by the tenderer. 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.
>
> This modification in the HTC & RTC will be applicable with prospective effect.
>
> You are, therefore, requested to make necessary amendment in the MTF of HTC and RTC accordingly with immediate effect."

3. It is common ground that the firm does not have the necessary experience and that only one of its partners has the experience necessary to qualify for participating in the tender process. The respondent firm (original petitioner) was constituted on 04.01.2016 and is engaged in the business of handling and transportation of food grains. One of the respondent's partners one Daniel Masih is stated to have vast experience in handling and transportation of food grains by virtue of his having been a partner in another partnership firm which has successfully completed and carried out similar contracts. The petitioner itself does not, indeed could not have had the requisite experience of five years for it had been constituted only ten months before the NIT.

4. The respondents contended that the stipulation that in the case of a partnership, only the experience of the firm would be reckoned and that the experience of the individual partners would not be counted, is illegal being contrary to the judgment of the Supreme Court in *M/s New Horizons Ltd. and another v. Union of India and others (1995) 1 SCC 478* and the judgment of a Division Bench of this Court dated 17.05.2016 in *M/s Daniel Masih Satprit Singh Bedi v. State of Punjab and others* Civil Writ Petition No. 7073 of 2016 *to* which one of us (S.J. Vazifdar, CJ) was a party.

5. In *New Horizon's Ltd.*, the Department of Telecommunication invited tenders for printing telephone directories. The advertisement required the tenderer to have had experience in compiling, printing and supplying telephone directories to the large telephone systems with the capacity of more than 50,000 lines and required the tenderer to substantiate this with documentary proof and to furnish his credentials in the field. The appellant and respondent No.4 were among the five bidders. The appellant in its offer mentioned that it was a joint venture company comprising of five entities incorporated both in India and abroad. It had been established as an information and database management company with expertise in database processing, publishing, etc. In addition to its projected strength, the appellants' joint venture partners had access to the benefit of the complete resources of their parent company each of

which was a recognized market leader. The High Court held that although each of the members of the joint ventures had more than the requisite experience, the appellant itself did not have the same. The Supreme Court referred to the experience of each of the members of the joint ventures. The royalty offered by respondent No.4 for three years was Rs.95 lakhs, whereas, the appellant had offered Rs.459 lakhs i.e. nearly five times the fourth respondents offer. It is in this context that the judgment of the Supreme Court must be considered.

Mr. Chopra, the learned counsel appearing on behalf of the respondents relied upon the following observations of the Supreme Court and in particular those emphasized by us in paragraph 23:-

> **"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 IIPL 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 IIPL 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.

26. Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents namely, TPI, LMI and WML as well as IIPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman.

27. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of *Salomon* v. *Salomon & Co.* [1897 AC 22 : (1895-9) All ER Rep 33] Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. (See : *Gower's Principles of Modern Company Law*, 4th Edn., p. 112.) This concept, which is described as "piercing the veil" in the United States, has been thus put by Sanborn, J. in *US* v. *Milwaukee Refrigerator Transit Co.* [(1905) 142 Fed 247, 255] :

> "When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

28. In a number of decisions, departing from the narrow legalistic view, courts have taken note of the realities of the situation.

29. In *Scottish Coop. Wholesale Society Ltd.* v. *Meyer* [1959 AC 324, 343 : (1958) 3 All ER 66 : (1958) 3 WLR 404] , a case under Section 210 of the Companies Act, 1948, Viscount Simonds has quoted with approval the following observations of Lord President Cooper:

> "In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view."

> **40.** Thus the approach from the legal standpoint also leads to the conclusion that for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated 22-4-1993, the experience of the constituents of NHL, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company, (IIPL) has to be taken into consideration. As per the tender of NHL, one of its Indian constituents (LMI) had printed and bound the telephone directories of Delhi and Bombay for the years 1992 and its Singapore-based constituent (IIPL) has 25 years' experience in printing the telephone directories with "yellow pages" in Singapore. The said experience has been ignored by the Tender Evaluation Committee on an erroneous view that the said experience was not in the name of NHL and that NHL did not fulfil the conditions about eligibility for the award of the contract. In proceeding on that basis the Tender Evaluation Committee has misguided itself about the true legal position as well as the terms and conditions prescribed for submission of tenders contained in the notice for inviting tenders dated 26-4-1993. The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of Respondent 4. The total amount of royalty offered by Respondent 4 for three years was Rs 95 lakhs whereas NHL had offered Rs 459.90 lakhs, i.e., nearly five times the amount offered by Respondent 4. Having regard to this large margin in the amount of royalty offered by NHL and that offered by Respondent 4, it must be held that decision of the Tender Evaluation Committee to refuse to consider the tender of NHL and to accept the tender of Respondent 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed." *(emphasis supplied)*

6. The learned Judge upheld the contention also on the basis of a judgment of a Division Bench of this Court dated 17.05.2016 in *M/s Daniel Masih Satprit Singh Bedi v. State of Punjab and others* Civil Writ Petition No. 7073 of 2016 *to* which one of us (S.J. Vazifdar, CJ) was a party. The learned Judge held that in view of this judgment also, the clause is illegal.

7. In *M/s Daniel Masih's case* (supra), the judgment in *M/s New Horizons Ltd. and another v. Union of India and others (supra)* was referred to in considerable detail. Paragraphs 8 to 11 of the judgment read as under:-

"8. The judgment squarely covers the case in favour of the petitioner. In the sentence emphasised by us, the Supreme Court has clearly held that 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 past experience in its name, the experience of the partner must be taken into consideration.

9. Mr. Bakshi, the learned counsel appearing on behalf of the official respondents, sought to distinguish the judgment of the Supreme Court contending that the language of the terms and conditions in that case and in the case before us is entirely different. We do not agree. The ratio of the judgment of the Supreme Court is clear. It requires the experience of the partner to be taken into consideration while determining the eligibility of a bid submitted by a firm. We set out the eligibility conditions in that case. There is nothing therein that persuades us to distinguish the judgment from the case before us.

10. A partnership firm does not have a separate independent legal existence. The firm name is only a compendious method of describing the partners. The experience and expertise of a partner is, in a broad sense, an asset, albeit an intangible one. He may bring to bear his expertise and experience in connection with and in relation to the business of the firm and thereby for the benefit of the firm. There is no reason then why the experience of a partner ought not to be taken into consideration to be the experience of the firm for the purpose of evaluating the experience of a firm that bids for the contract. Such an interpretation gives the terms and conditions of the tender commercial efficacy.

11. A view to the contrary would be devoid of any commercial efficacy. All the partners of a firm do not necessarily have the same qualifications even where the firm engages in only a single venture. The single venture or a particular type of enterprise may well require persons with different expertise. For instance, the work of construction does not require only engineers. It would also require accountants, financial analysts and labour

> and legal consultants. If the respondents' view were to be accepted, it would require every partner in the firm to have the experience stipulated in the notice inviting tenders. The firms would then be eligible only if every partner has the requisite experience. Even where all the partners belong to the same profession, they may not have experience of the same kind. Take, for instance, a case where the notice inviting tenders requires the bidders to have experience in a particular type of engineering contract. All the partners of the firm may be engineers but with experience in different fields of engineering. This is often the case when the firm wishes to diversify. Large law firms are known to have partners with expertise in different branches of law. Unless the notice inviting tenders specifies otherwise, the exclusion of the firm from the tender process on the ground that the firm does not have the requisite experience, although one or more partners of the firm has the requisite experience, would not be justified." *(emphasis supplied)*

8. The clauses in both the judgments did not specify that only the experience of the firm and not the experience of the individual partners would be taken into consideration. The judgments did not deal with cases where it was expressly provided that it is only the experience of the firm and not the experience of the partners of the firm that will be taken into consideration. The issue that arises before us was neither raised before nor considered in either of the cases. Neither the judgment of the Supreme Court nor the judgment of this Court dealt with the effect of a clause such as the one before us.

9. The clause in *M/s New Horizons Ltd. Case (supra)* stipulated that the tenderer should have the experience mentioned therein. The clause in *M/s Daniel Masih's* case as translated read as under:-

> "24- The qualifications for the Technical Bid of a Transport Contractors in of all (sic) the districts shall be as follows:-
>
> ....
>
> .....
>
> (iii) The tenderer must hold in his name an experience of two years in transportation of food grains and the experience certificate must be in the format as annexed as Annexure 'B' which must be certified by the District Manager of the concerned Agency. In respect of the above mentioned experience, the tenderer shall present before the District Tender Allotment Committee proof of Turnover in one year that shall be based on last year's actual arrival of food grains in the cluster of Mandis. Sr. No. Arrival in the Mandies lying within the cluster Requisite Minimum Turnover/Experience (in Rs.) 1. 0 to 5000 Tonnes 10,00,000 2. 5001 to 10000 Tonnes 20,00,000 3. 10001 to 20000 Tonnes 40,00,000 4. 20001 to 30000 Tonnes 60,00,000 5. 30001 to 40000 Tonnes 80,00,000 6. 40001 to 50000 Tonnes 1,00,000,00 7. 50001 to 75000 Tonnes 2,00,000,00 8. 75001 to 100000 Tonnes 3,00,000,00 9. More than 100000 Tonnes 4,00,000,00 ...."

From paragraph-11 in *Daniel Masih's case,* it is evident that the clause was interpreted as requiring the experience of the firm. The clause was not interpreted to mean that the respondents therein who invited the tenders had insisted upon the experience being only that of the firm and not of the individual partners. Infact, the last sentence of paragraph-11 in *Daniel Masih's case,* it was expressly held:-

> "Unless the notice inviting tenders specifies otherwise, the exclusion of the firm from the tender process on the ground that the firm does not have the requisite experience, although one or more partners of the firm has the requisite experience, would not be justified".

10. Both the judgments are clearly confined to cases where the qualification is stipulated in respect of the firm without excluding the qualifications of the partners thereof. They do not deal with cases where it is specified that the conditions of eligibility must be fulfilled not by any of the individual partners but by the firm itself. These judgments do not, therefore, prohibit such a term. The question is whether such a term is otherwise illegal.

11. Our attention was not invited to any provisions of law that prohibits a party inviting tenders from stipulating such a condition. The two judgments as we have explained do not hold otherwise. Our attention was not invited to any other judgment and we, therefore, must answer the question on principle.

12. It is for the party inviting tenders to stipulate the terms and conditions of eligibility. A condition that the qualification for eligibility must be fulfilled by the firm itself and not by any one or more of its partners is neither contrary to law nor bereft of commercial efficacy. Nor is such a condition illogical or contrary to common sense even where

one or more of the partners of the firm satisfies the conditions of eligibility.

13. Every partner does not necessarily attend to the day to day business of the firm or even participate in its management or in the work performed by the firm. Even a partner of a firm who possesses the requisite qualification stipulated in the notice inviting tenders may not have participated in any of the affairs of the firm. He may not even intend participating in any of the affairs of the firm. He may only be an investment partner. Such a partner would not bring to bear his experience in the performance of the work for which the tenders are required. In such a case the fact that he possesses the qualifications stipulated in the notice inviting tenders would be entirely meaningless. The party inviting tenders would, therefore, be entitled to insist upon the firm itself having executed such contracts of the stipulated kind and value.

14. We are aware that a partnership firm is not a separate legal entity and that the firm name and style is but a compendious mode of referring to the partners collectively. We appreciate and are conscious of the fact that there can be no certainty about a partnership firm having the necessary experience at all material times in the execution of the work contemplated in the tender. The constitution of the firm may change. The partner with the requisite experience who performed the contracts that rendered the firm eligible may

leave the firm. The remaining partners either by themselves or even with the new partners may not have the requisite experience and yet the firm would be eligible. This difficulty, however, could also arise in the case of an enterprise which has a separate legal entity such as a company incorporated under the provisions of the Companies Act. The personnel who executed the contracts on account of whose contribution the company possessed the requisite qualification may leave the company. The remaining personnel may not have the requisite experience and yet the company would be considered as having the requisite qualification to participate in the tender process.

15. These are the uncertainties brought about by the exigencies of businesses. It is for the person handling the commercial and business affairs of an enterprise to device means and methods of dealing with them. Business decisions must be left to the party inviting tenders. There may be several methods of dealing with situations. It is almost impossible to provide a fool proof set of terms and conditions. It is impossible to visualize or provide for every eventuality and to guard against every uncertainty. The party inviting tenders must within these constraints stipulate the most suitable terms and conditions of eligibility. Courts cannot and ought not to interfere with such decisions.

16. It is for the party inviting tenders to stipulate such conditions as it deems necessary to ensure that the bidders have the necessary qualifications which would ensure the effective execution of the work in respect of which the tenders are invited. The conditions they stipulate may in certain cases not meet the requirement. It is probably for this reason that the terms and conditions in some cases provide that the constitution of a firm or the share holding pattern of the company remain unchanged during the execution of the work. These uncertainties and ever changing factors, however, do not render the conditions such as the impugned condition in the present case illegal merely because the conditions do not guarantee absolutely the requirements of the party inviting tenders.

17. This view is not inconsistent with the judgment in New Horizon's Ltd. and in Daniel Mashi's case. The terms of eligibility in those cases and the term of eligibility in the case before us are but different ways of ensuring the appointment of the most suitable bidder. It is not for the Court to select the method. Courts are not in a position to do so either. Parties such as the appellants are entitled to stipulate the terms and conditions which they believe would satisfy their requirements. As we mentioned earlier, the impugned term would for instance ensure that the firm has the requisite qualification. The appellants would be justified in presuming that merely because a partner has the requisite experience it

does not necessarily follow that he would bring to bear his experience and qualification in the execution of the work for which the tenders are invited. There is no compulsion for the partner to do so. Even otherwise such a condition does not guarantee the desired result. The Court cannot sit in judgment over the business decision of the appellant or any other party inviting tenders.

18. In the circumstances, the appeal is allowed. The impugned order and judgment is set-aside and the petition is dismissed. There shall, however, be no order as to costs.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(ANUPINDER SINGH GREWAL)
JUDGE

05.04.2017
'ravinder'

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No