

(1999) 02 AP CK 0017

In the Andhra Pradesh High Court

Case No : Writ Petition No. 34991 of 1998

Avula Contractions Pvt. Ltd., Secunderabad and another

APPELLANT

Vs

Senior Divisional Electrical Engineer, Traction Distribution,
South Central Railway, Vijayawada and others

RESPONDENT

Date of Decision : 02-02-1999

Acts Referred:

Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 3(42)
Partnership Act, 1932 — Section 4

Citation : AIR 1999 AP 318 : (1999) 3 ALD 105 : (1999) 3 ALT 236

Hon'ble Judges : S.V. Maruthi, J

Bench : Single Bench

Advocate : Mr. C. Kodanda Ram, for the Appellant; Mr. Gouri Shankar Sanghi, Senior Standing Counsel For SC Railways, Mr. S.R. Ashok and P. Vasudeva Reddy, for the Respondent

Judgement

1. This writ petition is filed by M/s. Avula Construction Pvt. Ltd., for a declaration that the award of the work "Additions and Alterations to the existing 25 KV overhead equipment in Guntur Yard at South end of Vijayawada Division on South Central Railway in connection with extension of Road Nos.2 and 6" to the second, respondent pursuant to the Tender Notice dated 26-8-1998 as arbitrary and illegal.

2. The 1st petitioner is a company registered under the Companies Act and engaged in construction works and in particular, execution of electrical, engineering and fabrication of railway traction works. The 2nd petitioner is a qualified Engineer with vast experience of 16 years in various aspects of overhead equipments, in particular, with railway electrical works. Initially, the 1st petitioner was a Partnership Firm and later on it was converted into a Private Limited Company and they executed various projects worth Rs.600 lakhs.

3. The first respondent issued the Tender notice dated 26-8-1998 inviting eligible

contractors to bid for the works of "Additions and Alterations to the Existing 25 KV overhead equipment in Guntur Yard at South end of Vijayawada Division on South Central Railway in connection with extension of Road Nos.2 and 6". According to Clause 8 of the Tender Schedule, the tendered should have executed 25KV traction OHE works of atleast 10 TKM. The tenderer shall submit complete details of the works executed in the past and the works presently under execution as per proforma given in Form 5 along with the completion reports/performance reports, if issued for the work executed/under execution by him. The annual turnover of the tenderer should be at least Rs.25,00,000/- during any of the last five years.

4. Along with the petitioners, seven other contractors purchased the Tender Schedules and six contractors submitted the completed Tender Schedules. The tenders were opened on 6-10-1998. The 2nd respondent quoted Rs.39,29,958.70 and stood as L1, while the 1st petitioner quoted Rs.39,97,050/- and stood as L2. The 1st respondent awarded the work to the 2nd respondent on 7-12-1998. Aggrieved by the same, the present writ petition is filed.

5. The main argument of the learned Counsel for the petitioners is that the 2nd respondent is not qualified under the Tender Notification, as he does not fulfil the qualification prescribed. In view of the settled proposition of law in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , awarding tender in favour of an unqualified person is arbitrary and the Court under Article 226 of the Constitution of India, should set it aside in the interest of public.

6. The learned Counsel for the petitioner submits that one of the qualifications required under the Tender Notification is that the tenderer should have executed 25 KV traction OHE works of at least 10 TKM. The 2nd respondent is a Partnership Firm started only in April, 1998 with one Sri G. Ram Mohan Rao as the Managing Director. Sri G. Ram Mohan Rao was earlier a Partner of a partnership concern under the name and style M/s. Surya Industries, Vijayawada with effect from 31-1-1997 and retired from the said partnership on 31-3-1998. Neither Sri Ram Mohan Rao nor the 2nd respondent had ever executed any 25 KV traction OHE work of atleast 10 TKM or of value of at least Rs. 25 lakhs. Therefore, they did not fulfil the qualification and hence they are not eligible for the award of tender.

7. In the counter/affidavit filed by Sri G. Ram Mohan Rao, the Managing Director of the 2nd respondent-firm, it is stated that he has executed three works of 25 KV overhead equipment works of 10 TKM while he was working as a partner in M/s. Surya Industries, Vijayawada. It is further stated that the aggregate work done by him in the aforesaid three works for exceeds the minimum stipulated amount of Rs.25 lakhs. Further, the Railway authorities assigned three other works, which he was completed to their satisfaction. Therefore, he has fulfilled the qualification required by the Railway authorities in the tender notification. It is further stated that the 1st petitioner who is the 2nd lowest tenderer did not

qualify himself for participation. The reason being that one of the stipulations in the tender notification is that the tendered shall submit Earnest Money Deposit to the tune of Rs.35,000/- in the manner prescribed in Para 3 of the instructions. Para 3 says that the EMD should be paid by way of cash to the Senior Divisional Accounts Officer, South Central Railway, Vijayawada or by demand draft. The 1st petitioner furnished a fixed deposit receipt standing on the account of one P. Dakshaini. Therefore, the same could not be taken into account of the Railway Department. Therefore, he is not qualified in the tender proceedings.

8. The 1st respondent-Railways filed a counter affidavit stating that the 2nd respondent is qualified and the petitioner is not qualified as in the event of recalling his tender, the Railways could not encash the fixed deposit receipt as EMD is liable to be cancelled on not accepting the tender as it is in the name of a 3rd party. It is also stated that it is for the Railway authorities to consider as to whether the tender is to be accepted or not, having regard to the qualification experience etc.

9. The main argument of the learned Counsel for the petitioners is that accepting that Mr. G. Ram Mohan Rao has the required qualification as prescribed in the tender notification, his qualification cannot be treated as the qualification of the 2nd respondent-firm, as he is only a partner. Therefore, the 2nd respondent-firm is not entitled for the consideration at all.

10. It is true that the 2nd respondent-firm find not have any necessary qualification as such prescribed in the tender notification. However, its Managing Partner has the necessary experience. The question, therefore, is whether the experience of the Managing Partner can be treated as the experience of the firm.

11. In *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, , it was held:

"The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders....."

12. It was a case under the Income Tax Act.

13. In *Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others*, , it was held :

".....since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership....."

14. In *Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur*, , the concept of partnership was considered and it was explained :

"..... English lawyers do not recognize a firm as an entity distinct from the members comprising it. Our partnership law is based on English law and we have also adopted the notions of English lawyers as regards a partnership firm."

It was also held :

"It is clear from the foregoing discussion that the law, English as well as Indian, has, for some specific purposes, some of which are referred to above, relaxed its rigid notions and extended a limited personality to a firm. Nevertheless, the general concept of partnership, firmly established in both systems of law, still is that a firm is not an entity or "person" in law but is merely an association of individuals and a firm name is only a collective, name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership. According to the principles of English jurisprudence, which we have adopted, for the purposes of determining legal rights "there is no such thing as a firm known to the law" as was said by James L.J. in "Ex parte Corbett", (1880) 14 Ch D 122. In these circumstances, to import the definition of the word "person" occurring in Section 3(42) of the General Clauses Act, 1897, into Section 4 of the Indian Partnership Act will, according to lawyers, English or Indian, be totally repugnant to the subject of partnership law as they know and understand it to be. It is in this view of the matter that it has been consistently held in this country that a firm as such is not entitled to enter into partnership with another firm or individuals. It is not necessary to refer in detail to those decisions many of which will be found cited in (1955) 27 ITR 88 to which a reference has already been made. We need only refer to the case of Bhagawanji Morarji Gucaldas v. Alembic Chemical Works Co. Ltd, AIR 1948 35 PC 100 (C), where it has been laid down by the Privy Council that Indian Law has not given legal personality to a firm apart from the partners....."

15. In *M. Sitarama Reddy Vs. Indian Railways and Others*, , a learned single Judge of this Court held :

"... it is relevant to note, a partnership firm does not have a separate legal identity and every partner of the firm represents the firm....."

16. Similarly, in *M/s. Margadarsi Borewells and others Vs. The Singareni Collieries Co. Ltd., Hyderabad and others*, , it was observed :

".... it is true that the experience of partners is the experience of the partnership firm. But in the instant case, the partnership having come into existence in September, 1996, the experience of the partners of the firm, prior to the Constitution of the partnership firm cannot be treated as the experience of the partners of the said firm....."

17. On the facts of that case, it was observed :

"Even if it be taken that the experience of the individual is the experience of partnership firm, admittedly since in the instant case, the partnership was formed in September, 1996 and the individuals being not partners of the firm prior to the formation of the firm, their experience cannot be treated as the experience of the firm."

18. What follows from the above is that a partnership firm has no existence of its

own. It is a compendium of partners. Further, we do not recognise a firm as an entity distinct from the members composing it. The law recognises partnership firm as a distinct personality only for the purpose of income tax by virtue of the specific provisions under the Income Tax Act. A firm is merely an association of individuals and firm name is only a collective name of those individuals who constitute the firm. It is a compendium which has to carry on the business. It has no personality of its own apart from the partners. In view of the legal position stated above, since the firm has no personality of its own and since it is not a juristic person, the constituents of the firm viz., partners, are the real representatives of the firm, the experience of the partners can be treated as the experience of the firm. In this context we may refer to the judgment in *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, wherein it was held :

".....in respect of a joint venture company, the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of companies and the foreign based company."

19. It was also held that :

"..... 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. The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of respondent No.4. The total amount of royalty offered by the appellant NHL for three years was merely five times the amount offered by respondent No.4. Having regard to this large margin in the amount of royalty offered by NHL and that offered by respondent No.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 No.4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed."

20. Therefore, though a firm is distinct and separate from a company and since it has not personality of its own, the experience of the partners can be treated as the experience of the firm. If so in view of the experience of Ram Mohcm Rao, the second respondent-firm is a qualified tenderer. Therefore, the contention that the 2nd respondent is not a qualified tenderer is rejected.

21. The jurisdiction of this Court under Article 226 of the Constitution of India to interfere in a case like this is very limited. It is only in a case where the exercise of the powers by the authorities is arbitrary or based on mala fides and against public interest, this Court can exercise jurisdiction under Article 226.

22. As regards mala fides the allegation made in the affidavit filed in support of the writ petition reads as follows:

"It is respectfully submitted that petitioner and other contractors had built up and established their credentials over the years to be eligible to participate in

certain category of works. However, the 2nd respondent is allowed to have a march over all others only because of the clout and the connections they have with the officials of the 1st respondent who are willing to close their eyes and look other way for oblique reasons."

23. In Sukhwinder Pal Bipan Kumar and Others Vs. State of Punjab and Others, , it was held :

"There still remains the question whether impugned orders of suspension are mala fide or motivated. We are unable to hold from the material on record the licensing authorities acted with improper motives or were actuated with bias in directing the suspension of the licences held by the petitioners. All that is averred in para 9 is thus :

"Under oral instructions of the Punjab Government from the Civil Supplies and Food Department to all the Licensing Authorities, including the Food Department and Supplies Controllers, instructions were issued that if any one dealer is found exporting wheat to another State, there being no direct or indirect ban on such movement, he should be punished at the spot by way of suspension of licences so that the dealer may not export wheat to any other State for which there are no restrictions imposed by any law or notified order or even the terms and conditions of the licence. In our view, the allegations in the writ petition are not sufficient to constitute an averment of mala fides so as to vitiate the impugned orders of suspension. The Court would be justified in refusing to carry out investigation into allegations of mala fides. if necessary particulars of the charge making out a prima facie case are not given in the petition. The burden of establishing mala fides lies very heavily on the person who alleges it. The petitioners who seek to invalidate the impugned orders of suspension must establish the charge of bad faith or bias or misuse by the Government of its powers."

24. In other words, the burden of proof of mala fides lies on the petitioner who alleged the same. Unless necessary particulars of the charge making out a prima facie case are not given in the petition this Court should refuse to exercise its jurisdiction under Article 226 of the Constitution of India directing investigation into those mala fides. In my view no particulars are furnished. Therefore, it is not necessary to go into the question of mala fides.

25. The question of exercising the power arbitrarily does not arise as in my view the qualification possessed by one of the Managing Partners is the qualification of the firm and, therefore, the firm is eligible for consideration for allotment offender. In addition, it is pointed out that it is for the authorities to consider the sufficiency of the qualification required for the purpose of executing the works and it is for them to assess the experience required for the grant of tender and once the authority considered them sufficient to warrant issuance of tender form, it is not for this Court to sit in judgment, (Refer to in M/s. G. J. Fernandez Vs. State of Karnataka and others, .

26. In Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , it was held that when a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation."

It is also held :

"Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the Court should not intervene under Article 226 in disputes between two rival tenderers."

27. I have already pointed out that the tender of the first petitioner is a second lowest while the tender of the 2nd respondent is the first lowest. Further, the petitioner has not complied with one of the conditions by depositing the earnest money deposit. In the event of refusing tender of the petitioner the Railways are not in a position to encash the EMD as he has furnished fixed deposit receipts belonging to a third party. In other words, the public interest involved in this case is in favour of the 2nd respondent and not in favour of the petitioner. Further, the writ petition was filed on 14-12-1998 while the 2nd respondent has commenced work on 7-12-1998 prior to filing of the writ petition. Further, the work is to be completed, under tender notification, within 75 days from the commencement of the work. By the time the writ petition came up for hearing the 2nd respondent has completed 50% of the work. It would be against the public interest if at this stage this Court interferes under Article 226. In any view of the matter the exercise of power under Article 226 is not warranted and, therefore, the writ petition is dismissed with costs. Advocate's fee Rs.1000/-.