
(2004) 04 OHC CK 0011
In the Orissa High Court
Case No : Writ Petition (C) No. 11169 of 2003

D.R. Associates

APPELLANT

Vs

General Manager, East Coast Railways and Others

RESPONDENT

Date of Decision : 21-04-2004

Acts Referred:

Partnership Act, 1932 — Section 14

Citation : (2005) 1 BC 10 : (2005) 1 CivCC 328 : (2004) 98 CLT 109 : (2005) 1 CTLJ 146 : (2004) 1 OLR 689

Hon'ble Judges : Sujit Barman Roy, C.J;B.P. Das, J

Bench : Division Bench

Advocate : Subir Palit, A.K. Mahana and H.K. Rout, for the Appellant; Bidyadhar Misra, (S.C. Railways), for the Respondent

Final Decision : Dismissed

Judgement

B.P. Das, J.—In the present writ application, the petitioner prays for a direction to the opposite parties to issue work-order in respect of the work indicated in Annexure- 1 in favour of the petitioner.

2. The brief facts as delineated in the writ application tend to reveal the following :

The petitioner claims to be a partnership firm. In response to the tender call notice dated 22.5.2003 issued by the East Coast Railway for supply of hard stone machine crushed ballast of 15 MM size, vide Annexure-1, the petitioner and some others submitted their tenders. The aforesaid tender was of the value of Rs. 1,35,30,000/-. After opening the tenders, it was found that the petitioner's firm was L-1 and another firm, namely, A.R.S.S., was L-2. According to the petitioner, on 20.8.2003, the Opp. Party No. 3, Senior Divisional Manager (Central), East Coast Railway, issued a letter to the petitioner seeking certain clarifications regarding financial capability of the petitioner's firm, vide Annexure- 3, and on 28.8.2003 a reply was sent on behalf of the petitioner clearly indicating about

the financial status of the petitioner-firm as well as its partners (Annexure-4). On 29.8.2003 Opp. Party No. 3 issued another letter asking the petitioner-firm to submit the Solvency Certificate, and the petitioner submitted the same along with its letter-dated 12.9.2003 (Annexure-7). As the Opp. Parties did not communicate anything to the petitioner, the petitioner issued a letter to Opp. Party No. 3, vide Annexure-8, and thereafter a reminder, vide Annexure-9. However, by letter dated 22.10.2003 (Annexure-10) Opp. Party No. 3 requested the petitioner to revalidate its tender up to 27.12.2003 for finalization of the same. The petitioner accordingly by letter dated 23.10.2003, vide Annexure-11, communicated extension of the validation of the tender to Opp. Party No. 3. When nothing was heard regarding the fate of the petitioner's bid either way, the petitioner on enquiry came to know that the credentials and past experience of individual partners were refused to be treated as the experience of the partnership firm, for which the petitioner was not awarded with the work covered under the tender notice. On 27.10.2003 the petitioner received a letter dt. 18.10.2003, vide Annexure-12, from opposite party No. 3 stating that the authority reserved the right not to allot the tender work to the lowest party and further that no correspondence will be made with the tenderers in the event of rejection of the tender.

3. A counter affidavit has been filed by the opposite parties, wherein the Opp. Parties have justified their action in not accepting the tender of the petitioner and in this regard reliance has been placed on the eligibility criteria indicated in the tender call notice. According to the Opp. Parties, as per the eligibility criteria; if the tender value is more than rupees one crore, then (i) the tenderer is to furnish revenue/bankers solvency certificate of 40% of advertised tender value of work; (ii) he should have completed in the last 3 financial years i.e. current year and 3 previous financial years, at least one similar single work for minimum 35% advertised tender value of work; and (iii) total contract amount received during last three years and in the current financial year should be a minimum of 150% of advertised tender value of work.

The tenderers are required to produce along with the tender the attested copies of the certificates from the employer/client/audited balance sheet duly certified by the Chartered Accountant etc. in support of the financial turnover.

4. So, according to the Opp. Parties, the petitioner's firm did not possess the requisite experience to be eligible to participate in the aforesaid tender. Fact remains that the petitioner is a partnership firm running in the name and style of "M/s D.R. Associates" having 4 partners, namely; Sri Dinesh Singh, Sri Rajesh Singh, Smt. Bhaswati Nayak and Smt. Jolly Patnaik and by virtue of a deed of partnership, dated 10.4.2003, copy of which is annexure- 2, the said partnership firm was reconstituted and one Sanatan Rout was admitted to the partnership firm on and from 10th April, 2003 having a share of 10% to the profit and loss of the said firm. The document of reconstitution of the firm is an unregistered deed of partnership. As it appears, the newly added partner, namely, Sanatan Rout,

was initially executing the contract works in his individual capacity being the proprietor of a firm and amongst the partners of the petitioner-firm so reconstituted, he is the only partner, who has the requisite experience as per the tender notice, as his individual turn over was more than the amount required under the tender notice during the period from April, 2002 to 31st July, 2003. As per the Opp. Parties, the credentials and past experience of an individual partner, namely, S. Rout, cannot be treated as the experience of the partnership firm of the petitioner, and therefore, the petitioner-firm is not at all eligible to participate in the tender as they do not have the turn over of value more than the amount required under the tender. The sum and substance of the argument of the Opp. Parties is that the experience acquired and the turn over of work done by Sanatan Rout in his individual capacity prior to 10.4.2003 i.e. the date on which Sanatan Rout entered as a partner of the D. R. Associates, cannot be treated to be the experience of the partnership firm and treated to be the turn over of the partnership firm, So the question falls for consideration is whether the turn over of work done by Sri Sanatan Rout can be credited to the partnership firm of the petitioner for the purpose of treating it to be the turn over of the partnership. According to the learned counsel for the Opp. Parties, the deed of reconstituting the partnership was executed on 10.4.2003, just little more than one month before the tender notice was published, for the purpose of participating in the tender.

5. Learned counsel for the petitioner in this regard takes us through Section 8 of the Indian Partnership Act, 1932, which enumerates as follows :

"Section 8. Particular Partnership : A person may become a partner with another person in particular adventures or undertakings."

Relying upon the aforesaid provisions of the Partnership Act, Mr. Palit, learned counsel for the petitioner, submits that the very purpose of formation of partnership by different individuals is not only to pool their individual resources, but also the good-will and experience that each individual gives together as a cohesive unit; each bringing along with him the limited physical resources that is available as also the good will, managerial equipments, capabilities and all the human elements that is required to run a business. It is argued that in the tender in question when a credential requirement of a particular amount of turn over is set, it is set with a view to ensure that the firm is capable of undertaking and executing their contract. The physical resources of the firm have already been certified by a scheduled Bank by means of a certificate issued in the form of Solvency Certificate. So far as the 3rd criteria is concerned, as Sri Sanatan Rout has experience as an individual fulfilling the criteria as set in the aforesaid tender notice, he walks into the partnership with his experience and becomes a partner for all practical purposes and the authorities should have considered it from the angle whether the firm will be able to execute the contract. Hence, according to the petitioner, the financial capability of M/s. D.R. Associates after joining of Sri Rout as a partner should have been taken into consideration because the

incoming partner was running a proprietorship concern, and the entire achievement of this concern including his turn over belongs to him alone. Naturally when he joins the partnership his turn over has to be taken as the turn over of petitioner's firm, for which the petitioner's firm qualified for the tender.

6. Under the aforesaid back-ground, it is to be examined whether the joining of Sri Rout subsequently in the partnership firm, namely, "M/s. D.R. Associates" can qualify the partnership firm as required under the tender notice. In this regard it is worthwhile to have a look at the provisions of the Indian Partnership Act, particularly, Section 14, which speaks as follows :

"Section 14. The property of the firm : Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the good will of the business.

Unless the contrary intention appears, Property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm."

7. It is well settled that the property used for the partnership purposes is necessarily not the partnership property. Property belonging to a partner does not become partnership property by being used for the purpose of the partnership. There must be some evidence of an intention to treat the property as a part of the capital of the business. There may be some cases wherein the business carried on may be the separate property of one of the partners. Where a partner brings certain property into the common stock as part of his capital, it becomes the partnership property. Likewise, the Partnership Act has specifically included the goodwill among the partners of the firm subject to any contract between the partners, in all accounts for determining the shares. So, whether in the present case Sri Rout has entered into the partnership with all his property by including the goodwill earned in the proprietorship concern, into the common stock can only be seen from the deed of partnership by virtue of which he stepped into the partnership firm of M/s. D. R. Associates. The copy of deed of partnership is annexed to this writ application as Annexure- 2 series. The agreement is an unregistered one and contains 5 clauses. Except saying that the party of the 5th part is admitted to the said partnership firm in consideration of his work, ability and in consideration of his agreeing to abide by the terms of the original partnership deed, there is nothing to indicate that the new partner either brought the good will of his proprietorship or there is anything to show that he brought certain property of his proprietorship concern to the common stock as part of his capital. The Opp. Parties did not accept the tender of the petitioner on the ground that the total amount of contract received by the firm during the period from April 2000 to 31st July, 2003 is less than the minimum required turnover, i.e., Rs. 2,02,95,000/-. While considering the tender of the petitioner, the Opp. Parties have not taken into account the turnover of Sri S. Rout for the

work done by him in his individual capacity. The minimum turnover required as per the tender notice is that the party should have received contract amount during the last 3 years and the current financial year a minimum of 150% of advertised tender value of work. If the turnover of Sri Sanatan Rout is excluded, the petitioner does not have the turnover as required under the tender notice.

8. In our considered opinion, the authorities are correct in rejecting the tender of the petitioner by excluding the turn over of Sri Rout, who was later on admitted to the partnership, as the partnership does not disclose anything to indicate that Sri Sanatan Rout has entered into partnership of M/s D.R. Associates i.e. the petitioner, with the properties of his proprietorship as well as the goodwill.

The writ petition is accordingly dismissed.

SUJIT BARMAN ROY, C.J.

9. I agree.