

**(2013) 09 OHC CK 0064**

**In the Orissa High Court**

**Case No : Writ Petition (C) No. 16667 of 2013**

M/s. Marine Diesel Service

APPELLANT

Vs

Bharat Petroleum Corporation Ltd. and Others

RESPONDENT

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**Date of Decision : 26-09-2013**

**Acts Referred:**

**Citation : (2013) 09 OHC CK 0064**

**Hon'ble Judges : Indrajit Mahanty, J;B.N. Mahapatra, J**

**Bench : Division Bench**

**Advocate : Goutam Ku. Acharya, B. Das, J.S. Acharya, S.K. Behera, K. Ghadai, R. Naik and D.K. Naik, for the Appellant; S.D. Das and Asst. Solicitor General of India, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

Indrajit Mahanty, J.—The petitioner-M/s. Marine Diesel Service claiming to be a registered firm, registered under the Indian Partnership Act, has filed the present writ application with a prayer seeking direction to the opposite party (Bharat Petroleum Corporation Ltd.) not to finalise the tender of the petitioner-firm as it is the lowest bidder amongst all the bidders/participants. From the pleadings of the case, it appears that the Opposite Party-Corporation had floated a tender call notice on 20.4.2013 in the daily newspaper "The Sambad" inviting bids from the eligible bidders for transportation of petroleum products from Paradeep and Balasore to other parts of the State throughout the country. The Opposite Party-Corporation rejected the bid of the petitioner-firm and communicated the grounds to them by letter dated 19.7.2013 amongst other grounds which is quoted hereunder:

However, the law prohibits a partnership firm with more than 20 partners. Section 11(2) of the Companies Act, 1956 lays down that "No Company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the

individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law." Since your partnership firm exceeded twenty partners and it was neither incorporated as a Company, your partnership being invalid, your firm failed to qualify in the Technical Bid. You were orally informed by the Technical Evaluation Committee accordingly. We therefore deny your contention that your Technical Bid was cleared by us.

2. In view of the aforesaid facts, the only question that arises for consideration in the present application as to whether the ground stated under the Companies Act, for holding the technical bid of the petitioner-firm to be invalid, is justifiable in law?

3. Sri S.D. Das, learned Senior Advocate appearing for the Corporation placed reliance on the judgments of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Punjab Vs. Chander Bhan Harbhajan Lal, as well as in the case of Seth Badri Prasad and Others Vs. Seth Nagarmal and Others, and pleaded that the petitioner's partnership firm have been constituted by the Deed Of Partnership available under Annexure-1 and on a plain reading thereto, it would be clear that 27 individuals signed the aforesaid partnership deed as partners of the petitioner-firm, namely, M/s. Marine Diesel Service who made the necessary bid pursuant to the tender call notice issued by the Corporation. He further stated that in view of the bar stipulated u/s 11(2) of the Companies Act, 1956, the partnership deed was invalid in law and, therefore, the Corporation had no other legal alternative other than to hold that the petitioner-firm fails to qualify in its technical bid.

4. Learned Senior Advocate for the petitioner-firm, on the other hand, placed reliance on the judgment of the Bombay High Court in the case of V.V. Ruia Vs. S. Dalmia, and submitted that since the Inspector-General of Registration-Cum-Registrar of Firms, Orissa, Cuttack had admittedly registered the petitioner-firm even though admittedly 27 partners had been indicated therein, the petitioner-firm should not be held as "technical invalid" since the valid registration exists as on date of submission of tender.

5. In the case of V.V. Ruia (supra), the Bombay High Court had analysed Section 11(2) of the Companies Act, 1956 and had noted that in order to attract the prohibition contained in Sub-section (2) of Section 11, four following conditions needed to be fulfilled:

(i) It must be a company, association or partnership consisting of more than twenty persons.

(ii) It must not have been registered as a company under the Companies Act nor must it have been formed in pursuance of some other Indian Law.

(iii) It must have been formed for the purpose of carrying on any business but other than of banking.

(iv) Business must have for its object the acquisition of gain by the company,

association or partnership or by the individual members thereof.

6. In the case of AIR 1930 300 (Privy Council) Hon"ble Privy Council had occasion to deal with Section 4(2) of the Companies Act, 1913 which is quoted hereinbelow:

No company, Association or Partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the Company, Association or Partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act, or of Letters Patent.

The aforesaid provision is parameteria with Section 11(2) of the Companies Act, 1956 which is quoted herein below:

No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law.

Considering the bar created by the Companies Act in a case where it was found that the partnership firm consisted of 22 persons and, therefore, violative of Section 4(2) of the Companies Act, 1913, it came to conclude as follows:

xxxx Where a plaintiff comes to Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, the only course for the Courts to pursue is to say that he is not entitled to any relief on the allegations made as the Courts cannot adjudicate in respect of contracts which the law declares to be illegal.

7. The aforesaid principles also referred to and confirmed by the Hon"ble Supreme Court in the case of Badri Prasad and others (supra) wherein the Hon"ble Supreme Court while dealing with the similar provision of Section 4(2) of the Rewa State Companies Act, 1935 held that where an association is formed, in contravention of Section 4(2) of the Rewa State of Companies Act, 1935, it was contended that by reason of the illegality of the contract of partnership, the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions and, therefore, no suit for accounts lay at the instance of the plaintiffs-appellants, who were also members of the said illegal Association.

The Hon"ble Supreme Court held that the aforesaid contention raised was sound since admittedly, more than twenty persons have formed the Association in question. It was not dispute that it was formed in contravention of Section 4(2) of the Rewa State Companies Act, 1935.

The Hon"ble Supreme Court has placed reliance in the case of AIR 1925 83 (Privy Council) and in particular, the observation made therein to the following

effect:

No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset. The enactment is prohibitory.

8. In the case of Commissioner of income tax, Punjab, Himachal Pradesh, Jammu and Kashmir and Simla (*supra*), Paragraph-24 would be relevant which is extracted hereunder:

(24) A further question which arises on the particular facts of this case is whether the Rupar firm can be said to have legal existence because its real partners are not merely 14 persons but there are 7 persons in addition to that number. Under the provisions of S. 11 of the Companies Act, 1956 (S. 4 of the 1913 Act) where the number of partners exceeds 20 the firm has to be incorporated and that is admittedly not what has been done here. If, therefore, the number is in excess of 20 the firm being unincorporated, it cannot be said to have a legal existence. Unfortunately the income tax Appellate Tribunal has not discussed the facts and circumstances of this case but dismissed the second appeal preferred by the appellant on the short ground that there was no merit in it in view of the decisions cited by it. It was necessary for the Tribunal to ascertain whether on the facts of this case those decisions concluded the matter. The questions which arise are in my opinion, substantial between the parties and are not settled. For these reasons I allow the appeal, set aside the judgment of the High Court and direct the Tribunal to refer the question earlier set out to the High Court. Costs so far incurred will abide the result.

9. On consideration of the submissions advanced by the learned counsel for the respective parties as well as the various judgments cited at the Bar as referred hereinabove, we are of the considered view that Section 11 of the Companies Act, 1956 prohibits a partnership consisting of more than twenty-four members to do any business and the object of which is the acquisition of gain and mere registration of the petitioner-firm by the Inspector-General of Registration-Cum-Registrar of Firms being on the face of it, opposed to law and the prohibition contained in the Companies Act, 1956, is of no legal consequence. Hence, rejection of the petitioner's tender by the Opposite Party-Corporation on the ground of violation of Section 11(2) of the Companies Act, 1956 is in order and justifies no interference. Accordingly, the writ application stands dismissed. Interim order dated 05.09.2013 passed in Misc. Case No. 15576 of 2013 stands vacated. The Opposite Party-Corporation is at liberty to proceed in the matter in accordance with law.

B.N. Mahapatra, J.

I agree.