

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

LPAOW No.7/2017, MP No. 1/2017

c/w

LPAOW No. 10/2017, MP No. 1/2017.

Date of Order: 22.02.2017

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- 1- State of Jammu & Kashmir,
Through Commissioner/Secretary to Government,
PWD (R&B) Department, Civil Secretary, Srinagar.
 - 2- Chief Engineer, PMGSY (JKRRDA),
Jammu, 4th Floor, JKPC Complex, Near Rail Head Complex,
Jammu.
 - 3- Financial Advisor (CAO), PWD (R&B) Department,
Civil Secretariat, Srinagar.

..... Appellants

Versus

M/s National India Construction Company,
Engineers & Contractors,
Through its partner, Sanjeev Singh,
S/o Shri Punjab Singh,
Sunjwan Road, Bathindi Morh, Jammu.

..... Respondent

Coram:-

Hon'ble Mr. Justice N. Paul Vasanthakumar, Chief Justice
Hon'ble Mr. Justice Alok Aradhe, Judge.

Appearing counsel:

For the Appellant(s)	:	Mr. Faraz Iqbal, Dy. AG.
For the respondents	:	Mr. R. K. Gupta, Sr. Advocate with Mr. Ratish Mahajan, Advocate.

i/	Whether to be reported in Press/ Media.	:	Yes
ii/	Whether to be reported in Digest/Journal.	:	Yes

Per: Alok Aradhe -J

LPAOW No.7/2017

In this Intra Court appeal, the appellants have assailed the validity of the order dated 18.04.2016, passed by learned Single Judge in OWP No.219/2013, by which writ petition preferred by

the respondent has been allowed. In order to appreciate the appellants challenge to the impugned order, few facts need mention, which are stated infra.

- 2.** A partnership firm, namely, M/s National Indian Construction Company with 05 partners including one Mr. Sanjeev Singh as the working partner was constituted and a partnership deed dated 22.11.2005 was executed at Pathankot, Punjab. The firm was duly notarized and registered with the Registrar of Firms, Punjab. The Principal office of the firm was at Pathankot and Head Office was at Jammu. The aforesaid firm participated in the tendering process pertaining to four works under the Pradhan Mantri Gram Sadak Yojana in the State of Jammu & Kashmir. The said works were allotted to the aforementioned firm between the years 2005 to 2008 and same were successfully completed and handed over to the appellants, for which even the payments were made to the respondent firm.
- 3.** The firm was initially constituted for executing the works under the Pradhan Mantri Gram Sadak Yojana in the State of Jammu & Kashmir, and since the partners of the firm decided to expand the business to all road works in Jammu &

Kashmir State, they got the firm registered afresh in the State of Jammu & Kashmir. However, the partners of the firm remained the same. A partnership deed dated 31.05.2010 was executed and duly registered on 03.06.2010 in the Court of Sub-Registrar, Jammu and was also registered with the Registrar of Firms, Jammu & Kashmir State on 09.06.2010. In the aforesaid deed, the office of the firm was shown to be at Jammu.

4. The appellants issued a Notice Inviting Tenders on 05.05.2010, pertaining to various contracts. It is also relevant to mention here that the respondent firm was registered with the Registrar of Firms, Jammu & Kashmir on 09.06.2010 i.e. prior to the last date of submission of tender forms. The respondent firm was found to be the lowest tenderer in as many as three contract works, namely, construction of road from Dera Baba to Tanda, construction of road from Kainth Gali to Lower Basnote and construction of road from Basantgarh to Khanned. While the process of allotment of the aforesaid works was going on, some unsuccessful bidders filed a complaint against the respondent firm, which was examined by the appellants. After obtaining requisite information from the Income Tax Department as well as opinion from the Chartered Accountants, it

was found that the respondent firm is a validly constituted firm. However, appellant No. 2 referred the matter to the Law Department for its opinion. The Law Department vide its opinion dated 22.11.2011 opined that the partnership deed of the respondent firm dated 22.11.2005 is not a valid document, as it is not registered with the Registrar of Firms, whereas the deed of 2010 is a valid partnership deed.

- 5.** On the basis of the aforesaid opinion received from the Law Department, appellant No. 2 proceeded to issue fresh tender in respect of two out of three contracts, in which the respondent firm was declared the lowest bidder and third contract was made subject to the opinion of the Law Department. Subsequently on 29.11.2011, appellant No. 2 issued a notice to the respondent firm, seeking its response to the opinion of the Law Department and the same was duly responded by the respondent firm. However, even before the issuance of notice dated 29.11.2011, a fresh tender was already invited by the appellants herein.
- 6.** Being aggrieved by the opinion rendered by the Law Department, the respondent filed OWP No. 1620/2011, in which a Bench of this Court was

pleased to direct maintenance of the status quo. Thereafter, vide order dated 30.11.2012, the aforesaid writ petition was disposed of with a direction to the respondents that since the respondent firm had already responded to the notice dated 29.11.2011 issued by the appellant No. 2, the aforesaid appellant shall take a final call and pass a speaking order with regard to the eligibility of the firm and shall also ascertain whether it is entitled to take the credits of the works executed between the year 2005 to 2008 and the opinion of the Law Department be appropriately considered while passing such order. The respondent firm thereupon filed a fresh representation, eventually vide order dated 24.01.2013, on the basis of the opinion given by the Law Department, the said representation was rejected.

- 7.** In the aforesaid factual backdrop, the respondent firm approached the Court by filing SWP No. 219/2013, which was allowed by a Bench of this Court vide order dated 18.04.2016 directed the appellants to allot contracts in question, namely, three in number to the respondent firm in pursuance of Notice Inviting Tender dated 05.05.2010, in which the respondent firm was

found to be the lowest. Being aggrieved the appellants have filed this Intra Court appeal.

8. Learned Dy. AG submitted that M/s National India Construction Company came into existence in the year 1997 with four partners in Pathankote and the same is a different entity than the respondent, which is a firm with five partners, which was constituted in 2005 at Jammu. It is further submitted that the aforesaid firm was unregistered and as per the law applicable in State of Jammu & Kashmir, registration of a firm is necessary. It is also argued that since firm came into existence in 2010 on its registration, and therefore, it neither had the requisite experience nor the turnover, as required under the Notice Inviting Tenders. However, learned Dy. AG appearing on behalf of the appellants fairly submitted that incase past experience of the respondent firm is taken into account, it fulfils the criteria and the offers of the respondent firm in respect of the contracts in question are the lowest. On the other hand, learned counsel for the respondent has supported the order passed by the learned Single Judge and has submitted that the respondent firm is ready to execute three contracts at the rates applicable, at the time of submission of its bids.

9. We have considered the rival submissions made by the learned counsel for the parties and have perused the record.
10. The Supreme Court in the celebrated case of R. D. Shetty (supra) approved the principle enunciated by Frankfurter J. that it is a well settled Rule of the administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be adjudged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Accordingly, it was held that having regard to constitutional mandate of Article 14 as also the judicially evolved rule of administrative law a tender or contract cannot be awarded arbitrarily and a tenderer must fulfill the eligibility criteria. In **G. J. Fernandez vs. State of Karnatka and others (1990) SCC 2 488**, it was held that tenderer is required to fulfill the criteria, with regard to eligibility. It was also held that if an authority has *bona fide* interpreted the standards prescribed by it in a particular manner, the court should not interfere with though it may be inclined to read or construe the conditions differently. It is equally well settled legal proposition that when power of judicial review is invoked in matters relating to tenders or award of contracts, certain

special features should be borne in mind, namely, evaluating tenders or award of contract are essentially commercial functions. If the decision relating to award of contract is *bona fide* and is in public interest, the Courts will not interfere, even if, procedural aberration or error in assessment or prejudice to a tenderer is made out and the power of judicial review will not be permitted to protect private interest at the cost of public interest or to decide contractual disputes and view of authority on fulfillment of a condition has to be respected unless the decision making process is either irrational or biased. **(See Sterling Computers ltd. Vs. MRN Publications ltd. (1993) 1 SCC 445, Rounaq International Limited vs. IVR Construction ltd, (1999) 1 SCC 492, BSN Joshi and Sons ltd. Vs. Nair Coal Services ltd. (2006) II SCC 548, Jagdish Mandal vs. State of Orissa and others (2007) 14 SCC 517 and Central Coal Fields ltd. and another vs. SLL-SML (Joint Venture Consortium) 2016 (6) Supreme 353.**

- 11.** It is very well settled legal proposition in case titled that validity of an order has to be adjudged on the grounds on which it is passed and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. See **“Mohinder Singh Gill and another V/s The Chief Election**

**Commissioner, New Delhi and others” AIR 1978
SC 851.**

12. In the backdrop of the aforesaid settled legal proposition, facts of the case in hand may be examined. At this stage, it is appropriate to take notice of the relevant clause of the Notice Inviting Tender:-

10. To qualify for award of the contract, each bidder should have in the last five years:-

a) Achieved in any one year a minimum financial turnover (as certified by Chartered Accountant & at least 50% of which is from Civil Engineering construction works only) equivalent to amount given below. The financial turnover achieved on account of execution of road works under PMGSY shall be counted as 120% for the purpose of this sub clause. The turnover will be indexed at the rate of 8% for a financial year.

(i) 60% of the amount put to bid in case the amount put to bid is Rs. 200.00 lacs and less.

(ii) 75% of amount put to bid in case the amount put to bid is more than Rs. 200.00 lacs but less than Rs. 1000.00 lacs.

(iii) 100% of amount put to bid in case the amount put to bid is more than Rs. 1000.00 lacs. The turnover should be for Civil Engineering works only.

b) Satisfactorily completed as prime Contractor, at least one similar work for amount.

(i) Works having State-I only equal in value to one-fifth of the estimated cost of work for which the bid is invited.

(ii) Works having State-II only equal in value to one-third of the estimated cost of work for which the bid is invited.

(iii) Works having Stage-I & II equal in volume to one third of estimated cost of work for which the bid is invited.

- (iv) The value of road work completed by the bidder under PMGSY in originally stipulated period of completion shall be treated 120% for the purpose of this sub-clause.

11. Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity for construction work is equal to or more than the total bid value. The available bid capacity will be calculated as under:-

Assessed available bid capacity = $(A \times N \times M - B)$

Where

A = Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the last year at the rate of 8% a year) taking into account the completed as well as works in progress.

N= Number of years prescribed for completion of the works for which bids are invited (period upto 6 months to be taken as half-year and more than 6 months as one year).

M= 2 or such higher figure not exceeding 3 as may be specified in the Appendix to ITB.

B= Value, at the current price level, of existing commitments and on-going works to be completed, during the period of completion of the works for which bids are invited.

Note: The statements showing the value of existing commitments and ongoing works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent."

13. Admittedly, the respondent firm is required to fulfill the eligibility criteria laid down in the terms and conditions of the Notice Inviting Tender. It is also not in dispute that this Court by an order dated 30.11.2016 passed in OWP No. 1620/2011, while disposing of the writ petition directed the respondents as under:-

"Respondents to take final decision as regards eligibility of the petitioner firm to participate

in tendering process and take credit of works allotted and executed during 2005-2008 having regard to the opinion received from Law Department and the reply filed by the petitioner firm and thereafter proceed further in the matter following the course as may be dictated by the final determination of the matter. The respondents shall take a decision in the matter within two weeks from the date of receipt of this order. Needless to say that the respondents shall afford the petitioner and any other competitor questioning their eligibility, an opportunity to reinforce and supplement its case as projected in the reply and also to submit any other document that it is in position to lay hands on. The retendering process obviously shall not be proceeded with till the decision is taken."

- 14.** Thus, it is apparent that this Court had directed the appellants herein to take a final decision with regard to the eligibility of the respondent firm to participate in the tendering process and take credit of works allotted and executed during 2005-2008, having regard to the opinion received from the Law Department and the reply filed by the respondent firm. It is not in dispute that the respondent firm was initially constituted on 22.11.2005 and was duly registered with Registrar of Firms, Punjab and its headquarters was in Pathankote, Punjab. Thereafter, various works were allotted to the respondent firm between the year 2005 to 2008 and another partnership deed was executed on 31.05.2010 and the same was got registered with the Sub-Registrar, Jammu on 03.06.2010 and was also registered in the Registrar of Firms, Jammu & Kashmir State.

- 15.** It is also not in dispute that a partnership deed executed in the year 2005 was registered at Pathankote, Punjab, where the provisions of Indian Partnership Act, 1932 and Indian Registration Act, 1908 are applicable. As per the provisions of the Indian Registration Act, the partnership deed is not compulsory registrable document and the requirement of registration of a partnership deed is only in the state of Jammu & Kashmir. In view of the directions issued by this Court in the previous round of litigation, appellants were under an obligation to give credit of works allotted to the respondent firm between the year 2005 to 2008. It has been fairly stated by learned Dy. AG that if the aforesaid credit of works allotted to the respondent firm is given for the period mentioned above, the respondent firm is eligible for the contracts in question. However, the representation of the respondent firm has been rejected in view of the opinion expressed by the Law Department which reads as under :-

“Partnership deed which was executed by the petitioner at Jammu on 3rd of June, 2010 creates a legal entity and a firm created by the partners mentioned in the deed is legally a valid firm. But another deed which has been placed on the file and has been executed on 21st November, 2005 between various partners has no legal entity as the same is not registered with the Registrar of Firms but simply authenticated by Notary, as such important legal requirement has not been fulfilled. Therefore, the said deed is not valid under

partnership act. The partnership created under the said deed is not legally correct.”

16. Thus, the respondent firm has been held to be not eligible only on the ground that the partnership deed dated 21.11.2005 was not registered, which is factually incorrect. Even otherwise, there is no requirement in law in State of Punjab that a deed of partnership is required to be compulsory registerable. Therefore, in our considered opinion, respondent firm has been found to be ineligible and his bid has been found to be non-responsive wholly on extraneous consideration. The impugned order suffers from the vice of non application of mind and is *per se* arbitrary.
17. It is also pertinent to mention here that the respondent firm has not been found to be eligible in the impugned order on the ground that there is a change in the members of the firm. Therefore, the contention of learned Dy. AG that there was change in the partners of the partnership firm cannot be accepted. Thus, the decision of the appellants that a bid of the respondent firm is non-responsive is arbitrary and is irrational.
18. We are conscious of this fact that the Government has the discretion to enter into contract with any eligible tenderer. However, subsequently, the respondent was held to be not eligible in view of

the opinion given by the Law Department. It is noteworthy that we are not examining the eligibility of the respondent, as the same has already been adjudged by a Committee of experts and the respondent firm was found to fulfill the eligibility criteria, laid down in the Notice Inviting Tenders by passing an order of acceptance by order dated 21.11.2011. However, the said acceptance was withdrawn by order dated 21.04.2013, merely on the basis of the opinion given by the Law Department, which reads as under:-

“In light of the opinion of the Law Department received vide No. PW(R&B)Acctts/Complaint/2011/439 dated 22.11.2011 and decision taken regarding the issued relating to the M/s National India Construction Co. vide this office No. CEJ/PMGSY/28152-59 dated 24.01.2013, the letter of acceptance issued vide this office No. CEJ/PMGSY/13964-72 dated 21.11.2011 conditionally is hereby withdrawn.”

19. Since the tender of the respondent, which was found to be responsive by the Committee of experts was rejected merely on the basis of the opinion given by the Law Department, which pertains to a legal issue, therefore, we have only examined the opinion of the Law Department and the legal position stated by the Law Department and the same is found to be erroneous, for the reasons indicated supra.

20. Learned Single Judge has however, has issued a direction to the appellants herein to award the contracts in question to the respondent firm. Usually, we would have modified the order passed by the learned Single Judge, however, in the peculiar facts of the case and taking into account the undertaking given by the respondent before us that the respondent firm is willing to perform and complete the works, which may be awarded to him on the same rates, which were offered by him at the time of submission of bids i.e. 7 years ago, we are not inclined to interfere with the order, as there has already been delay in execution of the public project and public exchequer would suffer. In view of preceding analysis, we do not find any merit in this appeal, in the result the same fails and is hereby **dismissed**.

LPAOW No. 10/2017

For the reasons assigned by this Court in the detailed order passed in LPAOW No. 7/2017, the instant appeal is also **dismissed** on the same analogy.

(Alok Aradhe)
Judge

(N. Paul Vasanthakumar)
Chief Justice

JAMMU
22.02.2017
(Muneesh)