

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Before: Justice Sanjay Kishan Kaul, Chief Justice , Justice Augustine George Masih.

M/s Subhash ChanderPetitioner

versus

Food Corporation of India and othersRespondents

Civil Writ Petition No.6617 of 2013 (O&M)

RESERVED ON: 19.07.2013 DATE OF DECISION: 31.07.2013

Tender- Cartelisation - Mere fact that two bids were given by two separate partnership firms having one common partner would not ipso facto amount to cartelization or killing competition.

Ms. Promila Nain, for the petitioner. Mr.Sumeet Goel, for respondents No.1 to 5, Mr.J.S. Sandhu, for respondents No.6 and 7

..

SANJAY KISHAN KAUL, CHIEF JUSTICE:

1. The petitioner is a proprietorship concern engaged in the trucking business and in that course of business has been providing trucks to Food Corporation of India (FCI), respondent No.1, from godown to Local Rail Head, Mullanpur. The petitioner was the successful contractor who was awarded the [contract](#) for the period 31.1.2011 to 31.1.2013. An extension was granted up to 30.4.2013, apparently because the tender process for the subsequent period was still underway.

2. The petitioner claims to have submitted the bid for the fresh tender for 1.5.2013 to 30.4.2013 on 21.12.2012 consisting of two parts, i.e., the technical and the financial bids. Two other contractors are also stated to have participated in the bid being respondents No.6 and 7.

3. It is the case of the petitioner that the said two bids by respondents No.6 and 7 were effectively the bids of the same person as one Shri Sushil Kumar is the partner of both the partnership firms and, thus, the bids are in violation of Competition Act, 2002 and the rules framed thereunder. In this behalf, it has also been alleged that respondent No.7 firm had, in fact, been constituted on 18.12.2012, just three days prior to the last date of filing of the bids, i.e., it was constituted really for making another bid on the anvil of the last date for submission of the bids as on the last date of filing of bids this firm had not even been allotted a registration number and only acknowledgement for registration of the firm was available. As far as respondent No.6 firm is concerned, one of the partners of the firm had just passed away and Shri Sushil Kumar had been inducted in his place.

4. The petitioner claims that having come to know the aforesaid facts, a letter dated 11.1.2013 was addressed to the respondents alleging that certain persons had filed more than one tender for the contract which was illegal and unfair. This was followed up by another communication making the same allegations, but to no avail and, thus, on 5.3.2013, a detailed representation was made. Since still no action was taken, a legal notice was served through counsel on 19.3.2013.

5. The FCI and its officers being respondents No.1 to 5, however, proceeded to open the financial bids on 21.3.2013. On the financial bids being opened, the position was as under:-

(i) M/s Narinder Kumar Sushil Kumar (Respondent No.7) - 167% above the rates given in the schedule of rates.

(ii) M/s Subhash Chander (Petitioner) - 170% above the rates given in the schedule of rates.

(iii) M/s Ram Lubhaiya & Co. (Respondent No.6) - 179% above the rates given in the schedule of rates.

6. In view of the aforesaid financial bids, the bid of respondent No.7 was accepted.

7. The petitioner has filed a writ petition under Article 226 of the Constitution of India seeking quashing of the award of the tender to respondent No.7 and, in fact, praying that the tender bids submitted by respondents No.6 and 7 being in collusion should result in forfeiture of the EMD. The further prayer is to finalise the award of the tender only after deciding the objections raised by the petitioner. No interim order was granted but the allotment of the contract was made subject to the further orders to be passed by the Court, in terms of order dated 29.4.2013.

8. The bid awarded to respondent No.7 is sought to be assailed by the petitioner on account of the pleas set out hereinafter.

(A) Cartelization prohibited by Competition Act, 2002

9. This plea arises out of Shri Sushil Kumar being partner of both respondents No.6 and 7 and two bids were given quoting different prices which amounts to cartelization under Section 2(c) of the Competition Act, 2002. It is also alleged to be amounting to abuse of the dominant position by getting together to control the price bids. This is stated to be specifically prohibited as per Clause-12 of the General Information to Tender, which reads as under:-

“12. In case of any clear indication of cartelization, the corporation shall reject the tender(s) and forfeit the EMD.”

10. The aforesaid is stated to be prohibited not only under the Competition Act, but also

the enunciation of the legal principles in *Union of India and others v. Hindustan Development Corporation*, (1993) 3 SCC 499.

(B) Violation of the terms and conditions of bid

11. It has been alleged that the respondent No.7 did not comply with the requirements of the tender conditions as the following documents were required to be submitted:

- “1. Attested copy of registered deed of partnership/memorandum and articles of association/ byelaws/certificate of registration, as applicable.*
- 2. Power of Attorney of person signing tender.*
- 3. Certificate of experience and details thereof.*
- 4. Duly audited P & L account and balance sheet of relevant completed years for which experience certificate has been submitted by the tenderer.*
- 5. Copy of Income Tax Return/PAN Card.*
- 6. Copy of EPF Code Number and Proof of Deposit of EPF for the relevant experience period, if applicable.”*

In the aforesaid context, it has been pleaded that respondent No.7 was constituted only 3 or 4 days prior to the submission of the tender bids and, thus, income tax return, PAN Card, registration number, etc., which were mandatory, were not submitted.

12. The respondents No.1 to 5 filed their counter-affidavit opposing the writ petition. It has been stated that the petition states incorrect facts. In the context of the submissions and the averments in the petition, it has been stated as under:

- (I) A registration number had already been issued to respondent No.7 firm prior to submission of the bids by the Registrar of Firms i.e. 2581/2012-13, a copy of which is annexed as Annexure R-1/1;
- (II) The fact that the respondent No.7 firm was registered on 18.12.2012 is not relevant as it did not violate any conditions of the tender document;
- (III) Respondents No.6 and 7 are two different partnership firms and the induction of Shri Sushil Kumar as a partner in both the firms does not violate any conditions of the Indian Partnership Act, 1932;
- (IV) Respondents No.6 and 7 are different legal entities who were eligible to participate separately in bidding process which does not amount to cartelization.
- (V) It is not as if the representations/objections of the petitioner remained unattended but were scrutinized and not found to be of merit resulting in the price bids being opened

where the bid of respondent No.7 was competitively better than that of the petitioner.

(VI) No doubt, the income-tax return or PAN Card could not have been submitted by the respondent No.7 because it was formed only 3 days before, but respondent No.7 had submitted an acknowledgement qua the PAN Number having been applied for by it which has been annexed as Annexure R-1/3 and the partners have supplied their own PAN Numbers.

13. The attention of the Court was invited to the Condition-3 of the tender dealing with qualification conditions which read as under:-

"3. Qualification conditions for Tender:

(I) *Tenderer should have experience of Rake Handling and/or Transportation duly obtained from Manufacturer/PSU/Govt. Dept./Public Ltd. Company/Private Limited Company 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 the work of value:*

(a) *At least 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.*

(II) *Experience certificate in the proforma prescribed at Appendix VI shall be produced from customers stating proof of satisfactory execution and completion of the contract(s) besides duly certifying nature, period of contract, and value of work handled.*

(III) Where the estimated contract value of Handling & Transport Contract is less than Rupees Five Crores, Tenderer without the requisite experience as mentioned above may also participate subject to providing an undertaking that an additional Performance Guarantee in the form of Bank Guarantee of 10 of the contract value from SBI Bank or Its Associate Banks or the other Public Sector Banks will be given, if selected. The format of the Bank Guarantee to be provided in such cases is at Appendix-V of Annexure-I.

(IV) *If the Tenderer is a partnership firm, there shall not be any re-constitution of the partnership without the prior written consent of the Corporation till the satisfactory completion of the contract.*

Note: The year for the purpose of experience will be taken as Financial Year (1st April to 31st March) excluding the financial year in which tender enquiry is floated."
[emphasis supplied]

14. It is, thus, submitted that the contract in question is governed by Clause (III) of

Condition-3 as the contract value was less than Rs. 5 crores.

The case of respondent No.7 would fall within the definition of "without requisite experience". Such a person was permitted to participate subject to an undertaking that an additional performance guarantee in the form of a bank guarantee of 10% of the contract value from public bank would be given. Respondent No.7 is stated to have complied with this condition.

15. We have examined the submissions of the learned counsel for the parties.

16. Insofar as the first allegation of cartelization is concerned, we really find no merit in it. The petitioner, in the petition, has gone into an elaborate discussion on the ills of cartelization as discussed in judicial pronouncements without reference to the facts in issue. The whole principle behind cartelization is an endeavour to form collusive association, to monopolise production, distribution, prices, etc. It is no doubt true that in the present case two bids have been given by two separate partnership firms having one common partner, but that itself would not ipso facto amount to cartelization or killing competition. Nothing prevented other participant contractors from making the bid and, in fact, the petitioner made his bid. Further, qua the induction of respondent No.7 as a partner, that was done in one firm on account of demise of the partner. Both the firms are registered with the Registrar of Firms. Proper material has to be placed on record to establish cartelization and not merely such an allegation. Thus, we outrightly reject the submission of the petitioner based on cartelization.

17. In our view, the only question to be examined was whether the essential terms and conditions of the tender document have been satisfied by respondent No.7 or not. It has already been pointed out by reference to the terms and conditions of the tender that requisite experience can be exempted if the bid is for a contract less than Rs. 5 crores subject to an undertaking being given for an additional performance guarantee of 10%. Thus, the mere fact that respondent No.7 has been constituted 3 days prior to the bid and does not have prior experience, could not result in the rejection of the bid if this performance guarantee is given. The respondent No.7 on satisfaction of this condition is entitled to participate.

18. There is also a specific denial by reference to a document qua the factum of the registration of the partnership firm which has taken place as is apparent from Annexure R-1/1. In fact, in the process of hearing arguments, the only argument which really required consideration was whether the failure to submit a copy of the PAN Card could be fatal as, admittedly, this was a requirement of the tender which was not given, though a copy of the application for issuance of PAN Number was filed which was treated as sufficient.

19. In respect of the aforesaid plea, the stand of respondents No.1 to 5 is that since PAN Cards are prepared by the franchises of the Income Tax Department, due recognition and cognizance is given to acknowledgement of having made an application for such PAN Cards which is treated as sufficient compliance. The payment qua work done is given to the contractor through cheque and TDS is necessarily deducted therefrom and at that time it is

ensured that PAN Number is available with the contractor. Thus, the acknowledgement of an application for issuance of PAN Card is taken into account as sufficient compliance. A uniform decision in this behalf was taken and for every tender this practice has been followed to promote a more healthy and fair competition and, thus, there is no deviation in allotment of the tender to the respondent. The original records were produced for our perusal.

20. On the other hand, the petitioner has emphasised that there cannot be a violation of the terms and conditions and for that purpose has relied upon the judgment of the Division Bench of this Court in Civil Writ Petition No.22688 of 2012 titled: **M/s Joginder Singh and Company v. Food Corporation of India and others**, decided on 5.12.2012.

21. We are of the view that terms of tender have to be followed, an aspect over which there can be no dispute. A question, however, is whether the non-compliance of the condition of having a PAN Number is fatal to the award of the tender or not.

22. In order to appreciate this contention one has to look to the purpose for which the PAN number is asked for i.e. routing of the payment through proper channel and deduction of tax at source, but before payments are made, PAN Number has to be available. To that extent, the interests are protected. However, the availability of PAN Number is not something which is material for the performance of the contract. No doubt, it would have been visible that in the terms and conditions, it should have been mentioned that the requirement is of a PAN Number/PAN Number Applied For with payment to be released only when PAN Number is made available. This is something which respondents No.1 to 5 should ensure for the future.

23. We are, however, of the view that there is not such a violation which goes to the root of the contract or affects the performance of the contractor in any manner so as to deprive respondent No.7 of the tender awarded which has been financially more competitive than the petitioner and, thus, saves the revenue for respondents No.1 to 5. It is not as if a less financially competitive bid is sought to be awarded the tender. Obviously, the petitioner having lost out on the tender bid seeks to displace the respondent No.7.

24. We are, thus, of the view that it is not a fit case for interference under Article 226 of the Constitution of India.

25. Dismissed.

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(B) Violation of the terms and conditions of bid

11. It has been alleged that the respondent No.7 did not comply with the requirements of the tender conditions as the following documents were required to be submitted:

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2. *Power of Attorney of person signing tender.*

3. *Certificate of experience and details thereof.*
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5. *Copy of Income Tax Return/PAN Card.*
6. *Copy of EPF Code Number and Proof of Deposit of EPF for the relevant experience period, if applicable."*

In the aforesaid context, it has been pleaded that respondent No.7 was constituted only 3 or 4 days prior to the submission of the tender bids and, thus, income tax return, PAN Card, registration number, etc., which were mandatory, were not submitted.

12. The respondents No.1 to 5 filed their counter-affidavit opposing the writ petition. It has been stated that the petition states incorrect facts. In the context of the submissions and the averments in the petition, it has been stated as under:

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- (II) The fact that the respondent No.7 firm was registered on 18.12.2012 is not relevant as it did not violate any conditions of the tender document;
- (III) Respondents No.6 and 7 are two different partnership firms and the induction of Shri Sushil Kumar as a partner in both the firms does not violate any conditions of the Indian Partnership Act, 1932;
- (IV) Respondents No.6 and 7 are different legal entities who were eligible to participate separately in bidding process which does not amount to cartelization.
- (V) It is not as if the representations/objections of the petitioner remained unattended but were scrutinized and not found to be of merit resulting in the price bids being opened where the bid of respondent No.7 was competitively better than that of the petitioner.
- (VI) No doubt, the income-tax return or PAN Card could not have been submitted by the respondent No.7 because it was formed only 3 days before, but respondent No.7 had submitted an acknowledgement qua the PAN Number having been applied for by it which has been annexed as Annexure R-1/3 and the partners have supplied their own PAN Numbers.

13. The attention of the Court was invited to the Condition-3 of the tender dealing with qualification conditions which read as under:-

"3. Qualification conditions for Tender:

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obtained from Manufacturer/PSU/Govt. Dept./Public Ltd. Company/Private Limited Company 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 the work of value:

(a) At least 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.

(II) Experience certificate in the proforma prescribed at Appendix VI shall be produced from customers stating proof of satisfactory execution and completion of the contract(s) besides duly certifying nature, period of contract, and value of work handled.

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(IV) If the Tenderer is a partnership firm, there shall not be any re-constitution of the partnership without the prior written consent of the Corporation till the satisfactory completion of the contract.

Note: The year for the purpose of experience will be taken as Financial Year (1st April to 31st March) excluding the financial year in which tender enquiry is floated."
[emphasis supplied]

14. It is, thus, submitted that the contract in question is governed by Clause (III) of Condition-3 as the contract value was less than Rs. 5 crores.

The case of respondent No.7 would fall within the definition of "without requisite experience". Such a person was permitted to participate subject to an undertaking that an additional performance guarantee in the form of a bank guarantee of 10% of the contract value from public bank would be given. Respondent No.7 is stated to have complied with this condition.

15. We have examined the submissions of the learned counsel for the parties.

16. Insofar as the first allegation of cartelization is concerned, we really find no merit in it. The petitioner, in the petition, has gone into an elaborate discussion on the ills of cartelization as discussed in judicial pronouncements without reference to the facts in issue. The whole principle behind cartelization is an endeavour to form collusive

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19. In respect of the aforesaid plea, the stand of respondents No.1 to 5 is that since PAN Cards are prepared by the franchises of the Income Tax Department, due recognition and cognizance is given to acknowledgement of having made an application for such PAN Cards which is treated as sufficient compliance. The payment qua work done is given to the contractor through cheque and TDS is necessarily deducted therefrom and at that time it is ensured that PAN Number is available with the contractor. Thus, the acknowledgement of an application for issuance of PAN Card is taken into account as sufficient compliance. A uniform decision in this behalf was taken and for every tender this practice has been followed to promote a more healthy and fair competition and, thus, there is no deviation in allotment of the tender to the respondent. The original records were produced for our perusal.

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condition of having a PAN Number is fatal to the award of the tender or not.

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25. Dismissed.