

THE HIGH COURT OF MADHYA PRADESH
W.P. No.18435/2019

(M/S ULTIMATE VENTURES SECURITY SYSTEM PVT LTD Vs BANK OF INDIA AND OTHERS)

Jabalpur, Dated: 23.01.2020

Shri Arjun Singh, learned counsel for the petitioner.

Shri Anoop Nair, learned counsel for the respondents.

Heard.

This petition has been filed under Article 226 of the Constitution of India seeking the following relief:

- “7.1 To issue order/orders, direction/directions, writ/writs to the respondent to allow the petitioner exercise his right of fair participation in the ongoing empanelment process for vendors for supply, installation, commissioning and maintenance of security gadgets.*
- 7.2 To direct the respondents to act in a fair, reasonable and justified manner as per the mandate of law as laid down by the Hon’ble Apex Court.*
- 7.3 To call for entire records of the subject empanelment process.*
- 7.4 Any other writ, order or direction which this Hon’ble Court may deem fit and proper in the light of fact and circumstance of the case including cost of the litigation may kindly be awarded in favour of the petitioner.*
- 7.5 To issue writ/writs, order/orders and direction/directions to quash the communication dated 6/9/2019 issued by the respondent, disqualifying the petitioner in an impugned manner.*
- 7.6 To issue writ/writs, order/orders, direction/directions quashing the order dated 30/7/2019 passed by the respondent.”*

The case of the petitioner is that it is a company registered under the Companies Act, 1956 in the year 2014 and prior to that, since 2006, one of its directors viz. Santosh Kumar Shrivastava was

running a proprietorship firm in his own name and subsequently the aforesaid proprietary concern was converted into a private limited company on 01.09.2014 in the name and style of ***M/S. ULTIMATE VENTURES SECURITY SYSTEM PVT LTD.*** It is the further case of the petitioner that the respondent floated a tender titled as '*Request for Proposal (for short 'RFP') for Empanelment of vendors for Supply, Installation, Commissioning & Maintenance of Security Gadgets*'. The eligibility criteria for applying for the said tender was minimum five years experience in the field of supply, installation and maintenance of security gadgets in Nationalized Banks as on 1st April, 2019.

The grievance of the petitioner is that despite having the aforesaid experience through the erstwhile proprietorship concern, the petitioner company is debarred from participating in the aforesaid tender proceedings vide document dated 06th September, 2019 whereby the respondents have informed the petitioner that since the company was incorporated on 01.09.2014, hence it does not have requisite five years of experience as on the date stipulated in RFP.

Learned counsel for the petitioner has submitted that the experience of the director of the petitioner Company, namely Santosh Kumar Shrivastava as the proprietor of the proprietary concern in the name and style of Ultimate Security System has to be considered in the experience of the company itself. Counsel has further submitted that the aforesaid issue is no more *res integra* and has already been decided by the Apex Court in the case of **New Horizons Limited and Another Vs. Union of India and Others reported as (1995) 1 SCC 478**. Counsel has further submitted that the respondents be directed to allow the petitioner to participate in the tender proceeding.

Learned counsel for the respondents on the other hand has opposed the prayer and has submitted that no case for interference is made out as the petitioner company itself was not having the requisite experience.

Having considered the rival submissions of the parties and taking note of the decision rendered by the Apex Court in the case of **New Horizons Limited (supra)**, this Court finds that the Apex Court in para 23 has dealt with the similar issue in the following manner:

“23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the **Companies Act** having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having

persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders

dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.

(emphasis supplied)

Considering the facts of the present case on the anvil of the aforesaid enunciation of the Apex Court, this Court has no hesitation to hold that the experience gained by the director Shri Santosh Kumar Shrivastava of the petitioner company *M/S. ULTIMATE VENTURES SECURITY SYSTEM PVT LTD* as a proprietor prior to forming the said company while working for the proprietorship concern *Ultimate Security System* shall also be considered in the experience of the company.

In view of the same, it cannot be said that the petitioner company has no experience as required by the respondent in the advertisement in question.

As a result, the petition stands **allowed** and the communication dated 06.09.2019 is hereby quashed and the

respondents are directed to consider the petitioner's name on merits while opening the tender. No costs.

(Subodh Abhyankar)
Judge

VC