

Ghai Construction Vs. State of Maharashtra and ors.

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Court : Mumbai

Decided On : Apr-30-2007

Reported in : 2007(5)MhLj862; [2009]184TAXMAN52(Bom)

Judge : S.J. Vazifdar and ;P.R. Borkar, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 2(31), 44AB, 44AD, 44AE, 44AF, 44B, 44BB, 44BBA, 44BBB and 288(2); Income Tax Rules, 1962 - Rule 6G(1)

Appeal No. : W.P. No. 4368 of 2006

Appellant : Ghai Construction

Respondent : State of Maharashtra and ors.

Advocate for Def. : V.H. Dighe, A.G.P. for Respondent No. 1, ;S.V. Adwant, Adv. for Respondent Nos. 2 to 4 and ;V.J. Dixit, Sr. Counsel for L.V. Sangeet, Adv. for Respondent No. 5

Advocate for Pet/Ap. : S.M. Godsay, Adv.

Judgement :

S.J. Vazifdar, J.

1. The petitioner essentially seeks an order directing respondent Nos. 1 to 4 to consider his tender in respect of toll collection work at Lahuki on the Aurangabad-

Jalna road and, an order quashing the process of considering the tenders, as he was excluded therefrom.

2. At the outset, we must state in fairness to Mr. S.M. Godsay that we did not permit him to address us on all the allegations of mala fides raised by the petitioner. Considering the view that we have taken, we do not find it necessary to deal with the same.

3. Respondent Nos. 2, 3 and 4 are the Managing Director, the Financial Advisor and the Executive Engineer of the Maharashtra State Road Development Corporation (M.S.R.D.C), respectively. Respondent No. 5, M/s Ellora Constructions, is also one of the offerers. For convenience we will refer to respondent Nos. 2 to 4 as the respondents.

4. In or about Feb./March, 2006, M.S.R.D.C. had invited tenders for allotment of the toll collection contract at Lahuki on the Aurangabad-Jalna Road. The petitioner purchased the tender documents on 6-3-2006.

5. It is necessary to refer to one aspect that preceded the disputes in the present writ petition. To the normal conditions of such tenders, the respondents added Sub-clause (h) to Clause 23 of the present Tender which reads as under:

Intending bidder who has got the tendency to go for litigation against M.S.R.D.C. regarding fixing the agency approved by the M.S.R.D.C. (or to go for litigation for any other cause) thereby causing financial loss to the Corporation, shall not be considered for eligibility. M.S.R.D.C. has full power to decide eligibility of intending bidder based on above criteria.

6. The petitioner, on grounds not necessary to elaborate, contended that this clause was introduced mala fide only to exclude him. The petitioner challenged the same by filing Writ Petition No. 2242/2006 in this Court. The petitioner's grievance was redressed as the respondents agreed to delete the condition.

7. The petitioner, thereafter, filled in and submitted the tender form in the two envelope system. Envelope No. 1 was in respect of the eligibility criteria and envelope No. 2 contained the financial bid. Clause 2 of the tender conditions

stipulated eligibility and qualification criteria. We will refer to the relevant sub-clauses shortly while dealing with the rival contentions.

8. Envelope No. 1 submitted by the petitioner was opened. The respondents, however, considered the petitioner to be ineligible and, therefore, did not open envelope No. 2 submitted by him. Mr. Adwant, the learned Counsel appearing on behalf of respondent Nos. 2, 3 and 4 fairly tendered a document in Court which stipulated only one reason for the disqualification of the petitioner from the tender process. The petitioner was considered ineligible under Clause 2.3.5 of the tender terms.

9. A consideration of Clause 2.3.5. necessitates a reference to certain other clauses as well. The following clauses are relevant and read as under:

2.3.5 Audited Balance Sheets along with Profit and Loss account certified by Chartered Account (Accountant) for the last three financial years in case of companies. In other cases tax audit report along with Balance Sheet and Profit and Loss account, duly certified by Chartered Accountant in terms of provision of Section 44AB, [Income Tax Act, 1961](#).

(Emphasis supplied.)

2.4.2. The net worth of the offerer shall be as stated at Sr. No. 6 in Vol. II page 71. Normally it shall be 7.5% of the annual estimated realisation. However M.S.R.D.C. has right to change this as per the requirement of M.S.R.D.C. and shall always be as given at Sr. No. 6 on page 71 of Vol. II of offer document.

19.4. All envelopes No. 2 of the offerers whose envelope No. 1 do not contain the specified documents or any of the specified documents is missing or the eligibility criteria is not fulfilled as stipulated will be separated out, and shall not be opened. A note indicating the nature of deficiency and the fact that it is not opened shall be recorded without communication to any of the offerer.

10. It is pertinent to note that the respondents admit that the net worth of the petitioner is more than the prescribed limit (paragraph 14 of the affidavit in reply filed on behalf of respondent Nos. 2 to 4). It is also admitted that the balance sheet

in respect of the sole proprietary business of the petitioner was audited in accordance with Section 44AB of the Income Tax Act. It was contended, however, that, the petitioner's personal balance sheet was not audited and was, therefore, not acceptable as per Clause 2.3.5. The admission and the ground are amplified in paragraph 17(i) of the said reply which reads as under:

(i) Disqualification on the ground of inadequate net worth - For the Lahuki toll station - The petitioner has submitted audited balance sheet in the firm's name where the net worth is less than the prescribed limit of Rs. 72 lacs. Another personal balance sheet of the petitioner reflects the net worth, which exceeds the prescribed limit, however the balance sheet is not audited as per Clause 2.3.5. on page 7 of the offer document, therefore the petitioner was/is disqualified.

11. The petitioner is an individual who also carries on business in the firm name and style of M/s Ghai Constructions as a sole proprietor thereof. The petitioner's income is assessed under different heads, including in respect of his business income. There is no dispute that his business income is audited. His income from other sources, which is not his business income, is not audited.

12. The question that falls for consideration is whether an individual who has income from different sources including income from business is bound to have his income from sources other than the business also audited under Section 44-AB of the Income Tax.

13. Mr. Adwant contended that the petitioner not having had his income, other than his business income audited in accordance with Section 44AB is ineligible under Clause 2.3.5.

14. The submission is not well founded. Before dealing with the question of law, it is important to note two things.

Firstly, this contention has been taken against the petitioner for the first time. The petitioner has participated in various similar tenders floated by the respondents. The averment in paragraph 15 of the writ petition in this regard has significantly not been denied in the affidavit in reply filed on behalf of the respondents. His

accounts had been furnished pursuant to similar clauses in the tender documents in those cases as well. Not once had the respondents raised this as a ground for rejecting his eligibility.

15. Though this fact cannot obviously be an aid to interpreting the provisions of Section 44AB it certainly indicates an intention to exclude the petitioner at any cost from the tender process.

16. Clause (a) of Section 44-AB is applicable in the petitioner's case and the provisos do not apply to him. Section 44AB is as under:

'Section 44AB : Audit of Accounts of Certain Persons Carrying on Business or Profession:

Every person,-

(a) Carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds forty lakh rupees in any previous year, or

(b) Carrying on profession shall, if his gross receipts in profession exceed ten lakh rupees in any previous year, or

(c) Carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under Section 44AD or Section 44AE or Section 44AF, as the case may be, and he has claimed his income to be lower than the profits or gains so, deemed to be the profits and gains of his business, as the case may be, in any previous year, get his accounts of such previous year audited by an accountant before the specified date and furnished by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed :
Provided that this section shall not apply to the person, who derives income of the nature referred to in Section 44B or Section 44BB or Section 44BBA or Section 44BBB, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later:

Provided further that in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and furnished by that date the report of the audit as required under such other law and a further report in the form prescribed under this section.

Explanation : For the purposes of this section,--(i) 'Accountant' shall have the same meaning as in the Explanation below Sub-section (2) of Section 288;

(ii) 'Specified date', in relation to the accounts of the previous year relevant to an assessment year means,- (a) Where the assessee is a company, the 30th day of November of the assessment year;

(b) In any other case, the 31st day of October of the assessment year.

17. The language of Section 44AB is clear. The requirement of compulsory audit is only in respect of the business carried on by the person and not in respect of his income from other sources.

18. This interpretation is also supported by the Income Tax Rules, 1962 and the forms prescribed thereunder. Rule 6G(l)(b) of the Income Tax Rules reads as under:

6G. (1) The report of audit of the accounts of a person required to be furnished under Section 44AB shall-

(a)

(b) in the case of a person who carries on business or profession, but not being a person referred to in Clause (a), be in Form No. 3CB.' (2) The particulars which are required to be furnished under Section 44AB shall be in Form No. 3CD.

Form No. 3CB inter alia provides:

3. (a) I/We report the following observations/comments/discrepancies/inconsistencies if any:

(b) Subject to above-

A) ...

B) In my/our opinion, proper books of account have been kept by the head office and branches of the assessee so far as appears from my/our examination of the books..

(emphasis supplied)

19. The form itself indicates that the audit report is required only in respect of the books of accounts pertaining to the business. This is clear from the requirement that the Accountant is required to state that in his opinion proper books of accounts have been kept by the head office and the branches of the assessee. It does not require the accountant to opine regarding the other records of the assessee.

20. The expression 'his accounts' in Section 44AB does not refer to all the accounts of an individual assessee. The term 'his' must be read with the term 'person' used in the beginning of the section. The term 'person' is defined in Section 2(31) as under:

'2. Definitions. - In this Act, unless the context otherwise requires-

...

(31) 'Person' includes-

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not.

(vi) a local authority, and

(vii) every artificial judicial person, not falling within any of the preceding sub-clauses.

Take for example, the case of a partnership or a body of individuals. An interpretation contrary to the one suggested by us would require not merely the firm but every partner thereof and not merely the body of individuals but every member thereof to have his individual income, unrelated to the business of the firm or the body of individuals, also to be audited. This would amount to rewriting the section altogether.

21. In order to ascertain the scope of Section 44AB, it is useful to note that, on 2-3-1970, the Government of India constituted a high power committee of experts under the chairmanship of Sri Justice K.N. Wanchoo, retired Chief Justice of India, to examine and suggest legal and administrative measures to unearth black money, to check the avoidance of tax arrears and to indicate the manner in which the tax assessment and tax administration may be improved and for giving effect to the recommendations. The Wanchoo Committee, in its final report submitted to the Government of India in December, 1971, inter alia, recommended mandatory audit at least in the big cases. The recommendation was also with a view to saving considerable time of the assessing officers which could then be utilized by them for more important investigational aspects of a case. Audit would help in the proper presentation of accounts before the assessing officers. Ultimately, Section 44AB was introduced in the Income Tax Act only with effect from 1-4-1985 providing for compulsory audit in the no corporate sector.

22. While stating in detail the need for mandatory audit, the Committee, inter alia, observed in paragraph 2.148 as under:

We, therefore, recommend that a provision be introduced in the law making presentation of audited accounts mandatory in all cases of business or profession where the sales/turnover/receipts exceed Rs. 5 lakhs or the profit before tax exceeds Rs. 50,000/-.

Thus, the recommendation for the presentation of audited account was in all 'cases of business or profession' and not in respect of the entire income of a person carrying on a business or a profession. It is these recommendations which were accepted in the form of Section 44AB of the Income Tax Act.

23. In the case of an individual carrying on business as a sole proprietor it is necessary to comply with the provisions of Section 44AB only in respect of his business income. It would not be necessary to comply with the provisions of Section 44AB in respect of his other income. The same would apply in the case of a professional whose income is over Rs. 10,00,000/- per annum. It is his professional income and not his income from other sources, which would be covered by the provisions of Section 44AB.

24. Faced with this, Mr. Adwant submitted that, on a proper interpretation of Clause 2.4.2. it is the net worth of the income from business of the offerer that should be considered and not the net worth of the offerer based on his other income as well. Firstly, this was not even a ground for disqualifying the petitioner. Nor was the petitioner disqualified on this ground in the several other cases where he filled in tenders. This ground is a mere afterthought.

25. Even otherwise, we are unable to accept this contention. Clause 2.4.2. clearly refers to the net worth of the offerer and not the net worth of the offerer only in respect of his business income or turnover. To accept Mr. Adwant's contention would be adding to the language of Clause 2.4.2. thereby re-drafting it.

26. Here again it is important to note that in all other contracts, the petitioner was found eligible despite an identical fact situation. This contention taken for the first time is also an afterthought.

27. Mr. Adwant then submitted that the petitioner was also found ineligible in view of the fact that he had filed proceedings against the respondents. This contention is rather curious, especially in view of the fact that Clause 23(h) had been deleted by the respondents.

28. However there is nothing to suggest that the legal proceedings adopted by the petitioner were at all mala fide or vexatious. The mere fact that a citizen challenges the action of a public body in accordance with law cannot, ipso facto, brand him undesirable for the purpose of considering him for public contracts.

29. Mr. Adwant submitted that the petitioner's offer was rejected also on the ground of failure to fulfil the demands made by the Corporation and failure to submit a Bank guarantee in respect of another Toll Station.

30. This submission too appears to be a mere afterthought. This was not the ground on which the petitioner was found ineligible. We have mentioned earlier, the document tendered by Mr. Adwant, which stipulated only one ground/reason for rejecting the petitioner's tender, namely, under Clause 3.2.5 of the Terms of the Tender. There is not a whisper in the affidavit in reply as to how the respondents came to a decision in this regard. Nor is there anything in the affidavit in reply about any Committee having been constituted for the purpose of considering the petitioner's eligibility in this regard. Admittedly, the petitioner has not only not been blacklisted but has not even been served with a notice, threatening to blacklist him. The reliance upon Clause 23(f) is, therefore, ex-facie, unsustainable and an afterthought.

31. Mr. Adwant stated that respondent No. 5 had tendered a bid of Rs. 7,90,00,011/- for three years. The petitioner's financial bid, in envelope No. 2, as stated earlier, was not opened. The petitioner, however, stated in Court that his bid was Rs. 7,90,00,000/-. The difference, therefore, between the two is only Rs. 11/-.

32. Mr. Godsay alleged that respondent No. 5 altered their bid after the petitioner's financial bid was illegally opened and his bid was disclosed. We do not find it necessary, at this stage, to consider this allegation. We will presume in favour of the respondents that the fifth respondent added a sum of Rs. 11/- to the bid of Rs. 7,90,00,000/- on account of it being an auspicious figure.

33. If all factors are otherwise equal, we have no doubt that the respondents must consider the fact that one bid was higher than the other only by Rs. 11/-, as justifying their proceeding under Clause 22 of the Tender Terms qua both,

respondent No. 5 and the petitioner. They are both substantially responsive offerers whose bids are the highest notwithstanding the difference of Rs. 11/- the difference coming within the ambit of expression de minimis no corporate lex. Clause 22 reads as under:

22. Negotiations: The Corporation may carry out negotiations with the substantially responsive offerer whose offer is highest for modification of the offer by calling offerer in its office in which case, the offerer shall remain present in the office for negotiations. As a result of negotiation the offerer shall give his revised offer in writing. The original offer shall then be treated as modified and modified offer shall be treated as final offer.

34. If the figure disclosed by the petitioner of Rs. 7,90,00,000/- is correct, the respondents are directed to proceed under Clause 22 considering the petitioner and respondent No. 5 to be the substantially responsive offerers whose offers are the highest.

35. Rule is made absolute by directing the respondent Nos. 2 to 4 to consider the petitioner's bid by opening his envelope No. 2 and by inviting respondent No. 5 and the petitioner and permitting them to revise their offers under Clause 22 of the tender terms. Respondent Nos. 2 to 4 shall pay the costs of this writ petition to the petitioner fixed at Rs. 15,000/-. The order is stayed for a period of 12 weeks to enable the respondents to challenge this order.