IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

FRIDAY, THE 30TH DAY OF JANUARY 2015/10TH MAGHA, 1936

WP(C).No. 34140 of 2014 (N)

PETITIONER(S):

S.K.G. GRANITES AND QUARRIES PVT. LTD.,
OTTUPARA P.O., KONNI, PATHANAMTHITTA DISTRICT- 689 691,
REPRESENTED BY ITS MANAGER.

BY ADVS.SRI.V.PHILIP MATHEW,
SRI.GIBI.C.GEORGE.

RESPONDENT(S):
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1. THE HEAD, INDIAN RARE EARTHS LIMITED,
   CHAVARA , KOLLAM -691 583.

2. INDIAN RARE EARTHS LIMITED,
   CORPORATE OFFICE, PLOT NO. 1207,
   VEER SAVARKAR MARG, NEAR SIDDHI VINAYAK TEMPLE,
   PRABHADEVI, MUMBAI -400 028,
   REPRESENTED BY ITS CHAIRMAN & MANAGING DIRECTOR.

3. DEPUTY GENERAL MANAGER (COMML),
   INDIAN RARE EARTHS LIMITED, CHAVARA,
   KOLLAM DISTRICT- 691 583.

4. DEENS CONSTRUCTIONS,
   1ST FLOOR, M.A. BOOK WORK, CIVIL LANE,
   BYEPASS JUNCTION, PALARIVATTOM,
   KOCHI -682 025.

5. THREE STAR SHIPPING SERVICES,
   5/68B, ANNA NAGAR, TUTRICORIN,
   TAMIL NADU.

6. CHALLAYAM TRAVELS & TRANSPORTS,
   CHALLAYAM DALE, S.V. MARKET P.O.,
   KARUNAGAPPALLY, KOLLAM DISTRICT- 690 573.

7. T.V.K. CONSTRUCTIONS,
AARAMAM, PADA NORTH, KARUNAGAPPALLY ,
KOLLAM DISTRICT-690 544.

R1 TO R3 BY ADVS. SRI.M.GOPIKRISHNAN NAMBIAR,
SRI.P.GOPINATH,
SRI.P.BENNY THOMAS,
SRI.K.JOHN MATHAI,
SRI.JOSON MANAVALAN,
SRI.KURYAN THOMAS.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27-01-2015, ALONG WITH WP(C). NO. 35106 OF 2014 AND WP(C).NO.663 OF 2015, THE COURT ON 30-01-2015 DELIVERED THE FOLLOWING:

rs.

WP(C).No. 34140 of 2014 (N)

APPENDIX

PETITIONER'S EXHIBITS:-

EXHIBIT P1	COPY OF TENDER NOTIFICATION ISSUED BY THE INDIAN RARE EARTHS LIMITED FOR LOADING AND TRANSPORTATION OF SPIRAL OUTPUT.
EXHIBIT P2	COPY OF COMMUNICATION DATED 27/10/2014 FROM THE 3RD RESPONDENT TO THE PETITIONER.
EXHIBIT P3	COPY OF REPRESENTATION DATED 09/12/2014 FROM THE PETITIONER TO THE 1ST RESPONDENT.
EXHIBIT P4	COPY OF LOGISTIC SERVICE CONTRACT BETWEEN PETITIONER AND KRISHNA CRUSHER METALS.
EXHIBIT P5	COPY OF INCOME TAX RETURN CERTIFICATE ALONG WITH BALANCE SHEET OF THE PETITIONER.
EXHIBIT P6	COPY OF THE INCOME TAX RETURN ALONG WITH BALANCE SHEET AND PROFIT LOSS ACCOUNT.
EXHIBIT P7	COPY OF THE ANNUAL RETURN UNDER THE KVAT.
EXHIBIT P8	COPY OF THE STATEMENT OF ACCOUNT FROM THE FEDERAL BANK, PATHANAMTHITTA BRANCH.
EXHIBIT P9	COPY OF THE CERTIFICATE REGISTRATION KVAT.
EXHIBIT P10	COPY OF THE CERTIFICATE OF REGISTRATION UNDER CENTRAL SALES TAX (REGISTRATION AND TURN OVER) RULES.
EXHIBIT P11	COPY OF THE CERTIFICATE DATED 04/04/2012 FROM NATIONAL SECURITIES DEPOSITORY LIMITED.
EXHIBIT P12	COPY OF THE WORK COMPLETION CERTIFICATE DATED 20/07/2014 FROM KRISHNA CRUSHER METALS.
EXHIBIT P13	COPY OF THE CERTIFICATE FROM KRISHNA CRUSHER METALS REGARDING PURCHASE OF RUBBLE DURING 2013-2014.
EXHIBIT P14	COPY OF THE CERTIFICATE FROM KRISHNA CRUSHER METALS REGARDING PURCHASE OF RUBBLE DURING 2012-2013.
EXHIBIT P15	COPY OF THE EMAIL DATED 15/01/2015 FROM THE THIRD RESPONDENT.

WP(C).No. 34140 of 2014 (N)

<u>RESPONDENT'S EXHIBITS</u>:-

EXT.R1A	**COPY OF THE GOVERNMENT ORDER DATED 16/05/2014.**
EXT.R1B	**COPY OF THE GOVERNMENT ORDER DATED 12/11/2014.**
EXT.R1C	**COPY OF THE MAIL DATED 15/01/2015 SENT BY THIS RESPONDENT TO THE PETITIONER IN THE WRIT PETITION.**
EXT.R1D	**COPY OF THE LETTER DATED 16/01/2015 SUBMITTED BY THE PETITIONER BEFORE THE RESPONDENT COMPANY.**
EXT.R1E	**COPY OF THE MINUTES OF THE MEETING OF THE STANDING TECHNICAL COMMITTEE HELD ON 17/01/2015.**

//TRUE COPY//

P.A. TO JUDGE

rs.

P.R. RAMACHANDRA MENON, J.

W.P(C). Nos. 34140, 35106 of 2014
& 663 of 2015

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Dated this the 30th day of January, 2015

<u>J U D G M E N T</u>

The petitioners have approached this Court challenging the course of action pursued by the respondent Company whereby the technical bids submitted by them have not been accepted due to different reasons, mainly alleging that they are defective; whereas, similar defects in respect of the tender quoted by the 4th respondent are given a 'go-bye' and steps are being taken to award tender to the 4th respondent in WP(C) No.35106/2014 & 34140/2014. In WP(C) No.663/15 preferred by the very same petitioner who has filed WP(C) No. 34140/2014, the challenge is against the restrictions/stipulations imposed in Ext.P4 'tender forms' as to the 'experience' to be possessed by the intending participants.

2. The case of the petitioners is that, they have quoted much lower rate than the 4th respondent in WP(C) No.35106/2014 & 34140/2014 and that elimination of the petitioners is with a

malafide intention to extend undue favours to the 4th respondent. In WP(C) No.35106/2014, the reason for non-consideration of the technical bid was that, the price quoted was shown as part of the technical bid, which is forbidden. The case of the said petitioner is that, it cannot adversely affect the rights and interest of anybody including the respondent Company or other participants, as the price if at all mentioned in the technical bid, can only cause prejudice to the petitioner / bidder as there is a chance for others to know about the price quoted by the petitioner even before opening the price bid, enabling the others to have a cartel formation. That apart, there was similar defect in the case of the tender quoted by the 4th respondent, wherein the amount has not been quoted "**in words**", but for mentioning the 'figures', which will enable the interested parties to have it varied or manipulated later. Still, the said tender of the 4th respondent was sought to be accepted and hence the challenge; in view of the 'double-standards'.

3. In the case of the petitioner in WP(C) 34140/2014, the rejection of the technical bid was with reference to the lack of prescribed experience as notified in Ext.P1 tender condition.

According to the petitioner, they are satisfying all the requisite elements including experience and that the attempt of the respondent Company is to add something more into the tender condition, which originally was not there. Allegation of malafides which intent to extend undue favours to the 4th respondent is raised in the said writ petition as well. Coming to WP(C) No.663/2015, as mentioned already, the stipulation in the tender forms with regard to the 'Experience Certificate' to be procured and produced is sought to be challenged, also praying to have an opportunity for the petitioner to participate in the tender.

4. Counter affidavit and additional affidavit have been filed on behalf of the respondent 1 to 3 in both WP(C) Nos.35106/2014 & 34140/2014. The 4th respondent has filed counter affidavit in WP(C) No.34140/2014. The petitioner has filed reply affidavit in both the cases. The petitioner in WP(C) No.34140/14 has produced some additional documents as well along with concerned I.A.s., besides an additional affidavit dated 20.01.2015 produced along with I.A. No.990/2015.

5. Heard both the sides in detail.

6. In the course of hearing held on 14.01.2015, the nature

of objection raised from the part of the respondent Company as to the alleged defects was subjected to scrutiny and the Company was required to reconcile, how it came to be cleared in the case of the 4th respondent Company and why such ground was not applied in a uniform manner. It is contended from the part of the petitioners that, tender conditions actually consist of 'essential conditions' and 'incidental conditions' and that the essential conditions stand already satisfied, whereas, the alleged defect, if at all any, could only be in respect of the incidental conditions which could always be cured.

7. After the hearing held on 14.01.2015, a consensus was reached among the parties to have the price bids of both the petitioners along with those of other valid tenderers be opened and verified, if the tenders submitted by the petitioners did not suffer from any major defects. A detailed order was passed on that day, which reads as follows:

> *"Heard the learned counsel for the petitioners, the learned Standing Counsel appearing for the respondent Company and the learned Counsel appearing for the respondent/Deens Constructions.*
>
> *2. The main case put up by the petitioner in*

W.P.(C) No.35106 of 2014 is that the petitioner has been wrongly disqualified for flimsy reason that the 'price' was mentioned in the technical bid, inspite of the fact that the petitioner's quote happens to be the lowest. It is stated that even if some minor defect was there, it could not be taken as a ground to reject the tender, as it is not an essential condition. If such a trait is to be accepted and applied in the case of the petitioner, similar defects are there in the case of the 4th respondent as well, who has not mentioned the price/quote in words in the tender and hence the tender submitted by the 4th respondent is liable to be viewed as a defective tender.

3. In the case of the petitioner in the other cases, according to the respondent Company, the petitioners had not submitted all the relevant records, particularly from the income tax Department to sustain the credentials. The learned Counsel for the petitioners points out that, it cannot be taken as a ground to reject the tender in toto, as it was a curable defect and that the petitioners have submitted the documents subsequently.

4. Considering the plea made by the respondent Company that the work has to be completed in a time- bound manner and that the price bid of the petitioners herein also could be considered, if they satisfy the basis eligibility other than the minor discrepancies as now pointed out, *there will be a direction to the respondent Company to open the price bid of the petitioners along with the price bid of other valid tenderes and inform the position to this Court, furnishing the outcome in a tabulated form. The documents produced by the petitioners and also the 4th respondent, if any, in support of their quote shall be considered while considering the matter as above.*

Post after one week.”

8. Pursuant to the above order, the price bids quoted by the petitioners were also opened, along with that of the 4th respondent and other valid tenderers. It is seen that the price quoted by the petitioner in WP(C) No.34140/2014 and the WP(C) No. 663/2015 is to the extent of Rs.399/- per metric ton, whereas, the petitioner in the other case has quoted Rs.435/- per metric ton. The rate quoted by the 4th respondent is Rs.513/-MT. The learned counsel for the petitioner in WP(C) Nos.34140/2014 & 663/2015 submits that, their tender being the lowest, the work shall be awarded to them, more so, when there is substantial difference between the rates quoted by the said petitioner and that of the 4th respondent or in relation to the rate quoted by the petitioner in the other case who happens to be at L2. The version

of the respondent Company is that, the petitioner in WP(C) Nos.34140/2014 & 663/2015 is not at all qualified, having no experience as prescribed and no document has been produced to substantiate the experience claimed, despite granting several opportunities. The very fact that the said petitioner is challenging the tender conditions / stipulations in the tender form in WP(C) No. 663/2015 itself is an indicator to the effect that, he does not satisfy the condition. It is further pointed out that, nothing has been added to the conditions than those clearly mentioned in Ext.P1 tender notice and the only question is whether the said petitioner does satisfy the requirements as per the tender notice. The respondent Company submits that, on opening the price bid ignoring minor defects in the tender, taking a uniform stand in all cases, tender of the petitioner in WP(C) No.35104/2014 stands to be at the lowest (L1) among the valid tenders, which is to be accepted.

9. The learned counsel for the Company submits that, Ext.P1 tender was floated by the respondent Company, based on Exts.R1(a) and (b) Government Order dated 16.05.2014 & 12.11.2014 permitting the Company to collect 46000 cu.m.

dredged out sand from Thottappilly Fishing Harbour, separate the mineral sand from the dredged out sand by installing a spiral unit at the harbour site itself; and transport the mineral sand to the Chavara Plant of the respondent Company for processing. The work had to be completed within 70 days from 15.12.2014 and that the time schedule has to be strictly adhered to, lest it should adversely affect the free movement of fishing vessels. It is also stated that because of the writ petitions filed by the petitioners, time has already run out and the Government may have to be approached for getting extension of time.

9. Sri.Grashious Kuriakose, learned Senior counsel appearing for the petitioner in WP(C) 35106/2014 submits that, the petitioner having been placed at L1, is ready to execute the agreement and complete the work within the time schedule. It is stated that the work involved requires much skill and experience and that the petitioner is having sufficient infrastructure and is ready to execute the entire work within the balance time available and no extension is required. The credentials of the petitioner in WP(C) No.35106/2014 having now been accepted and rated as the lowest among the valid tenderers, the prayer raised by the

petitioner in the writ petition, to direct the respondents 1 to 3 to accept the tender based on Ext.P1 stands satisfied, and no further orders are necessary in this regard. But the question is whether the petitioner in the other two cases, who has quoted Rs.399/- per metric ton, is having any actionable claim or a valid cause of action.

11. With regard to the disputed question of qualification of the petitioner in WP(C) No.34140/2014 & WP(C) No.663/2015, the learned counsel for the respondent Company points out that, the prescribed qualification by way of 'experience' and the documents required to be produced have been clearly mentioned in Ext.P1 tender notice itself, against Column No.11, which reads as follows:

Qualification criteria of bidders	**Financial:** **The bidder Shall have valid Service Tax Registration.** Average annual financial turnover during the last three years ending on 31st March 4 should be at least ₹7887672/- **(bidder to furnish copy of Income Tax Return/TDS certificate/Audited Financial statement-P&L statement)** **Experience:** Having successfully carried out similar works during the last seven years ending 31st August-2014 meeting any of the following: a) Three similar completed works costing not less than ₹10516896/- each,

	b) Two similar completed works costing not less than ₹13146120/- each, c) One similar completed work costing not less than an amount equal to ₹ 21033792/- each. **(The bidder to submit work orders and work completion certificate along with TDS(Form 26AS) / ITR as a proof for the value of the work done against experience)** **<u>Definition of similar works:</u>** Transportation or Loading & Transportation or Excavation, Loading & /Transportation of sand / Boulders / Rubble / Gravel / Red earth / Quarry materials or other similar materials by tippers / trucks / dumpers or Stevedoring **<u>Resources:-</u>** The bidder shall submit detailed action plan indicating the details of equipments which will be deployed for loading and transporting the daily target of 500 tons.

12. The above petitioner places reliance on Ext.P6 document which is the income tax return stated as produced along with Balance Sheet and Profit and Loss Account. The income, as given in the P&L statement for the year ending on 31.03.2013, is stated as Rs.8,86,80,570/- which is the revenue from operations, particulars of which have been given under <u>Note 16</u>. Quantum of 'other income' is to the extent of Rs.5,30,993/-, particulars of which has been given under <u>Note 17</u>. Note 16 dealing with revenue from operations as discernible from the very

same document shows that the said income of Rs.8,86,80,570/- is from the sale of products and the 'other income' of Rs.5,30,933/- shown under Note 17 is in respect of 7 different items as given below:

"16. SALES		
a) Sale of Products :	*8,86,80,570.00*	*6,03,04,460.00*
	8,86,80,570.00	*6,03,04,460.00*
17. OTHER INCOME		
Miscellaneous Income	*62,550.00*	
Discount Income	*8,070.00*	*5,808.00*
Scrap Sale	*97,182.00*	*18,565.00*
Interest Received	*1,261.00*	*674.00*
Insurance claim received	*1,89,820.00*	
Income Tax refund	*39,280.00*	
Vehicle Rent(Metal)	*1,32,830.00*	*1,03,440.00*
	5,30,993.00	*1,28,487.00"*

13. From the above, it is seen that the documents produced by the petitioner do not establish the requisite experience of specified value / quantum as notified in Ext.P1 tender conditions. The explanation sought to be offered by the petitioner by way of reply affidavit and the additional affidavit or the affidavits in support of the different I.As does not come to the rescue of the petitioner, in so far as the terms are quite clear and categoric, as to the nature of experience to be obtained in undertaking similar works as defined in the very same tender notification and also as to the type of documents to be produced

along with the tender. The tender submitted by the petitioner in WP(C) No.34140/2014 and WP(C) No.663/15 was not summarily rejected by the respondent Company, but was given a further opportunity, vide Ext.P2, seeking for a clarification and to produce further materials. The documents on which the petitioner want to rely on have been produced before this Court and the basic one is Ext.P6 as mentioned hereinbefore, which reflects the factual position as discussed above. This Court finds that the said petitioner has not satisfied the requisite condition and is not having the experience <u>as stipulated by the respondent Company</u> and as such the tender submitted by the said petitioner is not liable to be entertained, for want of necessary pre-qualification. This Court does not find any merit in the contention raised by the said petitioner, that some additional condition has been sought to be incorporated by the respondent Company changing the stipulations originally incorporated. No such modification has been effected and the conditions mentioned in Ext.P1 tender notice alone are sought to be given effect to. Rules of the game have not been changed after commencement of the game.

14. The learned counsel for the petitioner seeks to place

reliance on the decision rendered by this Apex Court in **B.S.N.Joshi & Sons Ltd. V. Nair Coal Services Ltd. and others (2006 (11) SCC 548)** and **Michigan Rubber (India) Ltd. (M/s.) V. State of Karnataka and Others (2012 KHC 4446)** as to the scope of interference by this Court in matters of similar nature. This Court does not find any support from the said decisions, to be in favour of the petitioner. On the other hand, the Apex Court alerts that interference of Court is not warranted, unless the action of the tendering authority is malafide and it misuses statutory powers; nor would the Court interfere because it feels some other terms in the tender could have been fairer, wiser or more logical. It is true that the conditions could be essential conditions and incidental conditions and that in the case of the latter, it need not stand in the way of considering the technical bid. But in the case of the petitioners in WP(C) No.34140/14 and WP(C) No.663/15, the defect is with regard to the lack of sufficient experience, as prescribed in Ext.P1 tender notification, which cannot but be an essential condition and not an incidental one. Since the petitioner has not satisfied the said requirement and has not produced the relevant documents as per the pre-qualification norms the challenge in this regard is not liable to be entertained under any circumstances.

15. The challenge raised in WP(C) No. 663/2015 to strike down the stipulations in Ext.P4 tender form produced therein is found as devoid of any merit or bonafies and it is not for the participant to dictate terms to the Awarder. That apart, it is not open for the said petitioner to challenge the tender conditions, after participating in the tender and losing the game. In the above circumstances, this Court finds that the challenge raised by the petitioner in WP(C) No.34140/2014 and 663/2015 fails and accordingly, both these writ petitions are dismissed.

In view of the factual position brought on record that the tender submitted by the petitioner in WP(C) No.35160/2014 happens to be the lowest among the valid tenders scrutinized by the respondent Company pursuant to the interim order passed by this Court, the respondent Company is set at liberty to proceed with further steps to have the deal finalised in this regard. WP(C) No.35160/2014 is disposed of accordingly.

Sd/-

P.R. RAMACHANDRA MENON, JUDGE.

Pn