IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : -09-2014

Coram

THE HONOURABLE MR. JUSTICE B.RAJENDRAN

Review Application No. 200 and 201 of 2014
and
M.P. Nos. 1, 1, 2, 2, 3 and 3 of 2014

M/s. Ambuj Hotels & Real Estates (P) Ltd
Rep. By its Director
Office at 7575, Gali No.1
Ram Nagar, Arakashan Road
Paharganj, New Delhi – 110 055 .. Petitioner in both the Review Applications

Versus

1. The Executive Officer (Catering)
Rail Bhawan
New Delhi – 110 001

2. The Chief Commercial Manager
Southern Railway
Head Quarters Office
Commercial Branch
Park Town, Chennai

3. Satyam Caterers Pvt Ltd
Rep. By its Authorised Signatory
Ashish Goel, 4th Floor
118/7, Masjid Road, Janagpura
Bhogal, New Delhi – 110 014 .. Respondent in both the Review Applications

(R3 impleaded as party respondent as per order dated 18.06.2014 made in MP Nos.3 and 3 of 2014 in WP No. 13932 and 19393 of 2014)

Review Applications filed under Order 47 Rule 1 read with Section 114 of CPC praying to review and re-consider the order dated 18.06.2014 passed in WP Nos. 13932 and 13933 of 2014 passed by this Court.

For Applicants : Mr. Pradeep Ranjan Tiwari in both the Review Applications

For Respondents : Mr. V.G. Suresh Kumar for RR1 and 2 in both the Review Applications

Mr. Rajkishore Bhagwatsaran for R3
in both the Review Applications

COMMON ORDER

Both these review applications have been filed by the writ petitioner in WP Nos. 13932 and 13933 of 2014 seeking to review the common order dated 18.06.2014 passed by this Court in those writ petitions.

2. According to the review petitioner, pursuant to the tender notification issued by the respondents 1 and 2 on 27.05.2013, inviting financial bid as well as technical bid, they have submitted their bid. One of the requirements for submission of the tender application is that the applicant should submit the Employees State Insurance Corporation (ESIC) registration Certificate along with the tender document as a proof of evidence to show that they have registered their name with the ESI Corporation. At the time of deciding the writ petition, this Court came to the conclusion that since the petitioner did not produce such certificate along with the tender document, even though the tender was opened one year ago during 2013, the respondents 1 and 2 are justified in not considering the tender document of the petitioner. Therefore, according to the review petitioner, this Court came to the conclusion that the petitioner did not fulfil the requirements as per the tender notification, he is not eligible to participate in the tender and eventually dismissed the writ petitions.

3. The learned counsel appearing for the review petitioner would only contend that even during the year 2002, the petitioner had obtained the ESIC Certification and the registration number was also promptly indicated the the tender document itself, of course, the number furnished was incorrect. There is a lot of difference between a person who is

ineligible to apply and a person who has qualification but did not furnish the details properly. The review petitioner falls in the latter category inasmuch as the petitioner is fully qualified and is in possession of ESIC Certificate, but the ESIC registration number was wrongly quoted in the tender document. However, this Court proceeded on the footing that the review petitioner did not possess ESIC Certificate at all and they are ineligible to participate in the tender. Therefore, according to the review petitioner, there is an error apparent on the face of the record which requires to be reviewed by this Court.

4. The learned counsel for the review petitioner would further contend that production of such certificate along with the tender document is not a mandatory one and it will not in any way disentitle the review petitioner from getting the contract awarded in their favour. Such a certificate is being insisted only to safeguard and secure the interest of the employees who may be employed by the contractor while implementing the contract. Such certificate is being insisted to ensure the safety of the employees to be employed by the contractor. Merely because such a certificate is not produced by the review petitioner, it will not be a ground for the respondents 1 and 2 not to process the petitioner's application. At best, the non-production of such certificate can be called as a defect, which can be cured by the petitioner later. However, during the course of argument in the writ petitions, it was argued on behalf of the respondents 1 and 2 as though non-production of such certificate is vital and the non-production of the document vitiates the tender document submitted by the petitioner. Therefore, this Court, considering that the production of such certificate is a mandatory one besides it was not produced at all by the review petitioner, dismissed the writ petitions, which is required to be reviewed.

5. The learned counsel appearing for the review petitioners, in support of his

contentions, relied on the decision of the Honourable Supreme Court in the case of (**Rashmi Metaliks Limited and another vs. Kolkata Metropolitan Development Authority and others)** reported in **(2013) 10 Supreme Court Cases 95** wherein the Honourable Supreme Court held that non-production of latest income tax return along with the bid will not be a ground to reject the tender document, instead, the tendering authority ought to have brought such discrepancy to the notice of the tenderer and even thereafter, such a discrepancy was not rectified by the tenderer, then the position would be different. Relying on this decision, the learned counsel for the review petitioner would contend that non-production of the ESIC Certificate by the review petitioner will not disentitle them from getting the contract awarded in their favour. According to the counsel for the review petitioner, in this case, the petitioner was not given an opportunity to produce the certificate or he was not put on notice regarding the alleged non-production of certificate at the earliest point of time.

6. Lastly, the learned counsel for the review petitioner would contend that at the time of deciding the writ petitions, this Court was under the impression that even though one year has passed from the date of submission of the tender document, the petitioner did not rectify the defect and there is laches and lapsed on their part. On the contrary, even though the tender documents were submitted during the year 2013, the bids were opened by the respondents 1 and 2 only during the year 2014. After opening the tender documents, the respondents 1 and 2, in their communication dated 01.04.2014, sought for a clarification with respect to the same number assigned by the review petitioner for the ESIC Registration as well as the Employees Provident Fund Account. Immediately, by a reply dated 04.04.2014, the review petitioner rectified the defect and produced the ESIC Certificate to the respondents 1 and 2. Therefore, according to the review petitioner, there

was no delay or laches on the part of the review petitioner and such alleged delay was taken note of by this Court at the time of dismissing the writ petitions. Therefore, the learned counsel for the review petitioners prayed for allowing the review applications.

7. On the contrary, the learned standing counsel appearing for the respondents 1 and 2, relying upon the counter affidavits filed on behalf of the respondents 1 and 2, would vehemently oppose the review petitions. According to the learned standing counsel appearing for the respondents 1 and 2, the contract in quesiton is a governmental contract and any decision taken thereof will not ordinarily be interfered with by this Court in exercise of jurisdiction under Article 226 of The Constitution of India. The tender documents contains the terms and conditions of the contract and the tenderer has an obligation to comply with all the requirements called for therein. When the petitioner did not fulfil such requirements at the time of submitting the tender, by producing a mandatory certificate sought for, the respondents 1 and 2 are justified in not considering the tender application of the petitioner. It is also stated that in the annexure to the tender document, it was clearly stated that production of documents listed therein are essentially to be enclosed. When such a requirement has not been fulfilled by the review petitioner, automatically, the review petitioner loose their right to get the contract awarded in their favour. As regards the letter dated 01.04.2014 sent by the respondents 1 and 2, it was in the nature of a clarificatory letter and it cannot be attached with much significance. The letter dated 01.04.2014 has become necessary because the petitioner quoted the same number for both ESIC Registration as well as Employees Provident Fund Registration. Therefore, such a letter dated 01.04.2014 issued by the respondents 1 and 2 will not entitle the petitioner to fill up their lacuna and produce the document at that point of time. When the review petitioner did not enclose the mandatory certificate along with the annexure to the tender document,

naturally, the respondents 1 and 2 would disqualify the petitioner from the purview of the tendering process. At the time of deciding the writ petitions, this Court has taken into account all the above aspects and rightly dismissed the writ petitions. Such an order of dismissal need not be reviewed by this Court at the instance of the petitioner especially when there is no error apparent on the face of the record.

8. The learned counsel for the respondents 1 and 2 would further contend that after dismissal of the writ petitions, the respondents 1 and 2 have awarded the contract in favour of the third respondent, who has also commenced the contract work. Therefore, at this stage, the relief sought for in the review applications need not be granted. It is also brought to the notice of this Court that as against the order dated 18.06.2014 passed in the writ petitions, which are sought to be reviewed in these review applications, the review petitioner has filed Writ Appeals before the Division Bench of this Court and the appeals have been dismissed, however, the Division Bench granted liberty to the review petitioners herein to file review applications. The review petitioners, having chosen to file writ appeals assailing the order dated 18.06.2014 and when the writ appeals have also been dismissed, these review applications are not maintainable.

9. In support of his contentions, the learned Standing counsel appearing for the respondents 1 and 2 relied on the decisions of the Honourable Supreme Court reported in (i) (**Jagdish Mandal vs. State of Orissa and others) (2007) 14 Supreme Court Cases 517** (ii) (**Global Energy Limited and another vs. Adani Exports Limited and others) (2005) 4 Supreme Court Cases 435** and (iii) (**Laxmi Sales Corporation vs. Bolangir Trading Co., and others) (2005) 3 Supreme Court Cases 157** for the proposition that in matters which are contractual in nature, this Court, in exercise of jurisdiction under Article

226 of The Constitution of India, should not ordinarily interfere unless the tender process is wholly arbitrary, discriminatory or actuated by malice. It is also further held in the aforesaid decisions that judicial review is impermissible in matters relating to award of contract.

10. The learned counsel appearing for the third respondent, in whose favour the contract was awarded by the respondents 1 and 2, would contend that the third respondent has already commenced the contract work and invested huge sums of money. In the counter affidavit filed on behalf of the third respondent, it was only contended that inasmuch as the third respondent commenced the contract work, at this stage, the relief sought for in the review applications need not be granted and he prayed for dismissal of the review applications.

10. I heard the learned counsel appearing for the respective parties and perused the materials placed on record. The review applications have been filed by the review petitioners by contending that they were given liberty to file such applications by the Division Bench of this Court in the writ appeals. Therefore, according to the review petitioners, the review petitions are maintainable.

11. Before adverting to the rival contentions urged on behalf of the respective counsel, it is necessary to look into para No.15 of the order dated 18.06.2014 passed in WP Nos. 13932 and 13933 of 2014, which is extracted as follows:-

> "15. A careful reading of the above would clearly indicate that the tendering authority should have brought to the notice of the bidder the mistake committed in the tender document. Here in this case, the requirement is a mandatory one and the same has been spelt out in the tender notification itself. Apart from that, the second respondent has also sent a letter dated 04.04.2014, but the fact remains that the tender was opened long back in the year 2013 itself. Therefore, even afte ropening of the tender bid and till date when the petitioner was not able to produce

the required documents, the petitioner cannot be allowed to rectify the mistake.

12. It is evident from the above paragraph that this Court, while deciding the writ petitions, was under the impression that the tender was opened even during the year 2013 but the petitioner did not produce the mandatory documents to prove that they have registered their firm with the ESI Corporation and obtained the ESI Certificate. It is now pointed out by the counsel for the petitioners that even though the tender documents have been submitted during the year 2013, the bids were opened only during the year 2014. It is also pointed out by the counsel for the petitioners that for the first time, it was brought to the notice of the review petitioners by a communication dated 01.04.2014 that they did not furnish the mandatory document and that the registration number furnished for both ESIC and Employees Provident Fund are one and the same. Immediately, within three working days, the petitioner, by a reply dated 04.04.2014 not only clarified the error crept in but also furnished the ESIC Certificate and rectified the defect. Therefore, it is now argued by the learned counsel for the review petitioners that this Court, at the time of dismissing the writ petitions, came to the conclusion that there was a delay on the part of the petitioners is factually incorrect and it requires to be reviewed. It is further stated that there is no delay or laches on the part of the petitioners in fulfilling the terms and conditions of the tender and such delay, if any, is attributable only on the part of the respondents-Railways inasmuch as they have taken a long time to point out the alleged defect in the tender application by writting a letter for the first time on 01.04.2014. This argument of the learned counsel for the petitioners has some force besides it is a plausible argument.

13. Even otherwise, in the first portion of the order dated 18.06.2014 in WP Nos. 13932 and 13933 of 2014, the reasons assigned by this Court for not accepting the contentions urged on behalf of the writ petitioners is that they did not comply with one of the

mandatory requirements as contemplated under the terms and conditions of the bid and went on to proceed with the matter as though the petitioner did not satisfy the prerequisite conditions which are precedent for considering their tender. According to the review petitioners, they have obtained the registration certificate from Employees State Insurance Corporation even during the year 2002 itself. It is not as though the petitioners did not obtain such certificate till the tender documents were submitted or the petitioners obtained such certificate after submission of the tender documents. Therefore, in my opinion, the petitioners have made a scope for reviewing the common order passed in the writ petitions. However, it has to be carefully examined whether these documents said to be in possession of the review petitioners is in tune with the requirement of the respondents 1 and 2 and whether by producing such documents the petitioners will be eligible for getting the contract awarded in their favour. It is also required to be considered whether such documents sought to be produced are mandatory or not. The validity of those certificates as well as the eligibility of the review petitioners to get the contract awarded in their favour cannot be gone into by this Court in these review petitions, but they could be decided later only in the writ petitions. The review petitioners have brought to the notice of this Court that they have obtained such certificate long back and made out a prima facie case. Therefore, suffice it to say that as per the decision of the Honourable Supreme Court in the case of (**Rashmi Metaliks Limited and another vs. Kolkata Metropolitan Development Authority and others)** reported in **(2013) 10 Supreme Court Cases 95** the non-production of the ESIC certificate alone will not deprive the review petitioners from the purview of consideration of their bid by the respondents 1 and 2. As held by the Honourable Supreme Court, in such a case, instead of disqualifying the bidder or disregarding their bid, the tendering authority has to bring such discrepancy to the notice of the tenderer by giving an opportunity for them to rectify the curable defect. In the present case, only for the first time on 01.04.2014 the respondents 1 and 2 sought for a clarification from the petitioner regarding the furnishing of same registration number for ESIC and Employees Provident Fund and the petitioner also, within three working days, by a reply dated 04.04.2014, rectified the mistake.

14. The learned standing counsel appearing for the respondents 1 and 2 relied on the decision of the Honourable Supreme Court reported in (**Jagdish Mandal vs. State of Orissa and others) (2007) 14 Supreme Court Cases 517** to contend that in matters relating to government contract/tenders, the power of judicial review is limited and unless it is shown that the procedures followed by the authorities is biased and discriminatory, the Court cannot ordinarily interfere. It is further held by the Honourable Supreme Court that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be born in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. It was also held that power of judicial review need not be invoked to protect private interest at the cost of public interest or to decide contractual disputes. No doubt, this Court cannot sit over appeal in the soundness of decision taken by the respondents 1 and 2 in awarding the contract but definitely, this Court can go into the question of eligibility or entitlement of the review petitioner and to examine whether the review petitioner has in fact complied with the mandatory tender conditions or not. As these aspects were not considered at the time of deciding the writ petitions, this Court is inclined to review the same.

15. The learned standing counsel for the respondents 1 and 2 also relied on the decision of the Honourable Supreme Court in the case of (**Ram Gajadhar Nishad vs. State of U.P. and others) (1990) 2 Supreme Court Cases 486** wherein the Honourable Supreme Court held that non-compliance of mandatory conditions relating to filing of

solvency certificate within the last date of submission of tender and current character certificate will disentitle the tenderer to get the contract and it cannot be reviewed by the Court. Relying on the above said decision, the learned standing counsel for the respondents 1 and 2 would contend that that when mandatory conditions imposed in the tender conditions have not been fulfilled by the petitioners, the petitioners are not eligible for being considered by the respondents 1 and 2 for awarding the contract. It is true that when the tender conditions have not been fulfilled, a tenderer is not entitled for consideration of awarding the contract in his or her favour. In this case, whether the petitioner fulfilled all the conditions required in the tender or not can only be gone into in the writ petitions especially when they have produced the ESIC registration certificate immediately on demand by the respondents 1 and 2. Therefore, the applicability of this decision has to be gone into only at the time of deciding the writ petitions and it is beyond the scope of the review petition.

16. The learned standing counsel for the respondents 1 and 2 next relied on the decision of the Honourable Supreme Court in the case of (**Laxmi Sales Corporation vs. Bolangir Trading Co., and others) (2005) 3 Supreme Court Cases 157** wherein it was held that this Court cannot go into the question as to whether the documents sought to be produced along with the tender application are mandatory or not and it is for the tendering authority to decide the same. This decision cannot be made applicable for consideration in the review applications because this Court is yet to consider whether the documents sought to be produced are mandatory or not and it cannot also be decided in the review petitions. The writ petitions were dismissed as though the petitioners did not possess such certificate or did not produce it along with the tender document. Inasmuch as the petitioners have now produced the certificate, a review of the order dated 18.06.2014 has become necessary.

17. For consideration of the Review Petitions, it has to be seen whether there is an error apparent on the face of the record warranting a review of the order dated 18.06.2014. As mentioned above, at the time of dismising the writ petitions, this Court proceeded as though the petitioner did not possess such certificate from ESIC at all and they did not rectify such defect even after lapse of time. Such a consideration which weighed this Court is now found to be factually incorrect inasmuch as the petitioners have obtained such certificate even in the year 2002 and also indicated the registration number in the tender document, though wrongly. Further, the petitioner has rectified the defect within three working days when it was brought to their notice by the respondents 1 and 2. Had these aspects were brought to the notice of this Court at the time of hearing of the writ petitions, there is every possibility for this Court to have taken a different view. Since these aspects have not been gone into by this Court at the time of deciding the writ petitions, the relief sought for in these review applications has go be granted. Therefore, this Court is of the view that this is a fittest case where the order dated 18.06.2014 has to be reviewed to subserve the interest of justice especially to review whether the petitioner has duly complied with the terms and conditions of the tender, whether there is lapses on the part of the petitioner in furnishing the ESIC certificate and whether the non-production of document is mandatory or not.

18. In the result, both the review applications are allowed as prayed for. No costs. Consequently, connected miscellaneous petitions are closed. Office is directed to post the writ petitions for adjudication on merits.

-09-2014

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Index : Yes / No

Internet : Yes / No

To

1. The Executive Officer (Catering)
   Rail Bhawan
   New Delhi – 110 001

2. The Chief Commercial Manager
   Southern Railway
   Head Quarters Office
   Commercial Branch
   Park Town, Chennai

B. RAJENDRAN, J

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Rev.Appln Nos. 200 & 201/2014

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