

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07-12-2015

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

WRIT PETITION No.17007 OF 2015

M/s.Abu Construction,
rep.by its Proprietor,
S.Abubakkar Sithick,
No.245, Gandhi Nagar,
Attur, Salem-636 102.

... Petitioner

-vs-

1. The Commissioner,
Attur Municipality,
Salem Kadalur Highway,
Attur-636102.

2. The Chairman,
Attur Municipality,
Salem Kadalur Highway,
Attur-636102.

3. Sri Amman Constructions,
727, Kaatukottai,
Chettikulam, Nadu Vallur,
Gengavalli.

... Respondents

Writ Petition under Article 226 of the Constitution of India, praying for issuance of a writ of mandamus, to direct the first and second respondents to accept the financial bid of the petitioner, for providing BT surface from Kottai Anna Statue to NH By-pass Link Road towards Forest Road in Ward Nos.1 and 2.

For petitioner : Ms.M.J.Prabhavathy

For respondents 1 & 2 : Mr.P.Srinivas

For respondent 3 : Mr.M.Santhana Raman

O R D E R

Heard Ms.M.J.Prabhavathy, learned counsel for the petitioner; Mr.P.Srinivas, learned Standing Counsel for respondents 1 and 2; and Mr.M.Santhana Kumar, learned counsel for respondent 3.

2. With the consent of the learned counsel for the parties, the Writ Petition is taken up for final disposal.

3. The petitioner, stating to be a registered contractor of the first respondent Municipality, has sought for issuance of a writ of mandamus, to direct the first and second respondents to accept his financial bid, for providing BT surface from Kottai Anna Statue to NH By-pass Link Road towards Forest Road in Ward Nos.1 and 2.

4. The facts of the case are, that the first respondent invited tenders for the abovesaid work, vide notice, dated 19.05.2015. The value of the contract was Rs.42.00 lakhs. The petitioner participated in the tender process and submitted his bid on 21.05.2015 at 03.00 p.m. The said tenders were to be opened on the same day at 03.30 p.m; however, citing technical snag, bids remained unopened on that day. The petitioner would further state that he came to know that two bids were manually submitted, which, according to him, is illegal, since the value of the contract is over and above Rs.10.00 lakhs, and, therefore, he registered his protest; thereafter, technical bids were opened on 02.06.2015, and the petitioner's technical bid was accepted on the same day, as well as that of the other bidders; and opening of the financial bids was fixed on 04.06.2015. According to the petitioner, at the time of opening of financial bids/quotations, the petitioner came to know that the bid submitted by the third respondent was defective, inasmuch as the bid was incomplete, and no rates were offered for one of the items, as described in Serial Number 15 of the Tender Schedule. The petitioner objected to the technical bid of the third respondent and also questioned the manual submission of the tender by the third respondent and another tenderer. The petitioner quoted at Rs.35,17,684.40 i.e., 16.24% less, and, according to him, the third respondent's bid suffers disqualification and, therefore, the petitioner's bid being the lowest, should be accepted, but, however, steps were taken by the first respondent municipality to pass a resolution to accept the bid of the third respondent, which necessitated the petitioner to approach this Court, by way of this Writ Petition.

5. At the time when the Writ Petition was entertained, this Court granted an order of status quo on 16.06.2015, which order was periodically extended and continues to remain in force till date.

6. Learned counsel for the petitioner, reiterating the above factual submissions, submitted, that as per the Circular, dated 22.07.2011, issued by the Commissioner of Municipal Administration, Chennai, in terms of Clause (5), in respect of procurement, where the estimate value of procurement is Rs.10.00 lakhs and above, the tenders shall be resorted to by e-tendering through the National Information Centre. Placing emphasis on the word "shall", it is submitted, that it is mandatory that tender process should be only by e-tender, and, manual tender should not have been accepted, since, in this case, the value of the work is more than Rs.10.00 lakhs i.e., Rs.42.00 lakhs. However, two manual tenders were accepted with a view to award the contract in favour of the third respondent so as to later on insert the necessary details in the manual tender document to show as if third respondent's financial bid is the lowest. Therefore, it is stated that acceptance of manual tender is mala fide, with an intention to favour the third respondent.

7. Learned counsel for the petitioner further referred to the typed set of papers, filed by the first respondent, containing e-tender notice and other connected records, and has drawn the attention of this Court to page 11 of the typed set, which is part of the tender document, pertaining to Serial No.15. The said document is a photostat copy of the original (produced by the first respondent), from which, it is seen, that the officer concerned, namely, the Tender Inviting Authority has found that no rate has been quoted by the third respondent for Serial No.15 and, therefore, he has struck off the column and noted at bottom as follows :

"Rate not quoted in Sl.No.15, signature and date 4/6/15"

8. Learned counsel for the petitioner submitted, that by this fact, the tender document submitted by the third respondent is defective and no alteration could have been permitted and, therefore, the bid of the third respondent ought to have been rejected. In this regard, reliance has been placed on Rule 23 of the Tamil Nadu Transparency in Tenders Rules, 2000, in short, "the Rules", which provides that "no changes, amendments which materially alter the tender prices

shall be permitted after the opening of the tender, except as per the procedure prescribed in sub-section (3) of Section 10 of the Act". Referring to Section 10 (3) of the Tamil Nadu Transparency in Tenders Act, 1998, in short, "the Act", it is submitted, that the change, which is sought to be now projected by the first respondent in respect of the third respondent's financial bid, is not permitted in terms of Section 10 (3) of the Act.

9. Learned counsel for the petitioner also submitted, that the petitioner sought for certain information under the Right to Information Act from the first respondent, and one of the questions was, whether any of the items could be left blank in the tender document, for which, the Information Officer of the first respondent Municipality, vide his reply, dated 06.07.2015, has informed the petitioner, that no item can be left blank.

10. It is not in dispute, that the abovesaid information secured by the petitioner does not form part of the writ papers, and the same is produced before the Court, for the first time, and, therefore, the petitioner will not be entitled to rest his entire case on this document. However, the first respondent has not disputed the information furnished by them under the RTI Act. In such circumstances, it is clear, that even according to the first respondent, no column of a tender document could be left blank.

11. Conversely, learned counsel appearing for the first respondent, by referring to the counter affidavit, submitted, that e-tender alone is not what is contemplated, but, it is one of the modes of tender, and, in this regard, rules have been amended. Learned counsel for the first respondent has referred to the amendments, which were notified by the Government from time to time in Government Orders vide G.O.Ms.No.177, dated 22nd May, 2007; G.O.Ms.No.471, dated 30th September, 2007; and G.O.Ms.No.599, dated 28th December, 2007.

12. By referring to the above rules and the provisions, more particularly, the amendment to Rule 18 (3) of the Rules, learned counsel submitted that the Tender Inviting Authority shall permit submission of tenders by post or courier or by electronic mode, and, therefore, the submission of the learned counsel for the petitioner, that manual tender cannot be accepted, is incorrect. Further, it is submitted that in so far as Clause (15) of the third respondent's financial bid, the third respondent, on

05.06.2015, had undertaken before the first respondent to carry out the said work at his own cost and it was also accepted, since the first respondent municipality stands to gain, as the third respondent has quoted 16.16% lower than the estimated rate of the petitioner, who quoted 11.60% lower. Therefore, in the interest of the Municipality, the authorities have proceeded further, in the matter.

13. Mr.M.Santhana Raman, learned counsel for the third respondent, while supporting the submissions of the learned counsel for respondents 1 and 2, reiterated, that the third respondent's actual bid was for Rs.35,21,800/- as against the upset price of Rs.42.00 lakhs, which is 16.16% lesser than the upset price. Further, in the counter affidavit of the third respondent, in para 4, it is submitted that the third respondent did not fill up the details in column 15 of the tender form, which was purely due to inadvertence, and, after the bid was opened on 04.06.2015, he submitted a letter on 05.06.2015 to the first respondent, stating that the amount quoted by him in his financial bid includes the works mentioned in column No.15. Further, it is submitted that the inadvertence of the third respondent will not put him in a disadvantageous position and that the petitioner cannot be allowed to take advantage of the situation and seek for the relief sought for in the writ petition.

14. After hearing the learned counsels for the parties in detail and also after perusing the documents, the issues, which fall for consideration in this Writ Petition are, two fold. Firstly, whether acceptance of manual tender submitted by the third respondent and another tenderer was proper, and whether it vitiates the entire tender process ? Secondly, Whether, after the financial bid was opened, it was open for the third respondent to state, that he will execute the work at his own cost, and, on account of inadvertence, he did not fill up the tender document completely and he should not be put in a disadvantageous position ?

15. Admittedly, no challenge is made by the petitioner to the Circular, dated 22.07.2011, nor is it there to any other circulars or rules, relating to the manner in which the tenders were called for, in terms of the Circular, dated 22.07.2011. Though the expression "shall" has been used in Clause (5) of the Circular, it does not specifically state that the submission of tender documents shall be resorted only through e-tender. Further, in the Rules, which have been amended from time to time, Rule 18 (3) would be relevant, and it reads as follows :

"18. Place and time for receipt of tenders.-

(1) xxxx

(2) xxxx

(3) The Tender Inviting Authority shall permit the submission of tenders by post or courier provided that the Tender Inviting Authority shall not be responsible for any delay in transit in such cases."

16. The above rule makes it evident that e-tender is one of the processes, which are permissible under the rules, and, therefore, the tender inviting authority is permitted to accept any one mode of submission, as per the rules. However, one more limb of argument made by the learned counsel for the petitioner is that manual tender was accepted so as to subsequently fill up the blanks and make the offer of the third respondent to be the lowest. The fact remains, that the third respondent conceded, that he left Serial No.15 of the tender document blank, and, according to him, it is due to his inadvertence. Therefore, on the first ground, learned counsel for the petitioner cannot succeed, by contending that only e-tender should have been invited, as e-tender is one of the modes of submission of tender document. However, this Court would wish to add, that e-tender process is a safe method to ensure that there is no mischief done by any other parties at a later stage, since, as rightly pointed out by the learned counsel for the petitioner, unless all columns of the e-tender document are complete, the system will not accept the tender. Therefore, the authorities should take note of this issue.

17. Coming to the second issue, the third respondent, in his counter affidavit, has admitted that he has left Serial No.15 blank and he pleaded inadvertence. It is rather surprising to note, that a registered contractor of the respondent municipality, who has bid for a work worth Rs.42.00 lakhs, has stated, that, due to inadvertence, he did not complete the tender document in full. That apart, the stand taken by the third respondent, which, in my view, is untenable, is sought to be supported by respondents 1 and 2. This clearly shows, that the third respondent appears to be a more favourable candidate to the respondent municipality. This observation is not made on the established plea of mala fides, but, on the perverted approach of the Tender Inviting Authority and the municipality. If a bid document is not complete, it could have been rejected summarily, and, if the tender condition provides for alteration or rectification of mathematical error or typing mistake, if there is a power to

permit such alteration, it could have been done. The respondents have not placed any record before this Court to show that the tender conditions provide for filling up incomplete tender document or there is power for the Tender Inviting Authority to subsequently allow the tenderer to take a stand as taken by the third respondent. On the other hand, the tender submitted by the third respondent was incomplete and the authority, who verified the document at the time of opening, has noted the same, and the photostat copy of the tender document produced by the first respondent clearly shows, that he has verified each page of the tender document and the same officer has signed in all the pages. Wherever there are no corrections, he has stated "no corrections", with signature and date 04/06/2015. However, with regard to Serial Numbers 15 and 16, the third respondent has filled up the rate at Serial Number 16, but, left the rate at Serial Number 15, blank. This has been noted by the authority and he struck off the entire column No.15, and stated "rate not quoted in Sl.No.15", with signature and date 04/06/2015. In such circumstances, it is to late for the third respondent now to state, that due to inadvertence, he has left out the said column, blank. If the third respondent is so inadvertent, being a certified contractor of the first respondent municipality, that, per se, would result in the proceedings being initiated against the third respondent, for cancelling his very registration. Be that as it may, the stand taken by the third respondent in paragraph 4 of the counter affidavit, is not exactly the same, as the stand taken in the letter given by him, and accepted by the first respondent, on 05.06.2015. This document finds place in the first respondent's typed set and he has submitted as follows :

"மேலே குறிப்பிடப்பட்டுள்ள பணியினை
குறிப்பிடப்பட்டுள்ள அளவுகளின் எனது சொந்த செலவில்
செய்து தருகிறேன் என்று தெரிவித்துக் கொள்கிறேன். "

A liberal translation of the above Tamil version would mean, that the third respondent is ready and willing to execute the said work, as described in Serial No.15, at his own cost. It is rather surprising to note, that a contractor is agreeable to execute a work of quantity of 2500 bituminous concrete of 25 mm compact thickness, free of cost. The scope of the work is, in fact, very large, and, I find from the tender document, that it is one of the four major works in the entire tender. Therefore, I am of the clear view, that the communication, dated 05.06.2015, of the third respondent is a clear afterthought, to cover up the lapses, and to somehow accept the bid of the third respondent. Therefore, the submission that third respondent has quoted the lowest rate and it is

16.6% lower than the upset price and, therefore, his bid should be accepted, has to be rejected. Firstly, the financial bid submitted by the third respondent was to be outrightly rejected, and the question of accepting alteration or re-opening or accepting a so-called magnanimous offer on the part of the third respondent to execute the work at his own cost is not permissible in terms of Rule 23 of the Rules. Therefore, the authorities 1 and 2 have acted clearly in breach of the Act, and the Rules framed thereunder. Though the authority initially acted in a proper and fair manner while scrutinising the document, it appears to have subsequently turned volta face and accepted the letter of the third respondent, who agreed to execute the work, at his own cost. The first respondent/Tender Inviting Authority has no jurisdiction to accept such a letter of the third respondent, as the offer made by the letter would not fall within the exemptions, carved out in Section 10 (3) of the Act.

18. For all the above reasons, the petitioner is entitled to succeed on the second ground. Accordingly, Writ Petition is allowed. As this Court has held that the third respondent's financial bid itself suffers from disqualification, the necessary corollary would be, to accept the petitioner's bid, subject, however, to his complying with the other conditions. As such, respondents 1 and 2 are directed to accept the financial bid of the petitioner, for providing BT surface, from Kottai Anna Statue to NH By-pass Link Road, towards Forest Road, in Ward Nos.1 and 2, within a period of two weeks from the date of receipt of a copy of this order. No costs. Consequently, the connected M.P.No.1 of 2015 is closed.

19. After the above order was pronounced, learned Standing Counsel for the first respondent municipality has raised a technical plea, stating that the petitioner has sought only for a writ of mandamus, and, since the first respondent has already passed an order, technically, the relief of the petitioner cannot be granted.

20. The above plea of the first respondent deserves to be rejected, for more than one reason. The arbitrary manner in which the tender was finalised smacks of mala fides. That apart, as pointed out earlier, the order of the first respondent, accepting the financial bid of the third respondent, is totally without jurisdiction. The third respondent has no jurisdiction to offer to execute the work at his own cost, when his financial bid was defective, and the same should have been summarily rejected. Therefore, all the

actions, done based on an inadmissible financial bid, have to be definitely held to be void, and this Court is justified in granting the relief in favour of the petitioner. Learned counsel for the first respondent raised one more plea, contending that if the bid of the third respondent is excluded, the petitioner would be a single tenderer and cannot be accepted. This submission is an afterthought, to be outrightly rejected. During the course of arguments, the learned counsel accepted that there were three bidders; one by the petitioner through e-tender, and two manual tenders. The counter affidavit of the first respondent does not disclose full details and appears to be a deliberate attempt to burke facts. If one of the financial bids is to be rejected, then, it does not mean that the tender itself would be scrapped. This Court will not countenance such a plea, as, by that, the object would be achieved. Furthermore, it would also amount to giving permission to an illegality, that too by a judicial order. Hence, the petitioner is entitled to the relief, as granted by this Court, above.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

dixit

To

1. The Commissioner,
Attur Municipality,
Salem Kadalur Highway,
Attur-636102.
2. The Chairman,
Attur Municipality,
Salem Kadalur Highway,
Attur-636102.

+1cc to Mr.M.Santhana Raman, Advocate, S.R.No.65668
+1cc to Mr.P.Srinivas, Advocate, S.R.No.65749
+1cc to Mr.R.Aravind, Advocate, S.R.No.66072

W.P.No.17007 OF 2015

KK(CO)
CA(18/12/2015)