IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

FOR THE STATE OF TELANGANA & THE STATE OF ANDHRA PRADESH

* * * *

WRIT PETITION No.25099 of 2015

BETWEEN

M/s. Janardhan Reddy (Partnership Firm) and another.

... PETITIONERS

AND

The Indian Oil Corporation Ltd., Hyderabad Marketing Division, Rep. by its Deputy General Manager (Operation), I.D.A. Phase-III, Cherlapalli, Hyderabad and another.

...RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: 22.12.2015

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

1.	Whether Reporters of Local newspapers may be allowed to see the Judgments?	No
2.	Whether the copies of judgment may be marked to Law Reporters/Journals?	No
3.	Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?	No

<u>ORDER</u>:

Petitioner No.1 is a partnership firm and second petitioner is a partner, who had participated in the tender process initiated by the first respondent for road transportation of bulk petroleum products from bulk oil storage and handling locations from Hyderabad Terminal to the consumers in the State from Tank Truck owners.

The notification relating to the said tender was issued calling for technical and financial bids in October 2013 and the contract period was for two years. The bids were invited from tank truck owners and the tenderers, who purchased tender documents, were invited for a

pre-bid meeting on 23.09.2013 wherein several doubts of the tenderers were clarified and the last date for filing tender was 03.10.2013 and tenders were to be opened on the same day.

2. One of the conditions of the tender for submission of document by each, regarding which there is not controversy, is as follows:

> "**2. TECHNICAL BID:**
> 2.1 …
> …
> 2.9 …
>
> 2.10 Attested acknowledged copy of the latest Income Tax Return Filed and Pan Card."

3. Petitioners state that regarding pan card there was no clarification issued in the pre-bid meeting and that the petitioners have submitted the present pan card and tender was accepted on that basis and the respondents did not insist on the pan card of the first petitioner firm. Petitioners state that while they were qualified and fulfilled all the other requirement and though their bid was accepted, they received a letter dated 21.12.2013 from the second respondent informing them that the pan card

submitted is not in the name of the firm and since the tenderer is a partnership firm, petitioners were advised to submit an attested copy of pan card in the name of the firm immediately. Petitioners gave a reply on the same day informing the second respondent that they have applied for pan card in the name of the firm and as soon as it is received, the same will be submitted for further processing of the tender. Subsequently, the petitioners state that they submitted the pan card on 08.01.2013 in the name of the first petitioner firm. However, the respondents excluded the petitioners and awarded the contract to 11 firms.

4. Meanwhile, another transport company and the petitioners approached this Court by WP.Nos.20512 and 20552 of 2014 respectively questioning the action of the respondents in not awarding the contract to the respective petitioners therein. On 25.07.2014, this Court passed an interim order, relevant part whereof is extracted hereunder:

> "... The petitioners purchased the tender documents and as per the same, the pre-bid meeting was held on 23.9.2013. Last date for filing tenders was on 03.10.2013 and opening of the tenders was on 03.10.2012. The 1st petition is a partnership firm. The 2nd petitioner was not aware of the fact that pan card of the 1st petitioner firm has to be submitted along with the tender documents. He submitted his pan card since he is a major share holder. Having noticed that the pan card of the partnership firm was not filed, 2nd respondent issued a letter dated 21.12.2013 directing the 2nd petitioner to file attested copy of pan card in the name of 1st petitioner-firm immediately.
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> Learned counsel for the petitioners submits that as directed by the respondent corporation in so far as 1st petitioner in W.P.No.20512 of 2014 is concerned, the attested copy of the pan card of the firm was furnished on the same day and in so far as 1st petitioner in WP.No.20552 of 2014 is concerned,
> it was submitted on 30.12.2013. He further submits that even though the pan cards were submitted in time, but for no reasons the tender document submitted by the petitioners were not processed and the contract was not awarded to them, whereas, such contracts were awarded to other transport holders.
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> Learned counsel for the respondents seeks time to file counter-affidavit to explain the reasons why the tender forms submitted by the petitioners could not be processed.

> *Prima facie*, it appears that the petitioners have submitted the requisite pan card before finalization of the tenders itself.
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> Having regard to the aforesaid submissions, the respondents are directed to process the tenders submitted by the petitioners subject to the condition that the petitioners have submitted the pan card of the partnership firm, as directed by the
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> 1st respondent corporation in their letter dated 21.12.2013 before 31.12.2013 and no rejection order is passed regarding the tender submitted by the petitioners."

5. Based on the said interim order, petitioners in WP.No.20512 of 2014 was stated to have been awarded to the contract but the petitioners herein were not given the contract, as the date for submission of pan card was wrongly stated in the affidavit of the petitioner that pan card was submitted before 31.12.2013. Petitioners, therefore, state that on account of the said mistake in the affidavit, the said interim order did not come to their rescue and realizing the said mistake, petitioners sought withdrawal of the said writ petition with liberty to file fresh writ petition. Accordingly, the earlier writ petition was withdrawn and the present writ petition is filed seeking a Mandamus to declare the action of the respondents in not awarding the contract to the petitioners as illegal.

6. Learned counsel for the petitioners has raised various contentions that submission of pan card was only for payment of TDS and as such, the said condition was not an essential condition of contract. Learned counsel also submits that in the subsequent correspondence between the second respondent and the petitioners, there was no mention of submission of pan card and as soon as the petitioners received the pan card, they submitted the same to the second respondent on 08.01.2014 and since the petitioners are alone excluded, their tender deserves to be considered on competitive basis.

7. Learned counsel relied upon a decision of the Supreme Court in **RASHMI METALIKS LIMITED v. KOLKATA METROPOLITAN**

DEVELOPMENT AUTHORITY[1] where the requirement of filing of income tax return was considered as a non-essential term and as such, the term was treated as a collateral term and consequently,
it was held that the financial bid of the appellant being substantially lower than that of others, was, therefore, pecuniarily preferable. Learned counsel also relied upon a Division Bench decision of this Court in **PBR SELECT INFRA PROJECTS v. COMMISSIONER OF TENDERS**[2] (to which I am a party) wherein the requirement of pan card of individual as per tender notification was considered and it was held that the pan card of the partnership firm to which the petitioner is a Managing Partner was sufficient compliance based upon Section 184 of the Income Tax Act. Another decision of the Bombay High Court in **A2Z MAINTENANCE AND ENGINEERING SERVICES LIMITED v. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED**[3] wherein the power of attorney submitted by the tenderer was not accepted on the ground that it was not notarized.
Interpreting the terms of the tender notice, it was held that the petitioner's bid cannot be treated as non-responsive in view of the deeming clause available under clause 5.1.1 of that tender.

8. Respondents have filed a counter affidavit wherein they deny that in the pre-bid meeting the petitioners were not informed about submission of pan card and that the entire tender document together with specific guidelines was part of the tender document purchased by the petitioners, which makes this position clear. Hence, while relying upon clause 2.10, extracted above, guideline 2.17 was also relied upon, which provides for submission of '*Two nos. of self attested & notarised photocopies of PAN card to be enclosed*'. Hence, deviation of the petitioners from the tender conditions cannot be accepted by the respondents. The counter affidavit further states that though the tender of the petitioner was deficient in the above respect, in order to give a fair opportunity to the petitioners, they were

sent a letter dated 21.12.2013 to submit the pan card of the firm immediately and since the petitioners failed to submit the pan card even after the said opportunity, the tender of the petitioners was rejected for non-submission of pan card.

9. The respondents contend that the submissions made in the present writ petition are, therefore, contrary to the submissions made by the petitioners in earlier WP.No.20552 of 2014. To the extent of awarding of contract to another transport company i.e. petitioner in WP.No.20512 of 2014, the counter affidavit explains that since the said transport company had submitted the pan card of the firm before 31.12.2014, their case was considered in terms of the interim order of this Court dated 25.07.2014 whereas the petitioners herein had not complied with the condition in the said interim order, hence, their tender could not be accepted. Reliance is also placed upon guideline 1.9 under general bid, which states '*Same PAN (in the name of a proprietor), is quoted by two or more tenderers, then such Tenders are liable to be rejected*'. The respondents, therefore, claim that they have followed the conditions of tender scrupulously and they have also given an opportunity to the petitioners and since they could not comply with the terms of the tender, the petitioners are not entitled for award of the contract in their favour.

10. An additional counter affidavit is also filed by the respondents stating that on 03.10.2013 all the tenders received were verified by the tender verification committee with respect to the D.D's submitted towards EMD, number of tank trucks offers etc. and that compliance of each and every term of the tender by each tenderer was not possible in view of the large number of tender, hence, 21 number of tenderers were found eligible for consideration. On further scrutiny, the deficiency in the tender of the petitioners was noticed and they were called upon to comply with the deficiency under letter dated 18.11.2013 to which the petitioners clarified on 23.11.2013 confirming that they have

submitted individual pan card and not that of the firm. Then again, under further letter of the respondents dated 21.12.2013, the petitioners were required to submit the pan card of the firm but the petitioner failed to comply. Out of 21 tenderers, 11 were short listed and out of 11, 9 were for found eligible for awarding the contract and remaining two tenderers were found not qualified, as the pan card was not submitted in the name of the firm. The said two unsuccessful tenderers filed writ petitions, referred to above, wherein interim order was passed by this Court, extracted above. It is further stated that the period of contract was two years commencing from January 2014 to January 2016 and as at present, 52 tank trucks are used by the respondents and it is stated that there is no further requirement of any additional tank trucks at this juncture.

11. I have heard the learned counsel for the parties at length and considered the submission on either side.

12. It must be kept in mind, at this stage, that the contract period itself was for two years and the period would expire by January 2016. Secondly, the contentions raised by the petitioners in the present writ petition and their earlier WP.No.20552 of 2014 show marked difference in the stand taken by the petitioners. Earlier writ petition proceeded on the footing that the requisite pan card was submitted before 31.12.2014 whereas in the present writ petition, petitioners state that the pan card was submitted only on 08.01.2014.

13. Learned counsel for the petitioners has very vehemently contended that there were factual mistakes in filing the earlier writ petition and petitioners could rectify the same only after withdrawal of the said writ petition and since they were permitted to file the present writ petition, there is no impediment for consideration of their case.

14. The terms and conditions of every tender, undoubtedly, contain

essential and non-essential terms and legal position in this respect is supplied by the earliest decision of the Supreme Court in

G.J. FERNANDEZ v. STATE OF KARNATAKA[4]. The aforesaid decision considers the pre-conditions of eligibility in a tender into essential conditions and non-essential conditions. Para 15 of the decision is appropriate to be extracted hereunder:

> "15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the N.I.T., it is open to the K.P.C. to decline to consider the party for the contract and if a party comes to Court saying that the K.P.C. should be stopped from doing so, the Court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the K.P.C. cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the K.P.C. made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed.
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> But neither of these situations is present here.
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> Sri Vaidhyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to Court with any such grievance. The question, then, is whether the course adopted by the K.P.C. has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxations of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the

> respondent's contention that while the rule in Ramana's case (supra) will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, M.C.C. is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the M.C.C. and in the K.P.C. going in for a choice of the better on the merits. The appellant had no doubt also urged that the M.C.C. had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant visa-vis M.C.C. are, however, a matter for the K.P.C. (counselled by the T.C.E.) to decide and not for the Courts.
> We were, therefore, rightly not called upon to go into this question."

15. To the same effect is the decision in **RASHMI METALIKS LIMITED's** case (1 supra), which also considered the clause in the impugned tender as to whether it is essential or non-essential term and on the facts of that case, came to the conclusion that the relevant clause therein cannot be treated as an essential term. The said decision also records that on the facts of that case, it was found that the authority in its communication of rejection had not adverted to the ground relied upon at all and the said ground of non-filing of income tax return was relied upon only in the arguments, which found favour with the High court. So far as the decision in **PBR SELECT INFRA PROJECTS's** case (2 supra) is concerned, that was a converse case where the tender was filed by an individual and he relied upon the income tax return filed by the firm wherein he was the managing partner and relying upon a decision in ***M.V.V. SATYANARAYANA v. ENIGNEER-IN-CHIEF, R&B*** [2008 (1) ALT 715] this Court held that any work rendered or obtained in the name of the petitioner deemed to have been taken on behalf of the firm of which he was the managing partner. Moreover, the grievance of the petitioner was against not disqualifying the third respondent for breach of conditions of the tender and the Division Bench relying upon the decision in ***TATA CELLULAR v. UNION OF INDIA*** [(1994) 6 SCC 651] held that an

administrative decision, being found to be not accentuated by unreasonableness or arbitrariness, it was not open for judicial review. Similarly, the decision in **A2Z MAINTENANCE AND ENGINEERING SERVICES LIMITED's** case (3 supra) also does not assist the learned counsel for the petitioners as that case also came to be decided on the basis of terms and conditions of the tender.

16. In the present case, however, the terms and conditions of the tender viz. clause 2.10, extracted above, and guidelines 2.17 and 1.9, referred to above, clearly show the requirement of filing of pan card by the tenderer firm was essential and since the petitioners have failed to comply with the same, it cannot be said that the said term was a non-essential terms so as to interfere with decision of the respondents in rejecting the tender of the petitioners. Moreover, the term of the contract would expire by January 2016, hence, at this late stage, the discretion of this Court does not deserve to be exercised in favour of the petitioners.

Consequently, the writ petition is dismissed. As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

VILAS V. AFZULPURKAR, J

December 22, 2015
DSK

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[1] (2013) 10 SCC 95

[2] 2013 (2) ALD 506 (DB)

[3] LAWS (BOM) 2010 (7) 173

[4] (1990) 2 SCC 488