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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 29.04.2016

CORAM :
THE HONOURABLE Mr.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE Mr.JUSTICE C.T.SELVAM

Writ Appeal(MD)No.1387 of 2015
M.P.(MD)Nos.1 and 2 of 2015

Haritha Constructions and Logistics,
Rep., by its Partner,
Mr.Arumugapandy

... Appellant

Vs.

1. The Block Development Officer (V Pt)
O/o. Panchayat Union,
Radhapuram, Tirunelveli District.

2. Ponniah Kavin Karuthiah

... Respondent

Prayer:

Writ Appeal under Clause 15 of the Letters Patent, against the order made in W.P.(MD)No.16107 of 2015, dated 27.11.2015.

Prayer in WP(MD)No. 16107/ 2015 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus calling for the records pertaining to the Tender No.Aa1/2497/2015 dated 31.07.2015 on the file of the 1st Respondent and quash the same and further quash the work order issued to the 2nd Respondent dated 31.08.2015, consequently direct the 1st Respondent to conduct a fresh tender by calling for fresh notification.

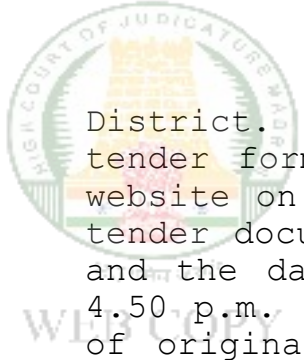
For Appellant	: Mr.Puzhazh Gandhi
For 1st Respondent	: Mr.Ayiram K.Selvakumar
For 2nd Respondent	: Mr.S.Parthasarathy, Senior Counsel for Mr.S.C.Herold Singh

JUDGMENT

(Judgement of this Court was made by S. MANIKUMAR, J.)

Challenge in this appeal is to an order made in W.P.(MD) No.16107 of 2015, dated 27.11.2015, by which, the Writ Court has confirmed the tender proceedings, dated 31.07.2015, of the Block Development Officer, Office of Panchayat Union, Radhapuram, Tirunelveli District, 1st respondent herein.

2. It was the case of the appellant before the writ Court was that the first respondent issued tender notice, dated 31.07.2015, inviting competitive bidders to participate in the tender process in respect of execution of six works at Radhapuram Union, Tirunelveli



District. The notification stipulates e-tender process and the tender form and other tender documents were made available in the website on 25.08.2015 from 10.00 a.m to 05.00 p.m. Submission of tender documents through online was fixed at 4.00 p.m on 26.08.2015 and the date of opening of the tender was fixed on 26.08.2015 at 4.50 p.m. However, in the tender form, the deadline for submission of original document was fixed on 31.08.2015 at 3.00 p.m. If a competitive bidder fails to submit the original documents on or before 31.08.2015 at 03.00 p.m, his tender will be rejected as a non-responsible one. However, the first respondent extended the deadline for applying tender online by one day without making any mandatory publication. The appellant applied for 5 works on 27.08.2015 through online. The EMD also was submitted on 27.08.2015 and the appellant was prepared to submit other tender documents on 31.08.2015 other than those uploaded in the website. However, to the utter shock and surprise of the appellant, he found from the website that the first respondent opened the bids on 29.08.2015 itself without the presence of the competing bidders and without any intimation and rejected his bid unilaterally. The appellant was given to understand that all the six works were awarded to the second respondent, who has not even qualified to participate in the tender, as he is not a class - I contractor. The second respondent has not executed any work in Radhapuram Union for the last 3 years, which itself is a disqualification. Therefore, the appellant has filed W.P.No.16107 of 2015, challenging the tender notice, dated 31.07.2015, issued by the first respondent and the work order issued to the second respondent, dated 31.08.2015. Consequently, he sought for a direction to the first respondent to conduct fresh tender by issuing fresh notification.

3. Before the Writ Court, the Block Development Officer, Office of Panchayat Union, Radhapuram, Tirunelveli District, 1st respondent herein, in his counter affidavit, has stated that the appellant made his application for registration as a class -I contractor in the Panchayat Union only on 17.08.2015 and therefore, he has no experience for participating in the tender. On 31.07.2015, tenders were called for, to execute six works and it was decided to have E-Tender, and the tender forms were made available in the website from 22.08.2015 onwards upto 26.08.2015. After accepting all the terms and conditions, the appellant submitted his tender and therefore, he cannot challenge the same subsequently. Due to the administrative reason and technical defect, which crept in the Internet, the processing could not be completed on 26.08.2015 and therefore, the date was extended upto 27.08.2015. The appellant uploaded his bid only on 27.08.2015 utilizing the extended time. Though the appellant submitted his bid for 5 works, he has not submitted all the documents as specified in the notification. He has submitted his original EMD, original affidavit regarding correctness of information furnished with bid document. He has furnished only the bid submission confirmation along with the demand draft and the other documents specified in clause 9.1 were not furnished by him. Even in the bid submission confirmation submitted



by the appellant, it is clearly stated that the bid opening date and time is 27.08.2015 at 04.30 p.m. The appellant has not submitted the documents as per the tender schedule. The bid was opened on 29.08.2015 and as the appellant was not qualified, his bid was rejected.

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4. According to the 1st respondent, the deadline referred to by the appellant as 31.08.2015 is only an error while preparing the invitation for tender. The second respondent, who was declared as successful bidder, satisfied the qualification specified for participating in the tender. The second respondent is a Class -1 contractor of District Rural Development Agencies (DRDA), Tirunelveli. Therefore, he is eligible to participate in the tender. The second respondent also furnished experience certificate. As per Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998, the appellant has to file an appeal before the Government within 10 days from the date of the order, if he has any grievance. Therefore, the appellant has got an effective alternative remedy. According to the 1st respondent, the appellant, having obtained the tender documents and submitted the same, is estopped from filing the writ petition, as there is no arbitrariness involved in opening the tender on 29.08.2015. After scrutinizing and analysing the bid submitted by the second respondent, work order was issued to him on 31.08.2015 and pursuant to the work order, an agreement was executed by the second respondent on 03.09.2015 and he has commenced the work on 04.09.2015.

5. The 2nd respondent, before the writ Court, has stated that he registered himself as a Contractor during 2010 and he is a class-I contractor. As per circular No.104657/98T.U.1, dated 08.11.2000, the second respondent is entitled to take work in any union of the District. The tender has two covers system, viz., technical bid and price bid. In the technical bid, the contractors have to submit the details of machineries and other technical qualifications and only when the technical bid is accepted, those contractors will be permitted to participate in the price bid. Having agreed to the terms and conditions, the appellant has submitted his tender on 27.08.2015 and on evaluation of his technical bid, the same was rejected, as not qualified. Whereas, the first respondent, after considering the qualification of the second respondent, issued work order to him. Since the work is in relation to laying of road and bridge, the second respondent commenced the work on 04.09.2015, after entering into an agreement on 03.09.2015.

6. After considering the submissions on either side, decisions relied and considering the facts and circumstances of the case, this Court in W.P.(MD)No.16107 of 2015, dated 27.11.2015, ordered as follows:

"10. The first respondent issued tender notification inviting tender for execution of 6 works from the qualified contractors under two covers tender system, namely, technical bid (pre-qualification) and



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price bid (item rate tender). No doubt, in the tender notification issued on 31.07.2015, the date of opening of the tender was referred as 26.08.2015 at 4.30 p.m. However, it is contended by the petitioner that in the technical bid (pre-qualification) and price bid notice form of contract, which is otherwise called the tender form, the last date for submission of the tender form at one place was referred to as 31.08.2015 before 03.00 p.m. This discrepancy is strongly relied on and projected by the writ petitioner to contend that the entire proceedings are vitiated as the petitioner was reasonably prevented from submitting the relevant documents on or before 31.08.2015. Therefore, this Court has to see as to whether the petitioner was prevented from submitting his tender within the time stipulated.

11. Admittedly, in this case, the date of receipt of opening of tender originally fixed as 26.08.2015 was subsequently postponed to 27.08.2015 through notice dated 21.08.2015 issued by the Block Development Officer. It is seen that both the petitioner as well as the second respondent have submitted their respective tender only on 27.08.2015. There is no dispute to the said fact. It is also not in dispute that at the time of submitting the tender, the petitioner has not furnished the working condition certificate. According to the petitioner, such certificate was issued to him only on 28.08.2015 and therefore, even before submitting the same before the last date, namely, 31.08.2015, the first respondent rejected the petitioner's technical bid. Hence, it is contended that the petitioner was prevented from submitting the documents before the cut of date. I am unable to appreciate the said contention for the simple reason that the petitioner having received the tender form and having accepted the terms and conditions of the tender, ought to have submitted the tender form along with the necessary documents within the time.

12. Even otherwise, I would like to point out at this juncture that the petitioner has misconstrued the date 31.08.2015, referred to in the technical bid (pre-qualification) and price bid notice at one place, as last date for receipt of tender form along with the relevant required documents. In fact it is not so. Perusal of the said notice would make it clear that the tender, namely, technical bid and price bid should be sent through electronic tendering system containing EMD (scanned copy) along with the documents and only the Original Earnest Money Deposit in the prescribed form should be submitted to the Block Development Officer in person before 3.00 p.m on 31.08.2015. Therefore, it is evident that at the time of submitting the tender, all



the tender documents along with the scanned copy of the EMD should be submitted. Further, it is made clear 'in the important note' shown at the bottom of the check list that bidder must submit all the required documents without fail and bids received without supporting documents are to be rejected at the initial stage itself. Further, under the caption "special attention of the bidder", referred to in the tender documents, it is clearly indicated that approval or otherwise of the technical bid (pre-qualification) will be strictly based on the detailed evaluation done on the basis of the Documents/Records/Evidences/Certificates produced by the applicant in the technical bid. Class 9.1 of the tender documents clearly contemplates that scanned copies of the documents referred to therein, shall be uploaded in the website at the appropriate places. One of such documents is in receipt of availability of construction equipments, machineries and other tools and plants owned/brought on hire. Therefore, it is very clear that what is to be furnished or submitted in person is only original EMD in the prescribed form and not any other documents, which are, on the other hand, necessarily to be sent along with the tender form itself by way of uploading the scanned copies of the same.

13. In this case, admittedly, the petitioner has given the EMD in the prescribed form on 27.08.2015 itself. Equally, it is an admitted fact that he has not sent all the necessary documents along with the tender form by scanning the same. Admittedly, he has received one of such documents, namely, working condition certificate only on the very next day of submitting the tender form. Therefore, the petitioner cannot harp upon the date, namely, 31.08.2015 as the last date for submitting the tender form. On the other hand, even though the date was mentioned as 31.08.2015 at one place wrongly, the said date was only intended as a last date for receiving the original EMD in the prescribed form and not for receiving the very tender form itself along with the necessary and relevant supportive documents.

14. Therefore, such mistake crept in one place with regard to the last date of submission of the original EMD will not be taken advantage of by the petitioner, in view of the fact that he has not waited till 31.08.2015 to submit his tender form itself. On the other hand, admittedly he has chosen to submit the tender on 27.08.2015 itself along with original EMD and therefore, he is not prejudiced or affected in any way by the wrong quoting of date at one place as 31.08.2015 for receiving the original EMD. Therefore, I find that the petitioner having not furnished the necessary



documents along with the tender form on 27.08.2015, cannot find fault with the authority, namely, the first respondent in rejecting his technical bid.

15. Even otherwise, while considering the qualification of the petitioner, it is seen that the petitioner has not stated anywhere in the affidavit about his experience or technical qualification for executing the said work. On the other hand, a perusal of the tender notification and tender form would show that the bidder should be a class-I contractor, currently registered in Radhapuram Union and should have been in the Civil Engineering Construction field at least for the past five years. The petitioner has not stated anywhere with regard to the said experience qualification. On the other hand, as rightly pointed out by the learned senior counsel appearing for the second respondent, the petitioner himself registered his name as a class-I contractor only on 11.05.2015 i.e., just three months before the participation of the present tender process. This fact is evident from the counter affidavit filed by the first respondent stating that the petitioner has made his application for registration as a class - I contractor in the panchayat union only on 17.08.2015 and paid the challan for his registration on 19.08.2015 and therefore, he has no experience for participating in the tender. This categorical statement made by the first respondent is not disputed by the petitioner by filing any rejoinder. Therefore, when the very basic qualification for participating in the tender process is lacking on the part of the petitioner, I do not find any justification for entertaining this writ petition at the instance of the petitioner, who is otherwise not even qualified to participate in the tender process. It is to be noted at this juncture that this writ is not a PIL and on the other hand it is filed by a person who participated in the tender process. Therefore, only when this court finds that such person is a qualified person and consequently affected by the tender process and thus, is having locus standi, it can exercise its discretionary power under Article 226 of the Constitution of India.

16. It is contended by the learned counsel appearing for the petitioner that only to favour the second respondent, the tender was opened much ahead of the last date. As I have already pointed out that in all the places the date of the opening of the tender was referred to as 26.08.2015 and only in one place, it was referred to as 31.08.2015, that too, for receiving the original EMD, I do not think that this contention of the petitioner is having any bona fide. Further, the



typographical mistake committed has in no way affected the petitioner, as he himself has submitted the tender on 27.08.2015 itself along with original EMD. When the petitioner as well as the second respondent have admittedly submitted their tender on the very same day, I do not think that the petitioner is right in contending that opening of the tender before 31.08.2015 is either to favour the second respondent in anyway or to affect the petitioner's right in any manner.

17. The learned counsel appearing for the petitioner relied on an unreported decision made in W.A.Nos.712 and 7113 of 2015 dated 07.09.2015 in support of his contention that when there is an uncertainty in the notification, the same cannot be sustained. I do not think that the above decision helps the petitioner in any manner in view of the fact that the petitioner herein having chosen to submit his tender form on 27.08.2015 knowing fully well that such being the last date for submitting the tender, as per the notice issued by the Block Development Officer dated 21.08.2015, he cannot be permitted to contend that there is an uncertainty. Even otherwise, it is not the case of the petitioner that he was waiting to submit his tender form on 31.08.2015, considering the said date as the last day for submitting the tender form. On the other hand, as already stated supra, he has submitted tender on 27.08.2015 itself. However, he failed to submit the necessary documents.

18. The decision reported in 2009-5 L.W. 858 (cited supra) is relied on by the learned counsel appearing for the petitioner that the appeal provision provided under the statute will not bar this Court from entertaining the writ petition. I do not think that the above decision is also relevant at this stage, as this Court, based on the facts and circumstances, has found that the petitioner cannot maintain this writ petition as a disqualified person.

19. The decision of the Honourable Apex Court reported in (2007)14 SCC 517 (cited supra) is relied on by the learned counsel for the petitioner to contend that this Court can interfere with the tender matters when the process adopted by the authority is mala fide or intended to favour some one. There is no quarrel about the said proposition. However, to apply the said proposition, facts and circumstances of a particular case should warrant such application. In this case, the factual aspects discussed earlier would show that there is no material placed before this Court to come to the conclusion that the authorities have acted only to



favour the second respondent. On the other hand, the petitioner having not furnished the relevant documents along with tender form and got himself disqualified in the technical bid, cannot contend that such rejection is only to favour the 2nd respondent.

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20. The learned senior counsel appearing for the second respondent relied on the decision of the Honourable Apex Court reported in (2006)5 SCC 138 (cited supra) to contend that in the absence of any public interest involved interference in the tender matters is not called for, merely because, a legal point is made out. The Honourable Apex Court in the said decision at paragraph 15 has observed as follows:-

"15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd., v. Cochin International Airport Ltd* (2000)2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

21. In this case, except the present writ petition, it appears that no other person has filed any other writ petition questioning the confirmation of the tender and work order issued in favour of the second respondent. Therefore, this Court is of the view that except the petitioner, no other participant, if any, is aggrieved. No doubt, the learned counsel appearing for the petitioner has also pointed out that the work order has been issued to the petitioner even before execution of the agreement and making the security deposit. But the conditions stipulated in the work order would show that the petitioner is having time to execute the agreement and make the fixed deposit in pursuant to the issuance of the work order. Therefore, such contention of the petitioner cannot be accepted to conclude that the

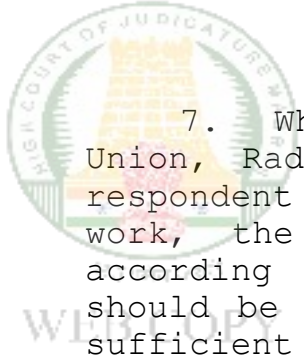


entire proceedings are vitiated. Even otherwise, assuming that there are some procedural lapses after confirmation of bid, if the same are not going to the root of the matter, they cannot vitiate entire proceedings, unless it is specifically pleaded and established that by such conduct the interest of the public is in any way affected.

22. Considering all these facts and circumstances, I find that this Court, while exercising the discretionary jurisdiction under Article 226 of the Constitution of India, need not interfere with the impugned tender proceedings. Therefore, the writ petition fails and consequently, the same is dismissed. The interim order already granted is vacated."

5. Though Mr.Puhazh Gandhi, learned counsel for the appellant assailed the correctness of the order made in W.P.(MD)No.16107 of 2015, dated 27.11.2015, on the grounds that the tender documents were made available only for seven hours from 10.00 A.M., to 5.00 P.M., on 25.08.2015, which according to him, is a violation of Rule 16 of the Tamil Nadu Transparency in Tender Rules, 2000 (hereinafter referred to "the Rules"), which mandated the Tender Inviting Authority, to make available the tender documents from the date of publication of Notice Inviting Tenders, ie., from 31.07.2015 onwards and that the bid submission date of 26.08.2015, has been amended to 27.08.2015, by way of a corrigendum issued on 21.08.2015, even before the issuance of the tender documents on 25.08.2015 and therefore, the cut-off date of 26.08.2015, does not have any relevance, this Court is not inclined to accept the same, as the Writ Court has considered the above objections, with reference to the rules and decisions, stated supra.

6. Further, the contention that the tender notice, dated 31.07.2015 is not in compliance with Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000, on the ground that 15 days' time has not been given from the date of application to the date of submission of tender papers is not sustainable, because, if really the appellant had any grievance regarding the said notification, he ought to have questioned the notification itself, without purchasing the tender papers and submitting the same. When the appellant has purchased the tender papers and submitted the same, quoting the valuation as per the rule, no prejudice is caused to him. Further, the tender has been awarded in favour of the second respondent by way of an agreement, dated 03.09.2015. If the petitioner is aggrieved over the decision of the first respondent, accepting the tender of the second respondent, he should have appealed the same to the Government, within 10 days from the date of receipt of the order, under Section 11 of the Tamil Nadu Transparency in Tenders Act, which remedy has not been exhausted by the appellant.



7. When the Block Development Officer, Office of Panchayat Union, Radhapuram, first respondent herein, has found the second respondent was suitable in all respects for the execution of the work, the appellant, who has not satisfied the requirements, according to the tender notification, will have no say that he should be awarded with the contract. Highest bidding alone is not sufficient for awarding the Government tender, but fulfilment of the conditions is also equally important.

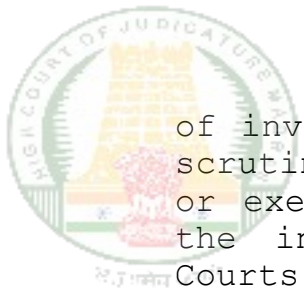
8. Scope of judicial review in the matter of tender is limited and Court has to examine as to whether the decision making process of the tender inviting authority is vitiated by arbitrariness, unfairness, illegality, irrationality or unreasonableness. When the decision is proper and it is made in accordance with the law contemplated, and when there is no procedural impropriety, this Court cannot interfere with the order of the writ Court. Few decisions on this aspect, is worth reproduction,

(i) In *Tata Cellular v. Union of India* reported in 1994 (6) SCC 651, the Hon'ble Supreme Court held as follows:

"While Court does not interfere with Government's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter, but whether the decision/action is vitiated by arbitrariness, unfairness, illegality, irrationality or 'Wednesbury unreasonableness' i.e., when decision is such as no reasonable person on proper application of mind could take or procedural impropriety can be looked into by Court."

(ii) In *R.Kumar v. Chief Engineer, Mettur Thermal Power Station, Mettur Dam* reported in 2008 (3) MLJ 173, this Court held as follows:

"10.... the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. Further, the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Board must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government, merely because it feels that some other terms in the tender would have been fair, wiser or logical. The Board can choose its own method to arrive at a decision. It can fix its own terms



of invitation to tender and that is not open to judicial scrutiny. In addition, in the matter of policy decisions or exercise of discretion by the Government, so long as the infringement of fundamental rights is not shown, Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters."

(iii) In Directorate of Education v. Educomp Datamatics Ltd., reported in 2004 (4) SCC 19, the Hon'ble Supreme Court had held that,

"It was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice, the Court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of the tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The terms of the invitation to tender are not open to the judicial scrutiny, the same being in the realm of contract. The Government must have a free hand in setting the terms of the tender. The courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism."

10. In view of the above discussion and decisions, this Court is of the view that the appellant has not made out any case to show that there is arbitrariness in rejecting his bid.

11. In the result, Writ Appeal is dismissed. No costs. Connected M.Ps are closed.

Sd/-

Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar (CS-II)

To

The Block Development Officer (V Pt)
O/o. Panchayat Union,
Radhapuram, Tirunelveli District.

W.A (MD) No.1387 of 2015
29.04.2016