



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.11.2016

CORAM :

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition (MD) No.19242 of 2016

and

W.M.P (MD) Nos.13889 and 13890 of 2016

S.M.Mohammed Ibrahim

... Petitioner

Vs.

1.The General Manager
Southern Railway,
H.O.Park Town,
Chennai.

2.The Divisional Railway Manager
Works, Tiruchirappalli Division,
Southern Railway, Chennai 620 001.

3.N.K.S.Constructions,
No.34, 1st Floor,
Anna Salai,
Swarnapuri II Gate,
Salem 636 004.

... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records of the 2nd respondent in its impugned proceedings in No.T/W.148/Central/16/2015 dated 04.08.2016 and quash the same and consequently direct the 2nd respondent to confirm the Tender of the petitioner.

For Petitioner

: Mrs.J.Maria Roseline

For Respondents

: Mr.S.Manohar

Senior Standing Counsel

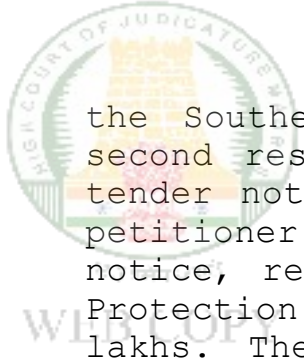
ORDER

Challenging the letter of acceptance issued by the second respondent dated 04.08.2016 in favour of the third respondent, the present writ petition has been filed.

2.Heard Mrs.J.Maria Roseline, learned counsel appearing for the petitioner and Mr.S.Manohar, learned Senior Standing Counsel for the respondents.

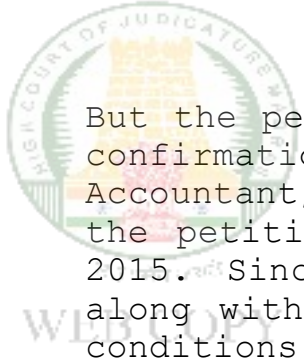
<https://hcservices.ecourts.gov.in/EcseServices> Case of the petitioner, in brief, is as follows:-

The petitioner is a registered class-I contractor with Public Works Department and also doing civil contract works for



the Southern Railways, Tiruchirappalli from the year 1990. The second respondent invited sealed tenders for various works vide tender notification dated 27.01.2016. Pursuant to the same, the petitioner submitted his tender for item No.2 listed in the tender notice, relating to the construction of barracks for the Railway Protection Force. The approximate value of the said work is Rs.70 lakhs. The petitioner fulfilled minimum criteria prescribed in tender schedule which requires the tenderer should have a total contract amount in the last three financial years and in the current financial year to the minimum of 150% of the advertised tender value. For the above said condition, the petitioner enclosed a certificate issued by a registered Chartered Accountant to show that the petitioner had registered contract value of more than Rs.1,43,40,321/- within the qualified period which is more than 150% of the advertised tender value. It is stated that as against items in A1, A2, and A3 in the schedule work, the tenderer/contractor was required to quote a collective percentage rate either 'at par' or enhanced/diminished by over the total SRUSSOR 2011 value and in respect of D schedule work, the tenderer/contractor required to quote unit rate for each item of the schedule. The petitioner has submitted his tender on 05.03.2016 and five other tenderers were also submitted for the above said work. The petitioner was the lowest the tenderer and when the tender was opened on 08.03.2016, the petitioner was to declare as successful bidder and after declaring the petitioner as successful bidder, the petitioner being the lowest bidder, the second respondent confirmed the tender and issued letter of acceptance in favour of the third respondent who has quoted 19% higher than the price quoted by the petitioner. In the above circumstances, challenging the letter of acceptance given to the third respondent, the present writ petition has been filed.

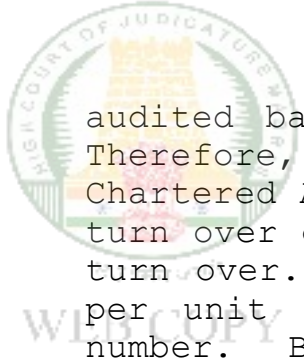
4.The respondents 1 and 2 have filed a counter affidavit stating that regarding the nature of work and similar work done by the tenderers, the tenderer should have a minimum turn over for the last three years and in order to satisfy the above turn over eligibility as per the turn over for the last financial years, namely 2012-2013, 2013-2014 and 2014-2015 and the current financial year 2015-2016 should be a minimum of 150% of the advertised value which comes to i.e, Rs.105 lakhs. For that purpose the tenderer should produce an attested certificate from the employer/client, audited balance sheet duly certified by a Chartered Account and/or attested certificate from the Central Government or State Government Public Sector undertakings organisation/department from where the tenderer received payment for the work done. It is further stated that the petitioner in order to satisfy the above turn over eligibility, he has failed to submit an attested copy of audited balance sheet for the last three completed financial years 2012-2013, 2013-2014 and 2014-2015 and attested certificate from where the tenderer received the payment for the last financial years and current financial year.



But the petitioner has only enclosed a copy of attested letter of confirmation issued by one Mr. Jenifer Arulraj, Chartered Accountant, Trichy, without furnishing details of work done by the petitioner during the last three financial year namely 2012-2015. Since the petitioner failed to submit the above records along with the tender documents and failed to satisfy the tender conditions and fulfil the eligibility criteria and the petitioner got the status of 6th lowest tenderer. However, the petitioner has remitted the earnest money deposit amount and also cost of the tender and thereby satisfied the tender condition on the above two aspects.

5. It is further stated apart from that the tenderer should quote a collective percentage rate at par or enhanced/diminished over ARUSSOR 2011 value as firm rate given in the schedule A1, A2 and A3. For schedule D, the tenderer was required to quote unit rate for each items of schedule D. It is stated that if the rate/percentage rate quoted by the petitioner/contractor is stated differently in figures and in word, then the rate/percentage rate quoted in words shall prevail and the tenderer should also quote a collective percentage rate in words in bold capital letters besides figures only in the space provided in tabulation with squares in the schedule for filling up of percentage rate. It is further stated that even though the petitioner quoted percentage rate properly for Schedule A1, A2 and A3, he has quoted rate indifferently in figures and in words, in respect of Schedule D and this was noted by the tender opening officials and based on the overall offer of the petitioner for the said work was worked out to Rs.8,68,69,86,486/-, the petitioner stands status of sixth lowest tenderer. It is further stated that the tenders were opened on 08.03.2016 in the presence of all the tenderers and the copy of the rates quoted by the petitioner as well as the other five tenderers are also furnished. It is further stated that the tender committee consisting of three members evolved all the the tenders and decided to conduct one round of negotiation to reduce rates for Schedule A1 and item Nos.1,2,3,4 and 5 of Schedule D with the eligible L1 tenderer and recommended to award tender in favour of eligible L1 tenderer namely, the third respondent. It is further stated that there is no malice against any of the tenderers including the petitioner. In the above circumstances, the respondents sought for dismissal of the writ petition.

6. Mrs. J. Maria Roseline, learned counsel appearing for the petitioner would submit that as per the tender condition, regarding the minimum eligibility criteria, the tenderer shall be eligible only if he fulfils that he should have received a total contract amount of minimum of 150% of the advertised tender value during the last three financial years and in the current financial year and in order to substantiate the same, they directed to produce an attested certificate from the employer along with



audited balance sheet duly certified by a Chartered Accountant. Therefore, the petitioner has produced a certificate issued by the Chartered Accountant to the effect that the petitioner has a total turn over of Rs.1,43,40,321/- which is over and above the required turn over. Apart from that the petitioner has also quoted Rs.60/- per unit for the items in schedule D in words as well as in number. But the respondents deliberately stated that the petitioner has quoted indifferently in figure and words and arrived at exorbitant figure of Rs.8,68,69,86,486/- and rejected his application which is not maintainable in law. He would further contend that the respondents with a mala fide intention did not consider the petitioner tender documents and issued letter of acceptance to the third respondent.

7. Per contra, learned Senior Standing Counsel for the respondents would submit that as per the tender condition No.10, the petitioner is required to submit audited balance sheet duly certified by the Chartered Accountant in order to prove his turn over. But the petitioner has only produced a confirmation letter from the Chartered Accountant without filing audited balance sheet for the last three financial years and the current financial year and therefore, the petitioner has violated the tender condition. In the above circumstances, the tender committee, after carefully considering the tender documents submitted by the petitioner passed a detailed order rejecting his application holding that the petitioner has not fulfilled the turnover for requisite value as prescribed in the tender condition and therefore, the petitioner is ineligible. Consequently, the third respondent being the lowest tenderer, his tender has been accepted. Therefore, there is no infirmity or irregularity in the order passed by the second respondent. In support of his contentions, learned counsel for the respondent relied on the following judgments:-

"(1) In *Michigan Rubber (India) Ltd., Vs. State of Karnataka* reported in AIR 2012 SC 2915

(2) In *Bakshi Security & Personnel Services Pvt., Ltd., Vs. Devkishan Computed P. Ltd.*, reported in AIR 2016 SC 3585 and

(3) In *Central Coalfields Limited Vs. SLL-SML (Joint Venture Consortium)* reported in AIR 2016 SC 3814."

8. I have carefully considered the submissions made by the learned counsel appearing for the parties and perused the materials available on record.

9. So far as the first contention of the learned counsel appearing for the petitioner regarding the fulfilment of the eligibility criteria for qualifying tenderer is condition No.10 of the tender condition which reads as follows:

"10. Minimum Eligibility Criteria:

(i) The tenderer(s) shall be eligible only if he/they fulfill minimum Eligibility Criteria of having received total contract amount during the last three



financial years and in the current financial year with a minimum of 150% of the advertised tender value.

(ii) Authentic Certificates shall be produced by the tenderer(s) to this effect which may be an attested Certificate from the employer/client, Audited Balance Sheet duly certified by the Chartered Accountant etc."

10. As per the said condition, the tenderer is required to produce an attested certificate from the employer/client, audited balance sheet duly certified by the chartered accountant etc., In the instant case, the petitioner instead of submitting the audited balance sheet duly certified by the Chartered Accountant, he has produced a confirmation letter said to have issued by the Chartered Accountant to show that his turn over for the last three financial years come to Rs.1,43,40,321/-. Even perusal of the above confirmation letter, there are no detail available regarding the nature of work done by the petitioner. As per the said tender condition, the tenderer should file audited balance sheet duly certified by the Chartered Accountant which enabling the respondents to assess the financial capacity of the tenderers and mere letter of confirmation is not sufficient to satisfy the tender condition.

11. As rightly contended by the learned counsel for the respondents that the eligibility criteria contains in paragraph 10 of the tender notification is a essential condition which is not considered as ancillary or subsidiary and which has to be strictly adhered to. Since the petitioner did not satisfy the eligibility criteria, the tender committee has rightly rejected the petitioner's tender.

11. The Hon'ble Supreme Court in B.S.N. Joshi & Sons Ltd., Vs. Nair Coal Services Ltd., reported in (2006) 11 SCC 548, has held as follows:-

"...(i) if there are essential conditions, the same must be adhered to;

....

"...(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with; ..."

12. Similarly, in Central Coalfields Limited's case (supra), the Supreme Court has held as follows:-

"47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the employer but also from the point of view of the successful party. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or

superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached " as held in *Jagdish Mandal* followed in *Michigan Rubber* (AIR 2012 SC 2915).

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

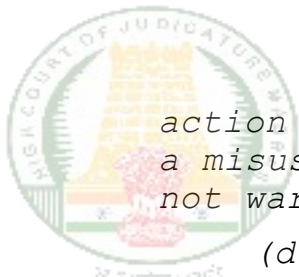
13. So far as the judicial review in respect of contractual matters, the Supreme Court in *Michigan Rubber (India) Ltd's* case (supra) has held as follows:

19) From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the



action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

14. In the instant case, the petitioner has failed to satisfy the eligibility criteria, as he failed to submit the audited balance sheet certified by the Chartered Accountant. In the above circumstances, the tender committee has considered the tender submitted by the petitioner and rejected the same giving reasons. As per the law laid down by the Supreme Court, this Court cannot interfere with the decision taken by the second respondent in the absence of any proof of mala fide or arbitrary exercise of power. Hence, I do not find any infirmity or irregularity in the order passed by the second respondent. Accordingly, the writ petition is dismissed. No costs. Consequently, W.M.P (MD) Nos. 13889 and 13890 of 2016 are closed.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

sms

TO

1. The General Manager

Southern Railway, H.O. Park Town, Chennai.

2. The Divisional Railway Manager

Works, Tiruchirappalli Division,
Southern Railway, Chennai 620 001.

+1cc to Mr. J. Maria Roseline Advocate Sr.No. 670008

+1cc to Mr. S. Manohar, Advocate Sr.No. 70192

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