

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION No. 28519 OF 2017

ORDER:

This Writ Petition is filed questioning the rejection of Techno-Commercial bid of the petitioner against Tender No. 06-CAO-C-SC-2017-ITEM 1, by Respondents 2 and 3 Chief Administrative Officer, Construction, South Central Railway and Convenor / Tender Committee, Construction Department, South Central Railway, Secunderabad, communicated through e-mail.

The brief facts of the case, as can be seen from the affidavit filed in support of the Writ Petition, are that, the petitioner is a joint venture of M/s KRANS Projects Private Limited, a private limited company represented by its Managing Director Sri K. Ranga Rao and an independent contractor Sri T.V. Sambasiva Rao, S/o Sri T. Suryanarayana, formed specifically for making an offer with respect to the work in tender notice No. 06-CAO-C-SC-2017-ITEM1 (hereinafter referred to as 'contract work'), dated 28.03.2017. In response to the tender notice issued for execution of the work i.e. *"Doubling of track between Guntur-Guntakal Section – Earthwork in formation including blanketing to GE.0014 specifications, construction of minor bridges, RUBs for LCs and other miscellaneous work including clearing the S&T obstructions from KM 5.00 to 60.00 between Nallapadu (including) and Santamagaluru (excluding) stations – Reach.I"*, the petitioner submitted its offer. In terms thereof, the petitioner is required to submit its offer *on-line*, by fulfilling various conditions notified therein. The offer can be made by the eligible contractors, including joint venture entities. However, the offer of the petitioner was not considered on the ground that it had failed to submit a specific document in compliance with Clause 3.2 of the

Commercial Compliance of the tender document, which clearly stipulates the documents to be submitted by a JV tenderer in terms of Clause 65.15.

Learned Senior Counsel *Sri R. Raghunandan* appearing on behalf of the petitioner contends that the document specified under Clause 65.15 is an inconsequential one and non-submission of such a document, at best, would result in non-compliance with a non-essential condition. The learned Senior Counsel, pointing out that the document mentioned in Clause 65.15 is only an affidavit, which is required to be given on a stamp paper by the constituent member of the joint venture, would submit that non-submission of such an affidavit cannot be taken as a ground for rejection of the offer of the petitioner to participate in the tender process. The learned Senior Counsel, placing reliance on the judgments of the Supreme Court in ***G.J. Fernandez v. State of Karnataka***¹, ***Poddar Steel Corporation v. Ganesh Engineering Works***², ***Cyano Pharma (P) Limited v. The State of Telangana***³, and ***Rashmi Metaliks Limited v. Kolkata Metropolitan Development Authority***⁴, would contend that the condition of the nature, non-compliance of which is complained of, is not an essential one and in those circumstances and in view of the law laid down by the Supreme Court, the action of the respondents in rejecting the offer of the petitioner is unsustainable. He, therefore, prays for a direction to the respondent authorities to consider the financial bid of the petitioner.

Resisting the prayer of the petitioner, *Sri C.V. Rajiv Reddy*, learned Standing Counsel for the Railways, placing reliance on the judgments of this Court in ***Union of India, South Central Railway***,

¹ (1990) 2 SCC 488

² (1991) 3 SCC 273

³ 2016 (2) ALT 282

⁴ (2013) 10 SCC 95

Secunderabad v. M/s Laxmi Builders⁵, and **Smt. Radha Konduri v. State of A.P.**⁶ and that of the Supreme Court in **State of Jharkhand v. CWE-SOMA Consortium** ⁷, contends that non-compliance of the notified conditions in the tender document is a good reason for rejecting the offer of the petitioner and in the absence of any allegation of *mala fides* or favouritism, the technical committee's opinion cannot be substituted by that of the Court and there being no discretion vested with the authorities, the action of the respondents in rejecting the offer of the petitioner as being not a '*responsive bid*' cannot be found fault with. The learned Standing Counsel further submits that this Court in the judgments referred to above, had considered various judgments of the Supreme Court, wherein law has been laid down to the effect that in the process of judicial review, the Court could not substitute its opinion with that of the authorities/expert committee.

Sri V. Srinivas, learned counsel appearing on behalf of the implead petitioner, placing reliance on the judgments in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)**⁸, and **Consortium of Titagarh Firema Adler S.P.A. – Titagarh Wagons Ltd. V. Nagpur Metro Rail Corporation Limited**⁹, would emphasize that the scope of judicial review being limited, the decision of the authorities is final and the Court cannot substitute its opinion and decide whether a particular condition is essential or not. In the absence of allegations of *mala fides* or favouritism, it is not open for the petitioner to allege rejection of non-responsive bid as arbitrary and illegal, learned counsel asserts. In those circumstances and in the admitted facts that the petitioner had failed to adhere to the

⁵ 2003 (3) ALT 1

⁶ 2017 (3) ALT 345

⁷ 2016 (6) ALD 185 (SC)

⁸ (2016) 8 SCC 622

⁹ (2017) 7 SCC 486

requirements in the notice inviting tenders, the learned counsel prays for dismissal of the Writ Petition.

In the light of the legal submissions made on behalf of all the parties, the question which falls for consideration is 'whether the action of the respondents in rejecting the offer of the petitioner for non-submission of an affidavit in terms of Clause 65.15 is justiciable, valid and as to whether a direction can be given to the respondents to consider the offer of the petitioner by opening the tender schedule'.

The fact that the petitioner had failed to enclose an affidavit as required under clause 65.15 is not in dispute. At the outset, Clause 65.15, non-compliance of which has resulted in rejection of the petitioner's offer, may be noticed. It reads as under:

“ **65.15.1** In case one or more of the members of the JV Firm is/are partnership firm(s), following documents shall be submitted:

- (a) Notary certified copy of the Partnership Deed,
- (a) Consent of all the partners to enter into the Joint Venture Agreement on a stamp paper of appropriate value (in original).
- (b) Power of Attorney (duly registered as per prevailing law) in favour of one of the partners of the partnership firm to sign the JV Agreement on behalf of the partnership firm and create liability against the firm.

65.15.2 In case one or more members is/are Proprietary Firm or HUF, the following documents shall be enclosed:

Affidavit on Stamp Paper of appropriate value declaring that his/her Concern is a Proprietary Concern and he/she is sole proprietor of the Concern OR he/she is in position of “KARTA” of Hindu Undivided Family (HUF) and he/she has the authority, power and consent given by other partners to act on behalf of HUF.

65.15.3 In case one or more members is/are limited companies, the following documents shall be submitted :

- (a) Notary certified copy of resolutions of the Directors of the Company, permitting the company to enter into a JV agreement, authorizing MD or one of the Directors or Managers of the Company to sign JV Agreement, such other documents required to be signed on behalf of the Company and enter into liability against the company and/or do any other act on behalf of the company.
- (b) Copy of Memorandum and Articles of Association of the Company.
- (c) Power of Attorney (duly registered as per prevailing law) by the Company authorizing the person to do/act mentioned in the para (a) above.

65.15.4 All the Members of JV shall certify that they are not black listed or debarred by Railways or any other Ministry / Department / PSU (Public Sector Undertaking) of the Govt. of India/State Govt. from participation in tenders/contract on the date of opening of bids either in their individual capacity or as a member of the JV Firm in which they were/are members.”

In the case on hand, there is no controversy with regard to the very notice issued inviting tender and the requirement of the

intending tenderers to fulfil certain criteria and file the necessary documents to support their claim with respect thereto. As stated earlier, it is also an admitted fact that the petitioner had failed to file the affidavit, as required under Clause 65.15.2. Non-fulfilment of the condition specified renders the intending tenderer to be disqualified on the ground that their bid is 'non-responsive'. While, initially, it is the case of the petitioner that the lapse on their part to submit an affidavit, as required under clause 65.15.2, is on account of misconstruing the same, at a later point of time, it contends that fulfilling the requirement under Clause 65.15 is not essential to judge the competency or otherwise of the petitioner to execute the work, as the eligibility criteria to enable a tenderer to participate in a tender has been prescribed and specified elsewhere. It is also the contention of the petitioner that the respondents had, in fact, exercised their discretion in relation to a bid submitted by M/s Sudhakara Infratech Pvt. Ltd., wherein the document signed by the Managing Director was taken as valid, notwithstanding the fact that the tenderer has not filed a specific declaration and a document evidencing the Managing Director to sign the bid documents. In other words, the sum and substance of the argument of the learned Senior Counsel for the petitioner is that the respondents ought to have exercised their discretion, particularly considering the lapse being only not filing an affidavit declaring the proprietor. The participant of the JV is a Proprietor, who is an individual and evidencing the same, the income tax returns have also been filed and in those circumstances, the rejection of bid of the petitioner is arbitrary and illegal. Learned counsel for the petitioner has placed reliance on the judgement in **G.J. Fernandez** (referred to supra) to support his case that the tendering authority is required to consider what are the essential conditions, non-fulfilment of which invalidates a bid from

consideration and what are the non-essential conditions which can either be waived or an opportunity can be given to make good of the lacunae/fulfil the same. According to him, it is only non-fulfilment of the mandatory essential condition alone that can be a valid ground for rejection of the bid of a tenderer. He would emphasize on non-exercise of such discretion by the respondent authorities, in which circumstances, the Court itself can look into the same and decide whether non-fulfilment of the condition of the nature can be used for rejection of the bid of the petitioner. Learned counsel also referred to **Poddar Steel Corporation's case** (referred to supra), particularly para 6. Likewise, the judgment in **Cyano Pharma (P) Limited's case** (referred to supra) is also to the same effect. The learned counsel also points out by citing the judgment in **Rashmi Metaliks Limited** (referred to supra) that the Court had reviewed all earlier judgments holding – fulfilment of a condition to be mandatory and not having differentiation between essential and non-essential conditions being bad on account of the earlier judgments not following the ratio laid down by a three-judge Bench of the Supreme Court in **TATA Cellular v. Union of India** {(1994) 6 SCC 651}.

Considering various facts and circumstances and the case law relied on by the respective parties, it has become a herculean task for this Court, particularly in the light of the conflicting opinions rendered by the Supreme Court of equal strength of two members, to come to a conclusion the real *ratio decidendi*. Peculiarly in every case, the larger bench judgements of the Supreme Court in **Ramana Dayaram Shetty v. International Airport Authority of India** (1979) 3 SCC 489, **TATA Cellular v. Union of India** {(1994) 6 SCC 651} and **G.J. Fernandez v. State of Karnataka** {(1990) 2 SCC 488} have been referred to.

After a closer scrutiny of all the judgments relied on by the respective counsel, this Court finds that the Supreme Court had held that:

1) the tendering authority is entitled to prescribe the criteria and conditions, which are required to be fulfilled by an intending bidder for consideration of a bid, either as a pre-condition or at a later stage, as long as the same are not whimsical and arbitrary and have nexus to achieve the objects;

2) it is open for the tendering authority to specify, in precise terms, what are essential and non-essential conditions and terms and which terms can be waived or opportunity be given to fulfil even after acceptance of the bid;

3) the tendering authority cannot and should not deviate from the notified procedure. However, if a discretion in deviation is to be exercised, the same has to be done uniformly and it is within the exclusive prerogative of the tendering authority and a tenderer does not have right to insist the tendering authority to exercise such discretion;

4) the soundness of the decision may be questioned if it is irrational or *mala fide* and intended to favour someone. In the absence of the allegation of *mala fides* or favouritism, it is not open for a party to question the discretion exercised in deciding what is an essential or non-essential condition;

5) in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)** (referred to supra), the judgments of this Court in **Rashmi Metallica case and Poddar Steel case** have been distinguished and have been held to be decided based on the peculiar facts therein (see para 45 & 48 of the judgment). For the purpose of clear understanding, both the paras are extracted as under:

“ 45. *Rashmi Metallica* was a comparatively different case inasmuch as Clause (j) of NIT was the subject matter of consideration.

This clause required a bidder to submit “Valid PAN No., VAT No., copy of acknowledgment of latest income tax return and professional tax return.” The employer interpreted this to be an essential term for qualifying in the bidding process. This view was upheld by a learned Single Judge and the Division Bench of the Calcutta High Court. This Court reversed in the following words (*Rashmi Metaliks case*, SCC p. 105 para 18).

“ 18. We think that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest income tax return was a collateral term, and accordingly, the Tendering Authority ought to have brought this discrepancy to the notice of the appellant company and if even thereafter no rectification had been carried out, the position may have been appreciably different.”

Essentially therefore, this Court substituted its view for that of the employer who interpreted this term of NIT to be mandatory for compliance. *Rashmi Metaliks* followed *Poddar Steel* and apparently overlooked the dictum laid down in *Ramana Dayaram Shetty, G.J. Fernandez, Tata Cellular and Jagdish Mandal* and must be confined to its own peculiar facts. In any event, this decision does not advance the case of any of the parties before us.

48. Therefore, whether a term of 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.”

Considering the scope of judicial review, though in the facts of this case, this Court can come to the conclusion that non-fulfilment of condition would not alter the competency of the petitioner for submitting his bid, the tendering authorities’ notification having mentioned that fulfilment of notified conditions as mandatory and

non-fulfilment thereof would result in rejection of the tender, this Court has no option except to adhere to the law declared and reject the case of the petitioner. If the tendering authority does not wish to waive or exercise the discretion, the Court cannot substitute its opinion and decide what is essential and non-essential condition, in a given case.

The Writ Petition is therefore, dismissed. No costs.

Consequently, the miscellaneous Applications, if any shall stand closed.

CHALLA KODANDA RAM, J

16th October 2017

ksld

