IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.13244 OF 2018

A.K. Mandhan, Transport Contractor,
Dhule Through its Proprietor,
Ashok Kashinath Mandhan,
Age-60 years, Occu:Business,
C/o-Kashinath Transport,
National Highway No.3,
Bombay-Agra Road,
Dhule.

...PETITIONER

VERSUS

1) The Food Corporation of India,
Through its General Manager(R),
Office of the General Manager,
FCI Building, 5th and 6th Floor,
Rajendra Nagar, Datta Pada Road,
Borivali(E), Mumbai-400066,

2) M/s. Premraj Chhogalal Pirot,
Shop No.24, Ground Floor,
Mahatma Gandhi Market,
Jalgaon-425001,
Through it's Proprietor,
Shri. Premraj Chhogalal Pirot,
Age-Major, Occu:Business,
C/o-As Above.

...RESPONDENTS

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Mr.N.B. Suryawanshi Advocate h/f. Mr. S.N. Suryawanshi Advocate for Petitioner.
Mr. Milind Patil Advocate for Respondent No.1.
Mr.R.S. Pawar Advocate for Respondent No.2.

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CORAM: S.S. SHINDE AND
K.K. SONAWANE, JJ.

DATE : 20TH DECEMBER, 2018

ORDER :

1. This Petition under Article 226 of the Constitution of India, takes exception to the impugned communication dated 27th November, 2018, and also to the impugned letter dated 30th November, 2018 (Exhibit F to the Petition), thereby accepting the offer of Respondent No.2 and allotting him the tender, which is subject matter of the Petition.

2. Learned counsel appearing for the Petitioner submits that it is a matter of record that on 27th November, 2018, at 11.41 a.m., the

technical bid of the Petitioner was rejected and after noticing it at 2.41 p.m. on the same day, the Petitioner forwarded audited balance-sheet and P & L accounts of the year 2016-17 along with the letter and thereafter at 3.30 p.m., the price bids were opened. The Petitioner has quoted 36% above Schedule of Rates in its tender which is less than lowest one, i.e. Respondent No.2 who has quoted 40% above Schedule of Rates. The Petitioner being lowest one, in the peculiar facts, is arbitrarily denied participation in the tender process by the arbitrary and unreasonable decision disqualifying the Petitioner. The Petitioner has complied with the essential conditions of the tender notice and the error on the part of the Petitioner in not submitting audited balance-sheet of the year 2016-2017 cannot be said to be collateral, and Respondent No.1 was not justified in disqualifying the Petitioner. It is submitted that by the impugned decision, the Petitioner is disqualified and offer of Respondent No.2 is accepted considering him as lowest one, when in fact the Petitioner is lowest one having quoted 36% above Schedule of Rates. It is submitted that submission of the audited balance sheet can be said to be a general condition and not the essential condition. The compliance on the part of the Petitioner is merely technical and not fundamental. The Petitioner immediately submitted such audited balance sheet of the year 2016-17 on the very same day, when the Petitioner came to know that his technical bid is rejected on the ground of non-submission of balance sheet of the year 2016-17. It is submitted that the Petitioner has fulfilled all essential conditions and therefore eligible for allotment of such tender/contract. Learned counsel invites our attention to the pleadings in the Petition, grounds taken therein and submits that the Petitioner's bid ought to have been accepted by Respondent No.1.

3. Learned counsel appearing for the Petitioner placed reliance upon the exposition of law in the case of Rashmi Metaliks Limited and another vs. Kolkata Metropolitan Development Authority and others[1], and submits that in the facts of that case, the Supreme Court held that, disqualification of appellant company on ground of its failure to submit its latest income tax return along with its bid/offer was not sufficient reason for disregarding its bid/offer. In such case, instead of disqualifying the bid for non-compliance with the term in question, tendering authority ought to have brought this discrepancy to the notice of tenderer and if even thereafter no rectification was carried out, position would be different. Learned counsel appearing for the Petitioner further pressed into service the ratio laid down in the case of Agrawal Roadlines Pvt.

1 (2013) 10 S.C.C. 95

Ltd. vs. Indian Oil Corporation and others[2], and submits that in the facts of that case, there was condition to submit demand draft of Rs.12,000/- in the name of particular Corporation, with the tender notice. However, the Petitioner therein submitted one tender form to the Indian Oil Corporation along with demand draft purchased in the name of the Hindustan Petroleum Corporation Limited, while the other tender form submitted to Bharat Petroleum Corporation Limited was accompanied by a demand draft purchased in the name of the Indian Oil Corporation. Tender forms were rejected on the ground that the demand draft annexed to the tender forms were not in the name of the Corporation to which the tender was submitted. In said case, however, the Supreme Court held that the mistake committed by the Petitioners by annexing the demand draft issued in the name of other Corporation deserved to be

2 2003(1) Mh.L.J. 610

condoned and waived as it was only a technical irregularity of little or no significance. Relying upon the ratio laid down in the aforesaid cases, learned counsel appearing for the Petitioner submits that the Petition deserves to be allowed.

4. On the other hand, learned counsel appearing for Respondent No.1 Corporation and learned counsel appearing for Respondent No.2, jointly submit that it was incumbent on all the participants in the tender process, to submit necessary documents along with the tender document. Learned counsel invites our attention to the list of the documents which need to be submitted along with tender document. It is submitted that admittedly the audited balance sheet of the year 2016-2017 was not submitted by the Petitioner along with the tender document, and therefore there was breach of necessary

conditions, at the time of filing tender document. Learned counsel further submits that in similar fact situation, wherein balance sheet was not submitted with the tender document, the Division Bench (CORAM: B.P. DHARMADHIKARI AND M.G. GIRATKAR, JJ.), of Bombay High Court, Bench at Nagpur, in Writ Petition No.4607 of 2018 (Gupta Freight Carrier vs. the Food Corporation of India and others), decided on 10th September, 2018, has taken a view that as audited profit and loss account and balance sheet were not submitted with the tender document, the Petitioner's technical bid was rightly rejected. Learned counsel further submits that the aforesaid order was challenged before the Supreme Court, however, the Supreme Court dismissed the Special Leave Petition.

5. We have given careful consideration to the rival submissions of the learned counsel appearing for the respective parties. With their

able assistance, we have perused the pleadings in the Petition, grounds taken therein and annexures thereto. Upon careful perusal of the tender notice and in particular, "Reference para 5(a) of General information to Tenderers" in Appendix-II of the tender notice (Page 19 of the tender notice), it clearly provides list of the documents which are to be attached with the tender document. In said list of 7 documents, at Sr. No.4, it is mentioned that:-

> "4. Duly audited P&L account and Balance Sheet of relevant completed years for which experience certificate has been submitted by the tenderer. In case of Partnership, only the experience of the Firm will be reckoned and for the purpose the experience of the individual Partners will not be counted."

6. In the present case, admittedly audited balance sheet for the year 2016-2017 was not submitted by the Petitioner with the tender document, and therefore his technical bid was rejected. The tender process has already undergone and tender/contract is alloted in favour of Respondent No.2. It is also informed that the work order is also issued. In our considered opinion, there is limited scope for judicial review in contract matters. Upon considering the aforesaid aspects and in particular, the fact that the tenderer desirous to participate in the tender process, has to submit the tender document along with necessary documents mentioned in the aforesaid Appendix-II of the tender document, it was incumbent upon the Petitioner and other tenderers who participated in tender process, to submit duly audited P & L account and balance sheet of relevant completed years for which experience has been submitted by the tenderer.

7. Upon careful perusal of the impugned communication dated 27th November, 2018, addressed to the Petitioner, the reason assigned for rejecting the technical bid of the Petitioner is that, during technical evaluation the duly constituted committee found that PL and balance sheet of relevant period has not been submitted. In that view of the matter, with the limited scope of judicial review, we are unable to persuade ourselves to grant any relief to the Petitioner. Hence the Writ Petition stands rejected.

[K.K. SONAWANE, J.] **[S.S. SHINDE, J.]**

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