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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6610 OF 2018

Swami Transport
A Partnership Firm, having its office at shop No.G-6, Viola Properties, Warje, Near Cipla Foundation, Warje Haveli, Pune through its Partner Mr.Vikrant Kisan Kale, Age: 33 years, Occupation Business and Agriculture, R/o. Warje Haveli, Pune. ..Petitioner.

V/s.

1) The State of Maharashtra through Secretary

2) Indian Oil Corporation Ltd. Through the Divisional General Manager, At post Bhose Chakaan Shikrapur Road, SH-55, Taluka Khed, District Pune.

3) The Divisional General Manager, Indian Oil Corporation Ltd. [Contract Cell, Western Region] [Marketing Division] Regional Office at Wester Region Cell, C-33, G-Block, Kurla Complex, Bandra (E), Mumbai-400 051. ..Respondents.

WRIT PETITION NO.6611 OF 2018

M/s. Naik Nimbalkar Enterprises Barshi
A Partnership Firm, having its office at 3931, Bhavani Peth Solapur, Main Road Solapur, at Barshi, District Solapur

through its partner Smt.Mega Malojirao
Nimabalkar, Age: 34 years, Occupation
Business and Agriculture, R/o. Vairag,
District Soapur. ..Petitioner.

V/s.

1) The State of Maharashtra through Secretary

2) Indian Oil Corporation Ltd. Through the Divisional General Manager, At post Bhose Chakaan Shikrapur Road, SH-55, Taluka Khed, District Pune.

3) The Divisional General Manager, Indian Oil Corporation Ltd. [Contract Cell, Western Region] [Marketing Division] Regional Office at Wester Region Cell, C-33, G-Block, Kurla Complex, Bandra (E), Mumbai-400 051. ..Respondents.

WRIT PETITION NO.6627 OF 2018

Swati Indane Gramin Vitarak
A Partnership Firm, having its office at
post Khed Shivapur, Taluka Haveli,
Haveli,Pune through its partner Mr.
Ajitkumar Chandrakant Konde, Age: 34
years, Occupation Business and Agriculture,
R/o. Khed Shivapur, Taluka Haveli
District Pune. ..Petitioner.

V/s.

1) The State of Maharashtra through Secretary

2) Indian Oil Corporation Ltd. Through

the Divisional General Manager, At post
Bhose Chakaan Shikrapur Road, SH-55,
Taluka Khed, District Pune.

3) The Divisional General Manager,
Indian Oil Corporation Ltd. [Contract
Cell, Western Region] [Marketing
Division] Regional Office at Wester
Region Cell, C-33, G-Block, Kurla
Complex, Bandra (E), Mumbai-400 051. ..Respondents.

Mr.Ajay Joshi for the petitioner in all the petitions.

Mr. Sunil Gangan with Mr.Shantanu Kalekar i/b. R.N. Lad Associates for respondent Noa.2 & 3.

CORAM: SHANTANU KEMKAR AND
NITIN W.SAMBRE, JJ.

DATE : JULY 2, 2018

ORAL JUDGMENT

Since all these petitions are arising out of the similar decision of rejection of Technical Bid of the petitioner by the common respondent, for award of tender for transportation of Indane LPG cylinders in vertical position on unit rate basis, these petitions are decided by this common judgment.

2. In Writ Petition No.6611 of 2018, the petitioner claimed to be partner of a firm. According to him, in response to

the tender notice dated March 9, 2018 vide Tender No.WRCC/ 2017-18/PT/114, the petitioner, a partnership firm applied for award of the contract in question. The nature of work in the tender is transportation of Indane LPG cylind"ers in vertical position on unit rate basis. The contract was initially for three years with a provision for extension for two years.

3. It is the claim of the petitioners that the condition incorporated in the tender document, of production of copy of registration certificate from Registrar of Firms certifying that the firm is registered partnership firm (To be referred to as 'certificate' for sake of brevity) enclosing all annexures wherein names of the partners of the said partnership firm are mentioned or certificate of incorporation, is directory and not mandatory in nature. According to the petitioner, after opening of the technical bid, by the impugned order dated June 11, 2018, the petitioners were declared disqualified by the duly constituted Committee as the petitioners had failed to submit the registration certificate. According to the petitioner, the said certificate was produced by the petitioner on June 12, 2018 i.e. on the next date of rejection / disqualification of the petitioner's technical bid. According to the

petitioner, the said decision warrants interference by directing the respondents to evaluate the bid of the petitioner on merits and not to reject the same for non submission of registration certificate of partnership firm issued by the Registrar of Firms.

4. The petitioner has sought quashing of the impugned communication dated June 11, 2018 and sought declaration that the petitioner be declared as technically qualified and his technical bid be opened and processed accordingly.

5. In Writ Petition Nos.6610 of 2018 and 6627 of 2018, it is the case of the petitioners that after the formation of the partnership firm, in a prescribed format it has applied for registration in November, 2017. However, the tender documents filed by the petitioners were rejected on similar grounds i.e. registration certificate from the Registrar of Firms are not produced. Based on the aforesaid background, the petitioners have claimed relief in the petitions for issuance of directions to respondent Nos.2 and 3 to process the technical bid of the petitioners and not to reject the same for want of registration certificate issued by the Registrar of Firms certifying that the

petitioner is registered partnership firm.

6. The learned counsel for the petitioners would urge that the condition incorporated in tender document, of production of registration certificate from the Registrar of Firms is not a mandatory condition as the certificate is not necessarily required, hence it be held that same is directory in nature. According to him, what is required to be appreciated is even if the firm is not registered, the partners of the firm can be sued in individual capacities for liabilities, if any, arising out of contract and can be personally held responsible. According to him, the Tender Inviting Authority need not to give effect to all terms mentioned in the tender notice in meticulous detail and it is within the ambit of the authority to modify the said condition.

7. The learned counsel then would urge that in Writ Petition No.6611 of 2018 certificate of registration was produced on the next date of rejection of the tender. According to him, in all the three cases if the Registrar of Firms grants certificate, same will relegate back to the date on which the application was made for grant of such registration. The learned counsel for the

petitioners would draw support from the judgment of the Apex Court in the matter of *V. Subramaniam V/s. Rajesh Raghuvandra Rao*[1]. According to him, the liability, financial or otherwise, if any, against the unregistered partnership firm can be established by impleading all the partners in a suit before the Court. He would then urge that once the provisions of section 69 sub-section (2-A) of the Partnership Act, 1932 introduced by the Maharashtra Amendment Act of 1948 are held to be *ultra vires*, the Court must read the condition of production of registration certificate as directory and not mandatory.

8. The learned counsel for the respondents would oppose the claim and submit that the condition of production of registration certificate that the petitioners are a partnership firm is mandatory. According to him, keeping in mind the provisions of section 69 of the Partnership Act, it cannot be held that by moving an application for registration, petitioners, unregistered partnership firm can claim compliance of the tender condition. He would then urge that this Court in its extra-ordinary jurisdiction cannot dilute or change the tender conditions as the same is not

1 **(2009) 5 SCC 608**

permissible in law. He sought dismissal of the petition.

9. Considered rival submissions.

10. In all these three petitions, the petitioners are claiming to be transport contractors, who are carrying out the said business through a partnership firm. Admittedly, on the date of evaluation of technical bid, none of the firm of the petitioner was registered as a partnership firm but were in the category of an unregistered partnership firm, as is apparent from the respective pleadings.

11. The tender condition particularly at page 30 of the Writ Petition No.6611 of 2018, is common in all the three petitions, which reads thus:-

> "**3. OTHER MANDATORY DOCUMENTS TO BE SUBMITTED BY THE BIDDERS PARTICIPATING IN THE TENDER.**
>
> x. *Copy of registration certificate from Registrar of Firm to establish the registered partnership firm enclosing all annexure wherein names of all the partners of the said partnership firm are mentioned or Certificate of Incorporation (wherever applicable).* "

12. From the aforesaid tender condition, which is part and parcel of the tender document, what is noticed is, the condition of production of registration certificate from the Registrar of Firm appears to be mandatory document. The petitioners have admittedly not produced the registration certificate as all the petitioners were not registered as partnership firm on the date of evaluation of the technical bid. It is only the petitioner in Writ Petition No.6611 of 2018, has produced the registration certificate on the next day of rejection of the technical bid certifying to have been registered. The said certificate is, as on June 12, 2018 as against the rejection of the technical bid on June 11, 2018.

13. As such, it can be easily inferred that none of the petitioners were complying with the mandatory condition of production of documents *qua* the petitioners who were participants in the tender.

14. Needless to say that at times tender conditions are directory and not mandatory in nature. A plain reading of condition No.3(x) reproduced hereinabove speaks of production of a registration certificate as one of the mandatory document for

participation in the tender process. In the matter of *Poddar Steel Corporation V/s. Ganesh Engineering Works and others*[2] while dealing the satisfaction of the mandatory condition, the Apex Court has observed :-

> *" It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the clause No.6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in GJ Fernandez v. State of Karnataka 7 Ors.,*

2 **(1991) 3 SCC 273**

MANU/SC/0175/ [1990] 2 SCC 488 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India & Ors., MANU/SC/0048/ [1979] [1979] 3 SCC 489 but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."

15. Applying the law laid down in the aforesaid judgment to the case in hand, what is noticed is, the condition of production of certificate of registration of a partnership firm from the

Registrar of Firms cannot be deemed to be insignificant document or hyper-technical condition. Such condition of requirement of certificate has to be read as mandatory requirement in the tender process. The said condition is required to be categorised as essential condition of eligibility and does not appear to be merely ancillary or subsidiary with the main object to be achieved. The fact is, the condition is required to be imposed with rigidity as is noticed from reading of the terms of the tender document. The tender document does not incorporate any condition which speaks of above referred condition need not be followed in meticulous detail by the authority inviting the tender and the authority can waive such condition. The respondent authority as such was obliged to reject the claim by relying upon principles of strict compliance of the mandatory tender condition.

16. Though the tender condition is not questioned by the petitioners, however, the petitioners have failed to demonstrate that the tender condition is arbitrary, discriminatory or actuated by malice. It is also not demonstrated by the petitioners that the condition of eligibility *viz.* production of certificate issued by the Registrar of Firms is enforced so as to favour some party or to

cause discrimination so as to arrest the claim of the petitioners.

17. Apart from above, it is noted that other similarly placed firms who have participated in the tender process have submitted their registration certificate. In the said background, it cannot be expected that the petitioners should be permitted to participate in the tender process without producing the registration certificate.

18. The Apex Court had an occasion to consider the scope of judicial review of terms of tender notice in the matter of *Global Energy Ltd. and another V/s. Adani Exports Ltd. and others*[3]. In para 10 of the said judgment, the Apex Court observed as under :-

> *10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly <u>arbitrary, discriminatory or actuated by malice</u>. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the*

3 **(2005) 4 SCC 435**

tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench.

19. Though the petitioners have sought support from the judgment of the Apex Court in the matter of *V.Subramaniam (cited supra)* and section 69 of Partnership Act, particularly on the issue of non requirement of registration of partnership firm, what is noted is said requirement was sought by the tendering authority being an essential condition of eligibility. This Court in the foregoing paragraph has held that the Court cannot in its extra-ordinary jurisdiction change the tender condition or direct the respondents to dilute / deviate from the same. In view of above, reliance placed by the learned counsel for the petitioners on the *V.Subramaniam (cited supra)* will be hardly of any assistance. Rather, the petitioners have tried to comply with the said condition, as is apparent from the pleadings in the petitions. That being so, the petitioners cannot *blow hot and cold* at the same time i.e. on one hand claiming that the tender condition is not essential and on the other hand producing certificate of registration in one of the case and in another matter coming out with a plea that registration is pending.

20. Apart from above, the judicial review of the administrative action particularly in the matter like the present one is permitted only to prevent arbitrariness, discrimination, unreasonableness, bias and malafide. This Court is required to see whether the decision of the tendering authority is lawfully made or not.

21. In the matter of *Tata Cellular V/s. Union of India*[4], the Apex Court has considered the aforesaid principles. The Apex Court noticed that judicial review will not be permitted to protect the private interest of the petitioner at public cost. It is always open for a tenderer or a contractor to redress his grievance by seeking damages in Civil Court.

22. In the aforesaid background, we are of the opinion that no case for interference in the extra-ordinary jurisdiction is made out. All the petitions as such are without any merit and are dismissed accordingly.

(NITIN W.SAMBRE, J.) ***(SHANTANU KEMKAR, J.)***

Srikrishna Ananth Sharma
Digitally signed by Srikrishna Ananth Sharma
Date: 2018.08.03 16:26:00 +0530

4 **A.I.R. 1996 S.C. 11**