IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION NO. 1073 OF 2018
IN WRIT PETITION NO. 4607 OF 2018

(Gupta Freight Carrier thr. Shri Vishal Pannalal Gupta vs. Food Corporation of India thr. its General Manager, Maharashtra, Regional Office, Mumbai & Ors.)

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's Orders.	Court's or Judge's orders.

CORAM : B.P. DHARMADHIKARI &
M.G. GIRATKAR, JJ.
OCTOBER 12, 2018.

This application for review is filed by the petitioner in Writ Petition No. 4607 of 2018 which was dismissed on 10.09.2018 by us. The interim order earlier granted in that petition was continued for a period of two weeks as the petitioner desired to approach the Hon'ble Apex Court . The Hon'ble Apex Court has on 20.09.2018 disposed of Special Leave Petition (C) No. 25591 of 2018, granting liberty to the petitioner to pursue the grievance in review before the High Court. The Hon'ble Apex Court granted that liberty and interim order was continued for a further period of two weeks to enable the petitioner to file review. The Hon'ble Apex Court also granted liberty to the petitioner to approach it again, if review petition be dismissed.

2. The present petition came to be filed accordingly and on 03.10.2018, we extended interim order.

3. Today, we have heard Shri R.S. Parsodkar,

learned counsel for the petitioner, Shri S.R. Deshpande, learned counsel for respondent Nos. 1 & 2 and Shri S. Tapadia, learned counsel for respondent No. 4. Nobody appeared for other respondents in writ petition.

4. Shri Parsodkar, learned counsel has invited our attention to the terms and conditions of Tender Notice and submitted that the requirement of furnishing the duly audited profit and loss account and balance sheet of relevant completed years cannot be seen as an essential condition. He draws support from the judgment of the Hon'ble Apex Court in the case of *Rashmi Metaliks Limited & Anr. vs. Kolkata Metropolitan Development Authority & Ors*., reported at (2013) 10 SCC 95, to urge that there the similar condition requiring filing of Income Tax return has been construed as co-lateral term. Our attention has also been drawn to judgment of the Hon'ble Apex Court in the case of *Om Prakash Sharma vs. Ramesh Chand Prashar & Ors.*, reported at (2016) 12 SCC 632, to demonstrate how the condition of submission of audited financial statements in support of annual turn over and net worth in last three years is found not an essential condition. He invites attention to certificate dated 17.02.2018 and contends that it is issued by the District Supply Officer (DSO), who is responsible authority in employment of the State Government and it supports eligibility of the petitioner.

5. Shri S.R. Deshpande, learned counsel has urged that bare perusal of terms and conditions of Tender Notice

show that employer has imposed it as an essential condition. He further submits that here the experience certificate issued by the DSO to the petitioner is for a period of about 5½ months and not for the entire year, hence, production of audited profit and loss account and balance sheet was all the more necessary.

6. Shri Tapadia, learned counsel has supported the arguments of Shri S.R. Deshpande, learned counsel. He has shortly taken us through application of mind contained in our order dated 10.09.2018. He submits that as per clause 8(4) in Tender Notice, non-submission of audited profit and loss account and balance sheet results in summary rejection. He relies upon the judgment in the case of *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & Anr*., reported at (2016)16 SCC 818 and in *Laxmi Sales Corporation vs. Bolangir Trading Co. & Ors.*, reported at (2005) 3 SCC 157. He submits that this judgment in the case of *Laxmi Sales Corporation* is delivered by the larger Bench and did not fall for appreciation in the case of *Rashmi Metaliks Limited & Anr. vs. Kolkata Metropolitan Development Authority & Ors*., (supra). He submits that framing of conditions in Tender Notice in particular mode is in demand of employer (Respondent Nos. 1 & 2) and their understanding of the same is of paramount importance.

7. Shri Parsodkar, learned counsel, in brief reply has invited our attention to the judgment in the case of *Tejas Construction and Infrastructure Private Limited vs.*

Municipal Council, Sendhwa & Anr., reported at (2012) 6 SCC 464, (paragraphs 25 & 26) to urge that in any case in present matter when the petitioner has furnished audited balance sheet later on and it supports the experience certificate, substantial compliance must be seen and hence the petitioner is entitled to relief.

8. Clause 3 in NIT is on qualifications of tenderer. The petitioner fulfills the same, however, he has not submitted duly audited profit and loss account and balance sheet for the relevant completed years/ period for which experience certificate has been submitted. Hence, that experience certificate has not been looked into and, therefore, the petitioner becomes ineligible.

9. The experience certificate dated 17.02.2018 shows that the petitioner has done work which is more than 25% of the estimated value of contract to be awarded in a single contract in any of the immediate proceeding five years. The period in which the petitioner has done work worth Rs.4,35,01,884/- is from 16.09.2017 to 31.01.2018. The requirement of submitting audited profit and loss account and balance sheet is also not in dispute before us. As per clause 8 of NIT, this audited statement and balance sheet is to be submitted as part of Technical bid on-line. Thus, scanned copy thereof is to be uploaded. Sub-clause (d) of clause 8 expressly stipulates that the tender which do not comply with instructions in clause 8 '*shall be*' summarily rejected. It is also not in dispute that hard copies of such

uploaded certificates/ documents are to be produced only by successful bidder.

10. A perusal of judgment in the case of *Rashmi Metaliks Limited & Anr. vs. Kolkata Metropolitan Development Authority & Ors*., (supra) shows that there the term was requiring copy of acknowledgment of the latest Income Tax return and provisional tax return. The Hon'ble Apex Court has evaluated this argument and found that the appellant before it was disqualified for not submitting the latest Income Tax return along with the bid. In paragraph 18, the Hon'ble Apex Court points out when Income Tax return would have assumed the character of an essential term. It finds that if one of the qualification norms was either the gross income or the net income, filing of income tax return could have been seen as an essential condition. As that was not the situation, the Hon'ble Apex Court holds that it was only a collateral condition.

11. The judgment in *Om Prakash Sharma vs. Ramesh Chand Prashar & Ors*., (supra), shows that there the objection to auction, in which property was sold, was taken after the execution of sale deed in favour of the highest bidder. Bids were invited for outright purchase of certain sites located in Himachal Pradesh. One of the conditions obliged bidder to disclose annual turnover and net worth in last three years. After the bidder succeeded and sale deed was executed, objection was raised by a neighbour of the site that the successful bidder had not submitted his annual

turnover and net worth for last three years. It appears that the learned Single Judge of High Court as also Division Bench in LPA found that successful bidder who did not disclose annual turn over could not have purchased the site. The entire process was, therefore, directed to be undertaken afresh. The successful bidder approached the Hon'ble Apex Court and the Hon'ble Apex Court in paragraph 12 found that advertisement did not contemplate creation and or continuation of any relationship between the parties. The ability to pay the price as per bid offer was the only relevant factor and as such it was not an essential condition but only ancillary one. The appellant who offered the highest price also paid it within prescribed period and obtained sale deed, the failure, therefore was not fatal.

12. In the case of *Tejas Construction and Infrastructure Private Limited vs. Municipal Council, Sendhwa & Anr.*, (supra), the successful bidder was expected to file audited balance sheet for five years preceding the award of contract. He submitted four years audited balance sheet. In relation to fifth year, due to non completion of audit, he submitted certificate of Chartered Accountant, his tender was accepted. The Hon'ble Apex Court found that there was substantial compliance with the stipulation in NIT.

13. The judgment in the case of *Laxmi Sales Corporation vs. Bolangir Trading Co. & Ors.*, (supra) is by larger Bench and in paragraph 12 there, the Hon'ble Apex Court observes that production of supporting documents

wherever applicable was one of the requirement of tender and Annexure '*J*' specifically required at Sr. No. 7 the proof of turnover of the firm over the last relevant years with supporting documents and the check list specifically mentioned that the production of proof of turnover with the latest profit and loss account duly certified by a Chartered Accountant was a mandatory requirement. The Hon'ble Apex Court, therefore, did not accept the finding of the High Court that production of these documents was not mandatory requirement.

14. The judgment of the Hon'ble Apex Court in the case of *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Anr.*, (supra) shows that respondent Nos. 1 & 2 who have offered the tender document are the best persons to understand and appreciate its requirements and interpret the same. The Hon'ble Apex Court has in paragraph 15 observed as under :

> *"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to*

the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

The order of High Court, therefore, was held unsustainable.

15. The judgment in the case of *Laxmi Sales Corporation vs. Bolangir Trading Co. & Ors*., (supra) did not fall for consideration in other judgments of the Hon'ble Apex Court mentioned supra.

16. Here, the language of tender document authored by respondent No. 1 is explicit. In clause 8 it has directed uploading of audited profit and loss account and balance sheet as part of technical bid. Its clause (d) specifically stipulates that tenders which do not comply with these instructions shall be summarily rejected. We, therefore, find substance in the submissions of Shri Deshpande, learned counsel that here failure on the part of the petitioner results in summary rejection of petitioner's tender. There is no challenge to this condition i.e. clause 8(d). Clause 3 requires that the tenderer should have executed in any of the immediate preceding five years the work of value (a) at least 25% of the estimated value of contract to be awarded in one single contract or then 50% of such estimated value in different contracts. Thus, time span envisaged is five years and quantity prescribed is 25% of tender work in one single contract or 50% in different contracts. Again there is no challenge to this condition.

17. The employer wants audited profit and loss account and balance sheet for the period for which experience is claimed and this expectation is neither arbitrary or erroneous. It has got definite nexus with eligibility norm prescribed in clause 3. The employer has also declared that omission to supply these documents results in summary rejection of tender. This drawing of tender document and object behind it is understood by the employer in a particular manner and it has, therefore, declared the petitioner not eligible.

18. We find the controversy covered by the observations in paragraph 15 in judgment in the case of *Afcons Infrastructure Corporation Limited & Anr. vs. Nagpur Metro Rail Corporation Limited & Anr*., (supra). We, therefore, find no case made out for exercise in review jurisdiction. Review petition is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

19. As the Hon'ble Apex Court has granted liberty to the petitioner to approach it again in case review is dismissed, we continue interim orders already operating for a period of three weeks more. The same shall cease to operate automatically thereafter.

JUDGE **JUDGE**

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