IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	06/02/2018
Delivered on	09/02/2018

CORAM:

THE HONOURABLE MR. JUSTICE K.KALYANASUNDARAM

W.P.No.71 of 2018 &
W.M.P.No.68 of 2018

Udhayam Constructions,
Represented by its Manager,
No.11, Sattaiyappar Sannathi,
Nagapattinam - 611 001. .. Petitioner

Vs.

1.The Executive Officer,
Velankanni Town Panchayat,
Velankanni.

2.The Assistant Director of Town Panchayat,
Room No.311, Thanjavur Collectorate Complex,
Thanjavur.

3.The Secretary to Government,
Municipal Administration and
Water Supply Department,
Fort st. George, Chennai - 9.

4.Ilayaraja .. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus, to forbear the first respondent herein from in any manner rejecting the petitioner tender and consequently direct the first respondent to evaluate the petitioner's quote as inclusive of taxes as per tender condition No.12.3 and finalise the tender process published by the first respondent in Tender Notification of the first respondent Heritage Development Augmentation Yojana (HRIDAY) Phase II Fund 2017-18, without rejecting the tender of the petitioner.

For Petitioner : Mr.K.M.Vijayan, Senior Counsel
For M/s.K.M.Vijayan Associates

For Respondents : Mr.S.T.S.Murthi, Additional
Advocate General,

Assisted by Mr.R.S.Selvam,
Government Advocate for R-1

Mr.V.Shanmuga Sundar
Special Government Pleader
for R-2 and R-3

Mr.V.Nalliyappan for R-4

O R D E R

Heard Mr.K.M.Vijayan, learned Senior Counsel for the petitioner; Mr.S.T.S.Murthi, learned Additional Advocate General, Assisted by Mr.R.S.Selvam, learned Government Advocate for the first respondent; Mr.V.Shanmuga Sundar, learned Special Government Pleader for the respondents 2 and 3 and Mr.V.Nalliyappan, learned counsel for the fourth respondent and perused the records.

2. The petitioner has come forward with the present Writ Petition seeking issuance of Writ of Mandamus, forbearing the first respondent from in any manner rejecting the petitioner's tender and consequently direct the first respondent to evaluate the petitioner's quote as inclusive of taxes as per the tender condition No.12.3 and finalize the tender process, published by the first respondent on 10.11.2017.

3. The case of the petitioner is that the petitioner-firm is a registered contractor. The first respondent invited tender for the purpose of "Upgradation of alternate approach BT Roads, in Velankanni Town Panchayat, Nagapattinam District. As per the tender notification dated 10.11.2017, the last date for submission of the tender was on 15.12.2017 and opening of bids was scheduled on 15.12.2017.

4. According to the petitioner, the petitioner's firm and the fourth respondent participated in the tender process and as per condition No.12.3, the tenderer has to quote the rates inclusive of all duties, taxes and other levies payable under the contract and as per the condition, the petitioner quoted Rs.3,56,90,188/- and the fourth respondent has quoted the value of Rs.3,42,40,000/- without tax and if the tax is included, the value of the fourth respondent would be Rs.3,86,91,200/-. When the petitioner is L1, the first respondent selected the fourth respondent contrary to the tender condition.

5. The learned Senior Counsel for the petitioner contended that the petitioner followed the law and as per the tender condition in Clause 12.3, the petitioner quoted the value including tax, whereas, the fourth respondent has quoted the

price less tax, but instead of rejecting the bid of the fourth respondent, now he is awarded with contract.

6. Per contra, the learned Additional Advocate General submitted that the tender was floated on 10.11.2017 and the intending tenderers were permitted to download the tender documents on 20.11.2017. The respondents have conducted a pre-bid meeting on 06.12.2017 in the Office of Velankanni Town Panchayat and as per the tender documents, the tenderers were directed to quote less tax for the reasons that the GST Committee may vary the tax rate. If the petitioner had any doubt or ambiguity, he should have participated in the pre-bid meeting and Clause 12.2, permits corrections by the tenderer. However, the petitioner instead of participating in the pre-bid meeting to clarify the doubts, allowed his tender application to be rejected on 26.12.2017.

7. It is further submitted that the Writ Petition has been filed on 2nd January 2018, seeking direction, forbearing the respondents for rejecting the petitioner's tender. Since the tender form of the petitioner was already rejected on 26.12.2017, the Writ Petition is not maintainable and now the only option available to the petitioner is to challenge the order of the rejection. It is further submitted that the Tender Evaluating Committee has rightly selected the fourth respondent, who has quoted Rs.3,42,40,000/- which is less than 10.88% of the estimated value and after approval by the Authorities, the work order was issued on 03.01.2018.

8. The learned Additional Advocate General further submitted that the Ministry of Urban Development, Government of India have chosen 12 cities in India for the purpose of implementing the scheme of "Heritage Development Augmentation Yojana" [HRIDAY] Phase II Fund 2017-18". Velankanni and Kancheepuram in the State of Tamil Nadu were selected for the said purpose and the fund has to be utilized before March 2018, otherwise, the funds alloted by the Government would lapse.

9. The learned counsel for the fourth respondent submitted that the tenderers can submit their applications either through online or offline, but in this case, admittedly, all the three bidders did not submit their applications through online. The petitioner, who is well aware of the conditions and the procedure for submitting the applications should have clarified his doubts, if any, before submitting the tender forms in the pre-bid meeting. Since the petitioner's bid was already rejected, the Writ Petition has become infructuous and prayed for dismissal of the Writ Petition.

10. Tender Condition No.12.3 reads as follows:-

> "All duties, taxes and other levies payable by the contractor under the contract, or for any other Act/Rules/Stipulations shall be included in the rates, prices and total Bid Price submitted by the Bidder."

11. A perusal of the tender condition No.12.3, makes it clear that the intending tenderers have to quote the price inclusive of tax. It is not in dispute, in the tender forms, the bidders were directed to quote the bid amount without taxes. It is also not in dispute that the petitioner had already uploaded the tender application on 20.11.2017, as per the schedule and the official respondents had conducted a pre-bid meeting on 06.12.2017.

12. It is the case of the petitioner that there is a contradiction between the tender condition and the contents in the tender forms. It is to be noted that the object of convening pre-bid meeting is to clear the doubts. In the affidavit filed in support of the Writ Petition, the petitioner has averred that the contradictory tender conditions, confusing the tenderers and in such case, the petitioner ought to have participated in the pre-bid meeting and cleared his confusions, but admittedly, he failed to do so. Further, no explanation is forthcoming for his non-participation in the pre-bid meeting.

13. The price bid of the petitioner was rejected on 26.12.2017. Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998, prescribes filing an appeal against the order passed by the Tender Accepting Authority under Section 10 before the Government within a period of 10 days from the date of receipt of the order. The petitioner, who was aware of the rejection of the tender on 26.12.2017 has filed this Writ Petition on 02.02.2018, seeking mandamus, to open the petitioner's tender application.

14. According to the learned Senior Counsel for the petitioner, the rejection of the petitioner's bid was neither intimated to him nor uploaded in the website and therefore, the petitioner has come up with this prayer. This Court finds it difficult to accept the contention of the learned Senior Counsel for the petitioner, since in this regard, nothing has been stated in the affidavit filed in support of the Writ Petition.

15. The learned Senior Counsel further submitted that only after filing of this Writ Petition, the bid of the fourth respondent was confirmed by anti-dating with a mala fide intention and the cheque issued by the fourth respondent was encahsed only on 27.01.2018. It is settled law that there shall be specific pleading and proof with regard to allegation of mala

fide. Perusal of records reveal that in the case on hand both are missing.

16. According to the fourth respondent, the work order was issued on 03.01.2018 and he has already completed 10% of the work.

17. In (2007)14 SCC 517 [Jagdish Mandal vs. State of Orissa and others], the Hon'ble Supreme Court has held as follows:-

> "22.Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tender and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:-
>
> (i)Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached":

(ii)Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of Stage largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

18. In (1994) 6 SCC 651 [Tata Cellular v. Union of India], the Hon'ble Supreme Court has held as follows:-

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

19. In the light of the above discussion and finding and the principles laid down in the above judgments, this Court does not find any merit in this Writ Petition. The Writ Petition fails and accordingly, the same is dismissed. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

r n s

To

1.The Executive Officer,
Velankanni Town Panchayat,
Velankanni.

2.The Assistant Director of Town Panchayat,
Room No.311, Thanjavur Collectorate Complex,
Thanjavur.

3.The Secretary to Government,
Municipal Administration and Water Supply Department,
Fort st. George, Chennai - 9.

+ 1 cc to Mr. K.M. Vijayan Associates Advocate Sr.10060
+ 1 cc to Mr.R. S. Selvan, Advocate SR.10116
+ 1 cc to Mr.R. Nalliyappan, Advocate Sr.10048
+ 1 cc to Government Pleader Sr.11013

W.P.No.71 of 2018 &
W.M.P.No.68 of 2018

(CS-IX)
EU(19/02/2018)