

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	03/04/2018
Delivered on	05/04/2018

CORAM:

THE HONOURABLE MR. JUSTICE K.KALYANASUNDARAM
W.P.No.6902 of 2018 &
W.M.P.No.8546 of 2018

M/s.Subaya Constructions Co. Ltd.,
Rep. by its Director Mrs.S.Meenakshi,
No.21, Soundarapandian Salai,
Ashok Nagar, Chennai - 600 083.

.. Petitioner

Vs.

1.The Superintending Engineer (Contracts & Monitoring),
Chennai Metropolitan Water Supply and Sewerage Board,
No.1, Pumping Station Road,
Chindadripet, Chennai -600 002.

2.The Commissioner,
Coimbatore City Municipal Corporation,
Big Bazar Street, Coimbatore - 641 001.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the
Constitution of India praying for issuance of a Writ of
Mandamus, to direct the first respondent to accept the Notarized
Work Completion Certificate dated 17.09.2016 of the second
respondent, submitted by the petitioner, for the purpose of
awarding contract, in view of the Clause 27.1 of the terms and
conditions, in the event that the records of the second
respondent are not traceable.

For Petitioner : Mr.ARL.Sundaresan, Senior counsel
For Mr.B.Natarajan

For Respondents : Mr.N.Ramesh, Standing Counsel for R1
Mr.R.Sivakumar, Standing Counsel for R2

O R D E R

Heard Mr.ARL.Sundaresan, learned Senior counsel,
representing Mr.B.Natarajan, learned counsel for the petitioner;
Mr.N.Ramesh, learned Standing Counsel for the first respondent;
Mr.R.Sivakumar, learned Standing Counsel for the second

respondent and perused the records.

2. The petitioner has come forward with the present Writ Petition seeking direction to the first respondent to accept the Notarized Work Completion Certificate dated 17.09.2016 issued by the second respondent.

3. According to the petitioner in the tender floated by the second respondent in the year 2009, the petitioner was the successful bidder and he executed and completed the project on 28.08.2015. The petitioner handed over the project to the second respondent on 05.10.2015 and after withholding 2.5% towards defect liability period, the remaining payment was made to the petitioner on 25.07.2016.

4. The petitioner would further state that in the tender notification issued by the first respondent for providing Comprehensive Sewerage Scheme to Manali, Chinnasekkadu, Karambakkam and Manapakkam in Chennai City, the petitioner submitted the tender documents including Work Completion Certificates and out of four performance certificates submitted by the petitioner, three of the Work Completion Certificates have been verified as genuine. However, in respect of the Work Completion Certificate issued by the second respondent, a reply was sent stating that the original records are not traceable.

5. The petitioner would claim that as per Clause 27.01 of the tender conditions, the first respondent has to inform and give opportunity to the petitioner, in case of any difficulty or delay in verifying the genuineness of the certificates. But, the first respondent in his letter dated 12.03.2018 has raised silly and frivolous queries with a mala-fide intention to eliminate and disqualify the petitioner from participating in the bidding process, by stating that why in the performance certificate issued by the second respondent dated 17.09.2016, it is not stated that the work was successfully and substantially completed. According to the petitioner, the Work Completion Certificate is genuine and an attempt was by the first respondent to eliminate him from participating in the tender. Hence, the present Writ Petition.

6. In the counter filed by the first respondent, it is stated that India has applied for financing from the the Asian Development Bank (ABD) towards the cost of Tamil Nadu Urban Flagship Investment Programme (TNUFIP)-Tranche 1. Part of this financing will be used for payment under the contract named "Providing Comprehensive Sewerage Scheme to Manali, Chinnasekkadu, Karambakkam and Manapakkam in Chennai City" and the bid document for procurement of works have been prepared by Chennai Metropolitan Water Supply and Sewerage Board based on the Standard bid document for the procurement of works issued by the Asian Bank in the month of December 2016. It is further

stated that as per Clause 2.4.1, the participant shall produce construction experience certificate for his successfully or substantially completed within the last five years and to satisfy the qualification criteria, the bidders were requested to furnish the performance certificate vide the Office letter dated 12.03.2018. So, the allegations of the petitioner are false and baseless.

7. The learned Senior Counsel for the petitioner submitted that as per the agreement dated 05.08.2009, the petitioner had successfully executed the work and a Work Completion Certificate was issued on 17.09.2016. Now, the only issue is the second respondent has to respond whether the certificate is genuine or not. It is the contention of the learned Senior Counsel that if there is any defect in execution of the work with the second respondent, the petitioner has to attend as per the obligation in the agreement, which has to be dealt with separately and at this juncture, the second respondent cannot go into the performance or the quality of work done by the petitioner. The learned Senior Counsel further submitted that the Clause 2.4.1 in the tender document has been included only with an mala fide intention to prevent the petitioner from participating in the tender.

8. Per contra the learned Standing Counsel for the first respondent while reiterating the averments made in the counter affidavit submitted that the tender conditions uniformly applied to all the tenderers and hence, no question of discrimination or arbitrariness in the decision. The qualification was included to ensure that the estimated cost of Rs.136.72 Crores for this project have been executed properly and it serves the interest of the public. The learned Standing Counsel further submitted that the technical bid was already opened on 27.02.2018 and now it is under evaluation.

9. The learned Standing Counsel by placing reliance on the decisions of the Hon'ble Supreme Court in the case of Tata Cellular v. Union of India [(1994) 6 SCC 651], Maharashtra Housing Development Authority Vs. Shapoorji Pallonji and Company Private Limited and others [(2018) 3 SCC 13] and a decision of this Court in Lanco Infratec Limited Vs. The Chief General Manager (Contracts), Neyveli Lignite Corporation Limited [2013 (6) CTC 667] submitted that the scope of judicial review in the tender matters is in narrow campus and therefore, no positive direction can be issued when the evaluation is in process.

10. In the case on hand, it is not in dispute that the petitioner has submitted tender documents pursuant to the tender floated by the first respondent for implementation of Comprehensive Sewerage Scheme in Chennai City. In the tender document, one of the conditions is for production of construction experience certificate. As per Clause 2.4.1, the

bidder has to produce certificate for participation for at least one contract that has been successfully or substantially completed within the last five years.

11. The Hon'ble Supreme Court in the case of Tata Cellular v. Union of India (referred supra) has held as follows:-

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

12. In 2003 (6) CTC 667 (referred supra), this Court has held as follows:-

"32. There is no dispute that Judicial Review is essentially against the decision making process and not against the merits of the decision. This is more in the realm of contract. The State should have the freedom to prescribe terms and conditions of contract. In case a Tender Notification is issued, it is open to

all concerned to apply if they are interested to take part and eligible to participate in the process. If the Tender conditions are tailor-made to suit the chosen few, and the process is arbitrary and action is violative of the equality clause enshrined under Article 14 of the Constitution of India, the Court would be justified in exercising the jurisdiction under Article 226 of the Constitution of India to correct the decision and to ensure a level playing field to all the competitors. However the question here is whether the Court would be justified in interfering with the Tender process in each and every stage. In case of Courts interference in every now and then at the instance of those who are in the race and convinced that they would not be in a position to secure the contract, it would paralyse the very system. The Government agencies would not be in a position to proceed independently in the event of such routine exercise of Judicial Review. There should be materials before the Court that the concerned bidder was fully qualified and in spite of eligibility, his Tender was not considered on extraneous reasons. The party must demonstrate that there is a conscious attempt to part with the privilege in favour of those, who are not eligible for such benefits and not withstanding the eligibility of others, who are in a better position to make a claim. The Court is expected to strike a balance in such cases. The larger public interest must guide the Court in a case of this nature involving substantial public money."

13. In the recent decision, the Hon'ble Supreme Court in (2018) 3 SCC 13, set aside the directions issued by the High Court of Bombay. In that case, a Writ Petition was filed contending that the writ petitioner had uploaded its technical and finance bid on 27.07.2017 on a website, but it could not get an acknowledgement of the bid submitted. The Mumbai High Court directed the NIC to access the files containing the bid documents of the petitioner and transfer it to the respondent and consider his bid documents as valid and open the technical bid forthwith. The NIC filed a counter stating that the bid uploaded by the writ petitioner was invalid as his representative did not press the "Freeze button" which alone would have completed the bid process and retrieval is not feasible or possible. It is further stated that on 27.07.2017, there was no problem with the server during the relevant time and as many as 427 bid documents were uploaded on that date. Considering the above fact, the Hon'ble Supreme Court set aside the direction, holding that the bid submitted in the petitioner was not a valid bid and the directions issued by the High Court

virtually confer on the petitioner a second opportunity, which cannot be countenanced.

14. Perusal of the conditions stipulated in the tender document and the counter filed by the first respondent, it is evident that the tender has been floated for implementation of the project at a cost of Rs.136.72 Crores and the qualification has been prescribed in compliance of the standard bid documents for the procurement of the work issued by the Asian Bank Development.

15. The petitioner having participated in the tender process has no right to challenge the tender conditions. It is settled law that it is the prerogative of the employer to impose conditions, which cannot be questioned in a Writ Petition by invoking Article 226 of the Constitution of India.

16. Taking note of the above facts and the principles laid down in the above decisions, I am of the considered opinion that the petitioner has no right to seek direction to accept the Notarized Work Completion Certificate for the purpose of awarding contract in violation of the tender conditions. In that view, the Writ Petition is dismissed. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CS IX)

/true copy/

Sub Asst. Registrar

r n s

To

1.The Superintending Engineer (Contracts & Monitoring),
Chennai Metropolitan Water Supply and Sewerage Board,
No.1, Pumping Station Road,
Chindadripet, Chennai -600 002.

2.The Commissioner,
Coimbatore City Municipal Corporation,
Big Bazar Street, Coimbatore - 641 001.

+ 1 cc to Mr.B.Natarajan Advocate,SR.25353
+ 1 cc to Mr.R.Sivakumar Advocate,SR.25319

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nr 06/04/2018