

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 11.09.2018	Delivered on 07.12.2018
---------------------------	----------------------------

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

W.P.Nos.13265 and 13266 of 2018
and W.M.P.Nos.15624 to 15627 of 2018

W.P.No.13265 of 2018:

K.M.Mustafa

... Petitioner

-vs-

1.The Indian Railway Catering and
Tourism Corporation (IRCTC) Ltd.,
rep.by its Group General Manager/LCS,
11/12th Floor, Statesman House,
148, Barakhamba Road,
New Delhi-110 001.

2.The Regional Director,
The Indian Railway Catering and
Tourism Corporation (IRCTC) Ltd.,
South Zone, 6A, The Rain Tree Place,
Mc Nichols Road, Chetpet,
Chennai-600 031.

3.M/s.Adyar Anandha Bhavan Sweets,
India Private Limited,
No.9, Mahatma Gandhi Road,
Adyar, Chennai-20.

... Respondents

W.P.No.13266 of 2018:

K.M.Mustafa

... Petitioner

-vs-

1.The Indian Railway Catering and
Tourism Corporation (IRCTC) Ltd.,
rep.by its Group General Manager/LCS,
11/12th Floor, Statesman House,
148, Barakhamba Road,
New Delhi-110 001.

2.The Regional Director,
The Indian Railway Catering and
Tourism Corporation (IRCTC) Ltd.,
South Zone, 6A, The Rain Tree Place,
Mc Nichols Road, Chetpet,
Chennai-600 031.

3.M/s.Anjali Hotels Pvt.Ltd.
Casino Hotel, Willingdon Island,
Cochin, Kerala-682 003.

... Respondents

W.P.No.13265 of 2018 filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus calling for the records of the first respondent herein in respect of the email dated 30.05.2018 sent to the petitioner and quash the same and direct the respondents 1 and 2 herein to grant license for setting up, operation and management of Food Plaza at Chennai Central (concourse) to the petitioner herein pursuant to Tender Notice No.CO/NIT/FP-FFU/2017/ 04 Group-B of the first respondent.

W.P.No.13266 of 2018 filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus calling for the records of the first respondent herein in respect of the email dated 30.05.2018 sent to the petitioner and quash the same and direct the respondents 1 and 2 herein to grant license for setting up, operation and management of Food Plaza at Chennai Central MMC to the petitioner herein pursuant to Tender Notice No.CO/NIT/FP-FFU/2017/ 04 Group-B of the first respondent.

For Petitioner :: Mr.AR.L.Sundaresan, Sr.Counsel for
Ms.AL.Ganthimathi
in both the writ petitions

For Respondents :: Mr.R.Thiagarajan, Sr.Counsel for
Mr.V.G.Sureshkumar for R1 in both
the writ petitions

Mr.Anishkumar for R2 in both the
writ petitions

Mr.Vishnu for Mr.K.Ramu for R3
in W.P.No.13265 of 2018

COMMON ORDER

The case of the petitioner in these writ petitions is that the first respondent-Corporation invited tender for setting up Food Plaza at 24 Railway Stations all over India including Chennai Central Railway Station, Tamil Nadu. The case in hand relates to setting up Food Plaza in Chennai Central (concourse) and in Chennai Central MMC. The bids were submitted in two parts, viz., Part-A consisting of technical and other conditions and Part-B consisting of financial bid. The petitioner submitted his tender. The technical bids of the tender were opened on 09.02.2018 at 12.15 hours and the petitioner got qualified in the same. The financial bids were opened on 30.05.2018 and on that day, at about 3.55 p.m., the petitioner was informed through e-mail that he has been disqualified due to non-fulfilment of eligibility criteria as prescribed in Annexure-B of the tender document.

2. Aggrieved over the same, the petitioner has come up with the present writ petitions.

3. W.P.No.13265 of 2018 has been filed to call for the records of the first respondent in respect of the email dated 30.05.2018 sent to the petitioner, quash the same and to direct the respondents 1 and 2 herein to grant license to the petitioner for setting up, operation and management of Food Plaza at Chennai Central (concourse), pursuant to Tender Notice No.CO/NIT/FP-FFU/2017/04 Group-B.

4. W.P.No.13266 of 2018 has been filed to call for the records of the first respondent in respect of the email dated 30.05.2018 sent to the petitioner, quash the same and to direct the respondents 1 and 2 herein to grant license to the petitioner for setting up, operation and management of Food Plaza at Chennai Central MMC, pursuant to Tender Notice No.CO/NIT/FP-FFU/2017/ 04 Group-B.

5. The learned senior counsel appearing for the petitioner has submitted that the petitioner is the highest bidder having quoted Rs.2,33,57,786/- and Rs.5,27,57,786/- respectively. He submitted that the reason assigned by the first respondent for disqualifying the petitioner stating that the petitioner has not fulfilled the eligibility criteria, is a total non-application of mind on the part of the first respondent and it lacks details as to the nature of non-eligibility. It is also his submission that the respondents 1 and 2 are trying to issue the Letter of

Approval to the third respondent, purposely to avoid grant of contract to the petitioner. According to the learned senior counsel, the respondents 1 and 2 having accepted the technical bid of the petitioner, are not correct in rejecting the financial bid of the petitioner. He contended that the rejection of the financial bid of the petitioner is nothing but to favour the fourth respondent in the writ petitions and nothing else.

6. The learned senior counsel appearing for the petitioner relied upon the judgment of the Hon'ble Supreme Court in *Tata Cellular v. Union of India*, reported in 1994 KHC 901 and submitted that in case the Tendering Authority later declares unequivocal compliance with tender conditions relating to the error in respect of non-essential matter, even then the bid furnished by the bidder could not be excluded from consideration and he cannot be punished for accidental action. He also relied upon the judgment of the Hon'ble Supreme Court in *Poddar Steel Corporation v. Ganesh Engineering Works*, reported in (1991) 3 SCC 273, to state that minor deviation in technical compliance with the tender conditions can be waived. He further relied upon the judgment of the Hon'ble Supreme Court in *Rashmi Metaliks Limited v. Kolkata Metropolitan Development Authority*, reported in (2013) 10 SCC 95 to emphasise the point that if there is any non-compliance of the tender conditions in the bid, the Tendering Authority can very well bring the same to the notice of the bidder and if even thereafter no rectification is carried out, only then the position would have been different. Thus, he stated that opportunity ought to have been given to the petitioner to rectify the defect. Stating so, he prayed for allowing these writ petitions.

7. A counter affidavit has been filed on behalf of the respondents 1 and 2, wherein all the allegations of the petitioner as set out in the affidavits filed in support of the writ petitions, have been denied. It is stated that the petitioner cannot maintain these writ petitions for want of jurisdiction. It is stated that only the Courts situated at New Delhi are having the exclusive jurisdiction in relation to any disputes under the License Agreement. The e-tender in the present case was floated by the first respondent at New Delhi and the tenders were received and opened on-line at New Delhi and the scrutiny of the tenders by the Tender Committee has been done only in New Delhi. The petitioner did not provide the names of the mobile/static units held by him and that the annual turnover as per the documents submitted by the petitioner, i.e., the Profit and Loss Statements for the year 2014-2015 did not tally with the Annual Sales Turnover for the year 2014-2015 as per the Chartered Accountant's Certificate submitted as Annexure-B2. Therefore, the petitioner was found ineligible in

the technical bid.

8.It is specifically stated in the counter affidavit filed on behalf of the respondents 1 and 2 that the petitioner did not satisfy the mandatory technical eligibility criteria as laid down in Annexure-B of the tender document. As per Annexure-B2, the tenderer has to provide the names of mobile and static units while giving the turnover from catering business. But the petitioner has not mentioned the details of static / mobile units in Chartered Accountant's Certificate for the years 2014-2015, 2015-2016 and 2016-2017. Moreover, as per the submitted Profit and Loss Statement for the financial year 2014-2015, the total sales turnover is shown as Rs.5.75 Crores, whereas the sales turnover as per the Chartered Accountant's Certificate for the financial year 2014-2015 is shown as Rs.6.25 Crores. Thus, both the values for the same record 'turnover' are not matching. In such circumstances, as per Clause(d) of Annexure-A of the tender document, IRCTC has the right to summarily reject the bid. The technical committee did not accept the said certificates as valid and complying with the requirement of eligibility criteria stipulated in the tender document. Thus, the petitioner did not satisfy the mandatory financial turnover criteria and hence was not found eligible while evaluating the technical bid of the petitioner along with other bidders. It is also stated that it is not only the petitioner alone, but the bids of seven others have also been disqualified, because of non-compliance of the tender conditions. It is specifically submitted that all the bids were scrutinised equally with no scope of any preferential treatment to any particular bidder and there is no discrimination against the petitioner herein. With regard to the third respondent in W.P.No.13265 of 2018, viz. Adyar Ananda Bhavan, Chennai, which got qualified in the tender, it is stated that the third respondent has quoted the highest amount of Rs.2,16,00,000/- and that there is no scope for the tender committee to evaluate the technical bid of the third respondent since prior knowledge is available regarding the details of financial bids. Similarly, in respect of the third respondent in W.P.No.13266 of 2018, viz. M/s.Anjali Hotels Pvt.Ltd., Cochin, Kerala State, it is stated that they have quoted the highest amount of Rs.3,51,00,000/- and there is no scope for the tender committee to evaluate the technical bid since prior knowledge is available regarding the details of financial bids. Finally, it is stated that having given an Undertaking by the petitioner as per Clause (d) of Annexure-A of the tender document and the Note of Annexure-B, that the bidder understands that in case of any information submitted by him is found to be incorrect, the IRCTC has the right to summarily reject the bid, it is not correct on the part of the petitioner now to challenge the decision taken by the IRCTC, as the same has been made only in accordance with the e-tendering procedure

laid down in the tender conditions.

9.Reiterating the submissions made in the counter affidavit filed on behalf of the respondents 1 and 2, the learned senior counsel for the first respondent and the learned counsel for the second respondent have submitted that the impugned e-mail communications by the IRCTC have been made properly in accordance with the tender conditions and the same does not require any interference in the hands of this Court.

10.A counter affidavit has been filed on behalf of the third respondent in W.P.No.13265 of 2018, in which it is stated that the third respondent has got nearly 140 branches throughout India and has established a reputation and goodwill in Hotel Industry by serving quality tasty food products. Hence the third respondent, who has been selected as a successful bidder, will be in a position to satisfy the needs of the common people by giving quality products at competitive price. It is stated that the writ petitions filed by the petitioner lacks jurisdiction, as the exclusive jurisdiction has been specifically vested only in the Courts situated at New Delhi. It is stated that the first respondent never opened the financial bid of the writ petitioner and on the contrary, the first respondent opened the financial bid only in respect of four bidders including the third respondent, who got qualified in the eligibility criteria and consequently the third respondent has been declared as the successful bidder, having quoted the amount of Rs.2,16,00,000/-. It is stated that the eligibility criteria have to be complied in full while the same is submitted before the Tender Scrutinising Committee; if the same is not fulfilled, it would go against the sanctity of the tender process; any relaxation shown in favour of the petitioner would open a flood gate and other bidders will also seek for relaxation in respect of the defects committed by them. Adherence to the mandatory instructions cannot be given a go-bye, as the same will breed or give scope to discrimination, arbitrariness and favouritism, according to the counter affidavit.

11.Reiterating the submissions made in the counter affidavit filed on behalf of the third respondent in W.P.No.13265 of 2018, the learned counsel for the third respondent has submitted that no special consideration has been shown to the third respondent relaxing any guidelines stipulated in the tender process, rather the third respondent got qualified only upon following the conditions stipulated in the tender scrupulously. Stating so, he submitted that the impugned communications need not be interfered with by this Court. The learned counsel relied upon the decision of this Court in Hero Ecotech Ltd. v. Commissioner

of Backward Classes Welfare, reported in 2018 (4) CTC 47, to state that the scope for interference in commercial contractual matters is very limited and that interference can be done only if there is any error in decision making process, and not in the decision itself; the bidder must comply in full the technical specifications, being a tender requirement. He also relied upon the decision of the Hon'ble Supreme Court in W.B.State Electricity Board v. Patel Engineering Co., reported in (2001) 2 SCC 451, to emphasise the point that even negligent mistakes in bid documents cannot be permitted to be corrected on the basis of equity and that adherence to the rules is the best principle to be followed in public interest, in respect of Government contracts.

12.Heard the learned counsel on either side and perused the materials available on record carefully and meticulously.

13.The first respondent-Corporation invited tender for setting up Food Plaza at 24 Railway Stations all over India including Chennai Central Station, Tamil Nadu. The case in hand relates to setting up Food Plaza in Chennai Central (concourse) and in Chennai Central MMC. The bids were submitted in two parts, viz., Part-A consisting of technical and other conditions and Part-B consisting of financial bid. The petitioner submitted his tender. The petitioner got qualified in the technical bid, but he has been disqualified due to non-fulfilment of eligibility criteria as prescribed in Annexure-B of the tender document, in respect of financial bid. The reasons stated for such rejection is that the petitioner has not mentioned the details of static / mobile units in the Chartered Accountant's Certificate for the years 2014-2015, 2015-2016 and 2016-2017 and further, as per the submitted Profit and Loss Account Statement for the financial year 2014-2015, the total sales turnover shown by the petitioner is Rs.5.75 Crores, whereas the sales turnover as per the Chartered Accountant's Certificate for the financial year 2014-2015 is shown as Rs.6.25 Crores. Thus, both the values for the same record 'turnover' are not matching.

14.It is the submission of the learned senior counsel appearing for the first respondent-IRCTC that it is not only the petitioner alone, but the bids of seven others have also been disqualified, because of non-compliance of the tender conditions. It is contended that all the bids were scrutinised equally with no scope for any preferential treatment to any particular bidder and there is no discrimination against the petitioner herein. He submitted that the third respondent in these writ petitions have correctly followed the procedures as laid down in the tender documents and only on proper scrutiny of

their tenders, they got qualified and there is no favouritism by the first respondent at any point of time. He further added that having given an Undertaking by the petitioner as per Clause (d) of Annexure-A of the tender document and the Note of Annexure-B, that the bidder understands that in case of any information submitted by him is found to be incorrect, the IRCTC has the right to summarily reject the bid, it is not correct on the part of the petitioner now to challenge the decision taken by the IRCTC, as the same has been made only in accordance with the e-tendering procedure detailed in the tender conditions.

15. In this connection, a reply affidavit has been filed by the petitioner, in which it is stated that an inadvertent error has crept in the tender documents, and it does not go into the root of the matter. It is stated that the object of the tender is to award the license among the eligible bidders, to the person who is quoting the highest amount. In the case on hand, the technical bid has been rejected on flimsy ground and if at all the first respondent wanted the break-up details also to be furnished, the first respondent ought to have called upon the petitioner to provide such details as required, so that the same would have been furnished to them. But instead of doing so, neither any opportunity has been afforded nor any notice issued to the petitioner informing the reason for such rejection.

16. According to the petitioner, such small inadvertent errors ought not to have been precipitated, rather an opportunity might have been given to the petitioner, before rejecting the technical bid.

17. This Court has to decide the points as to whether an opportunity has to be given to the petitioner before rejecting the technical bid by the first respondent, or not, and as to whether the rejection of the petitioner's technical is correct or not.

18. When these writ petitions came up before this Court on 31.05.2018, this Court issued a direction to the respondents 1 and 2 to proceed with the tender process, but not to pass final orders by accepting any tenders, till 12.06.2018. The said interim order has been periodically extended.

19. It appears that the petitioner's technical bid was rejected on the ground that it has not tallied with the Chartered Accountant's Certificate. According to the petitioner, the Profit and Loss Account shows the sales of catering and food items in two places, viz., Sales of catering and food items -

Rs.5,75,92,584/- and Catering income - Rs.49,84,395/- and if both the sums are added, it works out to Rs.6,25,76,979/-, and that is the one fulfils the requirement of the tender. Thus, according to the petitioner, the amounts have been split up and shown in the bids, which cannot be termed as illegal and even if it is illegal, an opportunity ought to have been given to the petitioner to rectify the said defect. It is also seen that the petitioner, in his letter dated 25.06.2018 addressed to the first respondent has stated that due to oversight, the split-out income (Rs.5,75,92,584/- + Rs.49,84,395/-) shown in the Trading and Profit and Loss Account for the year ending on 31.03.2015, had not been noticed by the first respondent.

20.First of all, it has to borne in mind that a bidder has to comply with the conditions stipulated in the tender strictly and meticulously. In this regard, it would be appropriate to refer to the Division Bench judgment of this Court in W.A.Nos.137 and 138 of 2017 dated 12.06.2018, wherein the question as to whether the Court can interfere in the relevancy of the tender conditions, has been answered in detail, referring to various decisions of the Hon'ble Supreme Court. Relevant paragraphs of the said judgment are extracted hereunder:

"31.A three Judge Bench of the Hon'ble Supreme Court in Laxmi Sales Corporation Vs. M/s.Bolangir Trading Co. and others reported in AIR 2005 SC 1962 had also reiterated the law to the effect that the Court cannot go into the nature of the tender conditions and re-write the contract between the parties while exercising the power of Judicial review under Article 226 of the Constitution of India. Though it is contended that the non-furnishing of the copy of the affidavits and the non-furnishing of the details of the pending works would not materially affect the evaluation of the bids of the respondent before us, we are of the considered opinion that the correctness of the action of the Tender Evaluation Committee in rejecting the bids of the respondent for certain deficiencies cannot be interfered on the assumption that the deficiencies or mistakes or omissions are trivial in nature.

32.The combined effect of the judgments of the Hon'ble Supreme Court in Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622, Maharashtra Housing Development Authority Vs. Shapoorji Pallonji and Company Private Limited and others reported in (2018) 3 SCC 13, West Bengal State Electricity Board

Vs. Patel Engineering Co. Ltd. and others reported in (2001) 2 SCC 451 and Goldyne Technoserve Ltd., Vs. State of Madhya Pradesh and others reported in AIR 2011 SC 2574 would go to show that it is not for the Court to substitute its own opinion as to the relevancy of the tender conditions. If the Tender Evaluating Authority had rejected the bids on the ground that they are not in strict compliance of the requirement of the tender conditions, this Court cannot substitute its own reasons to nullify the rejection on the ground that the deficiencies are either trivial in nature or are capable of rectification by providing an opportunity.

33. On the question of judicial review, the Hon'ble Supreme Court has time and again pointed out that this Court sitting under Article 226 exercising its power of judicial review cannot and shall not interfere with the orders of the Administrative Authorities on substituting its own findings. In Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622, the Hon'ble Supreme Court had, while dealing with the powers of the judicial review observed as follows:

"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."

... ..

35. In Bakshi Security and Personal Services Private Limited Vs. Devikishan Computed Private Limited and others reported in (2016) 8 SCC 446, the Hon'ble Supreme Court had, while dealing with the power of judicial review had after referring to Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517, reiterated the observations made therein regarding the power of the judicial review. After referring to the judgment in Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517, the Hon'ble Supreme Court in Bakshi Security and Personal Services Private Limited Vs. Devikishan Computed Private Limited and others reported in (2016) 8 SCC 446 had observed as follows:

"However, we do not think that the justice of the case requires us to do so, for two reasons. First and foremost. Respondent 1 before us has clearly violated the strict terms of the

tender condition on every occasion and hence cannot be given relief. And, secondly, we already find that due to litigation the present tender has not taken off for over one year. In the absence of mala fides, and indeed the High Court judgment has found that mala fides did not vitiate the calculation of minimum wage by the Labour Department, we cannot accept Shri Divan's submission that the figure of Rs.2,91,00,000 was tailor-made to suit the bid offered by the appellant herein. "

36. In the light of the above law, laid down by the Hon'ble Supreme Court, in various decisions cited supra we are constrained to conclude that the learned Single Judge was not right in going into the nature of the conditions and the violations. We are of the considered opinion that whether the bidder/ tenderer should be given an opportunity to correct the mistakes or the bid should be rejected at the stage of technical evaluation itself for non-compliance with the tender conditions is a matter which is solely within the purview of the Tender Evaluation Committee and this Court cannot substitute its own reasons."

21. In the case on hand, the contention of the petitioner is that merely because the amounts have been shown as split-ups, it does not amount to violation of any conditions of the tender, as a cumulative reading would not defeat the purpose of the tender conditions. It is also relevant to note that the petitioner has not given any reason for not providing the names of the mobile and static units while giving the turnover from catering business and the reply affidavit filed by the petitioner does not meet the same. But this Court is not inclined to go into the correctness of the action of the Tender Evaluation Committee in rejecting the bids of the petitioner for certain deficiencies and interfere with the same on the assumption that the deficiencies or mistakes or omissions are trivial in nature, since the law is clear and unambiguous from the above judgment of this Court, which decision has been rendered taking note of the various judgments of the Hon'ble Supreme Court. Hence, leaving alone the aspect of jurisdiction, the questions as to whether an opportunity has to be given to the petitioner before rejecting the technical bid by the first respondent, or not, and whether the rejection of the petitioner's technical bid is correct or not, cannot be gone into by this Court.

22.With the aforesaid observations, the writ petitions are dismissed. No costs. Consequently, the interim order passed by this Court in the miscellaneous applications stand vacated and all the miscellaneous applications are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

KM

To

- 1.The Group General Manager/LCS,
Indian Railway Catering and
Tourism Corporation (IRCTC) Ltd.,
11/12th Floor, Statesman House,
148, Barakhamba Road,
New Delhi-110 001.
- 2.The Regional Director,
The Indian Railway Catering and
Tourism Corporation (IRCTC) Ltd.,
South Zone, 6A, The Rain Tree Place,
Mc Nichols Road, Chetpet,
Chennai-600 031.

+2cc to Mr.Ms.AL.Ganthimathi , Advocate, S.R.No.84548
+2cc to Mr.Mr.V.G.Sureshkumar , Advocate, S.R.No.84608, 84609
+1cc to Mr.K.Ramu, Advocate sr.no.84778
+1cc to Mr.Anishkumar, Advocate sr.no.85321

W.P.Nos.13265 and 13266
of 2018 and
W.M.P.Nos.15624 to 15627
of 2018

nr 11/12/2018