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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.(MD) No.14375 of 2018

and

W.M.P.(MD) Nos.13009 & 13010 of 2018

M.Sindhu

... Petitioner

vs.

1.The Chairman

V.O.Chidambaranar Port Trust
Tuticorin

2.The Chief Engineer

Engineering Department (Civil)
V.O.Chidambaranar Port Trust
Tuticorin

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorarified mandamus calling for the records pertaining to the Clause Nos.3 and 4 of the impugned tender notice in NIT No.02/Rubble Bund/PD/2018-19, dated 27.06.2018, on the file of the second respondent and quash the same and consequently direct the first respondent to conduct the tender in a fair manner by amending the Clauses No.3 and 4 suitably in consonance with the Tender Transparency Act.

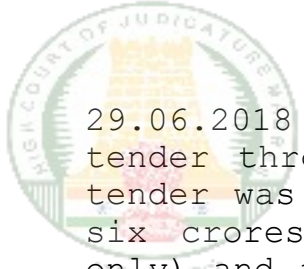
For Petitioner : Mr.Abudu Kumar Rajarathinam
for Mr.N.Anandakumar

For Respondents : Mr.Veera Kathiravan, Senior Counsel
for Mr.Arivuchandran
Standing Counsel

O R D E R

The challenge to the present writ petition is to a tender notification, dated 27.06.2018.

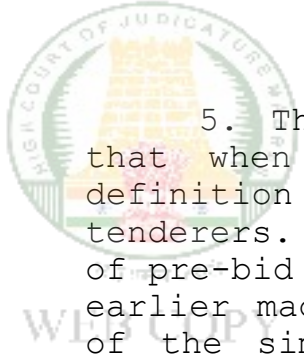
2. The second respondent herein had invited tender for the work of Construction of Rubble Protection Bund for dumping dredged materials of Capital Dredging at South of South Breakwater at their Port Trust, through a tender notification dated 27.06.2018. The downloading of the tender from the official website was fixed from



29.06.2018 to 19.07.2018 and the last date for submission of e-tender through online was 19.07.2018. The estimated value of the tender was fixed at Rs.136,18,89,033 (Rupees one hundred and thirty six crores eighteen lakhs eighty nine thousand and thirty three only) and a pre-bid meeting was scheduled to be held on 06.07.2018. The work experience for qualifying to participate in the tender process is that the tenderers should have successfully completed three similar works, each costing not less than Rs.54.48 Crores or two similar works, each costing not less than Rs.68.09 Crores or one similar work costing not less than Rs.108.95 Crores.

3. Prior to the aforesaid impugned notification, the respondents had earlier floated a tender for the same work on 09.02.2017. The work was open to the firms / companies / voluntarily formed joint ventures / consortia to whom the stipulated minimum eligibility criteria for qualifying to participate in the tender process was that they ought to have completed at least three similar works, each costing not less than Rs.53.48 Crores. While defining the term "similar work", the works of Construction of Bund, Breakwater at Offshore area with Boulders, Concrete Blocks, Tetrapods and Accropodes etc., was brought within its meaning. However, owing to administrative reasons, the tender came to be dropped. Again on 28.04.2018, a second tender for the same work at the same estimation was floated by the second respondent. The work experience for qualifying to participate in the second tender process was the same as prescribed in the first tender process. However, while defining the term "similar work", the respondents had chosen to bring "road works" into the purview of "similar work". A further condition was also stipulated that the tender document was open to the joint venture / consortium, who were required to fulfill all the criterias collectively by the associated groups. It was further contemplated that the lead member of the joint venture / consortium must have completed at least one similar work costing not less than Rs.54.48 Crores. However, the second tender notification dated 28.04.2018 came to be cancelled on 24.05.2018 citing administrative reasons. It is in this background, the present impugned tender came to be notified.

4. The learned counsel for the petitioner challenges the present tender notification on two grounds, namely, (i) the minimum qualifying criteria prescribing that the tenderer should have completed similar works; and (ii) while defining the term "similar work", the exclusion of road works done by the tenderer are arbitrary and mulcted with mala fides. It is his further submission that the other condition introduced that each joint venture partner, including the lead partner, should have an average annual turnover, as well as specific work experience of not less than 26% is again arbitrary and it has been made only to exclude the petitioner herein from participating in the tender process, since she would otherwise get qualified.



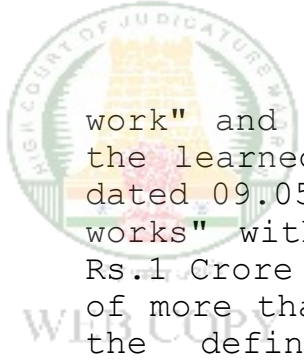
5. The learned counsel for the petitioner further submitted that when "road works" was brought under the purview of the definition of "similar works", there were objections from the tenderers. While considering the said objections during the course of pre-bid meeting, it was held that since the term "road works" was earlier made as a condition precedent for qualification in respect of the similar work of Construction of Rubble Bund for dumping dredged materials of Coastal Berth at the respondent - Port Trust, a decision was taken to keep the term "road works" as a part of definition of "similar work" in the subsequent tender notification. As such, the removal of "road works" from the definition of "similar works" is arbitrary.

6. The learned senior counsel appearing for the respondents, on the other hand, submitted that insofar as the first tender is concerned, there was no quarrel and the same came to be dropped for administrative reasons. However, when the second tender notification came to be issued on 28.04.2018, there were some objections in the pre-bid meeting with regard to the inclusion of the term "road works" as a pre-qualification criteria. In consequence to the objections, the Government of India, through its letter dated 08.05.2018 had called upon the first respondent to furnish a report on the objections, owing to which, they had to suspend the tender process. In consonance with the objections, the respondents thought it fit to refer the matter to an Expert Committee consisting of Experts from the Department of Ocean Engineering and on the opinion rendered by the Expert Committee, the term "road works" came to be excluded from the definition of "similar work". As such, its removal cannot be termed as arbitrary.

7. The learned senior counsel further submitted that though there was a clause in the earlier notification dated 28.04.2018, the respondents were constrained to redefine the clause to the effect that each of the joint venture partners should possess an average annual turnover and specific work experience of not less than 26%, since a similar practice was adopted in a tender dated 09.05.2018 floated by Paradip Port Trust. According to the learned senior counsel, such a percentage was omitted to be fixed in the earlier tenders, which necessitated the respondents to specify the percentage.

8. By relying upon the decisions of the Honourable Supreme Court in Directorate of Education and others vs. Educomp Datamatics Ltd., and others reported in (2004) 4 SCC 19 and Michigan Rubber (India) Limited vs. State of Karnataka and others, reported in (2012) 8 SCC 216, the learned senior counsel submitted that the High Courts exercising its power conferred under Article 226 of the Constitution of India should not interfere with the policy decision of the conditions imposed in a tender notification.

9. Insofar as the decision taken in the pre-bid meeting to retain the term "road works" as a part of the definition of "similar



work" and the consequent decision to remove the same is concerned, the learned senior counsel submitted that the earlier tender work, dated 09.05.2018 adopted as a yardstick for retaining the term "road works" within the meaning of "similar works", was for a value of Rs.1 Crore alone and since the present bid is for an estimated value of more than Rs.136 Crores, the term "road works" was excluded from the definition of "similar work" in the present impugned notification. In this background, the learned senior counsel submitted that there was neither arbitrariness nor mala fide while floating the present tender notification and as such, sought for dismissal of the writ petition.

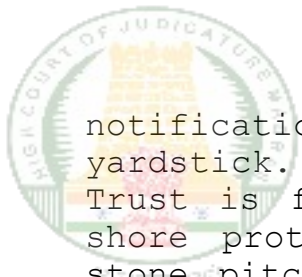
10. I have given careful consideration to the submissions made by the respective learned counsels.

11. Two conditions that have been introduced / removed from the impugned tender notification, by which the petitioner herein is aggrieved, are that the removal of the term "road works" from the definition of "similar work" for the purpose of determining the work experience and the qualification prescribed for each joint venture partner to have achieved 26% in their respective average annual turnover and specific work experience.

12. According to the learned counsel for the petitioner, such a deletion of the term "road works" from the definition of "similar work" and inclusion of 26% of the average annual turnover and specific work experience of each joint venture partner as a pre-qualification is arbitrary and has been made to eliminate the petitioner from participating in the tender process.

13. Insofar as the removal of the term "road works" from the definition of "similar work" is concerned, as pointed by the learned senior counsel, the decision seems to have been taken based on the recommendation of the Government of India, through their letter dated 08.05.2018 as well as on the basis of the Expert Committee's report. I have gone through the said report and taking into account the nature of the work involved in Ocean Engineering and as opined by the Expert Committee, it would not be appropriate to handover such a work to persons, who have qualified themselves only for road works. When such a decision has been taken on the basis of an Expert Committee's report, it would not be appropriate for this Court to scrutinize the Expert Committee's report and render a finding otherwise. As such, I do not find any infirmity in the respondents' act of removing the term "road works" from the definition of "similar work", which is based on the Expert Committee's report.

14. Nevertheless, insofar as the inclusion of 26% of the average annual turnover and specific work experience of each joint venture partner is concerned, I am not in agreement that the submissions of the learned senior counsel for the respondents that such a decision has been taken by adopting an earlier tender



notification floated by Paradip Port Trust, dated 09.05.2018 as a yardstick. Incidentally, the tender notification of Paradip Port Trust is for an estimated cost of Rs.7,09,74,319/- in respect of shore protection work from north oil jetty entrance to existing stone pitching and balance portion at Paradip Port. The present impugned notification is for an estimated value of more than Rs.136 Crores and the work for which the tender was invited for the Construction of Rubble Protection Bund for Dumping Dredged materials of Capital Dredging at South of South Breakwater at the respondent - Port Trust. I am unable to comprehend as to how a work valued at Rs.7,09,74,319/- can be equated or adopted to a tender, which is valued at more than Rs.136 Crores and there is no nexus or justification on the part of the respondents in adopting Paradip Port Trust's notification as yardstick for the present tender process. As a matter of fact, when the respondents had earlier chosen to include the term "road works" as a part of the definition of "similar work" on the basis of the work done by them in their own Port Trust, through a notification dated 06.01.2017, the subsequent decision to remove the term "road works" from the purview of the definition of "similar work" in the present impugned notification, was on the basis that the earlier notification, dated 06.01.2017 was for the value of Rs.1 Crore only and as such, it cannot be used as yardstick for the present tender process which is valued at more than Rs.136 Crores. When such a logic has been adopted by the respondents for the purpose of excluding the term "road works" in the impugned notification, the value of work of Paradip Port Trust ought to have also been taken into consideration and as such, the respondents are not justified in comparing and adopting the tender condition of the work with a value of Rs.7 Crores as a yardstick for the present tender process. Such an act of introducing a new qualification, which was conspicuously absent in the earlier notifications, can only be deemed to be an act of arbitrariness and it also an act of mala fides. It is not in dispute that if the present condition requiring each joint venture partner to possess 26% of their average annual turnover and specific work experience is not imposed, the petitioner would otherwise be qualified.

15. The learned senior counsel for the respondent, by relying upon the decisions cited supra, submitted that it would not be appropriate for the High Courts to interfere with the tender conditions, which is a policy decision taken by the respondents. It is well established proposition of law that if the tender conditions are made arbitrarily or mulcted with mala fides, the High Courts will be well within its powers to interfere with such conditions by exercising its power conferred under Article 226 of the Constitution of India. As a matter of fact, this aspect has also been reiterated by the Honourable Apex Court in Paragraph No.12 of the decision in Directorate of Education and others vs. Educomp Datamatics Ltd., and others (cited supra), which reads as follows:

"12. It has clearly been held in these

decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same



being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

and in Paragraph No.24 of the decision in Michigan Rubber (India) Limited vs. State of Karnataka and others (cited supra), which reads as follows:

"24. 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"?"

The above observations of the Honourable Apex Court are self-explanatory.

16. Though the Honourable Apex Court has laid down the dictum that it is normally not open to the High Courts to interfere with the tender conditions, it has been categorically held that whenever a policy decision is taken arbitrarily or is mulcted with mala fides, the High Courts will be well within its powers to question the same.

17. In view of the above observations, I am of the view that the qualifications prescribed in the impugned tender notification insofar as it relate to the condition No.4 requiring each joint venture partner including the lead partner should have not less than 26% of the average annual turnover and specific work experience is concerned, it is arbitrary and mulcted with mala fides. Such a portion of Clause No.4, which is extracted hereunder, is hereby quashed.

"Each JV Partner including the lead partner shall meet not less than 26% of the following criteria:

(i) Average Annual Turnover



(ii) Specific Work Experience"

18. Accordingly, the writ petition stands partly-allowed. No costs. Consequently, connected miscellaneous petitions are closed.

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Sd/-

Assistant Registrar (CO)

/True copy/

Sub Assistant Registrar

To

+1cc to Mr. V. Malaiyendran, Advocate, SR.No.73423.

+1cc to Mr.Arivuchandran, Advocate, SR.No.73400.

W.P. (MD) No.14375 of 2018

and

W.M.P. (MD) Nos.13009 & 13010 of 2018

17.07.2018

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RAM/SV/SAR 1/18.07.2018/7P/3C