BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 03.09.2018
CORAM
THE HONOURABLE MR.JUSTICE V.PARTHIBAN
W.P.(MD)Nos.17097 and 18049 of 2018
and
W.M.P(MD)Nos.15050, 15943,15944, 16265 and 16339 of 2018

W.P.(MD)No.17097 of 2018
S.Ganesan
... Petitioner

Vs.

1. The President,
D.D.160, Dindigul District Co-operative
Milk Producers Union Ltd.,
No.9, East Govindapuram,
Dindigul - 624 001.

2. The General Manager,
D.D.160, Dindigul District Co-operative
Milk Producers Union Ltd.,
No.9, East Govindapuram,
Dindigul - 624 001.

3.Mercy Thanies Mary ...Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Mandamus forbearing the respondents Nos.1 and 2 from awarding tender to the 3rd respondent and consequently direct the respondent Nos.1 and 2 to declare the petitioner as the successful bidder in pursuance the Notification published in Dinathanthi Daily dated 29/05/2018 for the Wholesale Milk Supply Agent for Dindigul Part I (Local Supply Route II) for the period from 01/07/2018 to 30/06/2020 and direct the respondents Nos.1 and 2 to issue Contract Appointment Order in the petitioner's favour within the period that may be stipulated by this Court.

For Petitioner : Mr.M.E.Ilango
For Respondents : Mr.B.Pugalendhi
Addl. Advocate General
assisted by
Mr.K.N.Goverdhan for R2
Mr.T.Lajapathy Roy for R3

W.P.(MD)No.18049 of 2018
S.Ganesan ... Petitioner

Vs.

1. Managing Director,
Tamil Nadu Co-operative Milk Producers'
Federation,
Madhavaram, Chennai - 600 051.

2. The General Manager,
D.D.160, Dindigul District Co-operative
Milk Producers Union Ltd.,
No.9, East Govindapuram,
Dindigul – 624 001.

3.Mercy Thanies Mary ...Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records relating to the impugned proceedings of the 2nd respondent in Na.Ka.No. 559/Pa.Vi/2018 dated 10.08.18 and his consequential impugned proceedings Na.Ka.No. 559/Pa.Vi/2018 dated 10.08.18 and consequently direct the respondents to declare the petitioners as the successful bidder in pursuance the Notification published in Dinathanthi Daily dated 29.05.18 for the Wholesale Milk Supply Agent for Dindigul Part 1 (Local Supply Route II) for the period from 01.07.2018 to 30.06.2020 and issue Contract order in petitioner's favour within the period that may be stipulated by this Court.

For Petitioner : Mr.M.E.Ilango
For Respondents : Mr.B.Pugalendhi
Addl. Advocate General
assisted by
Mr.K.N.Goverdhan for R2
Mr.T.Lajapathy Roy for R3

COMMON ORDER

Both the writ petitions are filed by the same petitioner in regard to the same subject matter and therefore, the same are taken up together for common disposal as under.

2.The facts as narrated in W.P(MD)No.18049 of 2018 are stated herein, which also hold good for the other writ petition as well.

3.The petitioner claims himself to be a long term agent of the respondent milk union. He is being a wholesale agent for the milk union for the past five years. The system of appointing wholesale agent for a particular supply route had been introduced in the year 2013, by which, Dindigul District had been separated into two units and 10 sub-units. The petitioner was selected as a milk supply agent for the earlier period commencing from 2013 and concluding on 30.06.2018. Since the fresh contract had not been finalized, the petitioner was admittedly allowed to continue to supply milk in terms of the old contract still 31.08.2018. According to the petitioner, in execution of the contract, the petitioner has not earned any complaint and there was no amount pending due to the respondent Union.

4.While so, by paper publication dated 29.05.2018, the respondent herein called for tender for supply of wholesale milk for the Dindigul District for the period from 01.07.2018 till 30.06.2020. In response to the call for of tender, the petitioner submitted his application and quoted a price of Rs.2.50 per liter of milk which included transportation cost, petitioner's commission as well as the commission of Rs.1.60 payable to sub-agents. According to the petitioner, the actual price quoted for per liter milk was 90 paise and the remaining being the commission payable to the sub agents as well as to the petitioner.

5.The entire selection process consists of two stages. First one being opening of technical bid and second one being commercial bid. On 18.06.2018, the technical bid was opened by the second respondent, in which, the petitioner's name as well as the third respondent's name were considered along with one other person. According to the petitioner, the third respondent had not furnished required details and also had not submitted necessary documents. But according to the petitioner, the second respondent proceeded further and opened commercial bid, as if, the third respondent was qualified in the technical bid. After opening of the commercial bid, the second respondent declared the third respondent as the lowest bidder as L-1 overlooking the just claim of the petitioner. According to the petitioner, even assuming that the third respondent was qualified in the technical bid, he was not the lowest bidder, but it was the petitioner who quoted the lowest amount namely, Rs.2.50 per liter of milk as against the quote of the third respondent at Rs.1.44 for sale of one liter milk. The third respondent quoted at Rs.1.44 is without sub-agent commission of Rs.1.60/- which is in fact payable only by the persons, who are entrusted with the contract, which means that the actual quote of the third respondent is to be taken as Rs.3.04/- and in which case, the quote of the petitioner ought to be treated as lowest.

6.In this circumstances, the petitioner had approached this Court in W.P(MD)No.17097 of 2018 seeking to declare him as successful bidder and the writ petition was posted for hearing on 14.08.2018. While the said writ petition was posted for hearing on 14.08.2018, the second respondent passed the impugned order in August 2018 and followed by other order dated 10.08.2018 directing the petitioner to handover all the charges to the new contractor, viz., the third respondent. Therefore, the petitioner was constrained to challenge these orders in the present writ petition.

7.The learned counsel appearing for the petitioner would, at the outset, submit that admittedly the third respondent did not submit the required documents before the technical bid was opened and the second respondent in order to favour the third respondent, had allowed her to participate in the commercial bid, despite the violation of the tender condition. In fact, the learned counsel would submit that both the technical as well as commercial bids were opened on the same day simultaneously. This itself was a wrong procedure adopted by the second respondent. He would therefore submit on this ground alone that the grant of the contract of the third respondent is liable to be interfered with.

8.The learned counsel appearing for the petitioner would further submit that the bank guarantee submitted for Rs.5,00,000/- at the time of submission of the application and solvency certificate to the tune of Rs.15,000/- should also be submitted in terms of the condition Nos.8 and 39 respectively. Neither the bank guarantee nor the solvency certificate were submitted by the 3rd respondent admittedly before the bids were opened on 18.06.2018. In fact, according to the learned counsel, the solvency certificate was issued by the Bank Manager, where the third respondent is having account and the same was not issued by the competent authority namely, the revenue official. Therefore, in any case, the certificates were dated 25.06.2018, which were much after the technical and commercial bids which opened on 18.06.2018. Therefore, there was a clear violation of the tender condition and despite the same, the third respondent was preferred. In fact, the counsel would also add that the third respondent did not even submit proper documents to establish her claim that she was having suitable vehicle to transport the milk. In the said circumstances, the action of the second respondent preferring the third respondent as against the petitioner's claim, is clearly *mala fide*, unreasonable and the same is colorable exercise of power and liable to be interfered with.

9.Per contra, on behalf of the third respondent, a counter affidavit has been filed. The learned counsel for the third respondent would submit that there was nothing wrong in the submission of the bank guarantee as well as solvency certificate on 25.06.2018, since the second respondent has specifically directed the third respondent to submit the certificates only by his proceedings dated 21.06.2018. According to the counsel for the third respondent, it is always open to the tender issuing authority to seek clarification as and when such situation arises in terms of the tender transparency rules and since the second respondent felt these certificates, viz., bank guarantee and solvency certificate were required for the second respondent, the same was directed to be produced only by communication, dated 21.06.2018, and immediately thereafter, the certificates were obtained and submitted on 25.06.2018. As regards the allegation that the third respondent did not have a suitable vehicle for transporting the milk, the counsel says that the third respondent had submitted documents to show that she was in possession of suitable vehicles to transport the milk and for effecting the execution of the contract. In any event, it is a factual controversy as between the petitioner and the third respondent and this Court cannot venture into adjudicate the factual dispute in the present jurisdiction. But however, the Court can always look into the violation of the tender condition, if any, whether by the petitioner or by the third respondent or the manner in which, the contract has been awarded by the second respondent in the circumstances stated above.

10.On behalf of the second respondent, a detailed counter affidavit has been filed. In the counter affidavit, it is stated that the third respondent submitted all the required documents as per the tender condition Nos.6, 8 and 39 and the third respondent was having puffed vehicle to protect the milk from being spoilt. The substance of the averments on behalf of the second respondent as stated in paragraph 8 of the counter affidavit, are extracted hereunder:-

> "8.With regard to the averment of the petitioner herein in paragraph 7 of the affidavit, it is submitted that the tender was called for by the respondent company only for the distribution of milk and allied milk products which does not include any commission as wrongly contended by the petitioner herein as the said Commissions are payable only by the petitioner herein as the said Commissions are payable only by the Company and not by the wholesale agent. While quoting the tendered amount, the 3rd respondent herein has quoted Rs.1.44 per litre regarding rental for vehicle, cost of the milk supplied and other service charges and does not include commission. The other service charges have been clearly indicated in the tender document viz., para 35: payment of toll fees; Para 36: it is the duty of the wholesale agent to appoint workers as per Motor Vehicles Act and the Company is no way responsible for any defective appointment; Para 37: The tenderer must insure the vehicle during the tender period; Para 38: If during the transit, the milk was unusable due to any defect in the transportation. The tender document does not contemplate making payment of commission to the sub agents as contended by the petitioner herein. "

11.According to the second respondent, it is their responsibility to contribute to the sub-agents' commission and not the wholesale agent. Therefore, in the above said circumstances, the quote of the third respondent was found to be the lowest and hence, the contract was awarded to him and therefore, the contention and the allegation of the petitioner that the third respondent was favoured is unfounded and baseless and cannot be countenanced both in law and on facts.

12.At this juncture, the learned counsel for the petitioner would submit that if without the sub-agents' commission, the quote by the petitioner was only 90 paise as against Rs.1.44 by the third respondent and in which case, the second respondent ought to have preferred the petitioner than the third respondent.

13.The learned counsel in order to clarify the above submission made on behalf of the second respondent would draw the attention of this Court to the condition laid down for award of contract for the present years viz., 2018-20, wherein in condition No.1, it is clearly mentioned that it was the responsibility of the wholesale agent to pay sub-agents' commission and would also draw the attention of this Court to the document of the second respondent, which establishes the fact that the commission of Rs.1.60 is to be paid to the sub-agents. According to the learned counsel, in the earlier contract, the agent was not required to pay commission and in fact, the petitioner has quoted the price without commission. However, the payment of sub-agents' commission has been made compulsory by the agent in the present tender condition and therefore, the petitioner had quoted Rs.2.50 including commission of sub-agent at Rs.1.60. If the commission to the sub agent is deducted then the actual price quoted by the petitioner comes only 90 paise as against the Rs.1.44 quoted by the third respondent. Therefore, in all fours, the petitioner ought to have been preferred for awarding the subject contract. Therefore, he would submit that the petitioner is entitled to succeed in the writ petition.

14.Heard the counsels appearing for the parties and perused the materials and pleadings placed on record.

15.From the materials and the facts as disclosed in the present writ petition, it could be seen that as per the tender conditions certain documents, like bank guarantee, solvency certificate, need to be submitted along with the application. Admittedly, the third respondent had not submitted both the bank guarantee and solvency certificate before the bids were opened on 18.06.2018. The explanation as forthcoming from the respondents 2 and 3 that only in pursuance of the clarification sought by the second respondent, vide communication dated 21.06.2018 the documents submitted by the third respondent on 25.06.2018 does not carry much conviction for the reason that the submission of both the documents mandated in the tender condition itself. Once the documents were not submitted before opening of the tender, this Court does not see how the second respondent allowed the third respondent to participate in the commercial tender and thereafter, declared her as the lowest bidder.

16.Further, there seems to be a dispute as regards whether both the technical and commercial bid opened simultaneously or one after the other, since both the bids were opened on the same day, which is an admitted position. However, without going into the factual aspects as to when and what time the bids were opened and even assuming in favour of the third respondent in this regard that the technical bid was opened earlier in time and commercial bid was opened thereafter, but this court is unable to appreciate the action of the second respondent in declaring the third respondent as qualified for the subsequent commercial bid, despite the absence of the crucial documents, like solvency certificate and bank guarantee to be made available on behalf of the third respondent. Therefore, from that point itself the consideration of the third respondent for the commercial bid was wrong and cannot be sustained in law.

17.Even assuming that it was open to the tender issuing authority to see clarification during the course of the tender process, as per the relevant rules, the said clarification cannot result in negation of the right of the other bidders viz, the petitioner herein, who had submitted all the required documents and in fact, he was also wholesale agent in respect of the earlier contract period and executed the same without any complaints. Further, it is to be seen that the solvency certificate was admittedly issued by the Bank Manager of the branch, in which, the third respondent is having account and the said solvency certificate cannot be a valid document in the eye of law. Once the second respondent has laid down certain tender conditions, the persons who participate in the tender process, need to comply with the tender conditions strictly. Any relaxation of the tender condition, at the cost of other valid bidder, will only give raise to favoritism and malpractice. Even otherwise, in the facts and circumstances of the case that if petitioner had quoted without sub-agents' commission, the cost of the milk per litre was only 90 paise and in such event, the petitioner ought to have been treated as lowest bidder and not the third respondent. Whether it is a responsibility of the wholesale agent or the company to pay sub-agents' commission is not very materials to decide the case for the simple reason that the payment of Rs.1.60 as sub-agent commission is not in dispute. If the second respondent is of the view that such commission is not the responsibility of wholesale agent, certainly, the same can be applied in favour of the petitioner as well and deduct that amount and arrive at actual price quoted by the petitioner (90 paise). However, from the tender conditions, it is seen that the responsibility is vested with the wholesale agent to pay the subagents' commission in Condition No.1 of the tender conditions. Therefore, this Court is unable to appreciate the stand of the second respondent as disclosed in the counter affidavit. As stated above, if the commission payable to the subagents is deducted from the quote of the petitioner, the petitioner ought to have been granted tender, as he had merely quoted 90 paise per liter of milk and that it would give benefit to the respondent unit and to the public at large. In the said factual position, the declaration by the second respondent that the third respondent was the lowest bidder cannot either be countenanced in law or on facts and therefore, the same is liable to be quashed.

18.For the above said reason, this Court is of the view that the petitioner has made out a clear case for relief. The Writ Petition(MD)No.18049 of 2018 is **allowed** and the impugned proceedings of the 2nd respondent in Na.Ka.No. 559/Pa.Vi/2018 dated 10.08.18 and his consequential impugned proceedings Na.Ka.No. 559/Pa.Vi/2018 dated 10.08.18 are hereby quashed and the first and second respondents are directed to declare the petitioner as the successful bidder in pursuance of the Notification published in Dinathanthi Daily dated 29.05.2018 for the Wholesale Milk Supply Agent for Dindigul Part 1 (Local Supply Route-II) for the period from 01.07.2018 to 30.06.2020 by issuing necessary work order in favour of the petitioner. The above direction shall be completed within a period of one week from the date of receipt of a copy of this order.

19.In view of the allowing the writ petition in W.P(MD) No.18049 of 2018, no further order is necessary in respect of the writ petition in W.P(MD)No.17097 of 2018, therefore, the same is closed. No costs. Consequently, connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(crl side)

/True Copy/

Sub Assistant Registrar(CS-IV)

To

1. The President,
D.D.160, Dindigul District Co-operative
Milk Producers Union Ltd.,
No.9, East Govindapuram,
Dindigul - 624 001.

2. The General Manager,
D.D.160, Dindigul District Co-operative
Milk Producers Union Ltd.,
No.9, East Govindapuram,
Dindigul - 624 001.

3. Managing Director,
Tamil Nadu Co-operative Milk Producers'
Federation,
Madhavaram, Chennai - 600 051.

+1cc to Mr.K.N.Goverdhan, Advocate Sr.No.82392

SKN

VB/RSK/SAR4/08.10.2018/8P/5C

W.P.(MD)Nos.17097 and 18049 of 2018
and
W.M.P(MD)Nos.15050, 15943,15944,
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