

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.39674 of 2018

ORDER:

In the present writ petition, challenge is to the proceedings Ref.No.TAPSO/POL/MSHSD/Contract Term dated 26.10.2018 of the 1st respondent. By way of the said proceedings, the 1st respondent terminated the Transport Contract awarded in favour of the petitioner herein.

2. According to the petitioner, it is a partnership firm, engaged in the business of undertaking transportation operations of petroleum products. The Respondent Indian Oil Corporation granted contract for transportation of petroleum products to the petitioner along with (18) others for a period of three years with a clause for extension by two years. In furtherance of award of the said contract, the Respondent issued Letter of Intent on 19.1.2017. An agreement was entered into on 25.1.2017 and the same was followed by a Work Order dated 18.2.2017. According to the petitioner, it started rendering its services.

3. The 1st respondent vide Ref.No.TAPSO/POL/MSHSD/SCN dated 9.10.2018 issued a show cause notice to the petitioner, alleging violation of Clause G(4) of the Terms and Conditions of the Tender Notification and Clause 4(a) of the Transport Contract Agreement dated 25.1.2017. In response to the said show cause notice dated 9.10.2018, the petitioner herein submitted an explanation/reply on 15.10.2018. Thereafter vide impugned proceedings dated 26.10.2018, the 1st respondent terminated the contract and ordered forfeiture of Security Deposit of Rs.50,000/-. This writ petition challenges the validity and legal sustainability of the said order of termination of contract.

4. Counter affidavit, deposited by the 1st respondent is filed on behalf of respondents, denying the allegations and averments made in the affidavit filed in support of the writ petition and in the direction of justifying the impugned action.

5. Heard Sri Vedula Venkataramana, learned Senior Counsel for the petitioner and Sri Dominic Fernandes for the Respondents, apart from perusing the material available before the Court.

6. Contentions of the learned Senior Counsel appearing for Petitioner

6.1 The terms and conditions of the Tender Notification dated 4.11.2016 in general and specifically Clause G(4) of the same do not bind the petitioner herein after conclusion of the contract by way of written Agreement dated 25.1.2017, as such, by relying upon Clause G(4) of the Tender Notification, the impugned action cannot be resorted to. Once the Agreement is entered into, it automatically supersedes the terms and conditions of the Tender Notification, as such, no reliance can be placed on the same.

6.2 Clause 4(a) of the Agreement dated 25.1.2017 does not stipulate any condition to place the Tank Trucks (TTs) at the disposal of the Respondents herein within 15 days and the said clause does not authorize the Respondents to terminate the contract.

6.3 Failure to place three TTs before 5.3.2017 is a past event and in fact, three TTs were placed at the disposal of the Respondents herein on 20.5.2017 and having maintained silence for approximately one and half years, there is no justification on the part of the respondents in initiating proceedings by issuing a show

cause notice on 9.10.2018. Having extracted service for one and half years and having paid the amounts by condoning the misconduct, if any, for the services rendered, the Respondent Corporation is estopped from taking any action.

6.4 Along with the petitioner, contract was awarded to as many as (18) Contractors and though they did not place the TTs in accordance with Clause 4(a), no action was initiated/taken against the said (18) Contractors and the same is discriminatory and violative of Article 14 of the Constitution of India.

6.5 In support of his submissions and contentions, the learned Senior Counsel places reliance on the judgment of the Hon'ble Apex Court in Sengara Singh and others v. State of Punjab and others¹.

7. Submissions/contentions of the learned Standing Counsel for Respondent Corporation

7.1 The contention that Clause G(4) of the tender conditions cannot be applied in the case of petitioner herein is neither sustainable nor tenable having regard to the language employed in the said clause.

7.2 Clause 4(a) of the Agreement enables and authorise the Respondents herein to terminate the contract in the event of failure on the part of the Contractor to place the Trucks at the loading locations at all times.

7.3 The contention that lack of any action from May 2017 to October, 2018 would amount to condonation of misconduct cannot be sustained in the eye of law.

¹ AIR 1984 SC 1499

7.4 It is also not open for the petitioner herein to allege any discrimination between the petitioner and (18) others as the delay in those cases was negligible i.e. not more than one month.

8. In the above background, now the issue that emerges for consideration of this Court is - "Whether the action on the part of the Respondents in terminating the contract of the petitioner herein by way of impugned proceedings dated 26.10.2018 is sustainable and whether the petitioner is entitled for any relief under Article 226 of the Constitution of India ?

9. There is absolutely no dispute with regard to the fact that pursuant to the tender notification issued by the Respondent Corporation, the petitioner herein along with (18) others emerged as successful tenderer. As per Clause G(4), failure on the part of the Contractor to execute Agreement or to furnish required security deposit within 15 days time of issuance of Letter of Intent and physical placement of Tank Trucks for loading at the location within 15 days time from issuance of Work Order enables the Respondent Corporation to forfeit the earnest money deposit and to terminate the contract and to recover the damages under law. The contention of the learned Senior counsel that the said Clause G(4) cannot be invoked in view of supercession of the same by written agreement on 25.1.2017, in the considered opinion of this Court, cannot be sustained and the conditions of tender are equally binding till the completion of contract. Therefore, the contention advanced by the learned Senior Counsel to the said effect cannot be sustained and is accordingly rejected. In fact, this Clause G(4) of the terms and conditions of Tender is required to be read along with Clause 4(a) of the Agreement dated 25.1.2017, which enables the Corporation to blacklist and to terminate the contract in the event of

failure to place the TTs at all times during the agreement period at the loading location.

10. Admittedly, in the instant case, Work Order was issued by the Respondents on 18.2.2017. It is also not in dispute that (17) out of (20) Tank Trucks, agreed to be placed by the petitioner, were placed at the disposal of the Respondents herein and there is no dispute with regard to the same. The only controversy is with regard to balance three Tank Trucks.

11. According to the counter affidavit filed by the Respondents herein, the petitioner herein placed the rest of three Tank Trucks at the disposal of the Respondents herein in the month of May, 2017. It is the specific case of the petitioner herein that there is discrimination in treatment between the petitioner and the rest of the Contractors. The justification sought to be offered by the Respondents in their counter affidavit is that the delay on the part of the rest of the Contractors is not more than one month and in the case of petitioner, it was five months. The said statement is not tenable as the due date for the petitioner was on 5.3.2017, but he placed the rest of three Tank Trucks at the disposal, even according to Respondents, in the month of May 2017. As such, three months delay was there on the part of the petitioner herein. Admittedly, there is no action against the rest of the Contractors. In the considered opinion of this Court, the said action tantamounts to discrimination, infringing fundamental right guaranteed to the petitioner under Article 14 of the Constitution of India. The respondents cannot adopt two yardsticks for the similarly situated individuals. It is also not in dispute that though the petitioner herein placed at the disposal of the Respondents herein the rest of three Tank Trucks, there was no action by the Respondents herein till 1st respondent

issued a show cause notice on 9.10.2018 i.e. after nearly one and half years. It is also not in dispute that during the said period, the petitioner herein was permitted to carry on business and was also paid the amounts. In fact, the particulars with regard to deficiencies on the part of the rest of the Contractors are also filed along with writ petition as material papers. Therefore, in the considered opinion of this Court, the impugned action is vitiated by element of discrimination, which offends Article 14 of the Constitution of India.

12. For the aforesaid reasons, the writ petition is allowed, setting aside the proceedings Ref.No.TAPSO/POL/MSHSD/Contract Term dated 26.10.2018 of the 1st respondent. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

Date: 20.12.2018
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A.V.SESHA SAI, J



THE HON'BLE SRI JUSTICE A.V.SESHA SAI



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