HON'BLE THE CHIEF JUSTICE
SRI THOTTATHIL B. RADHAKRISHNAN
AND
HON'BLE SRI JUSTICE S.V.BHATT

WRIT APPEAL No.1595 OF 2018

JUDGMENT: *(Per the Hon'ble Sri Justice S.V.Bhatt)*

Heard Mr. A.Sudarshan Reddy, learned senior counsel, appearing for appellant, learned Government Pleader for Irrigation and Command Area Development for respondents 1 to 4 and Mr.K.G.Krishna Murthy, learned senior counsel for respondent No.5.

The writ petitioner is the appellant. The appellant challenges the order dated 20.11.2018 in W.P.No.39813 of 2018. The parties are referred to as arrayed in the writ petition.

The petitioner prays for Mandamus declaring Enquiry/IFB/Tender Notice NIT No.37/2018-19 dated 06.09.2018 rejecting the technical bid submitted by the petitioner pursuant to Tender Notification Enquiry/IFB/Tender Notice NIT No.37/2018-19 dated 06.09.2018 as illegal and arbitrary. The petitioner prayed for a direction to respondents to open the financial bid of petitioner by declaring that the petitioner is qualified in technical bid and is entitled for consideration in the financial bid.

The subject work is restoration of Rallavagu and Rallavagu pick up dam, Karegattu Village, Palvoncha Mandal, Bhadradri Kothagudem District.

The circumstances leading to the filing of the writ petition and the pleadings and contentions on both sides are stated in detail by the order under appeal. For convenience and also brevity, we do not propose to refer to each one of the circumstances, but it is suffice to note the following circumstances to appreciate the fact in issue between the parties.

The tender document in paragraph No.17 stipulates the following condition for compliance by the bidders.

> "Liquid assets and/or credit facilities of not less than Rs.1477.17 lakhs (shall be equivalent of the estimate cash flow for 3 months in peak construction period) (credit facility/letter of credits/solvency certificates issued from Banks shall only be considered).

The respondents through the impugned communication rejected the technical bid of petitioner by noticing that the solvency certificate furnished by the petitioner is a conditional solvency. The petitioner filed the writ petition to set aside the decision disqualifying it in the technical bid by referring to the solvency certificate furnished by it as conditional solvency. The learned Single Judge has considered all the relevant circumstances and also the binding precedents on the scope of judicial review of this Court under Article 226 of the Constitution in tender matters and whether the solvency certificate issued by the petitioner can be treated as one duly complying with the bid document or not, and finally held that there is no illegality or irrationality or procedural impropriety in the decision making process of respondents in disqualifying the tender of the petitioner. Hence, the appeal.

Mr. A.Sudarshan Reddy, learned senior counsel, contends that the order under appeal is unsustainable, inasmuch as the order does not take note of the clarification on the contents of solvency certificate issued by the Commissioner, Commissionerate of Tenders through letter dated 26.06.2013. He further contends that the solvency certificate issued by the petitioner though not in form but in substance conforms to the requirement in the bid document. According to him, the condition is mandatory, but not directory. The contents of solvency certificate dated 19.09.2018 issued by the Indian Overseas Bank substantially satisfies the requirement of the solvency certificate and, therefore, the reason assigned by the respondents in technically disqualifying the petitioner as well as the approach of the learned Single Judge are unsustainable and suffer from erroneous approach. He places reliance on RASHMI METALIKS LIMITED AND ANOTHER v. KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY AND OTHERS[1] and contends that the respondents ought to have called upon the petitioner to make good the deficiency, if any, inasmuch as it is not a case of not submitting the solvency certificate at all, but a case of submitting solvency certificate not conforming to the requirement of tender conditions. He prays for setting aside the order under appeal and directing the respondents to evaluate the financial bid of petitioner as well.

The learned Assistant Government Pleader supports the judgment under appeal, and contends that it is not the case of respondents either that the condition dealing with furnishing solvency certificate is treated as directory, but the case of petitioner is examined only as mandatory requirement of furnishing the solvency certificate. According to him, G.O.Ms.No.94 dated

[1] (2013) 10 SCC 95

01.07.2003 deals with the broad framework of rules and conditions which are incorporated in the tenders floated by the respondents. The annexures to the said Government Order deal with tender procedure, registration of contractors and Annexure V(b) prescribes the format in which the solvency certificate is to be furnished by the tenderer. According to him, the offer on all material aspects conforms to the prescription of tender document. Assuming without admitting, if no mode or prescription is prescribed, the tenderer enjoys some discretion. In the case on hand, no discretion is available, as the document prescribes the form in which the solvency certificate is to be furnished by a tenderer to merit consideration of the tender as technically complying with all the requirements. He further contends that there is object or purpose in prescribing the forms in which various steps are required to be followed by the tenderers, for the respondents on being satisfied with their ability, solvency etc., alone can entrust the contract to such person. The solvency certificate issued by the petitioner does not conform to the requirement of G.O.Ms.No.94 Annexure V(b). He supports the judgment under appeal and prays for dismissing the same.

Sri K.G.Krishna Murthy, learned senior counsel, while supporting the judgment under appeal, contends that the learned Judge has rightly appreciated that crucial words in determining the solvency of a person are absent in the certificate dated 19.09.2018 furnished by the petitioner. According to him, the case on hand does not come within the scope of judicial review of this Court, vis-à-vis the matters relating to tender. He relies on the decision reported in CENTRAL COALFIELDS LIMITED AND ANOTHER v. SLL-SML (JOINT VENTURE CONSORTIUM) AND OTHERS[2] and prays for dismissing the appeal.

We have noted the submissions of the learned counsel appearing for the parties and perused the record.

The point for consideration in the appeal is - whether the certificate dated 19.09.2018 furnished by the petitioner satisfies the requirement of the tender conditions or not?

According to petitioner, the solvency certificate is substantially compliant and on the other hand according to respondents, the solvency certificate is incomplete or defective in form. To appreciate the rival submissions, we prefer to excerpt the solvency certificate prescribed by Annexure V(b) of G.O.Ms.No.94 dated 01.07.2003 and also the certificate dated 19.09.2018 furnished by the petitioner:

"FORM OF SOLVENCY CERTIFICATE BY BANKS

I_________________ Managing Director/Manager/ General Manager/Agent of ___________ Bank Ltd., do hereby certify that _________ (here the Names and address of the contractor) to be solvent to the extent of _____ (Rupees __________________) as disclosed by the information and record which are available with the aforesaid Bank.

Date:
Place

For the __________ Bank
(Designation of the Officer
Authorized to sign.) "

x x x x x x x x

SOLVENCY CERTIFICATE

This is to state that to the best of our knowledge and information M/s Sai Ram Constructions, H.No.5-10-31/1, Kishanpura, Hanamkonda, Warangal a customer of our Bank is respectable and can be treated as good up to a sum of 42.00 crores (Rupees forty two crores only). It is clarified that this information is furnished without any risk and responsibility on our part in any respect whatsoever more particularly either as guarantor or

[2] (2016) 8 SCC 622

> otherwise. This certificate is issued at the specific request of M/s Sai Ram Constructions.
> This certificate is issued at the specific request of the customer without any risk and responsibility of Bank or any of its officials.
>
> Senior Manager
> Date: 19.09.2018".

A bare comparative reading of the prescribed form and the solvency certificate furnished by the petitioner discloses that the solvency certificate is silent on the crucial aspect of what is certified i.e., the petitioner to be solvent to the extent of Rs.42 crores. The submission of Mr.Sudarshan Reddy that the respondents ought to have called upon the petitioner to furnish solvency certificate in prescribed form is merely noted and we are not persuaded to accept this contention for the simple reason that the opportunity as contended by Mr.Sudarshan Reddy is provided to one party, the same could be termed as facilitating one party to make good the defects in the tender document. The evaluation at that stage of technical bid will be visited by more arbitrary and discretionary exercise of power by respondents. It is always insisted that the conditions stipulated in the tender document are strictly adhered to. In the case on hand, the petitioner, being a contractor, is regularly doing business with the Government and is expected to know the prescribed form in which the solvency certificate is appended to the bid document. The word 'solvency' has different connotations. The solvency certificate means a certificate issued by the banker on the ability to discharge ones debts and obligations in full; describing a person for company in a state of solvency. Solvency further means ability to discharge the debts and obligations in full, the state of a person who is able to pay all his debts; as also such state of property as that it may be reached and subjected by process of law without his consent to the payment of such debts. The literal meaning of solvency certificate is stated to conclude that the solvency certificate appended by the petitioner does not comply with the fundamentals of solvency. The respondent has discretion and is entitled to reject a tender, if not submitted as per the requirements of the tender document. The case law on the point is well considered by the learned Single Judge and in addition to what is already considered by him, we are of the view that the ratio laid down by the Apex Court in CENTRAL COALFIELDS LIMITED case (2 supra) covers the point in favour of respondents and also to sustain the order under appeal. In our considered view, the intra court appeal is without merit and is liable to be rejected.

The writ appeal fails and is, accordingly, dismissed. No order as to costs.

As a sequel thereto, miscellaneous petitions, if any pending, stand closed.

THOTTATHIL B. RADHAKRISHNAN, CJ

S.V.BHATT, J

06th December, 2018

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