**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**WRIT PETITION NO.314 OF 2019
WITH
CIVIL APPLICATION NO.2341 OF 2019**

M/s. Skyrail Logistics Pvt. Ltd.,
Plot No. E-8, Additional MIDC,
Jalgoan,
Through its Authorized Representative
Pravin Narayan Rindhe,
Age: 49 years, Occu: Service,
R/o. Plot No.12, Flat No.5/C-4,
CIDCO, Aurangabad ..PETITIONER

VERSUS

1. Maharashtra State Warehousing
Corporation Ltd.,
583, B, Gul Tekadi Market Yard, Pune,
Through its Chairman / Managing Director

2. The Regional Manager,
Maharashtra State Warehousing
Corporation Ltd.,
583, B, Gul Tekadi Market Yard, Pune

3. The Deputy Manager,
Maharashtra State Warehousing
Corporation, Jalna

4. M/s Durga Trading Company,
Shop No.18, 2nd Floor,
Shendrakar Complex, Anand Nagar Chowk,
Nanded,
Through its Partner

5. The Managing Director and CEO,
ACC Limited,
Cement House, 121, Maharishi Karwe Road,
Mumbai

6. The Authorized Officer,
Aurangabad Area Office,

25-26, Raghubeer Nagar,
Opp. St. Francis High School,
Jalna Road, Aurangabad ..RESPONDENTS

Mr S. P. Shah, Senior Advocate holding for Mr A. N. Sikchi, Advocate for petitioner;
Mr N. B. Suryawanshi, Advocate for respondent Nos.1 to 3;
Mr R. N. Dhorde, Senior Advocate i/b Mr V. R. Dhorde, Advocate for respondent No.4

CORAM : PRASANNA B. VARALE
AND
S. M. GAVHANE, JJ.

DATE : 5th February, 2019

ORAL ORDER:

Heard Mr Shah, learned Senior Advocate appearing on behalf of the petitioner, Mr Suryawanshi, learned Counsel appearing on behalf of respondent Nos.1 to 3 and Mr Dhorde, learned Senior Advocate appearing on behalf of respondent No.4.

2. The petitioner, a private limited company, by way of present writ petition has approached this Court seeking quashment and setting aside the decision of respondent No.1 - Maharashtra State Warehousing Corporation Ltd., Pune, dated 4th January, 2019 to the extent, whereby respondent No.1 has qualified the technical bid of respondent No.4 - M/s Durga Trading Company, Nanded and permitted it to participate in the tender dated 2nd November, 2018, published vide Tender Notice No.MSWC/H&T/22/2018 for appointment of handling & transport contractor at MSWC, Jalna [(Bhokardan Road, Borkhedi (PEG 2008)]. On the backdrop of this prayer,

the petitioner has prayed for other consequential prayers, namely, prayer clauses (B) and (C), which read thus:

> "B] The Hon'ble High Court may be pleased to hold and declare that the Respondent No.4 is ineligible and disqualified to participate in the tender dated 02.11.2018 published vide tender notice No. MSWC/H&T/22/2018 for appointment of handling and transport contractor for Jalna [Bhokardan Road Borkhedi (PEG 2008)].
>
> C] The Hon'ble High Court may be pleased to issue an appropriate writ, order or direction in the nature of writ and thereby direct the respondent No.1 to issue the work order in favour of the petitioner in the tender dated 02.11.2018 published vide tender notice No.MSWC/H&T/22/2018 for appointment of handling and transport contractor for Jaolna [Bhokardan Road Borkhedi (PEG 2008)]."

3. The sum and substance of the submissions of learned Senior Advocate appearing on behalf of the petitioner is, though respondent No.4 has not complied with the pre-requisite conditions so as to declare it as a successful bidder and though the objection was raised by the petitioner, respondent No.1, neither considered the objection raised by the petitioner nor conducting any inquiry so as to satisfy itself, only by adopting a mechanical approach, permitted respondent No.4 to participate in the tender process.

4. Brief facts which would be necessary to appreciate the rival contentions of learned Counsel appearing for the respective parties are summarized as below:-

A copy of the Tender Notice No. MSWC/H&T/22/2018 is placed on record at Exh.'A' collectively. This tender was floated on 2nd November, 2018 for handling of food grains. The estimated volume and value of the contract is summarized in the tender notice in tabular form and the same reads thus:

Estimated Volume & value of contract

Sr. No.	Particular	Volume in M.T.	Value in Rs.
1.	Handling	4,50,000	9,00,00,000
2.	Transportation	2,20,000	4,00,00,000

5. It may not be necessary for us to refer to the other conditions and it would be useful for our purposes to refer to those conditions, on which a contest is raised. These conditions are stated as follows:-

"3) the tenderer must submit attested copy of Registered Deed of Partnership/Memorandum of Articles of Association/By-laws/Certificate of Registration etc. as applicable, attested by Gazetted Officer/Notary & also signed by the tenderer himself. "No Registration Certificate is required in case of Sole Proprietorship Firm/Individual for the purpose of technical qualification."

4) **THE WORK EXPERIENCE CERTIFICATE** should

be provided strictly as per format placed at Appendix-VI of TENDER FORM (TECHNICAL BID). a) The value of work executed to be shown in the experience certificate should be clearly bifurcated financial year wise i.e. from **1st April to 31st March** & no other format will be accepted. The experience for the purpose of qualification will be considered for single year. That single year can be any of the immediate preceding five years excluding the financial year in which tender is floated. b) **The contract period as well as Volume of work done should be considered yearwise from the date of awarding work contract.**

. Company/Organization issuing certificate of work done should be strictly in the format of Appendix VI.

. No certificates issued by dealers, distributors of the companies etc. will be taken into consideration. The Tenderers should take due care to ensure that the certificates are issued by the authorized persons, officials of the company, corporations along with the copies of Work Orders.

5) The work experience certificate to be submitted by the tenderer separately and should be provided strictly as per Appendix VI of the tender document by the tenderer. The information furnished in Appendix VI shall also to be supported by experience certificate issued by competent authority on their letter head with seal, signature and designation of issuing authority. The contract period and value of work executed to be shown in the experience certificate should be clearly bifurcated financial year wise i.e. from 1st April to 31st March and no other format will

> be accepted.
> The volume & value of work done under Handling and Transportation should be clearly bifurcated, separately, duly certified by the issuing authority for valuation purpose, along with compliance of all requisites of Handling and Transport contracts. If tenderer encloses the combined Handling & Transportation experience certificate still it is necessary that concerned company or certificate issuing competent authority should mention it clearly that the tenderer has both handling and transportation experience with the company/ Department/ Organisation. Then only combined certificate will be held authentic & admissible."

Needless to state that the petitioner, being an interesting party submitted its bid offer along with the other interested parties including respondent No.4. On 12th December, 2018, respondent No.1 informed five offerers, who were successful in the initial scrutiny. The communication dated 12th December, 2018 is placed on record at Exh.'C'. Perusal of this communication shows that the authorities of respondent No.1 were of the opinion that certain documents were not legible and were also not uploaded. The authorities called upon these five offerers for verification of the documents along with the original documents either personally or through their respective representatives. The petitioner raised an objection to respondent No.1 on 17th December, 2018. It is stated in the objection as under :

"..... there is a difference in the amount shown as work executed in the certificate and income from the relevant activity shown in the audited financial statements.

Sr. No.	Nature of activity (as per Experience certificate)	Amount as per certificate	Amount as per Audit Report	Remarks
1.	Handling	2,41,87,866	1,96,02,349	Shown under the head "Labour & Transport Charges 2% in the audit report
2.	Transportation	2,47,73,890	2,51,82,996	Shown under the head "Secondary Transport" in the audit report

"From the above, it is observed that the amount shown in the Experience certificate against the activity of Handling has been over stated in the Experience certificate as compared to the amount reflected in the audited financial statements. Also, the Name of Accountant head is labour and Transport charge 2% which means transportation charges has also been included here. It means that the amount of handling may be even less and is not commensurate with the amount mentioned in the Experience Certificate."

6. Respondent No.1, without considering the objections or conducting any inquiry, straightway fixed the schedule for opening the financial bid on 5th January, 2019 at 3.00 p.m. A copy of communication dated 4th January, 2019 is placed on record at Exh.'E'. Perusal of this document shows that

other four offerers were also informed that they may attend the opening of bid personally or they can follow the exercise of an on-line process.

7. The petitioner again submitted objection to respondent No.1 on the very next date i.e. on 5th January, 2019 against respondent No.4 and it was submitted that experience certificate placed on record by respondent No.4 only shows that respondent No.4 had an experience of handling work to the tune of 50,000 metric ton and in the balance-sheet respondent No.4 has shown the labour and transport charges to the tune of Rs.1,96,02,349/-. The petitioner requested respondent No.1 to call for the information from ACC Cement Company for verification of the experience certificate submitted by respondent No.4. Even though this objection was raised by the petitioner on 5th January, 2019, respondent No.1 proceeded further with exercise of opening the financial bid, as such, the petitioner was left with no choice but to approach this Court by filing present writ petition on 8th January and the same was circulated before this Court on 9th January, 2019.

8. On 9th January, 2019, while issuing notice to respondents, by way of an ad interim order, respondent No.1 was directed not to proceed further for issuing work order in the tender dated 2nd November, 2018 till the returnable date or till the respondents file reply before this Court, whichever is earlier. In response to the notice, replies were filed.

9. Mr Shah, learned Senior Advocate for the petitioner vehemently submitted that the approach of respondent No.1 in opening the financial bid even though the objections were raised by the petitioner, was an act of undue haste and arbitrariness. He then invited our attention to the general conditions under the caption "General Information to Tenderers" of the tender notice, which is subject matter of this petition and more particularly Clause 3 i.e. "Qualification conditions for Tender", which reads thus:

> "(I) Tenderer should have experience of Rake Handling and Transportation duly obtained from Manufacturer/PSU/Govt. Dept./Public Ltd. Company/Private Limited Company dealing in the field of Fertilizer, Food grains, Cement, Sugar, Coarse grains or any other commodity. Tenderer should have executed in any of the immediate preceding five years the work of value:
>
> (a) <u>At least 25% of the estimated volume and value of the contract to be awarded, in one single contract in one Financial Year.</u>
>
> **<u>OR</u>**
>
> (b) <u>50% of the estimated volume and value of the contract to be awarded, in different contracts in one Financial Year.</u>
>
> (II) Experience certificate in the proforma prescribed at Appendix VI shall be produced from customers stating proof of satisfactory execution and completion of the contract(s) besides duly certifying nature, period of contract, and value of work handled. Any contract which is 90% completed can be considered for the experience.

(III) Where the estimated contract value of Handling & Transport Contract is less than Rupees Five Crore, Tenderer without the requisite experience as mentioned above may also participate subject to providing an undertaking that an additional Performance Guarantee in the form of Bank Guarantee of 10% of the contract value from a Scheduled Bank will be given, if selected. The format of the Bank Guarantee to be provided in such cases is at Appendix-V.

(IV) For determining the eligibility of Tenderer the following shall apply:

(a) The Tenderer may be a single entity register of partnership or a group of entities (the "Joint Venture"), coming together to implement the Project. However, no Tenderer applying individually or as a member of a Joint Venture, as the case may be, can be member of another Tenderer. The term Tenderer used herein would apply to both a single entity and a Joint Venture."

10. Mr Shah then invited our attention to the list of documents under the caption "Tenderer should upload the following technical documents as per MSWC's Tender form of H& T work" and then invited our attention to following particulars :

"7. Certificate of experience as per format Appendix VI of concerned issuing Companies and details there of (as per format)

(a) Handling Experience details (Appendix-VI)
(b) Transportation Experience details (Appendix-VI)
(c) Copies of Work Orders. (For Related work Experience)"

12. Balance sheet and Profit and Loss accounts details (related Experience Certificate) (Last three Financial year)."

11. On the backdrop of aforesaid conditions, Mr shah, learned Senior Advocate invited our attention to the documents submitted at the instance of respondent No.4. The certificate dated 20th November, 2018 is submitted by respondent No.4 so as to claim that it is complying with the requisite criteria. It may be necessary to refer to the relevant statement of said certificate, which reads thus:

"This is to certify that, M/s Durga Trading Company, Nanded were our authorised C & F Agent for Nanded Parbhani & Hingoli District. As per our office record year wise payment made to them for the F.Y 1st April 2017 to 31st March 2018 is as follows

Financial Year	Executed Amount	Qty in MT	Product
2017-18 (Handling)	2,41,87,866.33	1,49,316.90	Cement
2017-18 (Transportation)	2,47,73,890.75	78,772.30	Cement

12. Mr Shah then vehemently submitted that this is a document stating to be a certificate issued by the District Officer, ACC Limited, Nanded on a letterhead of Aurangabad area office. Then it was the submission of Mr Shah that on the backdrop of objection raised by the petitioner, it was expected of respondent No.1 to conduct a scrutiny of the said document. He also submits that this document i.e. certificate only refers to the payment done and it is silent on the aspect of when the work order was issued to respondent No.4 for the said work between 1st April, 2017 to 31st March, 2018. Respondent No.4 has also failed to place on record the work order issued in his favour by the said Company i.e. ACC Limited.

13. Mr Shah then by inviting our attention to the copy of an agreement between respondent No.4 and ACC Limited submitted that this agreement refers to only the date of agreement i.e. 23rd February, 2017. He then submitted that the terms state that the agreement shall commence on 1st January, 2017 and shall continue untill 31st December, 2018, unless terminated earlier as per Clause 17. Thus, it was the submission of Mr Shah that this document is not sufficient enough to reflect the period for which respondent No.4 worked with ACC Company Limited as C & F Agent. It is also submitted by Mr Shah that in the very agreement in reference to the terms of payment, the rates are not quoted and the space against the rate is kept blank. Thus, it was also submitted by Mr Shah that this agreement at

the most could have been considered as draft terms and could not have been accepted as a document supporting the offer of respondent No.4.

14. It is then submitted by Mr Shah that in the balance-sheet submitted by respondent No.4, reference to the amount against the labour and transport charges is 2% to the tune of Rs.1,96,02,349/- and the amount is not corresponding with the amount referred to in the certificate dated 20th November, 2018, issued by ACC Company Limited.

15. In response to the notice of this court, the affidavit-in-reply is filed through one Shri. M. U. Suryawanshi, Regional Manager of respondent No.1 at Aurangabad and this affidavit is stated to be an affidavit-in-reply on behalf of respondent Nos.1 to 3. It would be necessary to refer to the relevant statements made in the said affidavit-in-reply and these statements read thus :-

> "05. I say that, the petitioner submitted a written objection which is annexed by the petitioner at Exhibit-C (Page-248). I say that, when the committee scrutinized the documents, no substance was found in the objections raised by the petitioner and hence the technical bid of the respondent No.4 was accepted.
>
> 07. I say that, the e-tender committee considering the objections raised by the petitioner was of the view that the said objection to the effect that the amounts in the balance sheet do not tally with the experience certificate is beyond jurisdiction of e-tender committee. Unless the certificate issued by the

> competent officer of the ACC Cement Company is proved to be incorrect, there is no question of doubting the same, therefore there is no substance in the objection raised by the petitioner.
>
> 12. I say that, it is not possible to verify the genuineness of the contents in the technical scrutiny as it is a summery proceeding. The person or the party taking objection is primarily responsible to prove the objection with relevant documents. The onus lies on Petitioner to prove that certificate issued by ACC Company is a false one. Till date, the Petitioner has not submitted any document to substantiate his objection regarding the experience certificate. I further say that it is necessary to bring to the notice of the Court that, there is provision in the tender document clause 4(VIII) of "Disqualification condition". That in case any information is provided by the tenderer is found incorrect, then contract shall be terminated with immediate effect & deposit shall be forfeited. The Petitioner ought to have given his objection at any point of time to prove his objection with supporting documents that the respondent No.4 has furnished incorrect information to the Maharashtra State Ware Housing Corporation."

16. Mr Shah, learned Senior Advocate for the petitioner vehemently submitted that the reply, nowhere states that the objection raised by the petitioner was looked into duly and properly and the reasons assigned for rejecting the objection of the petitioner are only for namesake. He then submitted that respondent No.1, instead of scrutiny and assessment of the material placed on record by respondent No.4, thrusted the burden on petitioner to prove these documents.

17. Mr Shah, learned Senior Advocate then placed heavy reliance on the following judgments:

> (i) S. K. Translines Private Limited and ors. Vs. The Maharashtra State Warehousing Corporation Ltd. and ors. (decided on 11th July, 2016 by this Court in Writ Petition No.3393 of 2016) and
> (ii) B. Himmatlal Agrawal & anr. Vs. Western Coalfields Limited & ors. (decided on 21st August, 2006 and 7th September, 2006 by Nagpur Bench of this Court in Writ Petition No.3854 of 2006).

18. Mr Shah submitted that in a nearly identical circumstance and where respondent No.1 itself was party to the judgment of this Court in the matter of S. K. Translines Private Limited and ors. Vs. The Maharashtra State Warehousing Corporation Ltd. and ors. (referred supra), the rejection of the objection raised by the petitioner by respondent No.1 is unsustainable. Our attention is invited to the observations of the Division Bench in the said matter and the same read thus:

> "41. .... It could have also been counter checked with the balance sheet submitted before it and the documents filed by the petitioner before it and then could have come to the conclusion that, whether the petitioner has satisfied condition of experience or that whether he has transported 25% or 50% of the estimated quantity of the estimated cost. ...."

19. Mr Shah, learned Senior Advocate then invited our attention in support of his submissions, observation of the Division Bench of this Court in the matter of B. Himmatlal Agrawal & anr. Vs. Western Coalfields Limited & ors. (referred supra) and the same read thus:

> "25. The controversy in issue is as to whether the tender conditions stipulated in Clause 3.5 are essential conditions or ancillary, subsidiary and non-essential conditions. The relevant condition is 3.5(b). The plain reading of Clause 3.5(b) shows that bidder, even though is qualified as per conditions in Clause 3.3, would be subject to disqualification, if he has a past record of poor performance of work, such as abandoning the work, not properly completing the contract, inordinate delay in completion of work, litigation, financial failure, etc. In other words, the bidder, who, in past, had abandoned the work under contract or caused inordinate delay in completion of work, etc. would be subject to disqualification as per Clause 3.5 (b), however, does not get disqualified automatically till such time decision is taken on such subject by the Tender Committee. To be a subject of disqualification and being disqualified though are two different and distinct situations, however, the result is the same, i.e. tenderer gets disqualified. In former, disqualification shall come into effect only after decision is taken on the subject by the Tender Committee, i.e. bidder, who is subject of disqualification has incurred disqualification and is disqualified. In latter, disqualification comes into effect on breach of conditions itself and disqualifies such bidder automatically. Clause 3.5 gives right, power and jurisdiction to the Tender Committee to take

> decision on the subject of disqualification only after following rules of natural justice and it is the decision of the Tender Committee, which will determine whether such bidder has been disqualified. However, having taken such decision by the Tender Committee, such bidder gets disqualified in view of condition 3.5 (b). So far as condition 3.5 (b) is concerned, record of poor performance or abandonment of work is a matter, which Tender Committee needs to consider while awarding contract in public interest. It is also well settled that Public Authorities while discharging public duty have to act in a transparent manner and their actions must be just, fair and free from arbitrariness as well as favouritism. It is also well settled that essential eligibility conditions are incorporated in the tender document in order to ensure proper implementation and fulfillment of objective of tender. ...."

20. Per contra, Mr Dhorde, learned Senior Advocate appearing on behalf of respondent No.4 vehemently opposed the petition and supported the action of respondent No.1. It was also submitted by Mr Dhorde that the floating of tender, acceptance of offers and then issuance of work order in favour of the successful tenderer or offerer are the aspects of largely commercial activity and merely because objection filed by the petitioner was rejected by the authority, this Court may not entertain the petition. It was also submitted by Mr Dhorde that the offer of respondent No.4 was the lowest one and respondent No.4 was fulfilling the requisite criteria. The authority rightly rejected the objection of the petitioner. It was also the submission of Mr Dhorde that the objection raised by the petitioner that

certificate is issued by the District Officer, Nanded, the District Officer being authorized signatory and the agreement between respondent No.4 and ACC Company Ltd. was in respect of four districts including Nanded district, no fault can be found in the certificate issued by the District Officer of Nanded. It was also submission of Mr Dhorde that as it was an agreement between a private Company i.e. ACC Co. Ltd. and respondent No.4, there was no requirement in work order issued in favour of respondent No.4, as such, it was only an agreement arrived at between parties and as per the agreement, respondent No.4 undertook the work activity.

21. Mr Dhorde then submitted that the judgment and order passed by this Court in the matter of S. K. Translines Private Limited (supra) on a peculiar backdrop that considering the order passed by the then Chief Minister, this Court thought it fit to hold an inquiry. It was also submitted by Mr Dhorde that the tender committee of respondent No.1 is not a quasi judicial authority, as such, it was not expected of the committee to pass reasoned order as like a quasi judicial authority. He then makes a submission that there is a very limited scope of judicial review in the matters of awarding tenders and this Court is very slow in showing interference in the commercial tender matters. He also places reliance on the following judgments :

(i) Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & anr. ((2005) 6 Supreme Court

Cases 138)

(ii) Michigan Rubber (India) Limited Vs. State of Karnataka & ors. ((2012) 8 Supreme Court Cases 216

(iii) Rasilaben Kantilal Kansara (Smt) Vs. Amratlal Babubhai Kocha & ors. (1987 (3) Bom. C.R. 620)

(iv) M/s Shobhana Traders, Nanded Vs. The State of Maharashtra & ors. (Writ Petition No.2275/2018 of this Court)

(v) Montecarlo Ltd. Vs. NTPC Ltd. (2016 (6) ALL SCR 2183)

(vi) Rashmi Metaliks Limited & anr. Vs. Kolkata Metropolitan Development Authority & ors. ((2013) 10 Supreme Court Cases 95).

22. In the reply filed on behalf of respondent No.4, following statement is made at para No.7 :-

> "I say that, the present petitioner raised an objection on 17.12.2018 and his objection was considered on same day and since documents were found correct his objection has been negatived."

23. Now the aforesaid statement by respondent No.4 runs contrary to the reply filed on behalf of respondent Nos.1 to 3 and more particularly in the reply filed on behalf of respondent Nos.1 to 3, it is clearly stated that the objection of the petitioner was considered on 24th December, 2018. Thus, the statement made on behalf of respondent No.4 that the objections raised by the petitioner were considered on 17th December, 2018 and since the

documents were found correct his objection has negatived cannot be accepted on the backdrop of rival submissions of learned Counsel appearing for the respective parties and on going through the material placed on record, we are of the opinion that though normally this Court is slow in entertaining the petitions challenging the tender matters and is also slow in the exercise of review, as we find considerable merit in the submission of Mr Shah, learned Senior Advocate, that the petitioner had immediately approached the authority raising his objection and the authority could have considered the objection subjectively and objectively but the authority only by a mechanical approach rejected the objection raised by the petitioner.

24. It will not be out of place to state that the objection raised by the petitioner was in respect of the compliance of pre-requisite criteria/conditions, as such, there was no harm to respondent No.1 to undertake the exercise of a proper scrutiny and assessment of the material on the objection raised by the petitioner. Though we are aware of our limitations, we may draw support from the observations of the Division Bench of this Court in the matter of B. Himmatlal Agrawal (supra), in view of the fact that the tender is being floated by respondent No.1 which is a public authority and not a private or commercial entity. Thus, at the cost of repetition, we refer to the order of the Division Bench of this Court in the matter of B. Himmatlal Agrawal and the same read thus:

> "25. .... It is also well settled that Public Authorities while discharging public duty have to act in a transparent manner and their actions must be just, fair and free from arbitrariness as well as favouritism. ...." **(Emphasis supplied).**

25. Considering the aforesaid facts, we partly allow the writ petition, with direction to respondent No.1 to consider the objections dated 17th December, 2018 of the petitioner before respondent No.1, afresh and decide the same by giving an opportunity of hearing to all the parties including the petitioner, respondent No.4 and all other qualified tenderers.

26. This exercise be undertaken by respondent No.1 expeditiously and be concluded not later than two weeks from 11th February, 2019.

27. In view of disposal of the petition, no orders are required to be passed on civil application. As such, pending civil application is disposed of.

(S. M. GAVHANE, J.) **(PRASANNA B. VARALE, J.)**

sjk