IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13619 OF 2018

M/s Saudagar Agencies (Contractor),
Through its Proprietor,
Mohd Rafi Mohd Khaja,
Age : 58 Years, Occu. : Business,
R/o Plo No. 16, Near Malik Ambar
School, Raza Road, Shaha Bazar,
Aurangabad, Dist. Aurangabad .. Petitioner

Versus

1. The State of Maharashtra,
Through its Secretary,
Mantralaya, Mumbai – 32.

2. Cantonment Board, Ahmednagar,
Through its Chief Executive Officer,
Mr. B. S. Shrivatava, Cantonment
Board, Ahmednagar.

3. M/s Khalatkar Construction,
Through its Proprietor,
Mr. Jayant S. Kalatkar,
Age : Major, Occu. : Business,
R/o No. R-96, Reshim Bag,
Umred Road, Nagpur,
District Nagpur.

4. M/s Skylark Securities Pvt. Ltd.,
Through its Proprietors,
Mr. Navnit Pratap Sing &
Navdeep Pratap Sing,
Age : Major, Occu. : Business,
R/o 1/84, 1st Floor, Sadar Bazar,
Delhi Cantonment.

5. M/s Balaji Enterprises,
Through its Proprietor,
Smt. Vaishali Lawrance Swami,
Age : Major, Occu. : Business,
R/o Bhingar, Tq. & Dist.
Ahmednagar. .. Respondents

Shri V. D. Sapkal, Advocate for the Petitioner.
Shri K. B. Jadhavar, A.G.P. for the Respondent No. 1.
Shri S. B. Deshpande, A.S.G. with Shri D. G. Nagode, Advocate for the Respondent No. 2.
Shri N. B. Narwade, Advocate for the Respondent No. 3.
Shri Shriniwas S. Wagh, Advocate for the Respondent No. 4.
Shri A. N. Kakade, Advocate for the Respondent No. 5.

CORAM : S. V. GANGAPURWALA AND A. M. DHAVALE, JJ.

Date on which reserved for Judgment : 18.01.2019

Date on which judgment pronounced : 05.02.2019

<u>JUDGMENT</u> (*Per S. V. Gangapurwala, J.*) :-

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. The respondent No. 2/Cantonment Board issued tender notice inviting tenders for collection of vehicle entry fees/tax for a period of one year. Amongst others, the petitioner and respondent Nos. 3 to 5 submitted their bids. The technical bids were opened on 29.11.2018. The petitioner's technical bid was rejected. The technical bids of respondent Nos. 3 to 5 were

accepted. The petitioner assails the rejection of his technical bid and acceptance of technical bids of respondent Nos. 3 to 5. The work order is not yet issued, nor a letter of intent is issued.

3. Mr. Sapkal, the learned advocate for the petitioner submits that, rejection of technical bid of the petitioner is on three grounds

(i) Invalid income tax returns for the year 2017-2018.

(ii) PTRC certificate is not submitted.

(iii) Permanent Shop Act license is not submitted.

4. The learned counsel submits that, the income tax return for the year 2017-2018 was submitted and the said document was also annexed with the tender. Only on the ground that Income Tax return is filed late with Income Tax office, the respondent No. 2 has held that, income tax return is invalid. The learned counsel further submits that, it is erroneous on the part of the respondent No. 2 to state that, the petitioner has not submitted permanent Shop Act license certificate. The earlier registration is dated 09.02.2015. The petitioner has only three employees. As per Rule 9 of the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017, the only requirement is issue of receipt of intimation in Form – G and it would be recorded in the register maintained. The petitioner has placed on record the said intimation dated 30th March, 2018. The same would be sufficient proof of continuation of shop and license

and, therefore, fresh renewal order is not required to be passed.

5. The learned counsel further submits that, the profession tax registration certificate is also submitted. The respondent has referred to circular dated 14.01.2011. The same is not relevant to the petitioner, as the same is referable to the employers who are registered before July 2007. There is no flaw as far as petitioner's profession tax registration certificate is concerned.

6. According to Mr. Sapkal, the technical bid of the petitioner is rejected only to favour the respondent No. 3. The technical bid of the respondent No. 3 ought to have been rejected. One of the essential condition was flouted by the respondent No. 3. As per Clause (B), the tenderer is required to submit signed and scanned copies of all the documents enumerated in sub clause (i) to (xvi). The respondent No. 3 had not signed any of the documents. Since documents are not signed by the respondent No. 3, there is total breach of Clause “B” of the technical bid. According to the learned counsel reliance by respondent No. 3 on the affidavit is erroneous. The affidavit filed by the respondent No. 3 and tender uploaded would not be sufficient to do away with the requirement of signed copies. Moreover, the said notarized document is also suspicious. The said document is signed on 15.11.2018, whereas document is notarized on 13.11.2018. The affidavit cum indemnity bond sworn on 13.11.2018 mentions that tender document is submitted on 16.11.2018 and the signature is made

by the executent at Ahmednagar on 15.11.2018, whereas the affidavit is shown to have been sworn at Nagpur. It is only with a view to favour the respondent No. 3, the technical bid is accepted, though suffers from mandatory requirements. The respondent No. 4 has submitted bank solvency certificate of commercial bank and not of a nationalized bank. As per clause (x) of the condition of the technical bid, the bank solvency is required to be submitted of a nationalized bank. The respondent No. 5 is brought in competition though his bid was below the upset price. The learned counsel relies on the judgment of the Apex Court in a case of **Ramana Dayaram Shetty Vs. The International Airport Authority of India and others** reported in ***AIR 1979 SC 1628*** and submits that, tender of a person, who does not fulfill the requisite requirement cannot be accepted.

7. Mr. Deshpande, the learned Assistant Solicitor General for the respondent No. 2 submits that, the technical bids have been evaluated by the Committee. The respondent No. 2 is a autonomous body. The evaluation of the technical bids was done thoroughly and in transparent manner involving the experts of concern field. The objections were examined. The income tax return for the assessment year 2017-2018 was required to be submitted on or before 31st March, 2018 as per Sec. 139 of the Income Tax Act, 1961, however, the petitioner has filed his income tax return on 07.05.2018, contrary to the provisions of the Income Tax Act. In the balance sheet assets are valued on

market rate, whereas liabilities are shown in the net worth certificate, which is not acceptable in the method of valuation. The learned A. S. G. further submits that, the petitioner failed to submit the shop Act license which was mandatory requirement. The EPF certificate submitted by the petitioner shows that the employee strength of his agency has increased to 19 on 01.11.2018 and was required to get a registered shop Act license under Rule 05 of the said rules. The receipt of intimation in Form – G cannot be considered to be valid.

8. The learned A. S. G. further submits that, the petitioner also failed to submit a copy of profession tax registration certificate. The petitioner has submitted copy of old profession tax enrollment certificate, which is not proper. The Government of Maharashtra has issued circular dated 26.11.2010 directing to renew all the PTRC/PTEC issued prior to the circular and PTEC certificate submitted by the petitioner is not valid.

9. The learned A. S. G. further submits that, the documents unsigned by the respondent No. 3 were not required to be submitted, therefore, though the said documents are not signed, the same is not detrimental. The affidavit has been submitted by the respondent No. 3 that, all the documents submitted by him are proper. The respondent No. 4 had submitted the solvency certificate of H.D.F.C. bank. The same was considered in view of the Reserve Bank of India's guidelines dated 01.01.2012. The

petition be dismissed. The learned A. S. G. relies on following judgments of the Apex Court and this Court.

(a) **Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651.**

(b) **Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council Sendhwa and others reported in (2012) 6 SCC 464.**

(c) **Municipal Corporation Ujjain and others Vs. BVG India Ltd. and others reported in (2018) 5 SCC 462.**

(d) **Jay Constructions Vs. State of Maharashtra and others reported in 2018(5) ABR 81.**

(e) **Meerut Development Authority Vs. Association of Management Studies and others reported in (2009) 6 SCC 171.**

(f) **Niyaz Ahmed Vanu Vs. Municipal Corporation of Gr. Mumbai and others reported in 2013 (1) BCR 1 (Full Bench).**

10. Mr. Narwade, the learned counsel for the respondent No. 3 submits that, the affidavit has been validly submitted by the respondent No. 3. The same is accepted and rightly considered by the Committee of experts. No error has been committed by the respondent No. 3 while submitting the documents. The respondent No. 3 is highest bidder amongst all for the collection of toll tax. The petition is malafide.

11. The learned counsel for respondent Nos. 4 and 5 also supported arguments of other respondents.

12. We have considered the submissions canvassed by the learned counsel for respective parties.

13. In a case of **Tata Cellular Vs. Union of India** referred to supra, the Apex Court has emphasized the need to balance between administrative discretion to decide matters on one hand and the need to remedy any unfairness on the other and laid down following principles.

> (1) The modern trend points to judicial restraint in administrative action.
>
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The court does not have the expertise to correct the administrative, decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be opened to judicial scrutiny because the invitation to tender is in the realm of contract.
>
> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi administrative sphere.

> However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

14. The Apex Court in a case of **Ramana Dayaram Shetty Vs. The International Airport Authority of India and others** (supra) observed thus.

> "7...It is a well settled Rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary Rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable...."

15. The Apex Court in a case of **__Municipal Corporation Ujjain and others Vs. BVG India Ltd. and others__** (supra) has summarized the principles laid down in various decisions of the Apex Court. The same are as under.

> (i) if there are essential conditions, the same must be adhered to;
>
> (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
>
> (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
>
> (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction'
>
> (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their

own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given propriety;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

16. Present matter is required to be considered on the touch stone of the aforesaid principles laid down by the Apex Court.

17. It has been held by the Apex Court in a case of **Ramana Dayaram Shetty Vs. The International Airport Authority of India and others** (supra) that qualification laid down in the tender is to be fulfilled. The State cannot accept tender of a person who does not fulfill the requirement and qualifications. It has been further laid down in the said judgment that the State action must not be arbitrary, but must be based on some rational and relevant principle which is non discriminatory. The State cannot act arbitrarily in entering into contracts with third party.

18. The interference of the Court in tender or contractual matters exercising powers of judicial review is minimal. The Court has to consider that the decision making process adopted is not malafide, arbitrary and irrational and the bidders have complied with the conditions enumerated in the tender for acceptance of the technical bid.

19. The petitioner has submitted copy of the return filed with the Income Tax Department for the assessment year 2017-2018. Merely not submitting said income tax return on or before 31.03.2018 would not make the income tax return invalid and same was not within the province of the respondent No. 2 to consider. The respondent No. 2 was only to consider the submission of the income tax return for the year 2017-2018. It is prerogative of the income tax department to consider the same. The ground raised by the respondent No. 2 with regard to income tax return cannot be sustained.

20. The petitioner had not submitted the copy of shop Act registration said to have been issued to him in the year 2015. The petitioner submitted a copy of the receipt of the intimation for renewal. The petitioner was required to submit the permanent shop Act license as per the relevant clause in the tender document. The petitioner ought to have along with the tender submitted the copy of permanent shop Act license at least with copy of the intimation of renewal. Then the respondents would

have considered whether the same is proper compliance or not. The permanent shop Act license showing the registration of the firm would be vital for considering the technical bid. In absence of filing the permanent shop act license, it cannot be said that the petitioner complied with the terms and conditions of the tender document. The rejection of technical bid on the said count does not appear to be improper.

21. This takes us to next contention of the petitioner viz acceptance of technical bid of respondent Nos. 3 to 5. After having gone through the record, it is abundantly clear that the respondent No. 3 did not sign the documents submitted along with the tender. Clause B of the tender document categorically requires the signed and scanned copy of all the documents enumerated from Clause (i) to (xvi). To overcome this defect, the respondents relied on the affidavit filed by the respondent No. 3 dated 15.11.2018. The said document instead of strengthening the case of the respondent No. 3, in fact negates it by creating a cloud over the execution of said affidavit in its true sense. The affidavit cum indemnity bond appears to be signed at Ahmednagar on 15.11.2018. The same is said to have been notarized on 13.11.2018 before the Notary at Nagpur that is two days prior to the execution of the said document and the said document further recites that the deponent therein has already filed tender for collection of vehicle entry tax vide tender document dated 16.11.2018. The same position is with regard to

declaration by the tenderer. The document is signed on 15.11.2018. It is notarized on 13.11.2018 at Nagpur. The said document in no way would help the respondent No. 3. The fact is not disputed that the signed copies of the documents enumerated in Clause B of the tender document were not submitted by the respondent No. 3.

22. As per sub Clause (ix) of Clause B of the tender document, the bidder is required to give solvency certificate of Nationalized Bank. The respondent No. 4 has not submitted the solvency certificate of nationalized bank. But same was submitted of a commercial bank that is H.D.F.C. Bank.

23. The tender of the respondent No. 5 was below the upset price and as such could not have been accepted.

24. If the technical bid of the petitioner so also that of respondent Nos. 3 and 4 was not in conformity with the terms of the tender, the tender process cannot be proceeded further as there are not three valid offers. It is not disputed by the learned A. S. G. that, if there are less than three valid offers, the tender process cannot be concluded and fresh tender notice is required to be issued.

25. It is also submitted by the petitioner that the highest amongst the respondents was respondent No. 3 giving an offer of

Rs. 3,68,00,000/- and the petitioner quoted Rs. 4,78,00,550/- and that if the work order is issued in favour of the respondent No. 3,, the respondent No. 2 would suffer loss of Rs. 1,10,00,550/-.

26. The acceptance of the offer of the respondent No. 3 inspite of the fact that, none of the documents submitted by the respondent No. 3 were signed is arbitrary. Principle of strict compliance is applied to the petitioner. However, it is relaxed for respondent Nos. 3 and 5. The same is arbitrary. Arbitrariness has no role in the society governed by rule of law. Arbitrariness is antithesis to the rule of law, fair play, justice, equity and good conscience.

27. The action of the respondents in accepting the technical bid of respondent Nos. 3 and 4 though not complying the requirement of documents and accepting of the same is set aside.

28. The public interest requires that the tender process shall be initiated afresh. Therefore, fresh tenders be issued, as it is clear that the technical bids of the petitioner and respondent Nos. 3 and 4 did not comply with the requirements of the tender and the

tender of the respondent No. 5 was below the upset price and was out of consideration.

29. In the light of the above, the respondent No. 2 may issue fresh tender, if it so advised for collection of vehicle entry tax.

29. Rule is made partly absolute in above terms. No costs.

Sd/-	**Sd/-**
[A. M. DHAVALE, J.]	**[S. V. GANGAPURWALA, J.]**

bsb/Feb. 19