



For Respondents : Mr.T.Arul
for Mr.M.Maharaja for R1
Mr.Karthik for R2

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O R D E R

Captioned Review Application has been taken out by Respondents 1 and 2 in W.P (MD) No.5089 of 2019 seeking review of an order dated 15.10.2019 wherein this writ petition along with the WMPs therein i.e., W.M.P.Nos.6785 and 4060 of 2019 were disposed of finally after full contest and after hearing all the parties concerned.

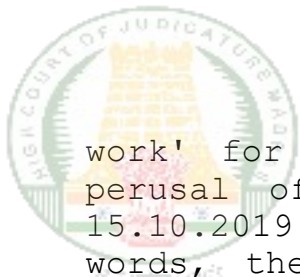
2. Respondents 1 and 2 in the writ petition are the Superintending Engineer and Divisional Engineer of National Highways, Tirunelveli and therefore, the two petitioners in the Review Application shall be collectively referred to as 'State' and this is for the sake of convenience and clarity. Sole writ petitioner is Respondent No.1 in captioned Review Application and Superintending Engineer, National Highways, Salem, who was arrayed as Respondent No.3 in the writ petition in personal capacity, has now been arrayed as second respondent in the captioned Review Application.

3. Mr.J.Gunaseelan Muthiah, learned Additional Government Pleader on behalf of the State, Mr.T.Arul, learned counsel representing Mr.M.Maharaja, counsel on record for first respondent (writ petitioner) and Mr.Karthik, counsel on record for second respondent (third respondent in the writ petition) are before me. As already mentioned supra, the two review petitioners shall be collectively referred to as 'State'. The writ petitioner, who is Respondent No.1 in the Review Application, shall be referred as 'contractor'.

4. With the consent of the aforementioned counsel, main Review Application was taken up for hearing in this web-hearing on a video-conferencing platform.

5. In the hearing, learned counsel for second respondent (third respondent in the writ petition) i.e., Superintending Engineer, who was arrayed in personal capacity, submitted that he is sailing with the State and he really has no say as it is a review petition and therefore the contest is now between the State and the contractor.

6. The writ petition moved by the contractor was for a certiorarified mandamus and the prayer is made up of two limbs. One limb is to quash the minutes of the State dated 21.02.2019 along with a corrigendum thereto and the other limb is to direct the State to award work concerned i.e., work in respect of 'widening SL to IL and strengthening of Vaithiyalinagapuram road' (hereinafter 'said



work' for the sake of brevity) in favour of the contractor. A perusal of the order sought to be reviewed i.e., order dated 15.10.2019 brings to light that pleadings were completed. In other words, there was an affidavit filed by the contractor, counter affidavit filed by the State and a rejoinder filed by the contractor. The crux and gravamen of the matter turns on a formula, which has been adopted for rejecting the contract and this formula has been adopted in the light of another work, which shall be referred to as 'Radhapuram work'. Most relevant paragraphs of the order dated 15.10.2019 i.e., order that is sought to be reviewed are Paragraphs 8 to 17 and the concluding paragraph 23, which read as follows:

'8. There is no disputation or disagreement before this Court that writ petitioner is the Contractor qua Radhapuram work also. There is also no dispute that the value of Radhapuram work is Rs.6,50,70,983/- (Rupees Six Crores Fifty Lakhs Seventy Thousand Nine Hundred and Eight Three only). This takes us to the formula which has been adopted for disqualifying the writ petition.

9. This formula has been set out with clarity and specificity in the counter affidavit of the State in paragraph No.5. Relevant portion reads as follows:

'5. I respectfully submit that para 6 of the affidavit is not fully correct. A petition has been received in the office of the first respondent from one Thiru.E.Natarajan on 06.02.2019. In this petition it is stated that one work (CRIDP) has been allotted in Radhapuram (H) C&M, Subdivision to Thiru.M.Murugan to a contract value of Rs.6.35 Crores. The writ petition with malafied intension purposefully suppressed the said work on hand. The following formula is used by our department to work out the financial capacity of every successful bidder after succeeding the technical bid. According to Tender rules, Bid Capacity is to be arrived as follows: Bid Capacity = $A \times N \times 2 - B$ A = Maximum value of work executed in any one year during the last five years (updated to the current price level) (rate of inflation may be taken as 10% per year for the competed as well as in progress)

B = Value at current price level of the existing commitments and ongoing works to be competed during the next 6 months.

N = No of years prescribed for the completion of the present work = $1144.65 \times 6 / 12 \times 2 - 0 = 1144.65$ lakhs '

the aforesaid formula was applied in the case of



writ petitioner has been very clearly articulated with specificity in Sub paragraph (b) of paragraph 5 and the same reads as follows:

'5(b).Taking the above value of work on hand of Thiru.M.Murugan bid capacity is arrived as follows: Bid Capacity = $A \times N \times 2 - B$ = $1144.65 \times 6 / 12 \times 2 - 635.00$ = 1144.65 lakhs - 635.00 Lakhs = 509.65 Lakhs

But the bid capacity required for this work as per tender condition is Rs.600.00 Lakhs. The writ petitioner's bid capacity as on 08.01.2019, is only 509.65 Lakhs hence the Contractor Thiru.M.Murugan is not qualified in the above said bid. Hence, the Evaluation Committee decided to cancel the tender on 21.02.2019. The cancellation of the Tender was uploaded in the website on 21.02.2019 and a copy of uploaded document is enclosed in typed set. The message of cancellation was intimated to the petitioner on 21.02.2019 itself by online. '

11.The aforesaid formula and computation is the crux and gravamen of this writ petition.

12.Both sides were heard on the formula and computation.

13.To be noted, State counsel was instructed by the official concerned, who was present in Court.

14.In the formula, with regard to A being 1144.65 there is no dispute or disagreement between the parties. As would be evident from the computation N, has been taken as 6/12 but this ought to have been taken as 9/12 as the period for completion of said work even according to the invitation of bids is 9 months.

15. With regard to B, the same has been taken as 635.00. To be noted B is, for the purpose of this case, value of Radhapuram work and as already alluded to supra, value of Radhapuram work is Rs.6,50,70,983/-. Therefore, it should not have been taken as 635.00, but it should have been taken as 650.71. Therefore, if N is taken as 9/12, B is taken as 650.71 and if the computation is reworked, result is not 509.65, but it is 1066.26.

16.Therefore, it emerges clearly that an error in computation has occurred while applying the formula to test the qualification/disqualification of the writ petitioner and that this error is owing to taking wrong values qua N and B.

17.It is not in dispute that if this error is rectified and if the final figure is 1066.26 and not 509.65 the writ petitioner will not stand disqualified qua said work.'

'23.To be noted, the prayer is in two limbs. One limb is to quash the impugned minutes and other limb is to award said work to the writ petitioner. Therefore, this Writ



Petition is allowed in part as the impugned minutes are set aside and with regard to second limb, the official respondents are directed to proceed with processing the tender for said work from where it stopped pursuant to 01.03.2019 interim order now by not disqualifying the writ petitioner or in other words by considering the bid of the writ petitioner also. No costs. Consequently, connected Miscellaneous Petitions are closed.'

7. In the review petition, seven grounds have been raised and they are as follows:

'1. The petitioner humbly submits that though the 1st respondent quoted the lowest amount, his tender allotment was cancelled since the petitioner does not qualify the requested terms of tender/notification, in respect of financial bid.

2. The petitioner humbly submits that since bid capacity was arrived based on the formula in the tender rules and the 1st respondent was disqualified and same formula and computation is the crux of the writ petition ad decided by this Hon'ble Court.

3. The petitioner submits that the 1st respondent is bound by the terms of the tender. In fact in the tender notice No.16/2018-19 Do dated 16.12.2018, the period of completion of work has been stated as 9 months. However, the period of completion work was reduced to 6 months by an amendment No.2 dated 03.01.2019 and same was uploaded.

4. The petitioner respectfully submits that the 1st respondent submitted the tender only on 06.01.2019 after the said amendment dated 03.01.2019. Therefore, the 1st respondent is bound by the said amendment.

5. The petitioner submits that as per amendment the completion period of the said work taken as 6 months and the value of work Rs.6,50,70,983/- as obtained from the Superintending Engineer (H) C&M, Tirunelveli vide Lr.No.725/2019/Do-1 dated 20.02.2019 and computed (1144.65X12X2-650.71) the bid capacity is arrived as 493.94 Lakhs and the respondent bidder was not qualified.

6. It is respectfully submitted that having the work on hand already, the 1st respondent has intentionally suppressed the facts, in order to get the work illegally. In fact that the petitioner is well aware of the amendment notification also. Thus the 1st respondent has approached this Hon'ble Court without clean hands.



7. The petitioner humbly submits that the calculation of qualification was made only in accordance with all the notifications. Therefore the 1st respondent is not eligible as per the notification.'

8. Learned State counsel, notwithstanding the aforementioned grounds submitted that he would argue this review application on two points and they are as follows:

a) The contractor suppressed the Radhapuram work qua said contract. This is impermissible and therefore, the rejection deserves to be sustained; and

b) The time period for completion of said work has been amended and what was originally 9 months, had become 6 months vide tender notice dated 06.12.2018 which is as follows:

'NATIONAL HIGHWAYS

TIRUNELVELI DIVISION

Tender Notice No.16/2018-19/DO dated 06.12.2018

Nature of works:

1. Widening SL to IL and Strengthening of
Vaithiyalingapuram road in KM 0/0 - 7/8

Amendment - 2 dated 03.01.2019

SI.No	Description	As per NIT	Now Amended
1	Period of Completion	9 Months	6 Months

1. All other conditions remain unchanged.

2. Subsequent corrigendum/addendum if any shall only be available in website indicated above.

To

Notice Board

Sd/xxxx

Superintending Engineer
National Highways
Tirunelveli'

9. In response to the aforesaid two points, learned counsel for contractor made submissions, which are as follows:

a) It cannot be gainsaid that there is suppression of Radhapuram work as contract for Radhapuram was entered into on 25.02.2019, whereas the writ petition was filed prior to that date;

b) With regard to amended period for said work from 9 months to 6 months, the same is impermissible as the tender notification clearly mentions that it is 9 months even on a demurrer any amendment cannot be done without notice to contractor as it cannot be done at all in view of Rule 17 (2) of Tamil Nadu Transparency in Tenders Rules, 2000.



10. As already alluded to supra, the contest is now only between State and the contractor. This Court carefully examined the trajectory of the matter and the rival submissions.

11. This Court has reminded itself that captioned application is a review application and therefore it should turn effectively on one or more of following three grounds:

- a) Some fact or material could not be brought to the notice of the Court at the time of order sought to be reviewed being made;
- b) Some other fact which has emerged post order which is sought to be reviewed which is significant to the case; and
- c) Any other relevant reason.

12. In the light of scope of a review petition, grounds raised in the review petition and the arguments advanced by learned State counsel, the question of suppression cannot be gone into in a review application. This Court has noticed this aspect of the matter on the rival pleadings and has passed the order which is sought to be reviewed. Therefore, the first ground of suppression does not fall for consideration in captioned review application. In any event, it will suffice to say that the argument is contract itself was post filing of the writ petition.

13. With regard to the second ground, a perusal of the pleadings before this Court when 15.10.2019 order came to be made reveals that this point has been raised clearly in the counter affidavit of the State and the rejoinder of the contractor. In the counter affidavit of the state relevant paragraphs are Paragraphs 5 (b) and 10 which read as follows:

'5(b) Taking the above value of work on hand of Thiru.M.Murugan bid capacity is arrived as follows:

$$\begin{aligned}\text{Bid Capacity} &= A \times N \times 2 - B \\ &= 1144.65 \times 6/12 \times 2 - 635.00 \\ &= 1144.65 \text{ Lakhs} - 635.00 \text{ Lakhs} \\ &= 509.65 \text{ Lakhs}\end{aligned}$$

But the bid capacity required for this work as per tender condition is Rs.600.00 Lakhs. The writ petitioner's bid capacity as on 08.01.2019 is only 509.65 Lakhs hence the Contractor Thiru.M.Murugan is not qualified in the above said bid. Hence, the Evaluation Committee decided to cancel the tender on 21.02.2019. The cancellation of the Tender was uploaded in the website on 21.02.2019 and a copy of uploaded document is enclosed in typed set. The message of cancellation was intimated to the petitioner on 21.02.2019 itself by online.

10. I respectfully submit that the fund for the work of "Widening SL to IL and strengthening of Vaithiyalingapuram



road in KM 0/0 - 7-8" has granted by the Govt. of India under Revamped Central Road Fund and the work has to be completed within 6 months. Due to the strength of the stay order granted by this Honorable Court in WMP (MD) No.4060 of 2019 will cause cost escalation, the stay petition may be closed in the interest of justice and welfare of exchequers.'

14. These paragraphs have been met in the rejoinder of the contractor in Paragraphs 3 and 5, which read as follows:

'3. In so far as the averments in para 5 is concerned, I already have the work for the value of 6.35 Crores, but I deny the fact that I submitted a letter dated 12.02.2019 stating that I have no work on hand and the 1st respondent never put on me any notice regarding petition of one E.Natarajan and no enquiry was conducted. I stoutly deny the very letter dated 12.02.2019 and never given such letter to the 1st respondent.

5.It is submitted that the period of work completion in original notification dated 06.12.2018 was 9 months, whereas in the tender notice dated 21.02.2019, the period of completion of work is purposely reduced to six months so that disqualifying me on the reason of lesser bid capacity. However, the previous work which being alleged by the respondents as on hand work is now completed. Therefore, the retender notification is invited only with the view to revenge the petitioner by the 3rd respondent due to previous motive on account of litigations and vigilance enquiry.'

15. On these rival pleadings, the matter was argued on the basis that in the formula 'N' should have been taken as 9/12 and not as 6/12. Likewise, it was also argued that in the formula 'B' should not have been taken as 635.00 and it should have been taken as 650.71. This is clearly captured by this Court in Paragraph 15 of the order which forms part of the extracted paragraphs reproduced supra. It was argued on this basis that an error in computation had occurred (on the teeth of the pleadings). To be noted, the concerned official was present in the hearing and instructing State counsel which has been captured in Paragraph 13 of the order which is sought to be reviewed.

16. Therefore, in this view of the matter, no ground for review i.e., a fact which could not be brought to the notice of the Court, any fact which has emerged post order or other compelling reason for review has arisen in the instant case. As no ground for review has been made out, this Court finds no ground to accede to the prayer for review of the order.



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Review Application Writ (MD) No.168 of 2019 in
W.P (MD) No.5089 of 2019

Review petition is dismissed and there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

gpa

+1 CC to M/s.Spl.Govt Pleader in SR.No.22171.

+1 CC to M/s.M.Maharaja, Advocate in SR.No.22125.

+1 CC to Mr.B.Saravanan, Advocate in SR.No.22100.

Review Application Writ (MD) No.168 of 2019 in
W.P (MD) No.5089 of 2019
18.11.2020

PM(CO)

AP(09/12/2020) 9P 4C