BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 21.02.2019
Pronounced on : 04.06.2019
CORAM:
THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

W.P.(MD)No.21801 of 2018
and
W.M.P.(MD)No.19737 of 2018
and
W.M.P.(MD)No.213 of 2019

M/s.S.K.Engineering and Construction Company,
Rep. by its Authorised Signatory T.Sivakumar. ... Petitioner

Vs

M/s.Bharath Heavy Electricals Limited,
Rep. by its Deputy General Manager
(Materials Management)
(MM/SDC), Tiruchirapalli - 620 014. ... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the respondent relating to the business ban order dated 30.07.2018 issued by the respondent in Reference:BHEL (T)/MM/SKENGG/Ban and quash the same and also consequently direct the respondent to refund to the petitioner a sum of Rs.7,00,000/- paid towards tender No.CT;TN;012, 2016-17, dated 08.10.2016.

For Petitioner : Mr.T.Saikrishnan

For Respondent : Mr.Raguvaran Gopalan
For Mr.K.Prabhakar

ORDER

The writ petitioner is a registered contractor with the respondent. It is seen that they have carried out quite a few contract works for the respondent. The respondent issued a tender notification on 08.10.2016. The petitioner participated in the said tender process and remitted a sum of Rs.7,00,000/- towards EMD. The tenderers were called upon to submit an attested solvency certificate from a nationalized or scheduled bank for the value of Rs.1,68,00,000/-. The petitioner was ranked as L3 and was hoping to be awarded with 20% of the scope of the work. While so, the respondent issued a show cause notice dated 22.02.2017, alleging that the solvency certificate furnished by the writ petitioner from HDFC Bank, Salem was not a genuine one. The petitioner submitted their reply dated 06.03.2017. There was one more meeting held in this regard on 19.07.2017. There was exchange of correspondence between the petitioner and the respondent. Not satisfied with the explanation given by the writ petitioner, the respondent issued the impugned business ban order dated 30.07.2018. Questioning the same, this writ petition has been filed.

2.The learned Judge of this Court who entertaining the writ petition on 25.10.2018 was pleased to grant an interim stay of the impugned order. Seeking to vacate the same, the respondent filed W.M.P.(MD)No.213 of 2019. The writ petitioner has filed a detailed counter affidavit in the said vacate petition.

3.Heard the learned counsel on either side.

4.The learned counsel appearing for the writ petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition. The petitioner's counsel also filed notes of submission.

5.The learned counsel appearing for the respondent submitted that the writ petition is not maintainable. The petitioner herein is very much having a remedy of arbitration. Secondly, it is admitted by the writ petitioner themselves that the solvency certificate dated 08.10.2016 was a forged one. The respondent is a Central Government undertaking enjoying immense reputation and it cannot allow such misconduct to go unpunished. The respondent has only gone by the standard guidelines and have not acted in an arbitrary manner. The respondent has fully complied with the principles of natural justice. The show cause notice was issued on 22.02.2017 and personal hearing was also given on 19.07.2017. Since the allegations made against the writ petitioner are true, the business ban order for a period of three years was definitely proportionate to the gravity of the misconduct. The learned counsel also submitted that the impugned order does not warrant any interference and wanted this Court to dismiss the writ petition.

6.After considering the rival contentions, I am of the view that the impugned order will have to be quashed and the matter remitted to the file of the respondent to pass orders afresh in accordance with law.

7.The allegations made against the writ petitioner that a bogus solvency certificate was submitted is not in dispute and show cause notice dated 22.02.2017 was rightly issued by the Civil Engineering Department of the respondent company. In response to the said show cause notice, the petitioner offered a detailed reply. The writ petitioner in response to the show cause notice as well as during personal hearing had contended that their power agent/employee by name Velu had done the mischief with bad intention to help the rival contractors. The petitioner had shown that they were very much having a correct solvency certificate at the time of submission of the tender document and there was absolutely no need for them to submit a bogus certificate. When the correct solvency certificate which was having validity at the time of floating of tender was resubmitted, the same was confirmed as correct and valid by the concerned bank. In the letter dated 10.04.2018, the petitioner had mentioned that they explained this aspect of the matter to the committee members. More than anything else, no tenderer could have gotten away by enclosing a bogus certificate. It is well known that if a solvency certificate is submitted, it should be sent to the bank concerned for confirmation. In this case, the writ petitioner is admittedly having a business relationship with the respondent since 2008-2009 onwards. They have sofar successfully completed about seven projects. They were very much having the correct and valid solvency certificate. The petitioner has indicated as to how the mischief had taken place.

8.In the impugned order none of these aspects have been dealt with. The respondent is a Government of India undertaking. Therefore, it cannot mechanically resort to blacklisting which will have great consequences for the petitioner. This Court is constrained to interfere with the impugned order principally for the reason that there is no consideration of the explanation given by the writ petitioner. The impugned order is virtually non-speaking. The stand of the respondent that the writ petitioner's reply was reviewed by the competent authority and found unsatisfactory is rather cryptic. The impugned order refers to the show cause notice dated 22.02.2017 and the reply dated 16.03.2017 and proceeds to issue the business ban order. There is no reference to any other materials. This is another defect. Personal hearing has taken place and the petitioner had appeared before the committee also. But these aspects are not referred to at all in the impugned order. The show cause notice was issued by one official and the impugned order was passed by another official. There is reference to the competent authority. But then the competent authority has not issued any show cause notice. It is not known whether the competent authority was present when personal hearing was accorded.

9.More than anything else, the punishment handed out to the writ petitioner appears to be grossly disproportionate. No doubt there was a very serious lapse on the part of the writ petitioner while submitting the tender documents. But then the petitioner did not stand to gain in any manner as a result. The petitioner has put the entire blame on one Velu an employee, who has since been dismissed from service. The petitioner obviously will have to pay some price rather substantial price for their lapse. But by the impugned order, the petitioner has not only lost the contract and that there is no mention of EMD of Rs.7,00,000/- paid by them. They have been blacklisted for a period of three years.

Even the pending contract stands closed. There is no automatic restoration of the registration after the ban. The petitioner will have to once again apply for registration. These appear to be rather too harsh. If the writ petitioner had not had any good track record and if he was not possessing a valid and correct solvency certificate during the relevant time, this Court would have taken a different decision. But since the petitioner does not appear to gain out such submission of bogus solvency certificate, this Court is of the view that the respondent will have to show some leniency. This Court is conscious of the fact that the respondent will have to decide on the proportionate penalty to be imposed on the writ petitioner. This is because, it has been admitted by the writ petitioner themselves that a bogus solvency certificate was submitted. Therefore, even while quashing the impugned order, the matter is remitted to the file of the respondent to pass orders afresh in accordance with law. The authority who is going to impose the penalty will have to necessarily hear the petitioner in person before passing the final orders. The orders to be passed by the respondent will have to necessarily deal with the defence of the writ petitioner. The respondent cannot pass an non-speaking order like the one impugned in this writ petition.

10.The writ petition is allowed on these terms. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

Sub Assistant Registrar(CS)

+1CC TO Mr.T.PON RAMKUMAR,ADVOCATE, SR.NO.67010
+1CC TO Mr.K.PRABHAKAR, ADVOCATE, SR.NO.66852

W.P.(MD)No.21801 of 2018

04.06.2019

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