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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **14.11.2019**

CORAM:

THE HONOURABLE **MR. JUSTICE M. SUNDAR**

W.P (MD)No.7061 of 2019

and

W.P. (MD)Nos.5657, 5658, 6552 and 13633 of 2019

D.Sivakumar

... Petitioner

Vs.

1.The District Collector & Chairman,
DRDA Project,
Tuticorin District, Tuticorin.

2.The Project Director,
DRDA, Collector Complex,
Tuticorin District, Tuticorin.

3.The Executive Engineer,
DRDA, Collector Complex,
Tuticorin District, Tuticorin.

4.M/s Sri Shanmugar Constructions,
162/A2/1, Anna Nagar,
2nd Street, East Main Road,
Madurai-625 020.

... Respondents

(R4 impleaded vide order dated 06/11/19, made in WMP(MD)Nos.6071 and 13632 of 2019 in WP(MD)No,7061 of 2019 by MSJ)

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus calling for the records of the respondent in Pre qualification Evaluation Statement in respect of Package No.TN/tut-07-NABARD RIDF XXIV/(2018-19) for improvement to 2 Nos of Roads in Vilathikulam Block of Thoothukudi District under NABARD RIDF XXIV/(2018-19) Tranche (Package No.07) by a Tender notification on 29.10.2018 to quash the same and consequently direct the respondent to open and include price bid of the petitioner dated 29.11.2018 and finalyse the work order.

For Petitioner : Mr.N.Sundaresan



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For Respondents : Mr.Aayiram K.Selvakumar
Additional Government Pleader
for R.1 and R.3
: Mr.M.Rajarajan
Government Advocate
for R.2
Mr.P.Ganapathi Subramanian
for R.4

ORDER

Mr.N.Sundaresan, learned Counsel on record for writ petitioner, Mr.Aayiram K.Selvakumar, learned Additional Government Pleader for respondents 1 and 3, Mr.M.Rajarajan, learned Government Advocate for second respondent and Mr.P.Ganapathi Subramanian, learned Counsel for fourth respondent (private respondent) are before this Court.

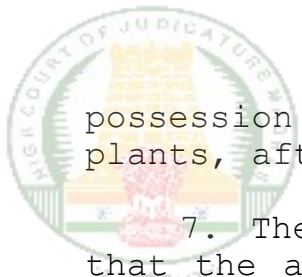
2. With consent of all the aforesaid learned Counsel, main writ petition is taken up, heard out and is being disposed of.

3. Subject matter of instant writ petition is a tender bearing tender notice reference DIPR/4422/TENDER/2018 and the name of the work is improvements to 2 No of roads in Vilathikulam Block of Thoothukudi District under NABARD RIDF-XXIV(2018-2019) Tranche (Package No.07) (hereinafter 'said tender' for brevity, clarity and convenience).

4. There is no disputation or disagreement that the said tender is in usual two cover system, ie., technical bid /technical cover followed by financial bid/financial cover.

5. The Tender Inviting Authority (TIA) is the second respondent. If said tender is the nucleus of this writ petition, rejection of writ petitioner's technical bid cover is the central theme of instant writ petition. To be noted, this Court is informed that the fourth respondent is the successful bidder and therefore, the fourth respondent has been impleaded post filing of instant writ petition.

6. The critical condition in said tender which is the fulcrum of the central theme of the writ petition is Clause - 7 and II thereunder under the caption of 'Information and Instruction for bidders under two cover system'. Suffice to say that the said clause says that a tenderer should enclose the list of the machineries set out therein in a prescribed format, that machineries can either be owned or leased, but the same should be duly certified by the Executive Engineer of the Rural Development Department in the District where the bid has been invited and this certification should be to the effect that the tenderer is in



possession of or under current lease of the requisite tools and plants, after verification of lease documents.

7. There is no contestation or disputation before this Court that the aforesaid certificate from the Executive Engineer was not produced by the writ petitioner, but it is the case of the writ petitioner that it could not be produced owing to third respondent getting evasive. This is articulated in paragraph No.6 of the writ affidavit and the same reads as follows:

'6.I submit from the date on which the 1st Respondent Floated the tender, I have been scrupulously following up to meet the Executive Engineer of DRDA of Tuticorin to get the certificate, however, he avoided in meeting me and after several attempts when I contacted over phone to issue certificate he simply told to get approval from higher officers and informed me that unless he was instructed by higher authorities, he cannot issue such certificate. When I meet higher authority, they simply say that they have not been authorized to certify. Thus I have been driven Pillar to post. The attitude of the Executive Engineer is not to issue any certificate as prescribed in the Tender. Being the Class-I contractor I do have all the equipments as needed to execute the said work and as the last date was nearing I have applied for the Bid on 29.11.2018 and submitted my Tender with 3% less than the quoted rate.'

8. Paragraph No.6 of the writ affidavit has been met by the third respondent in sub paragraph (iv) of Paragraph 5 of the counter affidavit filed by the second respondent being counter affidavit dated 04.04.2019, which has been filed by the second respondent on behalf of respondents 1 and 3 also. Relevant portion reads as follows:

'He is weaving a story as though he has contacted the Executive Engineer who avoided meeting him. This could not be correct. Even if it is true, he ought to have contacted either the 2nd or the 1st respondent or even the Director of Rural Development. Moreover he has not stated that he has sent a letter by enclosing the copies of above documents and that the Executive Engineer has not given him certificate. The Executive Engineer, Rural Development Department has given certificates to 16 tenderers who have participated in the above tender process.'

9. Therefore the above said contestation regarding non-production of certificate being owing to third respondent getting evasive turns on facts.



10. This Court is informed without any disputation or disagreement that the said tender is governed by the 'Tamil Nadu Transparency in Tenders Act, 1998' (Tamil Nadu Act 43 of 1998) and Rules thereunder (hereinafter 'said Act' and 'said Rules' respectively for brevity).

11. What is of relevance for instant writ petition is Section 11 of said Act which reads as follows:

'11.Publication of Notice Inviting Tenders in newspapers:

(1) The Tender Inviting Authority shall have the Notice Inviting Tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds rupees (fifty crores).

(2) The number, editions and language of the newspapers in which the Notice Inviting Tenders shall be published will be based on the value of procurement.

(3) In cases where publication of tender notices is to be done only in newspapers with circulation within the district, the Information and Public Relations Officer attached to the District Collectorate shall be the competent authority to release the advertisement and in all other cases the competent authority to release the advertisement shall be the Director of Information and Public Relations, Chennai.

(4). The Notice Inviting Tender shall be given due publicity in newspapers and also on notice boards in the District Offices. For tenders above rupees fifty lakhs, Director of Information and Public Relations will publish the Notice Inviting Tenders as per instructions of the (Procuring Entity). For other tenders, Director of Information and Public Relations will publish keeping in mind the request of the department. There should not be any additional insertion and no publication of Notice Inviting Tenders in newspapers not requested by the (Procuring Entity) for tenders above rupees fifty lakhs.'

12. Adverting to Section 11 of said Act, in the aforesaid counter affidavit of second respondent filed on behalf of respondents 1 and 3 also, plea of alternate remedy by way of an appeal under Section 7 of the said Act has been articulated in paragraph No.7 of the counter affidavit and the same reads as follows:

'Adequate alternative remedy of appeal in terms of Section 11 of the Tamil Nadu Transparency in Tenders Act, 1988. In a case of similar nature, this Hon'ble Court in W.P. (MD) No.4125 to 4131 of 2018 dated 28.02.2018 was pleased to

dismiss the writ petitions by directing the petitioners



thereon to avail the alternative remedy of preferring appeal to the Government and the same was upheld by the Division Bench of this Hon'ble Court in W.A.(MD)No.355 to 361 of 2018 dated 07.03.2018.'

This takes this Court to the order of Honourable Division Bench dated 07.03.2018 in W.A.(MD)Nos.355 to 361 of 2018.

13. Relevant paragraph of order of Honourable Division Bench is the concluding paragraph viz., paragraph No.27 and the same reads as follows:

'27.If the petitioners are so advised, they are at liberty to file an appeal before the appellate authority within a period of one week from the date of receipt of a copy of this order along with a petition for interim orders under Section 11(4) of the said Act and on such filing of appeal, the appellate authority shall entertain the appeal, if the papers are otherwise in order without putting the issue of limitation and after putting the respondents in the writ petitions on notice, shall take up the petition for stay at the first instance and give a disposal in accordance with law within a period of two weeks from the date of submission of the appeal. The Appellate authority is also at an option to give disposal of the appeal itself, within a period of six weeks from the date of entertainment of the appeal. However, in the circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.'

14. At this juncture, all the four learned Counsel before this Court agree / consent that a consent order can be passed in this writ petition. It is agreed that the consent order can be one giving liberty to the writ petitioner to avail alternate remedy by filing an appeal under Section 11 of said Act within a specified time frame to be specified by this Court.

15. As this is a consent order and as the writ petitioner is being relegated to alternate remedy in the light of narrative thus far, this Court refrains itself from dilating further on facts or legal position qua scope of judicial review under Article 226 of the Constitution of India qua in tender matters and the following consent order is passed:

(a) Writ Petitioner undertakes to file an appeal before the appellate authority under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998 along with a petition seeking interim orders under Sub Section 4 of Section 11 of the said Act within one week from the date of receipt of a copy of this order;



(b) On appeal along with a petition for interim orders being filed by the writ petitioner, the appellate authority shall entertain the appeal if the papers are otherwise in order without going into the issue of limitation;

(c) The petition for interim order under Section 11(4) of the said Act shall be disposed of by the appellate authority within one week from the date of presentation of the appeal;

(d) The appellate authority shall put the writ petitioner, fourth respondent and others interested (if any) on notice, give reasonable opportunity to them and dispose of the appeal on its own merits and in accordance with law as expeditiously as possible and in any event within four weeks from the date of presentation of appeal; and

(e) Therefore, the order of status quo granted by my Predecessor learned Judge on 26.03.2019 shall operate for a fortnight from the date of receipt of a copy of this order.'

16. Writ Petition is disposed of with the above directions. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar(CS)

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To

1.The District Collector & Chairman,
DRDA Project,
Tuticorin District, Tuticorin.

2.The Project Director,
DRDA, Collector Complex,
Tuticorin District, Tuticorin.



3.The Executive Engineer,
DRDA, Collector Complex,
Tuticorin District, Tuticorin.

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+1 CC to M/s.GP (SR-98838[F] dated 15/11/2019)

W.P (MD)No.7061 of 2019

14.11.2019

KK/SAR/18.11.2019/7P-5C/