IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.10.2020

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.8708 of 2020
and W.M.P.Nos.10559 and 10560 of 2020

A.S.P.T.Balakrishnan,
S/o.A.S.P.Thirupathi Chettiar,
Handling and Transport Contractor,
243/3, Ramayanpatti, Palani Road,
Meenakshi Nayakkanpatti Post,
Dindigul-624 002. .. Petitioner

.Vs.

1. The Regional Manager (Tamil Nadu),
   Central Warehousing Corporation,
   Regional Office,
   No.4, North Avenue, Sri Nagar Colony,
   Saidapet, Chennai-600 015.

2. Sree Balaji Transport rep. by its
   Partner - P.S.Selvaraj,
   S/o.P.S.Shanmugam,
   10/3, Om Towers,
   Royal Theatre Opp. Road,
   Near Nalli Hospital, Erode-638 011. .. Respondents

* * *

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records pertaining to the impugned order in No.CWC/RO-CNI/H and T-TNJ/2020-21, dated 19.06.2020 issued by the first respondent in favour of the second respondent in respect of E-Tender Notice in CWC/RO-CNI/H and T-TNJ/2020-21, dated 03.04.2020 for appointment of the regular contractor for handling and transportation work of food grains and allied materials at Central Warehouse, Thanjavur and the impugned order of the first respondent in the E-Mail letter dated 22.06.2020 issued to the petitioner and quash the same as illegal and consequently, direct the first respondent to award the contract to this effect to the petitioner on the basis of the Lowest Bid (L-1) of the petitioner and on consideration of his MSE Certificate Pertaining to the E-Tender Notice in CWC/RO-CNI/H and T-TNJ/2020-21, dated 03.04.2020. @

@ prayer amended vide order dated 13.08.2020 in WMP No.13065/2020 in WP No.8708/2020

* * *

For Petitioner : Mr.P.Wilson, Senior Counsel for Mr.N.Ganagasapapathy

For Respondents: Mr.R.Thirunavukarasu, Standing Counsel for R1
Mr.K.S.Jeyaganeshan for R2

O R D E R

Challenging the proceedings of the first respondent dated 19.06.2020 and 22.06.2020 with respect to the e-Tender Notice in CWC/RO-CNI/H&T-TNJ/2020-21, dated 03.04.2020 and seeking a consequential direction, this writ petition is filed by the petitioner.

2. The writ petition arises out of the e-Tender issued by the first respondent with respect to the warehouse in Thanjavur, which is issued for collecting, storing, handling and transportation of food grains. The petitioner is a Contractor, who has been in the field for more than 35 years and also the existing Contractor for the first respondent Corporation. The first respondent floated e-Tender on 03.04.2020 on the Tender Website for appointment of the regular Contractor for Handling and Transportation work of food grains and allied services for Central Warehouse, Thanjavur, for the year 2020-2022 fixing 24.04.2020 as last date for submission of bids. The technical bids were opened on 21.05.2020, wherein, the petitioner was qualified and the price bids were opened on 10.06.2020 and the petitioner was the Lowest Bidder (L1) among six other eligible tenderers, as per the list of Price Bids uploaded on the e-procurement portal of the first respondent Corporation. While the petitioner was eagerly waiting for the contract to be awarded in his favour, as being L1, the first respondent had awarded the contract to the second respondent, which is L2.

3. The Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012 as amended in 2018, provides for procurement of 25% of goods or services from MSEs. Accordingly, the first respondent also included Clause 5(a)(V) in the Tender Document, which provides for awarding the entire contract to MSEs instead of the 25% cap. The petitioner later realized that he omitted to upload the MSE Certificate with the other documents at the time of submission of the e-Tender, due to inadvertence. However, the petitioner sent the MSE Certificate and UDYOG Aadhar Memorandum on 18.06.2020 to the first respondent, as per Clauses 12.2 and 12.3. Despite having

received the said certificates, which is valid till 23.12.2020, the first respondent had sent an e-mail on 22.06.2020 stating that the MSE Certificate sent by the petitioner through e-mail on 18.06.2020 had become infructuous, as the same was not submitted earlier through e-Tender and that he was not claiming MSE benefits. On 19.06.2020, the contract was awarded to the second respondent and it was not mentioned in the communication sent to the petitioner on 22.06.2020. According to the petitioner, even presuming that the petitioner had not submitted his MSE Certificate that he is L1, there is no provision in the tender document to invite only the L2 and and award the contract to it. Hence, the petitioner has challenged the award of the contract dated 19.06.2020 in favour of the second respondent and the also the order dated 22.06.2020 rejecting their claim.

4. The Regional Manager of the first respondent Corporation had filed a counter affidavit contending that the first respondent is coming under the essential commodities service and the Controlling office of the first respondent had strictly directed the first respondent that movement of food grains should not be stopped due to pandemic and the first respondent is continuously working without any break, even during the lockdown period for proper distribution of food grains. It was stated further that apart from being the lowest bidder, there are other parameters to be fulfilled for the entitlement of the contract, which have been clearly mentioned in the tender document.

4.1. In the Annexure to the technical bid of the petitioner, the MSE registration status is shown as "Nil". The petitioner filed a declaration of undertaking on its letterhead stating that it is not an MSE bidder. The petitioner having participated in the bid as non-MSE bidder had conveniently covered up the same and had purported to state that the MSE certificate has been inadvertently omitted, which is a false statement. The submission of the MSE certificate by the petitioner on 18.06.2020 after opening of the price bid is only an afterthought to manipulate the results to suit their convenience. The tender clause 12.2(b) provides that the "missing document sought is allowed to be submitted only by uploading on the tender website through which the same has been asked." Therefore, the submission of the document through email dated 18.06.2020 is invalid and cannot be considered by the first respondent.

4.2. It is also further stated that as per the evaluation process and Government of India Policy on Public Procurement involving MSE bidders notified in 2012, the handling rate of the petitioner was offered to the L2, which is an MSE bidder, who was within the L1 + 15% price band, which is closest to L1 rate. It is further stated that the transportation rate originally offered by the L2 bidder was already less than that of the petitioner by Rs.6/- per MT. So, when the L2 bidder had accepted the counter offer of L1, handling rate, the net contract value offered by the L2 bidder became even less than that of the L1. Therefore, the first respondent had awarded the contact in favour of L2. As there is no truth in the contention made by the petitioner, the first respondent sought for dismissal of the writ petition.

5. The question that arises for determination is "Whether the petitioner who is an L1 has been overlooked and the second respondent was awarded the contract ?"

6. Though originally the petitioner had filed a Writ of Certiorarified Mandamus questioning the impugned order dated 19.06.2020, it was amended later to include the email received from the first respondent dated 22.06.2020 also, which was allowed by this court on 13.08.2020. The following facts are not in dispute : the e-Tender was issued on 03.04.2020 in tender website for the period 2020-2022 ; the technical bids were opened on 21.05.2020 and the price bids were opened on 10.06.2020 and the petitioner was the L1.

7. As per the tender document, the EMD payable is Rs.11,78,000/-, which has to be paid through e-payment gateway favouring the Regional Manager, Central Warehouse Corporation, Regional Office, Chennai, and the bidders were requested to upload the scanned copies of the documents, in support of their eligibility of the bids. The tender document also prescribed a minimum eligibility criteria under Clause 2(A), of which, Sl.No.4 states that the tender registered under micro and small enterprises, if applicable, are exempted from payment of EMD and cost of tender, for which they should enclose the proof of their being registered with the Agencies and also their registration should be valid as on last date of submission of the tender and they should also mention the terminal validity, if applicable. Clause 5 prescribed the other details. In Clause 5(a)I, it has been specifically stated that the tender document cost will not be charged from Micro & Small Enterprises (MSEs) and clause 5(a) II, it has been mandated that the MSEs, who are interested in availing themselves of these benefits and preferential treatment will enclose with their offer the proof of their being registered for goods produced and services rendered with any of the agencies mentioned in the notification of Ministry of MSME indicated therein along with the bid. The case of the petitioner is that he also has a valid MSE Certificate and UDYOG Aadhaar Memorandum issued by the Ministry of MSME with validity period till 23.12.2020. Clause 8 of the Tender Document prescribed that the MSEs registered with the prescribed agencies were exempted from payment of EMD and cost of tender, for which they should enclose the proof of their being registered with the

agencies mentioned in the tender document.

8. A perusal of the Annexure-I to the technical bid submitted by the petitioner, as produced by the first respondent, goes to show that for the query whether the document, i.e., Registration Certificate, was attached, if the bidder is an MSME, under Sl.No.1, which relates to cost of Document Fee Online, the petitioner replied "YES". Similarly, for the query whether the document, i.e. Registration Certificate, was attached, if the bidder is an MSME, under Sl.No.2, which refers to EMD online, the petitioner has specifically mentioned "YES". For the query that proof of MSEs Registration copy (if Exemption for EMD Cost of tender sought) [affidavit] is attached, the petitioner replied "NIL".

9. The learned Senior Counsel, who appeared on behalf of the petitioner, referred to Sl.No.18 and submitted that if the tenderer only wanted an exemption of payment of the EMD and the cost of tender, then the required certificate and the affidavit have to be furnished, as mentioned therein. As the petitioner herein had paid the EMD amount of Rs.11,78,000/-, it was not required for the petitioner to attach the copy of the proof of MSE Registration Certificate. However, the learned counsel for the first respondent pointed out that in the earlier columns under Sl.Nos.1 and 2, which specifically required the applicants to mention whether they are MSE, the petitioner had mentioned "YES". Pointing out the above discrepancy, the learned counsel for the first respondent would submit that when the petitioner had opted to submit the tender only as MSE, he ought to have attached the copy of the MSE Registration certificate. Merely because he had paid the EMD and the cost, it cannot be stated that the certificate need not accompany the bid.

10. The learned Senior Counsel for the petitioner invited the attention of this Court to Clause 12.2 captioned "Further evaluation of Stage : I Technical Bid". Clause 12.2(b) reads as follows :

> "12.2. Further evaluation of Stage : I Technical Bid
>
> .....
>
> (b) The Corporation, if necessary may ask the tenderer for any specific information / clarification relating to qualifying document / condition or can seek missing documents(s). The required clarification and missing document will be asked from only those bidders who have fullfilled the minimum eligibility criteria and it must be uploaded within specific time subject to maximum of 15 days on the same portal as per the proceure prescribed below i.e. in clauses 12.3."
>
> (emphasis supplied)

Relying on the above provision, it was submitted that the Corporation ought to have sought for missing document from the petitioner as per the above clause. The missing document referred to herein is the MSME Registration Certificate.

11. It was pointed out by the learned counsel for the first respondent that when the petitioner had not registered under the Micro and Small Enterprises, it was not for the Corporation to ask for the missing document. Learned counsel would point out that the petitioner had, along with other documents, sent a document signed by him stating specifically "tender not registered under micro & small Enterprises". The said document, which was filed before this court by the first respondent is admitted by the petitioner. Having asserted that they are not applying under the MSEs category by sending the above document, it is not open to the petitioner to expect the Corporation to call for the missing document from him.

12. The argument of the learned Senior Counsel for the petitioner that the MSE Registration Certificate of the petitioner sent on 18.06.2020 was not considered by the first respondent is countenanced by the first respondent stating that even as per Clause 12.2(b), any missing document ought to have been uploaded within the specified time subject to maximum of 15 days on the same portal as per the procedure prescribed in clause 12.3. Admittedly, the said document was not uploaded within 15 days, but it was done only after the technical and price bids were opened. Secondly, when the tender document specifies that the uploading should be in the same portal as per the procedure prescribed, the document was sent by email. Therefore, it was not considered by the first respondent. Besides, it is not obligatory on the part of the first respondent to seek any document or clarification as it is provided only for a bona fide purpose and not for favouring any applicant/bidder. The petitioner, who claims to be the existing contractor and is in the field for more than three and a half decade, has the experience of applying for such contracts. Therefore, it would not be fair on the part of the petitioner to say that due to inadvertence he had omitted to file the certificate at the first instance.

13. As mentioned in the counter affidavit of the first respondent, the second respondent was awarded with the contract on 19.06.2020 itself and the second respondent also had taken charge of the activities on 24.06.2020. Hence, the first respondent had sent the email dated 22.06.2020, which is impugned herein stating that "no document can be a part of the offer which was not submitted earlier through e-tender and having declared yourself that your firm is not claiming MES benefit, the submission of the MSE certificate through an email

dated 18.06.2020 is infructuous." As the contract has already been awarded and work had already been commenced, the communication dated 22.06.2020 was rightly sent to the petitioner as infructuous. Thus, the petitioner, who claims to be a seasoned contractor, having failed to follow the procedure in the manner required, cannot challenge the same that too beyond time. Therefore, there is no merit in the submission made by the learned Senior Counsel for the petitioner.

14. At this juncture, it is relevant to state that Clause 5 (a)V of the tender document reads as follows :

> "As per Public procurement policy on MSE, considering that this is a non-divisible tender, an MSE quoting in the price band of L1 + 15% will be awarded for full/complete work of tender, considering the spirit of policy for enhancing the government procurement from MSEs subject to bringing down of price to L1 rate after negotiation if any, by the MSE concerned."

15. In the counter affidavit, it is stated that though the petitioner was L1, as per the tender evaluation process and Government of India Policy on Public Procurement, as mentioned above, the handling rate of the petitioner was offered to the L2 - the second respondent and an MSE bidder who was within the L1 + 15% price band, closest to the L1 rate as per Public Procurement Policy notified by the Government of India in 2012. The transportation rate originally offered by L2 bidder was already less than that of the petitioner's quote. Therefore, when the L2 had accepted the counter offer of the L1 handling rates, the Corporation - first respondent found that the net contract value offered by the L2 bidder became even less than that of the offer of L1. Thus, even considering on the merits of the case, the claim of the petitioner has rightly been rejected by the first respondent.

16. While tender offer of the petitioner was rejected by the Tender Accepting Authority, it is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution of India for the reason that these decisions are not the judicial nor quasi-judicial. As pleaded by the petitioner, if reasons are to be given at every stage, then the commercial activities of the authorities would come to a grinding halt. There should be some leeway in this regard for the Tender Accepting Authority. The authority concerned is the best judge to find out the best person or institution or best quotation depending on the work to be entrusted under the contract. The Court cannot be compelled to direct the authority to choose a person, without knowing whether they deserve for such contract in all aspects, to be entrusted with the work. It

should also be borne in mind that poor quality of work goods can result in public hardship. At this juncture, it is pertinent to note that the Hon'ble Supreme Court in Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd., (2019) 14 SCC 81, referring the earlier judgments made the following observations :

> "38. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818], this Court has expounded further on this aspect, while observing that the decision-making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision-making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision-making process would not suffice.
>
> 39. ..... In fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is not acceptable to the constitutional court, but that itself would not be a reason for interfering with the interpretation given. We reproduce the observations in this behalf as under: (Afcons Infrastructure Ltd. case (2016) 16 SCC 818] :
>
> > "15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

17. The learned Senior Counsel for the petitioner relied on the following judgments to contend that there is no fairness in the decision arrived at by the first respondent :

(1) Maa Bindra Express Carrier and Another V. North East Frontier Railway and Others, (2014) 3 SCC 760 ;
(2) State of Punjab V. Bandeep Singh and Others, (2016) 1 SCC 724 ;

(3) Michigan Rubber (India) Limited V. State of Karnataka, (2012) 8 SCC 216;
(4) Meerut Development Authority V. Association of Management Studies and Another, (2009) 6 SCC 171 ; and
(5) Punjab State Electricity Board Limited V. Zora Singh and Others, (2005) 6 SCC 776.

However, it is relevant to state that in view of the aforesaid discussion and also the fact that there is a failure on the part of the petitioner in furnishing the required documents within the stipulated time, the above decisions render no assistance to advance the cause of the petitioner.

18. The above view is fortified by the principles summarised in the decision of the Hon'ble Supreme Court in Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, relied on by the learned Senior Counsel for the petitioner, wherein, after referring to various earlier decisions, it was held as follows :

> "23. From the above decisions, the following principles emerge:
>
> (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;
>
> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very

restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

19. Needless to say that the answers to the above questions in the instant case are in the negative and thus, the decision arrived at by the first respondent calls for no interference from this Courts exercising judicial review under Article 226 of the Constitution.

20. For the foregoing reasons, there is no merit in the claim of the petitioner and this writ petition is liable to be rejected and the same is, accordingly, dismissed as devoid of merits. However, there shall no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The Regional Manager (Tamil Nadu),
Central Warehousing Corporation,
Regional Office,
No.4, North Avenue, Sri Nagar Colony,
Saidapet, Chennai-600 015.

W.P.No.8708 of 2020

ad (co)
rr ii (27/11/2020)