

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

104 WRIT PETITION NO. 11571 OF 2021

M/S TIRUPATI CONSTRUCTION THROUGH ITS PROPRIETOR RAMRAO
DHANSINGH RATHOD

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS

...

Advocate for Petitioner : Mr. N.P. Patil Jamalpurkar
AGP for Respondent No. 1 : Mr. P. K. Lakhotiya
Advocate for Respondent Nos. 2 to 4 : Mr. S.S. Manale

...

AND

105 WRIT PETITION NO. 11597 OF 2021

M/S TIRUPATI CONSTRUCTION THROUGH ITS PROPRIETOR RAMRAO
DHANSINGH RATHOD

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS

...

Advocate for Petitioner : Mr. N.P. Patil Jamalpurkar
AGP for Respondent No. 1 : Mr. P. K. Lakhotiya
Advocate for Respondent Nos. 2 to 4 : Mr. S.S. Manale

...

AND

106 WRIT PETITION NO. 11598 OF 2021

M/S TIRUPATI CONSTRUCTION THROUGH ITS PROPRIETOR RAMRAO
DHANSINGH RATHOD

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS

...

Advocate for Petitioner : Mr. N.P. Patil Jamalpurkar
AGP for Respondent No. 1 : Mr. P. K. Lakhotiya
Advocate for Respondent Nos. 2 to 4 : Mr. S.S. Manale

...

**CORAM : S. V. GANGAPURWALA AND
S. G. DIGE, JJ.**

DATE : 6th DECEMBER, 2021

PER COURT :-

Mr. Patil, learned Advocate for the petitioner strenuously contends that the act of the respondent, in cancelling entire process and resorting to

the fresh process, is illegal and tainted with *malafides*. The same is arbitrary and unreasonable. The said decision deserves to be set aside. The learned counsel submits that the grounds stated by the respondents, that the technical and financial bids were opened on the same day and for that entire tender process is required to be cancelled, are erroneous.

2. The learned counsel for the petitioner placed on record the number of tenders issued by the respondents wherein technical and financial bids were opened on the very same day and the tenders were allotted to the successful tenderers. At that time, no objections were raised by the respondents. It is, whenever, the petitioner is found to be lowest bidder, the same *modus operandi* is resorted to of cancelling the tender process. The learned advocate further submits that the distance of the hotmix plant and farthest point of work is also verified after opening the technical bid and before opening of financial bid. This aspect is clearly recorded in the chart showing acceptance of the technical bid and the same is signed by two members of the Committee. The learned counsel submits that the tender process had progressed further. The financial bids are evaluated and uploaded. The petitioner was shown as the lowest bidder and his tender is required to be accepted. The petitioner, thereafter, also approached the office of respondents, for depositing security deposit and others charges. This shows that the petitioner was ready and willing to complete his part of the contract. The learned counsel further submits that malafide intention is writ large in cancelling the process. The learned counsel further submits that whenever the action of the authority is arbitrary, unreasonable and smacks of malafides, this Court can exercise its writ jurisdiction.

3. The learned counsel, to buttress his submission, relies upon the Judgment of this Court, at its Principal seat at Bombay, in ***Writ Petition No. 1936 of 2018 (Proactive in & out Advertising Pvt. Ltd. Versus Pune Mahanagar Parivahan Mahamandal Ltd, dated 22-06-2018,*** wherein it is

held that the principles of judicial review would apply to exercise of powers in contractual matters by the Government bodies in order to prevent arbitrariness. The learned counsel also relies upon the judgment of the Division Bench of this Court in the case of ***AG Enviro Infra projects Private Ltd. Versus State of Maharashtra in Writ Petition No. 13820 of 2018 dated 06-02-2019*** on the same issue. He also relies on the judgment of The Apex Court in the case of ***Union of India and others Versus Dinesh Engineering Corporation and another decided on 18-09-2001***, to support that a public authority, even in contractual matters, should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognized by the Courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decision being taken by the public authorities whose actions are amenable to writ jurisdiction of this Court.

4. The learned counsel submits that the respondents are trying to supplement the reasons by way of affidavit. The same is not permissible. To support this submission, he relies on the judgment of the Apex Court in the case of ***Mohinder Singh Gill and another Versus The Chief Election commissioner, New Delhi and others*** reported in ***(1978)1, SCC 405***.

5. Mr. Manale, learned Advocate for respondent Nos. 2 and 3 submits that because of glaring mistake by one of the person, namely, U.H. Rathod, the entire tender process has been cancelled. Clause no. 19 in the tender specially provides that, 'after opening the Envelope No. 1, it will be verified by the department that the distance of the plant to the farthest point of work is within 60 kilometers. If the distance is found to be more than 60 kilometers then Envelope No.2 of the bidder will not be opened i.e. bidder will be disqualified.' In the present case, there were many works and in some of the works, the distance of hotmix plant from the places of work of all the bidders was more than 60 kilometers. The learned counsel submits

that the same was verified subsequently by the authorities and none of the bidder as per the same was qualified.

6. According to learned counsel, the said Mr. U.H. Rathod used a digital signature of one of the members of the Committee, who was already transferred to other place at Amravati and another member of the Committee, the Executive Engineer was on leave and was in Rajasthan. The said technical bid chart does not bear physical signature of the Executive Engineer. The said Mr. Rathod could not have uploaded the financial bids. On the statement of evaluation of the financial bids, none of the committee members have put their signatures, so as to approve the same for uploading it. As there was gross illegality, the Chief Executive Engineer directed the Executive Engineer, to cancel the tender process and go for fresh tender process.

7. We have considered the submissions canvassed by the learned counsel for the respective parties. The scope of the judicial review in tender matters is in very narrow compass. The Court is concerned with the decision making process rather than the decision itself. The Court will have to verify whether appropriate decision making process was adhered to. In the present case, concluded contracts does not exist. No work order is issued to the petitioner. No agreement was executed between the parties in respect of the tender. The agreement qua rights and liability would flow from contract, if, the contract is a concluded contract.

8. Moreover, the Court can exercise its power of judicial review, if, it is found that the action of the public authority smacks of arbitrariness. Arbitrariness has no role in the society governed by rule of law. Arbitrariness is antithesis to justice, equity, fair play and good conscience. Arbitrary action cannot be sustained.

9. The question would be whether, the facts and circumstances of the case, mandate invoking powers of judicial review of this Court. The power of judicial review in contractual matters have been well settled by the Apex Court. Reference can be made to the Judgment of the Apex Court in a case of **Tata Cellular Vs. Union of India 1994 (6) SC 651.**

10. The technical bid uploaded contains signature of Additional Chief Executive Officer and Chief Accountants and Finance Officer, Zilla Parishad, Latur. It has been stated that the technical bids of four tenderers have been uploaded and they have been stated to be in order. It is also mentioned in technical evaluation chart uploaded that the required distance is also available. However, the chart of the financial bids does not contain signatures of the Committee members. There were three members in the Committee. Signatures of the members of the Committee do not find place in the evaluation of the financial bid.

11. The respondents have also placed on record the charts showing distance of hot mix plant from the site of the actual work. In the tender of the petitioner, for three of the works, distance is found beyond 60 kilometers.

12. Though it is contended from copies of the tenders placed on record that respondents in many of the tenders of other works also have opened the technical bid and financial bid on one and the same day, however, clause 19 of the tender also needs to be considered. Clause 19 of the tender notice is reproduced below:

“Scanned copy of sketch (in case of already installed plant) of plant location from farthest point of work signed by the bidder should be submitted. This distance should be within 60 kilometers so as to maintain the temperature of bituminous material as per specification before laying on site. This sketch has to be uploaded through online. After opening the envelope No.1, it will be verified by the department that the distance of the plant to the farthest point of work is within 60

kilometers. If the distance found to be more than 60 kilometers then envelope No.2 of the bidder will not be opened i.e. bidder will be disqualified.”

13. It is clear that after opening envelope no. 1, it was necessary for the department to verify the distance of the plant (Hot Mixing Plant) to the farthest point of work is within 60 kilometers. The time lag between opening the technical bid and financial bid is hardly 50 minutes. The technical evaluation summary details is updated/uploaded at about 5.38p.m. and the financial bid at 6.25. p.m. Short time span does not inspire confidence that evaluation of technical bid was made threadbare. As observed above, financial bid does not contain signature of any of the members of the Committee and still that was uploaded by one of the clerks. The same would not augur well in the decision making process.

14. It is true that reasons cannot be substituted by additional affidavit as has been held by the Apex Court in the case of **Mohindersing Gill** (supra) and also in the contractual matters, transparency is required to be maintained. The process does not appear to be transparent as financial bid has not been signed by the members of the Committee. As observed above, one of the members of the Committee, on 21st September, 2020 was on leave and was at Rajasthan and another member was transferred to another place i.e. Amravati.

15. In the light of above, we find that process was not free from glitches and the facts of the present case do not warrant interference. The writ petitions are disposed of. No costs.

16. Mr. Jamalpurkar, learned counsel submits that interim relief granted by this Court under order dated 28th October, 2021 may be continued for a period of six weeks. The same is opposed by Mr. Manale, learned advocate for the respondent Nos. 2 to 4.

17. Considering the fact that the interim relief is in operation, we continue the same for a further period of two (02) weeks only from today. Needless to state that on lapse of two weeks, interim relief shall automatically stand vacated.

(S.G. DIGE)
JUDGE

(S.V. GANGAPURWALA)
JUDGE

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