

Date of Reservation	04.02.2021
Date of Judgment	15.02.2021

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THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM**AND****THE HONOURABLE MR.JUSTICE G.ILANGOVAN**WRIT APPEAL (MD) No.259 of 2021andCMP (MD) No.830 of 2021

Hydro Electrical Systems
Represented by its Proprietor
Asha Raghavan
W/o.Raghaven
No:1, Masthan Ghorī Street,
Adambakkam,
Chennai-600 088.

: Appellant/Petitioner

Vs.

1.Tamil Nadu Water Supply and Drainage Board (TWAD)
Represented by its Managing Director,
No.31, Kamarajarsalai,
Chepauk, Chennai - 600 005.

2.The Chief Engineer,
Tamil Nadu Water Supply and Drainage Board (TWAD)
1/1, Sambakulam,
Opp to Mattuthavani Bus Stand,
Madurai - 625 007.

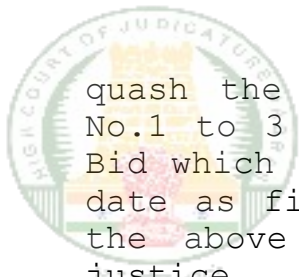
3.The Regional Technical Evaluation Committee,
Represented by the Chairman,
Tamil Nadu Water Supply and Drainage Board (TWAD)
1/1, Sambakulam,
Opp to Mattuthavani Bus Stand,
Madurai - 625 007.

4.Mr.R.Velumani : Respondents/Respondents

Writ Appeal has been filed under Clause 15 of Letters Patent against the order, dated 22.01.2021 made in W.P.(MD)No.18639 of 2020, on the file of this Court.

Prayer in WP (MD). 18639/ 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a writ of Certiorari/Mandamus, to call for the records pertaining to the impugned order passed by the 3rd Respondent dated 09.12.2020 and



quash the same as illegal and cosequently direct the Respondents No.1 to 3 to allow the Petitioner to participate in the Financial Bid which is scheduled to be held on 14.12.2020 or other subsequent date as fixed by this Honourable Court may deem fit and proper in the above facts and circumstances of the case and thus render justice

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For Appellant: Mr.M.Ajmal Khan
Senior Counsel for
Mr.R.Karunanidhi
For R2 : Mrs.Porkodi Kannan for
M/s. Polax Legal Solution
For R4 : Mr.Veera Kathiravan
Senior Counsel for
M/s.Veera Associates

J U D G M E N T

(Judgment of the Court was made by **G.ILANGOVAN, J**)

The Writ Appeal has been directed under Clause 15 of Letters Patent against the order of the learned single Judge of this Court, dated 22.01.2021 made in W.P.(MD)No.18639 of 2020.

2. The facts of the case narrated in the writ petition are that the first respondent/Tamil Nadu Water Supply and Drainage Board (TWAD), issued a Tender Notification, dated 06.11.2020 inviting tender for carrying out the work of 'Rejuvenation and improvements of existing Combined Water Supply Scheme to Andipatti - Sedapatti in Madurai and Theni District'. The appellant as well as the fourth respondent herein participated in the tender process. Even at the technical bid stage, the appellant was disqualified. The communication, dated 09.12.2020 was also sent, which is impugned in the writ petition. In that tender process, the fourth respondent herein, was awarded with the contract. So, challenging the same, the appellant has filed the impugned writ petition before the Writ Court and by the order, dated 22.01.2021, the writ petition was dismissed by holding that the appellant has not satisfied the tender conditions and so, disqualification has been rightly passed by the authorities. The contention raised by the writ Appellant before the Writ Court is that the fourth respondent herein is also not qualified to take part in the tender process and the authorities ought to have disqualified him also and instead, for extraneous reasons, the contract was awarded to him. Those contentions were rejected by the Writ Court mainly on the ground that he failed to enclose Annx viii ,as set out in the conditions of tender.Challenging the correctness of the said order, this writ appeal has been preferred.

3.Heard the learned counsel on both sides.

4.The law, on the point of judicial interference into the executive action, more particularly, with regard to contract through tenders is well settled. Particularly, in the case of **TATA Cellular**



Vs Union of India wherein, it has been pointed out among other things, the guide line No.2 reads as follows:-

" The Court does not sit as a Court of appeal, but, merely reviews the manner, in which, the decision was made"

The appellant wants to quash the tender process on this ground.

5.For better appreciation of the dispute involved, the chronological events can be summarised as follows:-

The notification of the official respondent, inviting tender is dated 29.10.2020 and last date for submission of the bid was 03.00 p.m on 03.12.2020. On 09.12.2020, the technical bids were evaluated at 05.00 p.m and the result was uploaded on 11.12.2020 in the official web site.The appellant was informed of his disqualification. On 14.12.2020, the the price bid was opened by the authorities the fourth respondent herein, was awarded with the contract.

6.According to the appellant, he submitted his tender application on 02.12.2020 and paid security amount . He annexed the documents, which were required to be filed. So, among the documents, which were alleged to have been enclosed along with the tender application, the dispute is only with regard to credit line certificates from the financial institutions.

7.When the bid was opened at 03.30 p.m on 03.12.2020, he was informed that original affidavit was not furnished and so, he submitted the same on 4.12.2020. At about 04.30 p.m, on 11.12.2020, he was informed that he was rejected during technical evaluation stating that the form submitted by the appellant has not satisfied the financial qualification criteria and the non-submission of original affidavit regarding the correctness of information furnished.

8.According to the learned Senior counsel for the fourth respondent, the award of contract to the fourth respondent was not challenged by the appellant. Moreover, conditions stipulated in 24.5 and 24.6 were not complied by the appellant . Even as per the information, the appellant undertook to produce the require document and so, there is no infirmity disqualifying the appellant.

9.Now according to the appellant, to show his financial qualification, he enclosed the document issued by the South Indian Bank, Pallavaram Branch, Chennai. Now, turning to this, a prescribed format has been issued by the authorities, which is Annexure No.VIII which runs hereunder:-

"

ANNEXURE VIII

SAMPLE FORMATE FOR EVIDENCE OF ACCESS TO OR AVAILABILITY OF CREDIT FACILITIES - CLAUSE 7.1.9

BANK CERTIFICATE

<https://hcservices.ecourts.gov.in/hcservices/>

This is to certify that
M/s..... is a reputed company with



a good financial standing.

If the contract for the work, namely is awarded to the above firm, we shall be able to provide overdraft/credit facilities to the extent of Rs..... to meet their working capital requirements for executing the above contract. "

10. Instead of annexing the availability of credit facilities in the prescribed format, the appellant has annexed the Solvency Certificate issued by the South Indian Bank, dated 01.12.2020, as observed by the Writ Court. Even if there is any deviation from the prescribed format, the substance of the format is important, and might have been properly incorporated in the solvency certificate enclosed by the appellant. A combined reading of the prescribed format in Annexure VIII and the Solvency Certificate issued by the South Indian Bank shows that they do not match. The solvency certificate does not answer the requirement of credit facility. Moreover, as pointed out by the Writ Court, the Certificate appears to have been issued without any guarantee or responsibility or commitment on the part of the Bank or any of its Officers/Employees. So, the substance of this letter shows that the South Indian Bank did not want to undertake any financial commitment concerning the appellant with regard to his business transaction. But, whereas, as main reason for the Annexure format VIII is that in the event of contract issued to the appellant, overdraft and credit facilities should be available to him to meet out the working capital requirement for executing the above contract. So, it is seen that the Certificate of Solvency annexed by the appellant along with his tender application does not meet the requirements of the conditions imposed in the tender document. So, only on that basis, the appellant was disqualified even at the technical bid stage.

11. It is also submitted that the prescribed format was submitted latter, and the same was also received by the Tender Evaluation Authority. But, on the date of opening of the tender i.e., on 09.12.2020, no prescribed format appears to have been presented and available with the authorities.

12. In paragraph 20, it is observed that the appellant has not satisfied the financial qualification criteria and the second ground is the non-supply of original affidavit regarding the correctness of the information furnished with the bid documents. So, with regard to his disqualification, the appellant appears to have sent the Certificate, the copy of the same enclosed in the typed set in page no 160, dated 14.12.2020. But it was already late. The disqualification occurred 09.12.2020 could not have been cured by submitting the Certificate on 14.12.2020.

13. (i) With regard to the argument that it is not mandatory and only directory, it is useful to refer to the conditions mentioned in the tender documents. Condition 26.2 reads as under:-

"26.2. Bidders are requested to read all norms for



qualification and evaluation carefully and submit the required credential documents in support of information given by them against these norms so that their evaluation may be carried. In the absence of these documents the bids are liable to be rejected. To assist in the examination, evaluation and comparison of bids, the Employer may, at his discretion, ask any Bidder for clarification of his bid, including breakdown of unit rates. The request for clarification and the response shall be sought, offered, or permitted except as required to confirm the correction of arithmetic errors discovered by the Employer in the evaluation of the Bids in accordance with Clause 28 of " Bid Opening and Evaluation".

(ii) Condition No.27.2 reads as under:-

" 27.2.A substantially responsive bid is one which conforms to all the terms, conditions, and specifications of the bidding documents, without material deviation or reservation. A material deviation or reservation is one (a) which affects in any substantial way the scope, quality, or specification of the Materials; (b) which limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the Bidder's obligations under the Contract; or (v) whose rectification would affect unfairly the competitive position of other Bidders presenting substantially responsive bids."

(iii) Condition 26.3 runs like this:-

"26.3.If a bid is not substantially responsive, it will be rejected by the Employer, and may not subsequently be made responsive by correction or withdrawal of the non conforming deviation or reservation."

14.**Kanhaiya LalAgrawal v. Union of India, (2002) 6 SCC 315**, answers the question, as to what is essential condition and collateral one, it was held,

"It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term".

15. So, a combined reading of these conditions and the judgment cited above shows that a non-responsive bid is one which is not in conformity with the specification of terms and conditions of the bid. It is also seen that there should not be any material deviation



or reservation.

16. Here as mentioned earlier the condition is with reference to the finance to meet out the work. So it cannot be termed as collateral but essential.

17. The learned Senior Counsel for the appellant would submit that the condition 26.2 gives discretion to the authorities to make a clarification with regard to the bidding documents with the bidders. But, no such clarification was sought from him before such disqualification.

18. The contention on the part of the appellant is that it was done with an ulterior motive for favouring the fourth respondent. But, the clarification can be sought only with regard to the documents which have been enclosed and not with regard to the non-enclosure of prescribed format. So, this ground is not available to the appellant. As seen from the conditions the form as well as the substance of the formats were mandatory in nature, since the bid involves the financial implications.

19. With regard to the second ground of disqualification that the appellant has not produced the affidavit in original, the appellant has enclosed a copy of the same, dated 02.12.2020 in page no 143 in the typed set. The consignment records in page no 144 in the typed set show that the same was received on 03.12.2020 at about 14.39.14 hours. But, the last date for submission of tender application is 03.00 p.m on 03.12.2020. So, it appears that it has been delivered to the authorities after the prescribed time. So, that ground is not available to the appellant.

20. So, the disqualification meted out by the appellant in the technical bid stage cannot be termed as arbitrary or with ulterior motive for extraneous consideration for favouring the fourth respondent. By his own default he has failed himself for which he has to blame his fault only. He is not a novice in the field. He has to his credit -according to his own statement- experience of 15 years in the field. So such an experienced contractor is not expected to make such a sort of fundamental mistake.

21. The next contention on the part of the learned Senior Counsel for the appellant is that the authorities have not complied with condition Nos. 24.5 and 24.6. According to the learned Senior Counsel, the result was uploaded on 11.12.2020 and five clear working days ought to have been given before opening the second part of the bid and if any complaint is received within the stipulated time, that must also be handled properly. So, according to the appellant, 11.12.2020 was Friday. Saturday and Sunday were holidays and price bid was opened on 14.12.2020 and thereby, they have successfully deprived/prevented the appellant from making complaint that the fourth respondent is also not a qualified person, he failed to satisfy the Clause VI.5 of the conditions. The conditions reads like this:-



" VI. Pumpsets and Accessories

General

- 1).....
- 2).....
- 3).....
- 4).....

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5).The bidder should enclose the performance curve duly indicating the duty point for the size of the impeller selected (family curve should not be furnished). The performance curve should furnish complete range of operation and the curve should be authenticated by the manufacturer or his authorized dealer. In the event of non compliance the offer shall be summarily rejected."

22. According to the appellant, there is a loss of Rs.70,00,000/- (Rupees Seventy Lakhs only) to the Government Exchequer by awarding the contract to the fourth respondent. This ground was also rejected by the Writ Court observing that such a contention cannot be raised in a Single Bench and if at all, it can be raised only before the proper Court. When this argument was advanced, this Bench observed that even if the fourth respondent has also not met the criteria, how the appellant can be benefited. It was answered by the learned Senior counsel for the appellant that re-tender would have been ordered. But, at this juncture, even if we consider that the appellant as well as the fourth respondent were not equally entitled to make the bid, the basic principle '*in pari delicto est conditio defendentis*' will come into play. When both parties are at equal fault line, a person, one who comes to the Court first, must fail. So, when we apply this principle to the facts of the case by that also, the appellant has to fail.

23.The appellant has not challenged the award of tender in favour of the fourth respondent. Now, he cannot make an argument that the fourth respondent also ought to have been disqualified. Moreover, it was observed by the Writ Court that the writ petitioner cannot canvass this ground for cancellation of the tender and this ground is not available at this appellate stage also.

24. The next contention on the part of the appellant is that the learned Single Judge ought to have followed its own order in W.P.(MD)No.21551 of 2019 dated 18.09.2020, while coming to the conclusion that the mandatory requirements mentioned in condition Nos.24.5 and 24.6 ought to have complied and since not, ought to have quashed the same. But, like cases need not necessarily be always like, moreover, we desist from making any discussion on this point, which is not relevant for considering this appeal.

25. The contention that the appellant has quoted less amount than that of the fourth respondent cannot be given any weight since the disqualification occurred even in the technical bid stage.

26. According to the learned counsel for the first respondent, none would have known the actual bid price until it was opened on 14.12.2020 and so, the allegations on the part of the appellant that the authorities acted in malafide manner to favour the appellant is not correct. This argument sounds reasonable and acceptable also and so, the argument that by awarding the order to the fourth respondent, the authorities have caused loss of Rs.70,00,000/- to the Ex-Chequerer also cannot be accepted.

27. Moreover, at the time of the argument, it was brought to the notice of the Court by the learned counsel for the first respondent, that the scheme was sanctioned under the Central Government fund and so, there is a stipulation to complete the work within six months that on 25.01.2020, work order was issued and the work also commenced. As per the Tender Notification, the work is to be completed within six months. So, according to the contesting respondents, nothing survives in this appeal and has become infructuous.

28. So, for all the reasons stated above, we find no ground to interfere with the order passed by the Writ Court and therefore, the writ appeal is liable to be dismissed.

29. In the result, this writ appeal is **dismissed**, confirming the order of the learned single Judge, dated 22.01.2021, made in W.P.(MD)No.18639 of 2020, on the file of this Court. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (crl side)

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/ /2021

Sub Assistant Registrar(CS)

To:

1. Tamil Nadu Water Supply and Drainage Board (TWAD)
Represented by its Managing Director,
No.31, Kamarajarsalai,
Chepauk,
Chennai - 600 005.

2. The Chief Engineer,
Tamil Nadu Water Supply and Drainage Board (TWAD)
1/1, Sambakulam,
Opp to Mattuthavani Bus Stand,
Madurai - 625 007.



3. The Regional Technical Evaluation Committee,
Represented by the Chairman,
Tamil Nadu Water Supply and Drainage Board (TWAD)
1/1, Sambakulam,
Opp to Mattuthavani Bus Stand,
Madurai - 625 007.

+1 CC to M/s.R.KARUNANIDHI, Advocate (SR-5202[F] dated 15/02/2021)

+1 CC to M/s.POLAX LEGAL SOLUTIONS, Advocate (SR-5282[F] dated 16/02/2021)

WRIT APPEAL (MD) No.259 of 2021
15.02.2021

Sv2 (CO)

KB (24.02.2021) 9P 6C