



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 16.03.2021

DELIVERED ON : 25.03.2021

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THE HONOURABLE MR.JUSTICE **V. PARTHIBAN**

W.P. (MD)No.3871 of 2021

and W.M.P. (MD)Nos.3109 and 3110 of 2021

Tiong Woon Project and Contracting India Private Limited,
represented by Director Manohar Masilamani,
Chennai-600 102. : Petitioner

Vs.

- 1.Nuclear Power Corporation of India Limited,
represented by it Chairman and Managing Director,
16th Floor, World Trade Centre,
Cuffe Parade, Coloba, Mumbai - 400 005.
- 2.Nuclear Power Corporation of India Limited,
represented by the Project Director (KK-III and IV),
(Kudangulam Nuclear Power Project),
Kudangulam, Radhapuram Taluk, Tirunelveli District.
- 3.The Scientific Officer-E,
Centralised Tender Cell,
(Kudangulam Nuclear Power Project),
Kudangulam, Radhapuram Taluk,
Tirunelveli District.
- 4.Sarens Heavy Lift India Private Limited,
represented by Managing Director,
Uttarpradesh - 201 313. : Respondents

PRAYER:- Petition filed under Article 226 of the Constitution of India seeking a Writ of Certiorarified Mandamus, to call for the records of the impugned communication in his letter NPCIL/KKNPP/CTC/2021/S/302, dated 06.02.2021 on the file of the second respondent order and quash the same and to direct the respondents to accept the price bid of the petitioner E.Tender No.NPCIL/KK-3&4/CONST/MECH/PT/2020/112.

For Petitioner	: Mr.R.Raja Rajan
For R1 to R3	: Mr.Krishna Srinivasan
	for Mr.Muthu Saravanan
For R4	: Mrs.Priyavadhana



petitioner company claims to have quoted the lowest rate (L1), ie., Rs.7,32,76,353/- and therefore, was hoping that the contract would be awarded to them.

6. Subsequent to the opening of the technical bid, the second respondent opened the price bid on 06.02.2021. On the same day, a communication was also issued to the petitioner company stating that the bid submitted by the petitioner company was not acceptable and the petitioner company was disqualified in Part-I tender evaluation for not meeting Notice Inviting Tender (for brevity, "NIT") clause 15.4. According to the communication that the petitioner company has not uploaded supporting document authorising Digital Signature Certificate (for brevity, "DSC") holder to bid on behalf of the petitioner company and therefore, was found disqualified in terms of the tender conditions.

7. On receipt of the communication, dated 06.02.2021 disqualifying the petitioner company from grant of the contract, the petitioner company represented to the second respondent corporation that the bid was submitted through the Director of the petitioner company, who is the authorised Digital Signatory. According to the petitioner, the rejection of their bid, even in the preliminary stage, on the premise of not meeting the requirements of clause 15.4 of the tender condition, was without any justification.

8. While the matter stood thus, the fourth respondent has been chosen for the award of the contract on the opening of the price bid on 06.02.2021, even though they have quoted much higher amount than the petitioner and the second respondent has deliberately, with *mala fide* intention to favour the fourth respondent, rejected the technical bid of the petitioner company on a hypertechnical reason, thus prevented the petitioner from their participation in the next stage of opening of price bid. In the said circumstances, challenging the rejection of the technical bid by the second respondent corporation vide its communication, dated 06.02.2021, the present Writ Petition has been filed.

9. Mr. R. Raja Rajan, learned Counsel for the petitioner would vehemently submit that the reason for rejecting the technical bid of the petitioner company on a flimsy ground that the clause-15.4 was not satisfied, was, in fact, intended to eliminate the competitors and to favour the fourth respondent with the contract. He would further submit that the petitioner company, in fact, placed its bid through its Director Mr. Manohar Masilamani, who is the deponent of the affidavit and in support of the fact that the said Manohar Masilamani is the Director of the petitioner company, GST certificate, containing the digital signature of the Director, was also enclosed along with the e-application.



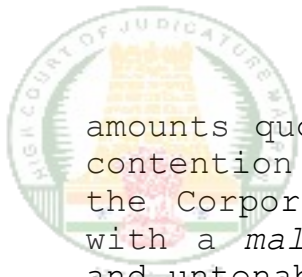
impugned communication by the second respondent, dated 06.02.2021 is a colourable exercise of power and the same is liable to be quashed.

13. Per contra, the learned Counsel Mr. Krishna Srinivasan, appearing for the respondent Corporation, at the outset, would submit that the petitioner company did not satisfy the requirement of clause-15.4, as the petitioner company has not submitted a legally acceptable document authorizing the DSC holder to bid on its behalf. According to the learned Counsel, the clause makes it very clear that failure to enclose the document along with bid will entail automatic disqualification and the bid will be rejected summarily.

14. A detailed counter affidavit has been filed on behalf of the respondent Corporation, wherein, it is stated that the petitioner company submitted its bid signed by one Sowrirajan and he was not a DSC holder and the bid was submitted by using the digital signature of the Director, Mr. Manohar Masilamani. Therefore, the requirement of clause-15.4 of the NIT had not been fulfilled. In this regard, the learned Counsel would submit that the GST certificate submitted by the petitioner company even assuming that it contained the digital signature of Manohar Masilamani, the same would not be a legally acceptable document, strictly in terms of the tender conditions. The learned Counsel for the respondent Corporation would further submit that in terms of clause-18.1, which deals with examination and evaluation of the bids, the respondent Corporation found that the petitioner company did not satisfy the stipulation prescribed for the technical bid and by their own default, they attracted the disqualification as prescribed under clause-15.4 of the tender condition.

15. The learned Counsel would also refer to the counter affidavit and state that the technical bids were actually opened on 27.01.2021 and found three bids had been submitted and after evaluation of the same, a communication was issued on 06.02.2021 to the petitioner company intimating the petitioner company of its disqualification and rejection of its technical bid. The learned Counsel would also submit that the petitioner company in response to the rejection of the technical bid, represented to the Corporation on 08.02.2021 and accepted that other than clause-15.4, they fulfilled all the technical requirements as per the tender criteria. In the face of such admission on the part of the petitioner company, it doesn't lie in the mouth of the petitioner company to question the rejection of their bid by invoking clause-15.4 of the tender criteria.

16. The learned Counsel for the Corporation would submit that the price bid was opened only after the evaluation of the technical bids and till that time, the Corporation had no idea about the bid



amounts quoted by the participants. Therefore, he would refute the contention of the petitioner that after opening of the price bids, the Corporation had taken a decision to disqualify the petitioner with a *mala fide* intention, which is absolutely without any basis and untenable.

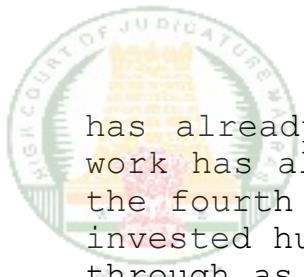
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17.The learned Counsel refer to paragraph-9 of the counter affidavit, wherein, it is clearly stated, as to how the allegation of favoritism against the respondent corporation is unfounded and without any basis. The relevant passage in the counter affidavit reads that the selection of Lowest Bidder (L1) is done by the portal itself and the Corporation has no role to play in the same. The learned Counsel would, therefore, submit that these baseless allegations are being made only for the purpose of this case in order to bring the tender process under a cloud without any iota of material supporting such allegation.

18.The learned Counsel would further submit that after opening of the price bids on 06.02.2021, the fourth respondent was selected as lowest eligible bidder by the online portal itself and consequently, the fourth respondent was called for price negotiation on 12.02.2021 and thereafter, a letter of intent was issued in its favour. Subsequently, the fourth respondent has also commenced their work on 18.02.2021 at the work site and has also made all the arrangements to complete the project entrusted to them. At this stage, this Court had granted an order of status-quo on 24.02.2021 and in view of the interim order passed, which was subsequent to the entrustment of the work to the fourth respondent, the entire project has come to a halt abruptly.

19.In reply, the learned Counsel for the petitioner would submit that in the absence of definition of legally acceptable document, a GST certificate, which was submitted along with the tender document, must be considered to authorise the DSC holder and the letter written by the petitioner company on 08.02.2021 to the respondent Corporation cannot be taken to mean that the petitioner company is estopped from raising this objection, while challenging the unjust rejection of their bid by the second respondent corporation. In fact, the learned Counsel for the petitioner would also refer to the list of mandatory documents towards pre-qualification criteria to be uploaded and in that, the requirements of clause 15.4 are not found. Even assuming that a board resolution or any other legally acceptable document to be submitted authorising the Director, the said requirement was only directory and hence disqualification of the petitioner on the stated ground summarily was uncalled for and also liable to be interfered with as illegal and void.

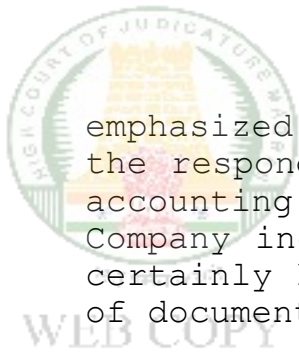
20.On behalf of the fourth respondent, Mrs.Priyavadhana, learned Counsel would fervently submit that the letter of intent



has already issued to the fourth respondent on 12.02.2021 and the work has also commenced. According to the learned Counsel that, as the fourth respondent has incurred considerable expenditure and also invested huge money for completion of the project, which is half way through as on date, the ongoing project has been discontinued in the face of the status-quo order of this Court. The learned Counsel would submit that the so called *mala fide* attributed to the corporation is not at all established and the petitioner company, having not fulfilled the preliminary requirement of the technical bid, has needlessly embarked upon throwing wild allegation, as if the fourth respondent had been unjustly favoured with the award of the contract. The learned Counsel would submit that no materials have been filed or shown, even remotely to suggest that there was any favoritism in the grant of award to the fourth respondent. In the absence of any proof of *mala fides* in the award of contract, the fourth respondent, who has come out successful by fulfilling all the eligible criteria both in respect of the technical bid as well as the price bid, must be allowed to complete the project and the award of contract in their favour does not call for interference. The learned Counsel would finally submit that at the instance of a company, which failed to fulfil even the preliminary norms, the award of contract to the fourth respondent is not liable to be interfered with at all by this Court.

21.This Court considered the submissions of Mr.R.Raja Rajan, learned Counsel for the petitioner, Mr.Krishna Srinivas, learned Counsel for the respondent Corporation and Mrs.Priyavadhana, learned Counsel for the fourth respondent and perused the pleadings and materials placed on record.

22.The kernel of the issue for consideration of this Court is whether the petitioner company has satisfied and fulfilled the technical bid criteria/norms in terms of clause-15.4 of the NIT or not. As a corollary to that, whether the norms prescribed in clause-15.4 are mandatory or directory? In this regard, two competing submissions have been made. The learned Counsel for the petitioner initially submitted in the interpretation of the clause that for registered Company no requirement of authorisation is contemplated. This Court is however not inclined to accept such sweeping submission. The expression found in the clause are wide and inclusive or not constricted and narrow. Therefore, the submission of the Counsel is to be rejected outright. Alternatively, it was argued that enclosing of GST certificate was fair enough, as the same was indicative of authorising Director of the company as DSC holder. In the absence of specifications, as to what are the legally acceptable documents, GST certificate being a legal document, cannot be discarded. On the other hand, it was argued that the expression used in clause-15.4 must receive proper construction and interpretation and the principle of "*ejusdem generis*" needs to be applied. This rule of construction was



emphasized by the learned Counsel Mr.Krishna Srinivas, appearing for the respondent Corporation. According to him, filing of GST was an accounting formality, which can be done by anyone authorised by the Company including its employees. But, authorisation of Director can certainly be not by filing of GST certificate, but, the production of documents, like, board resolution would satisfy the criteria.

23.The above rival contentions need to be evaluated and examined with reference to the relevant clauses in the tender notification. As far as clause-15.4, is concerned, the petitioner company's interpretation that GST certificate would qualify to be included as any other legally acceptable document, may appear to have some substance on a first impression on a precipitating understanding of the clause. However, if the issue is to be critically examined, the contention on behalf of the respondent corporation through Mr.Krishna Srinivas, appears to carry more legal sense and substance, namely, that mere enclosing of GST certificate with the Digital Signature of the DSC holder cannot be construed as a acceptable legal document in terms of clause 15.4 of NIT.

24.In clause 15.4 itself, it has been clearly spelt out that in case of non submission of the technical bid in proper form, the same shall be summarily rejected. In the face of such strict prescription, the argument, that stipulation in clause 15.4 was only directory, has to be discountenanced. When deviation of norms results in the summary rejection as per tender notification, what follows is that bidders are expected to adhere to the norms strictly. Therefore, the submissions regarding substantial compliance of the condition is of no sanctity in law. Moreover, when the claim of the petitioner is juxtaposed to the right of the fourth respondent, *inter se*, the fourth respondent has emerged successful in both stages of selection, namely, technical as well as price bids. Having failed to measure up to the prescribed norms to the hilt, even at the stage of the technical bid as established from the documents, the challenge of the petitioner has to be necessarily fail.

25.On behalf of the petitioner, it was strongly pleaded that the second respondent corporation had eliminated the petitioner company on a flimsy ground in order to unjustly favour the fourth respondent. But, as rightly objected to by the learned Counsel for the respondent corporation, no concrete or valid materials have been produced in order to sustain such allegation of *mala fides*. It is trite in law to hold that plea of *mala fide*, can be urged as a matter of course, in order to bring the tender process under a cloud, but interference of Court on such plea is possible only when this Court finds valid materials proving that the decision of the authority was founded on the basis of extraneous consideration. A cursory and a off hand allegation of *mala fide* does not merit



serious consideration and that the said plea has to be held unfounded and baseless.

26. This Court also finds that in the counter affidavit filed on behalf of the respondent corporation, all the relevant facts have been narrated clearly, bolstering the impugned action of rejecting the technical bid of the petitioner company. According to the counter affidavit, the scrutiny of the bid was done in terms of clause 18 of the NIT, which is extracted hereunder:

"18.0 Examination of bids and determination of responsiveness

18.1 Prior to detailed evaluation of bids, the corporation will determine whether each bid(s) meets (a) the minimum requirements as pre-qualification criteria (b) is accompanied by the required bid security (c) is responsive to the requirements of the bidding documents (d) has been properly signed by authorized signatory as per clause-15.4."

27. From the above, it could be seen that the corporation has laid emphasis on proper authorisation in terms in clause-15.4 and on the basis of which, finding that the petitioner did not fulfil the norms in terms of the prescription of the corporation, the bid was summarily rejected.

28. From the above narrative, it can be seen that the entire challenge to the impugned action of the corporation is rested on narrow confines, as to the fact of the petitioner conforming to the requirements of clause-15.4 in *stricto sensu* or not? Considering the circumstances of the case, when the corporation has made certain requirements are mandatory, which could be deduced from the terms of the tender condition, it is imperative on the part of the petitioner to follow such peremptory prescription without any infraction. If any deviation is to be condoned or overlooked in contractual matters, it will only result in allowing arbitrariness to creep into the tender process and consequent award of contract. Therefore, in an issue like this, there cannot be any latitude shown on the plea of the petitioner that rejection was on hypertechnical and pedantic consideration.

29. The learned Counsel for the respondent Corporation has cited a decision of Honourable Supreme Court in the case of **Central Coalfields Limited and another vs SLL-SML (Joint Venture Consortium) and others**, reported in **(2016) 8 SCC 622**. He would, in fact, draw the attention of this Court to paragraphs 37, 47 and 48, which reads as follows:

"37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is



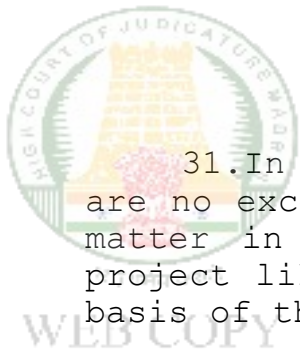
stricter than and there was no reason not adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny privilege to some.

....

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned, it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagadish Mandal* followed in *Michigan Rubber*.

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court be taking over the function of the tender issuing authority, which it cannot."

30. The decision was relied on to emphasise the legal position that in contractual matters, the soundness of the decision of the employer cannot be questioned as a matter of course and the Court cannot take over the function of the tender issuing authority and substitute its views in the interpretation of the tender terms, ordinarily. Only in exceptional and extraordinary circumstances, when this Court finds that arbitrariness or illegality or mala fides is writ large, this Court in its exercise of the power of judicial review would intervene for securing the ends of justice and not in all run of the mill challenges of this nature.



31.In the aforesaid circumstances, this Court finds that there are no exceptional grounds impelling this Court to intervene in the matter in favour of the petitioner. This is more so, a public project like a present one, need not be held up any further on the basis of the objection by the unsuccessful bidder.

32.In the above circumstances, this Court does not find any scope for interfering with the decision of the second respondent and hence, the Writ Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed and the status-quo order stands vacated.

Sd/-

Assistant Registrar(CS-III)

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Sub Assistant Registrar(CS)

Cmr

+1 CC to M/s.G.PRIYAVADHANA, Advocate SR-13784[F] dated 25/03/2021

Order made in
W.P. (MD)No.3871 of 2021
25.03.2021

es (CO)

TR(17.04.2021) 11P 2C