

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3778 OF 2022

M/s. Jay Constructions,
a partnership firm through its
Partner - Tukaram Tulshiram Dahite

.. Petitioner

Versus

Executive Engineer,
Public Works Division, Dhule
and others

.. Respondents

Mr. K. C. Sant, Advocate for the Petitioner.
Mr. S. K. Tambe, AGP for Respondent Nos. 1 to 4.

**CORAM : R. D. DHANUKA &
 S. G. MEHARE, JJ.**

DATED : 28th MARCH 2022.

PER COURT:-

. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks a writ of mandamus or any other writ, order or direction, in the nature of writ of mandamus to direct the respondents to immediately quash and set aside the Errata dated 12.03.2022 to Tender Notice No. 31/2021-22, issued by respondent No. 1.

2. The respondent No. 1 has issued a tender notice for construction of road NH-3 to Dhule city, for constructing bridge road between NH-03

to farmer statue on Parola Road, NH-6, Taluka and District Dhule at the estimated cost of Rs. 14,86,10,111/-. The tender condition prescribed a note below annexure 1 at page no. 53 of the tender document stating that 'it is mandatory for bidders to obtain site visit report from concern Deputy Engineer of P. W. Sub Division, Dhule office before submission of Bid.'

3. On 07.03.2022 a pre-bid meeting was called in the office of the respondents. It is the case of the petitioner that the respondent No. 5 also participated in the pre-bid meeting. The respondent No. 5 only raised an issue in respect of segregation of two works i.e. construction of a bridge and construction of road. The said bidder requested to allow a joint venture to participate. On 12.03.2022, the respondent No. 5 issued a letter to the Chief Engineer – respondent No. 3. According to the petitioner, by the said letter issued by respondent No. 5 to the Chief Engineer – respondent No. 3, the respondent No. 3 was threatened that he would make allegation of corruption against him and he will have to face consequences. According to the petitioner, the Errata was accordingly published on the same day at 6.00 p.m. thereby deleting the said note. It was mandatory for bidders to obtain site visit report from concern Deputy Engineer of P. W. Sub Division, Dhule office before submission of bid.

4. Mr. Sant, learned counsel for the petitioner submits that considering the said note, compliance is mandatory. He invited our attention to the letter dated 10.03.2022 sent by his client to respondent No. 3 requesting for permission to visit site to enable the petitioner to submit the site visit report in compliance with the said note. He submits that his client was granted permission to visit the site. On 12.03.2022 his client visited the site so as to comply with the requirement of the said note. He submits that the Executive Engineer could not have deleted the said note in view of the threat given by respondent No. 5. According to the petitioner, he had complied with site visit pursuant to the permission granted by the Sub Divisional Engineer to the petitioner.

5. It is submitted by the learned counsel for the petitioner that respondent No. 5 as a matter of fact ultimately did not participate in the tender. He submits that since the petitioner had visited the site so as to comply with the conditions prescribed under the said note, the bidders who had not visited the site will have no benefit of site visit and may quote the lesser amount which would affect the other bidders who have visited the site so as to enable themselves to comply with said conditions.

6. Perusal of Clause 7 of the letter dated 09.03.2022 addressed by the Assistant Chief Engineer to the Superintending Engineer, Public Works, Circle, Dhule indicates that in uploaded tender document if any correction / mistake error & omission is observed, the same shall be uploaded along with this C.S.D. as correction addendum.

7. In so far as, note below annexure 1 is concerned, the note only will indicate that the bidders were required to submit the site visit report from concerned Deputy Engineer of P. W. Sub Division, Dhule office before submission of Bid.

8. The apprehension of the petitioner is that the bidders who have not visited the site as contemplated in the note would quote the lower rates deliberately and that would prejudice to the rights of the petitioner. It is for the employer to decide whether the condition which initially provided for site visit was required or not.

9. Be that as it may, the corrigendum issued by the respondent Nos. 1 to 3 was not only for the petitioner, but was for all the bidders. On the contrary, if the petitioner has already visited the site in view of note to annexure 1 and complied with all conditions, the petitioner would be in a better position to submit its bids. It is fact that the condition was subsequently deleted. No malafides are attributable against the

respondent Nos. 1 to 4 for deleting the said note by way of corrigendum.

10. The Hon'ble Supreme Court in a case of *M/s. N. G. Projects Limited Vs. M/s. Vinod Kumar Jain & Ors.* reported in *2022 Live Law (SC) 302* has held that position of law with regard to the interpretation of terms of the contract is that the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer. Complying the said position of law, the Hon'ble Supreme Court rejected the contention of the petitioner therein that the employer could not have framed the condition of the bank guarantee. The Hon'ble Supreme Court in the said judgment held that, the writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision making process is after complying with the procedure contemplated by the tender conditions.

11. It is further held that the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion, rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. It is held that, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work. The principles laid down by the Hon'ble Supreme Court in case of **M/s. N. G. Projects Limited** (supra) applies to the facts of this case. We respectfully bound by the said principles.

12. In our view, if the employer has thought it fit to delete the note prescribed in tender document for site visit report, this Court is not inclined to interfere with said decision of the employer.

13. Writ petition is totally devoid of merits and is accordingly dismissed. No order as to costs.

(**S. G. MEHARE**)
JUDGE

(**R. D. DHANUKA**)
JUDGE

PS.B.