



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 26.07.2022

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)Nos.9431 of 2022

and

WMP(MD)No.6763, 6764 & 7309 of 2022

I.Kezhson

... Petitioner

v.

1.The Principal Secretary to Government,
Highways and Minor Ports Department,
Fort St.George, Secretariat,
Chennai – 600 009.

2.The Chief Engineer (Highways),
Construction and Maintenance,
Integrated Chief Engineer's Office,
HRS Campus, 70, Sardar Patel Road,
Guindy, Chennai – 625 025.

3.The Superintending Engineer (Highways),
Construction and Maintenance Circle,
149, A.R.Lane Road,
Tirunelveli – 627 002.

4.J.Senthil Kumar

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the 3rd respondent in connection with the impugned rejection dated 26.04.2022 updated through official website with regard to the Tender Notification issued by him vide Tender Notice No.32/2021-2022/HDO



dated 24.02.2022 in respect of item No.2 that is TNV-88 in so far as the petitioner is concerned and quash the same as illegal and arbitrary by cancelling the work order given to the 4th respondent and consequently direct the respondents 1 to 3 to allot the work order to petitioner for the above said tender within a time limit that may be stipulated by this Court.

For Petitioner : Mr.S.R.Rajagopal for Mr.G.Thalaimutharasu

For Respondents : Mr.Veera Kathiravan,
Additional Advocate General
assisted by Mr.M.Prakash,
Additional Government Pleader for R1 to R3

ORDER

Heard the learned counsel for the petitioner and the learned Additional Advocate General assisted by the learned Additional Government Pleader for the official respondents.

2.The third respondent issued tender notification dated 24.02.2022 calling for the calling for tenders in respect of two works. This writ petition is concerned only with Item No.2 which is as follows :



Thovalai (H) C&M, Sub Division					
1.	Construction of Retaining wall and improvements in Government Roads of Thovalai(H) C&M Sub-Division (TNV-87)	Rs.761.00 lakhs	Rs.3,91,000	Nagercoil (H) C&M Division	6 Months
2.	Widening from IL to TL and improvements to Government roads of Thuckalay (H) C&M Sub Division (TNV-88)	Rs.836.56 lakhs	Rs. 4,29,000/-	Nagercoil (H) C&M Division	6 Months

The last date for submission of tender documents was on 04.04.2022 at 02.00 P.M. This was extended up to 05.04.2022. The petitioner herein was one of the applicants. The technical bids were to be originally opened on 05.04.2022 at 01.00 P.M. This was extended to 19.04.2022. On 19.04.2022, the technical bids were opened. Though in the e-portal it was originally mentioned that the petitioner's bid was accepted on 26.04.2022, the status of the petitioner's technical bid was mentioned as rejected. As per the statutory scheme governing the Tamil Nadu Transparency in Tenders Act, 1998 and the rules framed thereunder, the reason for rejecting the technical bid cannot be communicated till the price bids are opened. The price bids were opened on 28.04.2022. Since the petitioner was not posted with the reasons, he applied to the tender accepting authority to furnish him with the reasons for rejecting



the technical bid. Vide communication dated 06.05.2022, the third respondent informed the petitioner that the petitioner's bid capacity was evaluated as 576.36 lakhs and since it fell below the tender condition regarding the bid capacity, his technical bid stood rejected. Challenging the same, this writ petition came to be filed.

3. Interim order was granted in favour of the petitioner on 05.05.2022. The respondents have filed their detailed counter affidavit and the learned Additional Advocate General for the official respondents took me through its contents. The first contention urged by the learned Additional Advocate General is that the petitioner ought to have availed the alternative remedy of appeal under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998 and this writ petition is therefore liable to be dismissed on the ground of non-exhaustion of alternative remedy. He drew my attention to Clause 2.8 of the tender notification which deals with bid capacity. As per the said clause, the applicant must meet the minimum qualification criteria and he would be deemed to have been qualified at the technical bid stage only if the available bid capacity at the expected time of bidding is more than the total estimated cost of the works of Rs.836.56 lakhs. The said clause contains the formula to quantify the bid capacity. In this case, the petitioner's bid was far below the aforesaid figure. He pointed out that the department had issued tender



notification for three other works. The petitioner herein had submitted his tender application in respect of those three works. The petitioner's bid was found to be lowest. Negotiation took place between the petitioner and the department in March 22 itself. The petitioner had also expressed and signified to take the said three works. On 22.04.2022, the department had taken a decision to issue work order to the petitioner in respect of those tender works. The scrutiny of the technical bids in respect of the case on hand took place only on 26.04.2022. By then, the department had already taken a decision to award the aforesaid three works to the petitioner. Having knowledge of the same, the tender accepting authority could not have eschewed them out of consideration. Once those three works are to be taken into account applying the bid capacity formula set out in clause 2.8, the petitioner's bid capacity was rightly quantified only at Rs.578.36 lakhs. According to the learned Additional Advocate General, the authorities have not acted in arbitrary manner. Their decision rests on sound approach. He therefore submitted that the impugned order does not call for any interference.

4.I carefully considered the rival contentions and went through the materials on record. There is no dispute that the petitioner was disqualified at the technical bid stage on 26.04.2022 only by applying the formula to determine the tenderers' bid capacity. Clause 2.8 of the tender notification is



as follows :

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2.8 BID CAPACITY

The applicant who meet the minimum qualification criteria will be qualified only if their available bid capacity at the expected time of bidding is more than the total estimated cost of the works Rs.836.56 Lakhs. The available bid capacity will be calculated as under

Assessed available bid capacity = $(A \times N \times 2-B)$

Where

A is Maximum value of construction works executed in any one year during the last five years (updated to the current price level) rate of inflation may be taken as 10% per year which will take into account the completed as well as works in progress.

B is Value at current price level of the existing commitments and ongoing works to be completed during the next - **6 months** (period of completion of works for which bids are invited), and

N is Number of years prescribed for completion of the works for which the bids are invited, i.e., - **6 months** in the present case.

Even though the Applicants meet the above criteria, they are subject to be disqualified if they have :

- ❖ Made misleading or false representation in the form, statements and attachment submitted, and/or
- ❖ Records of poor performance such as abandoning the work, rescinding of contract for which the reasons are attributable to the non-performance of the contractor, consistent history of litigation awarded against the applicant or financial failure due to bankruptcy.

NOTE:

1. Copies of the documentary evidence to be furnished in support of the pre-qualification requirements should be uploaded.
2. The tenderers should furnish the original documents such as EMD and the uploaded Technical Tender documents shall be received by the Superintending Engineer (H) C&M Tirunelveli on or before 04.04.2022 at 14.00 hours.

The only question that calls for consideration is whether the authorities had rightly applied the aforesaid formula to disqualify the petitioner at the technical bid stage. A mere reading of the clause 2.8 would show that the



tender accepting authority shall take into account only the "existing commitments" and "ongoing works" to be completed during the next six months. Though the learned counsel appearing for the petitioner would strongly urge that the files were back dated, I decline to go into the said allegation. Even if I assume that the department had taken a decision to award three other tender works in favour of the petitioner on 22.04.2022, the fact remains is that they remained only on the files. It was never communicated to the petitioner.

5.The learned counsel appearing for the petitioner had established that only on 11/05/2022 the decision said to have taken on 22.04.2022 was actually communicated to the petitioner. Since the decision was not communicated to the petitioner earlier and remained only on the files of the concerned official, it could not have been taken as "existing commitment" or "ongoing works". The learned counsel for the petitioner drew my attention to the decision of the Constitution Bench of the Hon'ble Supreme Court reported in ***AIR 1966 SC 1313 (State of Punjab vs. Amar Singh Harika)***. The ratio laid down therein is that a decision that remains only on the official file and not communicated to the party concerned cannot be a decision at all. The Hon'ble Supreme Court in the decision reported in (2001) 8 SCC 443 (State of W.B v. M.R.Mondal and anr) held as follows :



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“16...An order passed but retained in file without being communicated to the plaintiff can have no force or authority whatsoever and the same has no valid existence in the eye of the law or claim to have come into operation and effect.”

6.Applying the aforesaid ratio, I have no doubt whatsoever in my mind that the tender accepting authority could not have taken into account the tender value of the other three works which the department had decided to allot in favour of the petitioner. The tender accepting authority has misapplied the bid capacity formula as set out in Clause 2.8 of the tender notification. On this sole ground, the writ petition deserves to be allowed. I am of course obliged to deal with the contention anchored on the principle of non-exhaustion of alternative remedy. It has been held many a time that this is only a rule of discretion and that it will not come in the way of the High Court exercising jurisdiction under Article 226 of the Constitution of India. A learned Judge of this Court had chosen to entertain the writ petition and also grant interim order. At the stage of final hearing, I am not inclined to non-suit the petitioner on the ground of non-availing of alternative remedy under Section 11 of the Act. That apart, the petitioner could have availed the said remedy only if the authority had furnished him with the reasons. The reasons for rejecting the petitioner at the technical bid stage came to be furnished to him only following his request on 11.05.2022.



7.In ***Dhana.Vimal v. the Assistant Director of Town Panchayat,***

Thiruchirappalli [WP(MD)No.11721 of 2022], I have held as follows :

“5.After carefully considering the rival contentions and going through the materials on record, I am satisfied that the right of the petitioner to avail the alternative remedy of appeal under Section 11 of the Act has been frustrated. It is true that in the tender notification, there is no stipulation that within a particular time frame, the unsuccessful tenderer must be informed about the reasons for rejection of his tender. But the tender notification must be read along with the provisions of the Tamil Nadu Transparency in Tenders Act, 1998. As per Section 10(7) of the Act, the Tender Accepting Authority shall intimate the information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers.”

When the authority had not adhered to the statutory scheme set out in the Tamil Nadu Transparency in Tenders Act, 1998, it would not be fair to expect the petitioner alone to strictly abide by the same. For the foregoing reasons, the rejection order dated 26.04.2022 is set aside. The acceptance of the price bids in favour of the fourth respondent is dependent and contingent to the impugned order. The Hon'ble Supreme Court in the decision reported in AIR



1988 SC 897 (G. Ramegowda and Ors. vs. Special Land Acquisition Officer, Bangalore) had held as follows :

“We might, perhaps, deal with the latter submission of Shri Veerappa first. The fact that the main appeals are themselves, in the meanwhile, disposed of finally on the merits by the High Court would not by itself detract from and bar the consideration of the correctness of the order condoning the delays. This is an instance of what are called 'dependant-orders' and if the order excusing the delays is itself set aside in these appeals, the further exercise, made in the meanwhile, by the High Court finally disposing of the appeals, would be rendered nugatory.”

The price bids proceedings were obviously subordinate to the impugned rejection order. Once the rejection order is set aside, all the subsequent orders have to go as a corollary. The third respondent is directed to consider the petitioner as having qualified at the technical bid stage and thereafter proceed with the tender accordingly. In view of the lapse of time, the revised price terms may have to be applied.

8.The writ petition is allowed on these terms. No costs. Connected miscellaneous petitions are closed.

26.07.2022

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To

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Highways and Minor Ports Department,
Fort St.George, Secretariat, Chennai – 600 009.
- 2.The Chief Engineer (Highways),
Construction and Maintenance,
Integrated Chief Engineer's Office,
HRS Campus, 70, Sardar Patel Road,
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- 3.The Superintending Engineer (Highways),
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G.R.SWAMINATHAN, J.

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