IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1306 OF 2023

Shree Govardhan Sugar Industries
Registered Office 37-38, 1st Floor,
Meena Commercial Complex,
Taloda Road, Tq. And Dist. Nandurbar 425 412
through its Authorized Signatory,
Sadanand Pruthviraj Zervar,
Age 47 years, Occ. Businessman,
R/o. Riddhi Siddhi, Pardeshi Pura,
Tq. and Dist. Nandurbar .. Petitioner

Versus

1] The State of Maharashtra,
through its Principal Secretary,
Cooperative Marketing and Textile Department,
Mantralaya, Mumbai-32.

2] The Cooperative Commissioner,
2nd Floor, New Central Building,
Dr. Baba Saheb Ambedkar Road,
Pune- 411 001.

3] Shripur Shetkari Sahkari Sakhar Karkhana Ltd.,
through its Chairman,
Shivajinagar, at Post Dahiwad,
Tq. Shirpur, Dist. Dhule 425 405.

4] Marewa Sugars Pvt. Ltd.,
through its Director,
R/o. Narmadanagar, Tq. Kukshi,
Dist. Dhar- 454 335.
.. Respondents.

Miss. Pradnya S. Talekar, Advocate for petitioner.
Mr. S.B.Yawalkar, AGP for respondent Nos. 1 and 2,
Mr. V.D. Hon, i/b. Mr. D.B. Thoke, Advocate for respondent No.3.
Mr. A.M. Gaikwad i/b. Mr. N.V. Gaware, Advocate for respondent No.4.

**CORAM : MANGESH S. PATIL
& S.G. CHAPALGAONKAR, JJ.
DATE : 9 FEBRUARY 2023**

ORDER.:-

1. The petitioner has approached this Court under Article 226 of the Constitution of India with the prayers as under: -

> "A. To quash the impugned communication dated 27.01.2023 thereby rejecting the bid of the petitioner and returning his EMD amount on ground of negotiations with the lower bidder, by issuing a writ of *certiorari* or any other writ, direction or order as the case may be ;
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> B. To direct the respondent No.3 to award the tender to the petitioner being the highest bidder in the E-tender process by issuing the writ of mandamus or any other writ, order or direction"

2. The petitioner contends that it submitted his complete bid with necessary documents in response to tender notice for lease of sugar factory issued by respondent No.3. According to the petitioner, it had offered price much higher than reserved price. In response to the submission of the tender, petitioner received E-mail confirming successful submission of tender as well as acceptance of its technical bid. The technical bid evolution report was uploaded by respondent No.3. That shows 4 bids were received. On 19.12.2022, financial bids of eligible bidders were opened excluding the bid of one Omkar Sugar Factory, who was found ineligible. The petitioner, along with two other bidders was considered eligible. Amongst the eligible financial bids, the petitioner

had offered highest annual rent and crushing charges per metric ton. In the light of highest quote submitted by the petitioner, it was required to be declared as highest bidder.

3. The petitioner further contends that despite being highest bidder, the letter of intent was not issued to it. On 21.1.2023, the petitioner was telephonically informed to attend the meeting for certain clarifications. The petitioner was asked, if it was willing to increase the bid amount. The petitioner showed disinclination to enhance annual rent as he had already quoted highest bid. The petitioner further contends that only in order to respect the request of the respondent No.3 the petitioner has offered increased crushing rare @124 per metric ton, instead of his original quote of Rs. 123 per metric ton.

4. The petitioner further contends that the respondent No.3 had invited respondent no.4 for negotiations after the petitioner had left the meeting place and then the respondent No.4 had given its modified offer. The respondent No.4 after getting knowledge of the offer given by the petitioner, marginally increased its rates above the rates quoted by the petitioner. In view thereof, the respondent No.3 issued communication dated 27.1.2023 thereby declaring that 3 bidders were called for negotiations. The petitioner though was found to be highest bidder earlier in on-line bidding process, had declined to increase the bid amount beyond Rs.124 per metric ton in the meeting of negotiations. Its offer was found to be second highest and, therefore, it was rejected and its EMD amount was refunded to it.

5. Ms. Pradnya Talekar, learned advocate for the petitioner

submitted that there was no clause in the tender that would permit the respondent no.3 to negotiate amongst the 3 eligible bidders. Neither bidders were called for negotiations in presence of the petitioner nor was it called upon to submit increased bid. In good faith, petitioner had made modified offer in formal meeting. She would further submit that after getting the offer from the petitioner, respondent No.3 had called the respondent No.4 behind its back and after disclosing the offer made by the petitioner, got the marginally increased offer from the respondent No.4. She would submit that the respondent No.3 had not maintained transparency and fairness in tender process. The respondent No.4 is favoured in breach of the E-tender norms. The petitioner was highest bidder, however, by creating a farce of negotiations, calling the lower bidders behind the back of the petitioner, the respondent No.4 has been selected.

6. Mr. V.D. Hon, learned senior advocate, appearing for respondent No.3 would submit that clause 58 of the E-tender notice, clearly stipulates that the amount mentioned in the bid shall be considered as final quote and would be subject to negotiations. The eligible highest bidders were given opportunity of negotiations and re-submission of maximum quote/offer. In pursuance of the procedure contemplated under clause No.58, the petitioner along with two other bidders were called upon to submit their revised/enhanced offers. The petitioner has blatantly refused to enhance the bid towards enhanced annual rent. However, offered the enhanced crushing rate of Rs. 124 per metric ton as against its initial offer of Rs. 123. The respondent No.4 offered the annual rent of Rs. 82 Lakh and rate of Rs. 125 towards crushing of sugarcane per metric ton. He would submit that the entire process has been carried out in transparent manner with the object to

fetch maximum income to the sugar factory. The petitioner is making false allegation that offer of the respondent No.4 is considered behind its back.

7. Mr. A.M. Gaikwad, learned advocate appearing for respondent No.4 would submit that Respondent No. 4 has made the highest offer during negotiations undertaken by respondent No.3 in pursuance of the clause No.58 of the tender notice. He would submit that during the negotiation meeting, the petitioner did not offer additional annual rent. It offered crushing rate @ Rs. 124 per metric ton, whereas, respondent No.4 has given better offer. Naturally, the offer of respondent No.4 is accepted. He would submit that the petitioner is trying to make out a fictitious story after losing the tender.

8. We have considered the submissions advanced on behalf of the respective parties. The respondent No.3 sugar factory suffered losses and huge amount was overdue towards loans advanced by various financial institutions. Respondent No.3 sugar factory took a decision to lease out the factory and adjust the income towards the repayment of loan and to clear the statutory as well dues of the employees. In pursuance of such decision, the E-tender notice was issued to lease out the sugar factory on "as is where is, as is what is, and whatever there is" basis. The lease period of 20 years is fixed from 2022-23 to 2042-43. In response to the E-tender notice, 4 bidders submitted the technical as well as financial bids. 3 bidders were found successful in technical bid whose financial bids were opened.

9. Clause No.58 of the tender notice prescribes special procedure providing for round of negotiations amongst top 3 bidders.

The procedure prescribed under said clause was adhered to and all the 3 bidders were invited for negotiations. We find that on 21.1.2023, a special meeting for negotiations was called. The petitioner gave its written revised offer. It showed its inability to increase the annual rent, with marginal increase towards rate/ per metric ton towards crushing of sugarcane.

10. It appears that the respondent No.4 has offered annual rent of Rs. 82 Lakh and sugarcane crushing rate of Rs. 125 per metric ton. Since the respondent No.4 has given highest offer in the round of negotiations, it has been selected. The communication dated 27.1.2023 has been issued, thereby intimating the petitioner that though in the on-line bidding, his offer was highest, in the meeting dated 21.1.2023, he refused to raise the bid amount but the respondent No.4 had given better offer. The petitioner was further intimated that its offer was rejected and it was entitled to refund of the Earnest Money Deposit.

11. The petitioner contends that the respondent No.4 made its secret offer behind its back. The respondent Nos. 3 and 4, however, denied such allegations. According to them, during negotiations, the petitioner had flatly refused to give enhanced offer. The respondent No.4, however, modified its initial offer and enhanced the amount towards annual rent as well as towards rate for crushing sugarcane. We have perused all the documents containing the offers given by the respective bidders during the negotiations meeting dated 21.1.2023. The petitioner had submitted its written offer. Same is the case with respondent No.4 and third bidder. There is clear stipulation signed by the petitioner that it was not willing to enhance its offer. The petitioner must be aware in view of Clause 58 that a similar negotiation would take

place even with the other two bidders. In view of this factual scenario, the factual dispute sought to be raised by the petitioner cannot be gone into, in exercise of judicial review in writ jurisdiction. The material submitted before us shows that the respondent No.3 has followed the tender process as prescribed under the tender notice. There is no material on record before us that would indicate absence of fair play or transparency in the tender process. We do not find merit in the contentions of the petitioner.

12. The respondents have raised the objection that petitioner is seeking a writ of Mandamus under Article 226 of the Constitution of India against cooperative sugar factory. The respondent No.3 sugar factory is neither "State" within the meaning of Article 12 of the Constitution of India, nor discharge statutory function or obligation. In that view of the matter, the petitioner cannot invoke the writ jurisdiction of this Court. But we need not go into that aspect since we are deciding the matter on the grounds mentioned above.

13. The petitioner could not bring convincing material before us to seek indulgence under Article 226 of the Constitution of India. The result of the discussion above, leads us to conclude that the writ petition is devoid of merits. Hence, it is dismissed without any order as to costs.

[S.G. CHAPALGAONKAR]
JUDGE

[MANGESH S. PATIL]
JUDGE

grt/-