

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

**WRIT PETITION NO.2109 OF 2022
WITH
CIVIL APPLICATION NO.9829 OF 2022**

Pooja Manohar Wagh
Age: 29 years, Occu: Business and Household,
R/o 2, Siddhant Enclave, Gangapur Road,
Sawarkar Nagar, Nashik
At present R/o. Saraswati Colony,
Kannad, Tq. Kannad,
Dist. Aurangabad

... Petitioner

Versus

1. The State of Maharashtra
Through it's Secretary
Public Works Department
Mantralaya, Mumbai – 32
2. The Collector, Aurangabad
Collector Officer, Aurangabad
3. The Superintendent Engineer,
Public Works Division,
Aurangabad
4. The Executive Engineer
Public Works Division (West),
Aurangabad
5. The Deputy Executive Engineer
Public Works Division,
Kannad Sub Division (East)
Aurangabad
6. The Junior Engineer
Public Works Division
Kannad Sub Division
Aurangabad
7. M/s. K. H. Construction, Aurangabad
Through its Proprietor,
Khandoba S/o. Hanmantrao Biradar,

Age: Major, Occ.: Business
 R/o. Shop No.18, Mhada Complex,
 CBS Road, Opp. Hotel Green Olive, Aurangabad
 E-mail ID khconstruction777@gmail.com

... Respondents

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Mr. V. D. Hon (Senior Advocate) i/b Mr. Kakde Yuvraj V. for the Petitioner
 Mr. S. B. Yawalkar, Advocate for Respondent Nos.1 to 6
 Mr. V. D. Sapkal (Senior Advocate) i/b Mr. Prasad D. Jarare, Advocate for
 Respondent No.7

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**CORAM : MANGESH S. PATIL &
 S. G. CHAPALGAONKAR, JJ.**

DATE : 03.02.2023

ORDER : [PER S. G. CHAPALGAONKAR, J.]

1. The present petition is filed under Article 226 of the
 Constitution of India with the following prayers :-

“(B) The Hon'ble High Court may be pleased to issue writ of mandamus or any other appropriate writ, order or direction in like nature, thereby direct the respondent authority to initiate the inquiry against the concern person and respondent No.7 for breach of condition in the tender documents, and for that purpose issue necessary writ, order or direction;

(C) The Hon'ble High Court may be pleased to issue writ of certiorari or any other appropriate writ, order or directions in like nature, thereby quashed and set aside the work order bearing Outward No.86 dated 23/07/2021 issued by the respondent No.4 in favour of the respondent No.7, and for that purpose issue necessary writ, order or direction;

(D) The Hon'ble High Court may be pleased to issue writ of mandamus or any other appropriate writ, order or directions in like nature, thereby direct the respondent authority to initiate the fresh tender process as per the terms and conditions in the tender

document, and for that purpose issue necessary writ, order or direction;"

2. The petitioner claims that she is an unemployed Engineer registered with Public Works Department of the State of Maharashtra for the works having capacity upto Rs.50 Lakhs. It is the contention of the petitioner that respondent no.4 – Executive Engineer had issued a detailed tender notice in 'B-1 form' for construction and development works in various wards of Kannad Nagar Parishad, Taluka Kannad, District Aurangabad. An estimated cost of the work is stated to be Rs.5,69,60,106/- and the period for execution of the work is stated to be twelve (12) months. The relevant part of tender condition regarding availability of Automatic Micro Processor Based PLC with SCADA Enabled Concrete Batch Mix Plant with the contractor can be found in condition nos.1 and condition nos.2.3 to 2.6, which states as under :

"1. If the Contractor owns a Fully Automatic Micro Processor Based PLC with SCADA enabled Concrete batch mix plant of any standard company as required under this contract then he should give details of its current location and undertaking whether the batch type plants needs to be shifted or otherwise for this work.

2.3. if Contractor Intend to purchase Batch Mix Plant as mentioned In Para 2.2 above or shift already owned plant from existing location to the new location as required for this work, for that bidder shall submit additional security as specified in 2.4 below. He shall give trial run on or before 60th day from the date of issue of work order.

2.4. If the current location of the plant is beyond 20 km radius, the bidder shall submit the additional security of Rs.5,00,000/- (Rupees Five Lakhs Only) through RTGS/NEFT in the account of Executive

Engineer, Public Works (West) Division, Aurangabad vide Account No. 697005600070, IFSC CODE: ICIC0006970. If Contractor fails to give trial run of this BATCH MIX PLANT on or before 60th day from the date of issue of said work, his above said additional Security shall be encashed without any notice to the contractor without considering any force majeure and shall be credited to Government Revenue by the Engineer in charge Immediately on 61st day.

2.5. Encashment of additional Security Deposit as mentioned above shall not absolved the Contractor from the responsibility of installing the BATCH MIX PLANT which is required for the R.C.C. works.

2.6. No extension of time limit shall be granted at any level for giving trial run after 60th day from the date of issue of work order.”

3. It is the contention of the petitioner that the tender work is allotted to respondent no.7, but he has failed to comply with the condition regarding Concrete Mix Plant to be within the distance of 20 kilometers. She further contends that respondent no.7 continued execution of the work without complying the conditions of the tender. He has established Concrete Mix Plant 55 kilometers away from the work under tender. The petitioner further contends that though the basic condition in the tender document has been breached by respondent no.7, no action is taken by respondents – authorities against him.

4. The respondent nos.5 & 6 filed an affidavit-in-reply. The paragraph nos.5 & 6 of the affidavit-in-reply states as under :

“5. I say and submit that, as per the tender condition as stated above, the petitioner has not shifted the plant and machinery within 20 KM of the work and therefore, considering the breach of

mandatory condition, the respondent no. 5 vide communication dated 14.02.2022 forfeited the additional bank guarantee of Rs. 5 Lakh and further instructed to install the Concrete Road Mixture Plant within 20 KM from the place of work.

6. I say and submit that, in response to the communication issued by the respondent no. 4, the respondent no.7 has not acted and has not shifted the plant, the respondent no.4 therefore constrained to issue communication dated 23.02.2022 thereby not only confirmed the forfeiture of amount but also further directed to stop the work.”

5. An additional affidavit-in-reply is also filed by respondent nos.5 & 6.

The Paragraph Nos.5 to 9 reads as under:-

“5. I say that, it was stated in the earlier affidavit that, till 23.02.2022, the respondent No. 7 had not either shifted of the plant of Redimix Concrete Plant nor erected which is important condition in the tender document. I say that, due to failure on the part of successful bidder to erect the plant the office of present deponent constraint to issue notices as stated earlier in the affidavit and further constraint to seize the amount. I say that, however there was no condition either in the tender document or in the agreement of termination of tender for failure of installation of plant.

6. I say that, on 13.06.2022 a communication has been received from respondent No. 7 intimating thereby, above installation of a Concrete Redimix Plant and further requesting the office of present deponent to visit the plant which is within the 20 km radius of the work. The copy of letter dated 13.06.2022 is annexed herewith and marked as EXHIBIT-R-1.

7. I say that, on receipt of such letter from the respondent No. 7 the present deponent visited the given site to verify the fact of installation of a plant. I say that, on visit the present deponent could notice the installed plant. Accordingly, the deponent prepared its installation certificate on 16.06.2022. The copy of said certificate is annexed herewith and marked as EXHIBIT-R-2.

8. I say that, though the deponent herein had given visit to the plant on 16.06.2022. However, the deponent is not a person who is competent to say that the plant is operational. Therefore, the respondent No. 7 required to obtain a certificate from Mechanical Division of Public Works Department. I say that, accordingly, the Assistant Chief Engineer (Mechanic) Public Works Regions, Aurangabad issued certificate on 27.06.2022 and certified that, the plant erected/installed by the respondent No. 7 is operational and functional as well is efficient and working in good condition. The copy of certificate issued by Assistant Chief Engineer (Mechanic), Public Work Region, Aurangabad is annexed herewith and marked as EXHIBIT-R-3.

9. I say that, this also not out of place to mention here that, thereafter, the respondent No. 7 has completed 18 out of 31 works and a third party inspection of the completed works has also been carried out through the Government College of Engineering, Aurangabad. The authority of the said college vide communication dated 24.11.2022 reported the inspection report. Copy of the said report is annexed herewith and marked as EXHIBIT -R-4.”

6. Learned Senior advocate Mr. V. D. Hon appearing for the petitioner would submit that the work order dated 23.07.2021 was issued subject to fulfillment of the conditions under the tender. The clause No.1.10 of the detailed tender notice stipulates that the tender which do not fulfill any or all conditions or are incomplete in any respect, are liable for summary rejection. He would submit that, it is mandatory for contractor to have Fully Automatic Micro Processor Based Concrete Batch Mix Plant within the sphere of 20 kilometers from the work under tender. The tender condition mandates that, such plant is to be established within 60 days and

the trial run must be demonstrated within the stipulated period. The respondents have simply issued notice to respondent no.7 asking him to comply with the aforesaid conditions without cancelling the tender. According to him, respondents were under obligation to cancel the work order issued in favour of respondent no.7 and to re-issue the tender for execution of the work.

7. Learned AGP Mr. S. B. Yawalkar appearing for respondent nos.1 to 6 invites our attention to clause no.2.4 of the tender notice. He would submit that respondent no.7 was not having plant within the radius of 20 kilometers. Therefore, he was required to submit additional security of Rs.5,00,000/- in the account of respondent no.4. The respondent no.7 owned Batch Mix Plant beyond 20 kilometers of radius. Since he failed to comply with the condition of having Batch Mix Plant within radius of 20 kilometers, the additional security deposit of Rs.5,00,000/- has been encashed. Mr. Yawalkar would further submit that respondent no.7 has completed almost 90% of work under tender.

8. Learned Senior advocate Mr. V. D. Sapkal appearing for respondent no.7 would submit that there is no stipulation in the tender notice regarding cancellation of the tender for non-compliance of the condition regarding having Hot Mix Plant within the radius of 20 kilometers. The stipulation regarding deposit of additional security of Rs.5,00,000/- was duly complied with and respondent – authorities have encashed the same.

The respondent no.7 has established his plant within the radius of 20 kilometers. The same has been inspected by respondent – authorities and have issued the certificate to that effect. The respondent no.7 has already completed 90% of the work under tender. He would further submit that the petitioner has no *locus standi* to file present writ petition.

9. We have considered the submissions advanced on behalf of the respective parties. We have given anxious consideration to the terms and conditions of the tender notice. It is apparent that the petitioner has neither participated in the subject tender process, nor was she eligible to do so. The impugned work order has been issued in favour of respondent no.7 on 23.07.2021. The present writ petition has been filed on 03.02.2022. Apparently, she has no personal interest. Therefore, we have no hesitation to hold that the petitioner has no *locus standi*.

10. Even otherwise, we have examined the grievance raised in the petition since the matter pertains to execution of the public work. There is no dispute that respondent no.7 was found eligible to execute the work under tender and fulfilled the requisite eligibility criteria. So far as the conditions regarding having fully Automatic Micro Processor Based PLC with SCADA Enabled Concrete Batch Mix Plant, condition no.1 requires that the contractor shall provide the details of its current location and undertaking whether the batch type plants needs to be shifted or otherwise for this work. The contractor who is not having such plant within the radius of 20

kilometers was required to furnish additional security deposit of Rs.5,00,000/- which was to be encashed if the contractor failed to give trial run on or before 60th day.

11. In the present case, respondent no.7 had made such deposit and the same has been encashed by the respondents – authorities. It is also brought to our notice that respondent no.7 has established such plant belatedly and an intimation to that effect was given by him on 13.06.2022, which was examined by respondents – authorities. Even the certificate has been issued by Mechanical Division of Public Works Department that the plant is operational which has been erected and installed with efficient working condition. It is also observed that respondent no.7 has completed 90% of the work.

12. Considering the aforesaid factual matrix, we do not find any reason to grant the prayers of the petitioner. Hence, the writ petition is dismissed without costs. In view of dismissal of writ petition, pending civil application stands disposed of.

(S. G. CHAPALGAONKAR, J.)

(MANGESH S. PATIL, J.)