

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

WRIT PETITION NO. 6079 OF 2023

1. ASHOK JANARDHAN TAYADE

2. SANDIP BHAUSAHEB LOKHANDE

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS

...

Advocate for Petitioners : Mr. C.R. Thorat
AGP for Respondent Nos. 1 & 2 : Mr. A.S. Shinde
Advocate for Respondent Nos. 3 to 6 : Mr. R.G. Joshi

...

**CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.**

DATE : 07 SEPTEMBER 2023

PER COURT (PER : SHAILESH P. BRAHME, J) :

1. Heard learned counsel for the respective sides finally at the admission stage with their consent.

2. The petitioners have filed this petition challenging an essential tender condition no. A (Cover - I) and praying for quashment of E-tender notice dated 19.05.2023, issued by the respondent no. 3 – Zilla Parishad. The petitioners are the contractors. They have experience of executing works of Water Conservation Department of Zilla Parishad. The respondent no. 3 – Zilla Parishad, published tender notice dated 19.05.2023, inviting tenders for 32 items of construction of K.T. Weir/Kolhapuri Bandhara.

3. Impugned Clause No. A (Cover - I) provides for essential documents to be filed by the contractors. Following is the provision :

"जि. प. कडील वैध नोंदणी प्रमाणपत्राची प्रत, पॅन कार्ड, GST नोंदणी प्रमाणपत्र व GST कर परतावा सन २०२१-२२ पर्यंत भरणा केलेले अभिलेखे सादर करावी , व्यवसाय कर व आयकर प्रमाणपत्रासह सन २०२१-२२ (दि . ३१. ०३. २०२२) पर्यंत चे परतावा अभिलेखे सादर करावी, स्वतःच्या लेटर पॅडवर विहित नमुन्यातील घोषणापत्र (कामनिहाय स्वतंत्र) Declaration of the contractor, कंत्राटदाराने निविदा भरतांना (upload) सारख्या प्रकारचे (similar type of work) या निविदा रकमेच्या किमान ५०% रकमेपेक्षा जास्त काम मागील ३ वर्षात यशस्वीरीत्या पूर्ण केल्याचे प्रमाणपत्र जोडणे आवश्यक राहिल तसेच नमूद कामाचा स्थळ पाहणी अहवालाबद्दलचे संबंधित उपविभागीय जलसंधारण अधिकारी यांचे प्रमाणपत्र बांधनकारक राहिल . तसेच कंत्राटदाराने / त्यांचा अधिकृत प्रतिनिधी व उपविभागीय जलसंधारण अधिकारी अथवा शाखा अभियंता यांच्या समवेत निविदा कालावधीत ३ दिवसात कार्यालयीन वेळ ११:०० ते ४:०० या कार्यालयीन, वेळेत कामाचे स्थळ पाहणी अक्षांश / रेखांश सहीत कामाचे स्थळाचा फोटोप्रत निविदा भरताना कागदपत्रे जोडावे . अन्यथा आपली निविदा Rejected (अवैध) ठरविण्यात येईल."

4. The petitioners have a grievance for the condition that the representative of the Contractor along with Sub-Divisional Water Conservator Officer should conduct spot inspection within three days during 11:00 to 04:00 and submit the photograph of the spot of the work. A certificate of concerned Sub-Divisional Officer and the

photograph are essential, otherwise bid should result in rejection. Against this condition, representation was made on 25.02.2023 to the respondents but no cognizance was taken. The duration for submission of the Bid was from 19.05.2023 to 25.05.2023. The time for opening of technical bid was 29.05.2023.

5. Under these circumstances, the petitioners have filed this Writ Petition. The impugned condition is challenged on the ground of arbitrariness and mala fides to favour particular bidders. The condition is alleged to have been designed to eliminate the petitioners or the competent bidders. The impugned condition is designed for the personal gain of respondent nos. 3 to 6, and it may lead to corruption. It is causing prejudice to the petitioners. It is against the government policies stipulated by Government Resolution dated 08.04.2021.

6. The respondent nos. 3 to 6 have filed affidavit-in-reply contesting the claim of the petitioners. It is stated that E-tender process covers 42 construction of K.T. Weir and 32 Nala Bandh. Considering the nature of the work, it is necessary to incorporate Jio tagging, site visit and verification of the current position of the work site. The condition under challenge is necessary to verify the material of construction is available within stipulated leads,

transportation of the material is available and to avoid technical problems and delay in completing the work.

7. It is averred in the reply that in response to the tender notice 239 applications are received and none of them raised any objection in respect of terms and conditions of the tender document. The tender process is in consonance with Government Resolutions stated in paragraph no. 9 of the reply. The petitioners did not submit their bid and therefore, estopped from challenging the tender condition or the process.

8. It is further stated that three days period for Jio tagging mentioned in the tender condition under challenge is adequate. It is possible for an aspirant to have spot inspection along with the officers and to submit the photograph. The grievance of the petitioners is totally imaginary. The allegations levelled against the officer of the respondent are denied. It is also expressed that the work needed to be completed within financial year 2003-2004, otherwise funds would lapse.

9. The petitioners have filed rejoinder stating that sufficient time is not given to submit the E-tender. The condition under challenge is against Government Resolution dated 08.04.2021. A further grievance is expressed that in E-tender booklet longitude

and latitude are not mentioned. There are only 12 officers from four divisions for whom it is practically not possible to accompany the aspiring contractors to have spot inspection.

10. Learned counsel appearing for respondent nos. 3 to 6 has raised preliminary objection of locus standi of petitioners to prefer Writ Petitions. The petitioners did not participate in the tender process and they are estopped from challenging the particular tender condition and tender process. A reliance is placed on the decision of Karnataka High Court rendered in *Mahalaxmi Engineering Works Versus Bangalore Electric Supply Company Limited*. The learned counsel for the petitioners submits that the tender condition under challenge is so arbitrary and perverse that prevented them from submitting their bid. They have adequate experience to execute the work. They are interested to secure the work by participating in the tender process. Therefore, objection in writing was submitted on 26.05.2023, which is not responded to.

11. To answer the preliminary objection, we deem it fit to rely upon law laid down by the Supreme Court in the matter of *Ramanna Dayaram Shetty Versus The International Airport Authority of India and others*, **AIR 1979 SC 1628**. It is useful to quote paragraph no. 9, which is as follows :

“9. That takes us to the next question whether the acceptance of the tender of the 4th respondents was invalid and liable to be set aside at the instance of the appellant. It was contended on behalf GI the 1st and the 4th respondents that the appellant had no locus to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant did not enter the field of competition by submitting a tender, what did it matter to him whose tender was accepted; what grievance could he have if the tender of the 4th respondents was wrongly accepted. A person whose tender was rejected might very well complain that the tender of someone else was wrongly accepted, but it was submitted, how could a person who never tendered and who was at no time in the field, put forward such a complaint ? This argument, in our opinion, is mis-conceived and cannot be sustained for a moment. The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondents, but that he was differentially treated and denied equality of opportunity with the 4th respondents in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of

consideration by reason of the condition of eligibility, while so far as the 4th respondents were concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in law and the acceptance of the tender of the 4th respondents was vitiated by any legal infirmity.”

12. We hold that the petitioners have locus to maintain the present petition. They have a right of participation in the tender process which is denied. We are bound to examine the matter on merit, instead of non-suiting the petitioners on hyper technical grounds.

13. High Court while exercising writ jurisdiction under Article 226 of the Constitution of India, has limited jurisdiction. The tender jurisdiction is settled from the following judgments of the Supreme Court :

i. *Afcons Infrastructure Ltd. Versus Nagpur Metro Rail Corporation Ltd. and others*, **AIR 2016 SC 4305** ;

- ii. *The Silppi Constructions Contractors Versus Union of India and another etc, etc., (2020) 16 SCC 489 ;*
- iii. *M/s. Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Versus M/s. New J.K. Roadways, Fleet Owners and Transport Contractors and others, AIR Online 2020 SC 959 ;*
- iv. *N.G. Projects Limited Versus Vinod Kumar Jain and others, AIR 2022 SC 1531 ;*
- v. *Tata Motors Limited Versus The Brihan Mumbai Electric supply & Transport Undertaking (BEST) and Others, AIR 2023 SC 2717 ;*
- vi. *Airport Authority of India Versus Centre for Aviation Policy, Safety and Research (CAPSR) and others, AIR 2022 SC 4749.*

14. A useful reference can be made to paragraph no. 19 of *Jagdish Mandal Versus State of Orissa and others, (2007) 14 SCC 517*. In the matter of *Michigan Rubber (India) Ltd. Versus The State of Karnataka and others, AIR 2012 SC 2915*, the principles are culled down in paragraph no. 19 which is as follows :

19. From the above decisions, the following principles emerge :

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible

reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

15. While floating the tender process the respondents have considered the nature of the work, requirement to complete the work within stipulated period. To avoid any impediment in executing the work and to ensure the completion within stipulated period and by utilization of the funds the condition under challenge is incorporated. It is prerogative of respondents to have overall view of the situation. We are not persuaded by the submissions of learned counsel for the petitioners that condition in question is arbitrary or irrational.

16. There is no material placed on record to demonstrate malafides or dishonest design to favour particular contractors and to eliminate the petitioners. We find that the apprehensions of the petitioners are either imaginary or axiomatic. In the absence of corroboration, we are not prepared to accept the submissions of the petitioners.

17. Learned counsel for the petitioners has also not demonstrated any violation of statutory provisions or the policy governing the field. An attempt is made to show that the impugned tender condition is against government corrigendum dated 08.04.2021. It is submitted that minimum five days duration would be essential for spot inspection. We cannot substitute the discretion or the decision of selecting conditions of the respondents authorities for fixing the duration / time span for conducting spot verification, submitting the photographs

and to have joint inspection. Considering the supervening circumstances, the employer has to incorporate the conditions.

18. The submissions of learned counsel for the petitioners that there are only 12 officers who are supposed to conduct spot inspection along with the contractors within a period of three days which is impossible. Hence, it is argued that the impugned condition leads to corruption, favoritism and discrimination. The respondent no. 6 has explained in paragraph no. 12 of the reply that it is possible to comply the conditions under challenge and time span is also adequate considering the distances in all the sub divisions. The respondent nos. 3 to 6 after due deliberation have included the impugned condition. We are not the experts to substitute discretion exercised by the respondents. We find that the explanation tendered in the affidavit-in-reply is sufficient to repel the submission of the petitioners.

19. It is a matter of record that 239 bidders have responded the tender notice. They have complied with the impugned tender conditions without any demur. They are awaiting conclusion of the tender process. This is one of the instances to negate the grounds of challenge of the petitioners. We cannot lose sight of the fact that because of interim order the financial bids are yet to be opened. The respondents have rightly anticipated the predicaments of lapsing of the funds, delay in completion of the work, inconvenience to the stakeholders, ensuing rainy season,

etc. before selecting the tender conditions. Considering over all circumstances, we do not find any case is made out by the petitioners to quash the impugned tender condition or tender process.

20. We hold that the petition has no merit. The same is dismissed. There shall be no order as to costs.

[SHAILESH P. BRAHME, J.]

[MANGESH S. PATIL, J.]

spc/