



WP(MD)No.16853 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.10.2023

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.16853 of 2023

and

WMP(MD)Nos.14081 & 14085 of 2023

A.Pandian

... Petitioner

v.

1.The Superintending Engineer,
Public Works Department,
Buildings (Construction and Mainenance)
Circle,
Madurai – 625 002.

2.The Executive Engineer,
Public Works Department,
Buildings Construction Division,
Madurai – 625 002.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus to directing the 1st respondent to call for the records of the entire impugned rejection order of E-tender summary report dated 08.07.2023 in respect of the work and quash the same as illegal and void and consequently directing the 1st respondent to declare the petitioner as successful bidder on the basis of the quoting of lowest price and allot the petitioner in the work order for the subject matter of the tender after accepting the petitioner valid tender in respect of the work or proceed with fresh tender proceedings.



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For Petitioner : Mr.K.Muraleedharan

For Respondents : Mr.Veerakathiravan,
Additional Advocate General
assisted by Mr.S.Ra.Ramachandran
Additional Government Pleader

ORDER

The petitioner participated in the tender process floated by the first respondent for carrying out the work of construction of Taluk Office building at Melur in Madurai District. Notification was issued on 06.06.2023. The last date for submission of tender was 28.06.2023 at 03.00 P.M. The tenders were to be submitted online. Single cover system was to be adopted. The writ petitioner's tender was rejected on 08.07.2023 and information to that effect was uploaded in the web portal. Challenging the same, this present writ petition came to be filed.

2.When the matter was taken up for admission on 13.07.2023, interim order was granted since submission was made that compared to the successful tenderer, the petitioner's quote was lower by Rs.21.00 lakhs.



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3.The learned counsel appearing for the petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition and called upon this Court to set aside the impugned order and grant relief as prayed for.

4.The respondents have filed counter affidavit and the learned Additional Advocate General took me through its contents and contended that rejection of the petitioner's technical bid was justified and he called upon this Court to dismiss the writ petition.

5.I carefully considered the rival contentions and went through the materials on record. The foremost stand of the respondents is that the petitioner failed to furnish certain material documents. My attention is drawn to the following clause found in the tender qualification under the heading "For Special Attention of the Tenderer" :

"5.The following particulars shall also be furnished by the contractor along with the tender :

a) List of details of works executed by the contractor with their value.

b) A list of details of work under execution by the contractor with their values.



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c)Annual turnover of the last one year (necessary certificate to the effect issued by the respective bank shall be attached)."

I wanted to know from the learned counsel for the petitioner if the particulars as required in the aforesaid clause were uploaded along with the tender application. The learned counsel for the petitioner would on the other hand insist that it was not a mandatory clause to be complied with but only directory. According to him, the minimum criteria for qualification has been set out in Clause 9 of the Special Conditions. The said clause reads as under :

"The applicant should produce Income Tax Clearance Certificate valid for the current period, "VAT" Verification Certificate (ie., previous assessment year) and "TIN" number having validity and copy of Goods and Services Tax (GST) Registration No."

The learned counsel for the petitioner contended that since the petitioner has enclosed the necessary certificate, the petitioner should be deemed to have fulfilled the minimum criteria for qualification and that therefore, the authorities ought to have gone only by the financial quote of the tenderers.



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6.I am not persuaded by this submission. It is true that the tender conditions can be categorised into two : a) mandatory conditions and b) directory conditions. The tender inviting authority will consider if the bid submitted by a tenderer is substantially responsive to the bid requirements. If the bid is substantially responsive and if any of the conditions has not been fulfilled, it is open to the tender inviting authority to condone the lapse on the part of the tenderers. The whole issue boils down to whether the condition is a material one or not. If a material condition is not satisfied, even if the tenderer is qualified on all other aspects, still the authority would be justified in rejecting the tender. I am more than satisfied that the requirement set out in clause 5 under "For Special Attention of the Tenderor" is a material condition.

7.Unless the details sought for by the tender inviting authority are furnished, the authority will not be able to take a call on the credentials of the tenderer. It is true that in the rejection order, the tender inviting authority had stated that since experience certificate has not been furnished, the tender had been rejected for technical reasons. The authority actually had the non-fulfillment of the requirement set out in clause 5 under "For Special Attention of the Tenderer" in mind when the said order was passed. The Hon'ble Supreme Court in the decision reported in (2020) 17 SCC 577 (Vidarbha Irrigation Development Corpn. v. Anoj Kumar Agarwala) held as follows :



“14. The law on the subject is well settled. In *Bakshi Security & Personnel Services (P) Ltd. v. Devkishan Computed (P) Ltd.* [*Bakshi Security & Personnel Services (P) Ltd. v. Devkishan Computed (P) Ltd.*, (2016) 8 SCC 446] , this Court held : (SCC p. 453, paras 14-16)

“14. The law is settled that an essential condition of a tender has to be strictly complied with. In *Poddar Steel Corpn. v. Ganesh Engg. Works* [*Poddar Steel Corpn. v. Ganesh Engg. Works*, (1991) 3 SCC 273] this Court held as under : (SCC p. 276, para 6)

‘6. ... The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance with the condition in appropriate cases.’

15. Similarly in *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* [*B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548] this Court held as under : (SCC pp. 571-72, para 66)

‘(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with



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all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;’

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties.”

15. However, the learned counsel appearing on behalf of the appellant strongly relied upon *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.* [*Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818] , and paras 14 and 15 in particular, which state : (SCC p. 825)

“14. We must reiterate the words of caution that this Court has stated right from the time when *Ramana Dayaram Shetty v. International Airport Authority of India* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless



there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

16. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous—they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.”

In the decision reported in **(2022) 6 SCC 127 (N.G.Projects Limited v. Vinod Kumar Jain and ors)**, the Hon'ble Supreme Court held as follows :

“**16.**In *Galaxy Transport Agencies v. New J.K. Roadways* [*Galaxy Transport Agencies v. New J.K. Roadways*, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , a three-Judge Bench again reiterated that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. It was observed as thus : (SCC paras 17-18 & 20)

“**17.** In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench [*New JK Roadways v. UT of*



J&K, 2020 SCC OnLine J&K 733] ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the NIT. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the NIT prescribing work experience of at least 5 years of not less than the value of Rs 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , this Court noted : (SCC pp. 531-32, para 22)

‘22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. *Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even*



if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.'



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20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the Appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own.”

8. Respectfully applying the aforesaid principles, I am satisfied that the petitioner's tender application did not conform to the bid requirements and therefore it was rightly rejected. No case for interference is made out. This writ petition is dismissed. The EMD amount remitted by the petitioner shall be returned to the petitioner immediately and without any delay. No costs. Connected miscellaneous petitions are closed.

17.10.2023

Index : Yes / No
Internet : Yes / No
Skm

To
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Public Works Department,
Buildings (Construction and Maintenance)
Circle, Madurai – 625 002.

2. The Executive Engineer,
Public Works Department,
Buildings Construction Division,
Madurai – 625 002.



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G.R.SWAMINATHAN, J.

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