



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

WRIT PETITION NO. 3285 OF 2023

Swapnil S/o Sanjay Choure,
Age : 29 years, Occu. : Contractor,
R/o Khandala, Tq. & Dist. Beed. .. Petitioner

Versus

1. The State of Maharashtra,
Through its Secretary,
Water Supply and Sanitation
Department, Mantralaya,
Mumbai – 32.
2. The Chief Executive Officer,
Zilla Parishad, Beed,
Tq. & dist. Beed.
3. The Executive Engineer,
Rural Water Supply Department,
Zilla Parishad, Beed, Dist. Beed.
4. Rahul S/o Ranjit Garkal,
Age : 35 Years, Occu. : Contractor,
R/o Bhagwan Sai Niwas,
Kalikanagar, Beed,
Tq. and Dist. Beed. .. Respondents

Shri R. D. Khadap, Advocate for the Petitioner.

Shri A. R. Kale, Addl..G.P. for the Respondent No. 1.

Shri A. R. Tapse, Advocate h/f Shri P. D. Suryawanshi, Advocate
for the Respondent Nos. 2 and 3.

Shri N. T. Tribhuwan, Advocate for the Respondent No. 4.

**CORAM : MANGESH S. PATIL AND
SHAILESH P. BRAHME, JJ.
DATE : 27 AUGUST 2024.**

JUDGMENT (Per Shailesh P. Brahme, J.) :-

. Rule. Rule is made returnable forthwith. With the consent of the parties heard both the sides finally.

2. The petitioner has invoked jurisdiction under Article 226 of the Constitution of India for challenging work order dated 23.01.2023 issued by the respondent No. 3 in favour of the respondent No. 4 being successful bidder and he is seeking mandamus to issue him work order. The petitioner being unemployed engineer participated in a tender process, but denied the work order arbitrarily and in a non transparent manner, which is the cause being put forth for approaching this Court.

3. The tender process pertains to work of water supply scheme for Shripatwadi, Tq. Shirur Kasar under the Jal Jivan Mission floated vide tender notice dated 08.09.2022. In all five tenderers participated including the petitioner. The petitioner qualified the technical bid and in the financial bid he was found to be Lowest-I. When he was expecting a work order to be issued, he was shocked to know that the respondent No. 4 was issued with work order on 23.01.2023, setting aside his claim.

4. The learned counsel Mr. Khadap appearing for the petitioner submits that the petitioner being the Lowest-I financial bidder should have been allotted the work and in a non transparent manner it was allotted to the respondent No. 4 by the impugned order, who was Lowest-II. It is submitted that in

a clandestine manner the petitioner was eliminated from the process purportedly under false and perverse grounds. The learned counsel would submit that disqualifying the petitioner for having secured more than three work orders is not in consonance with the tender conditions. He would further submit that he was present for a meeting on 09.01.2023, but he was shown to be absent. It is further submitted that the petitioner was not called upon to submit fixed deposit receipt and to pay additional security deposit, though he was waiting and ready to comply.

5. The petition and the submissions of the petitioner are opposed by the respondents. The respondent Nos. 2 and 3 have submitted affidavit in reply jointly. The learned counsel appearing for them Mr. Tapse, holding for Mr. P. D. Suryawanshi submits that though the petitioner was the lowest bidder, he failed to comply with condition No. 7 within stipulated period despite being informed. It is further contended that he was called upon to remain present for a meeting on 09.01.2023. He was absent and the authorities were required to consider second lowest bidder, the respondent No. 4, for issuing work order.

6. It is submitted that the conditions, norms and the procedure do not require to call upon successful bidder to comply condition No. 7. It is further submitted that in view of his instructions issued vide letter dated 16.09.2022, the petitioner was found to be ineligible having secured more than three work orders, which affected his bid capacity. The learned counsel

refers to the judgment of this Court in the matter of Tirupati Construction, Latur Vs. State of Maharashtra and others reported in *2021(4) Mh.L.J. 428* and would pray to dismiss the petition.

7. The learned Additional Government Pleader appearing for the respondent No. 1 and the learned counsel appearing for the respondent No. 4 adopt the submissions of the respondent Nos. 2 and 3. The respondent No. 4 makes submissions on the line of his affidavit in reply.

8. We have considered rival submissions of the parties. The petitioner was the lowest bidder in a financial bid opened on 15.12.2022. In view of condition No. 7, it was imperative for him to submit fixed deposit receipt and additional security deposit within five days from opening of the financial bid. He was aware of result of the financial bid. There is no explanation coming forth as to why fixed deposit receipt and additional security deposits were not deposited within five days from 15.12.2022.

9. We have gone through the tender conditions and the Government Resolution dated 04.09.2020 in order to find out as to whether there is any procedural requirement to call upon the successful bidder to deposit FDR and additional security deposit. No provision is pointed out by the learned counsel for the petitioner. The only explanation of the petitioner is that on previous occasion in respect of work of village Gadhlaiwadi, Tq. Kaij,, Dist. Beed intimation in writing was issued to the petitioner calling upon him to submit FDR and additional

deposits. This incident cannot form mandatory procedure unless some norms of procedure or condition is pointed out. When the petitioner was aware that he was the lowest bidder, there was no reason to again intimate him in writing for compliance of condition No. 7. We do not find any justification for non compliance of the vital condition.

10. The respondent authorities have rightly resorted to next option of the respondent No. 4 when petitioner was found to be non responsive. The procedure adopted by them cannot be branded as a non transparent or arbitrary. It was a case of failure of the petitioner to comply condition No. 7. We do not find any arbitrariness or *mala fides* in the tender process in this regard.

11. Our attention is invited to mail dated 06.01.2023 issued by the respondent No. 3 to the petitioner calling upon him to remain present for meeting on 09.01.2023. We have gone through the minutes of meeting conducted on 09.01.2023. The petitioner was absent. It was recorded that as per the instructions in letter dated 16.09.2022, if the work orders in hand exceeded three in a financial year that would adversely affect the bid capacity of a tenderer and accordingly the petitioner was found unfit. It is further recorded that he failed to submit FDR and additional security deposit within stipulated period as per the tender condition. Left with no option, the respondent Nos. 2 and 3 selected the next lowest bidder that is the respondent No. 4 and issued work order.

12. Though, by filing rejoinder the petitioner has disputed the fact of his absentism on 09.01.2023, there is no convincing material on record to show that he was present on 09.01.2023. This being a disputed question of fact, cannot be appreciated in the writ proceedings. We do not find any apparent perversity or arbitrariness in the tender process.

13. A reference is made by the learned counsel for the respondent Nos. 2 and 3 to the law laid down by this Court in the matter of Tirupati Construction, Latur Vs. State of Maharashtra and others (supra). In that matter also the petitioner was successful bidder in the financial bid, who failed to comply the tender condition of depositing demand draft of additional performance security deposit within a span of eight days. There was strict instruction for not to extend the period for depositing the amount. He was declared to be disqualified and second lowest bidder was called upon to deposit the amount. The work was allotted to him. In that context it has been laid down in para Nos. 25, 26, 29 and 30 as under :

25. If there are essential conditions incorporated in the tender, certainly the same must be adhered to. The essential conditions only be relaxed if there is general power of relaxation. In case at hand, there is no such general power of giving relaxation to deposit additional performance security deposit even after eight days. Moreover, there is no correspondence from the side of the petitioner – successful bidder to extend the time by one day to deposit the amount of additional performance

security deposit. There was no difficulty for the petitioner to make such kind of communication and get extended one day for depositing additional performance security deposit. No such pains were taken by the petitioner. Now the petitioner is taking disadvantage of Covid-19 pandemic and holidays fallen on 25th and 26th April 2020, which cannot be considered in a case of commercial transaction i. e. awarding of contract. Perusal of photo copy of Demand Draft of Rs.2,15,000/- placed on record by the petitioner reveals that it was drawn on 27.04.2020. After stipulated period is over.

26. The scope of judicial review in tenders has been explored in depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision and not its soundness. Phrases differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result.

29. The award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. The party issuing the tender can fasten the conditions and its own terms of invitation to tender and

has the right to punctiliously and rigidly enforce the terms of the tender. 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. The Court cannot make distinction between essential and non essential terms contrary to the intention of the tender issuing authority and thereby rewrite the arrangement. The terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers.

30. The authority, publishing the tender is bound to adhere to the essential terms, norms, standards and procedures laid down by it and cannot depart or deviate from the arbitrarily much less by giving relaxation. In the case at hand, the respondent Nos. 2 to 4 seem to have followed the Government Resolution dated 26.11.2018 and adhered to the terms and conditions incorporated in the tender notice. The petitioner has failed to deposit additional performance security deposit of Rs.2,15,000/- within stipulated period of eight days and thus committed default. Certainly, he is out of the race because of his own default. Now he cannot blame the authorities for not giving relaxation of one day for depositing additional performance security deposit. The petitioner is not entitled to get such kind of relaxation in view of terms and conditions of the tender notice.

14. We do not find any substance in the writ petition. The writ petition is dismissed. Rule is discharged.

[**SHAILESH P. BRAHME, J.**] [**MANGESH S. PATIL, J.**]
bsb/Aug. 24