IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6905 OF 2024

M/s. S.T. Agrawal,
Contractors and Engineers
Through its Authorized Representative,
Mr. Shri Shivnandan Balaji Gote,
Age : 45 years, Occupation : Business,
R/o. Post Tondgaon,
Dist – Washim,
Maharashtra. ..Petitioner

Versus

1. Divisional Railway Manager,
Sangi Road, DRM Complex,
South Central Railway, Nanded.

2. Additional Divisional Railway Manager,
Sangi Road, DRM Complex,
South Central Railway, Nanded.

3. Senior Divisional Engineer
Sangi Road, DRM Complex,
South Central Railway, Nanded.

4. Senior Divisional Finance Manager,
Sangi Road, DRM Complex,
South Central Railway, Nanded.

5. M/s. Shri J.P. Khosla-Akola,
R/o. Ramdas Peth,
Akola 444 001, Maharashtra ..Respondents

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Advocate for Petitioner : Mr. G.K Naik-Thigle
Advocate for Respondent Nos.1 to 4 : Mr. A.G. Talhar
Advocate for Respondent No.5 : Mr. P.S. Gaikwad

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CORAM : S.G. MEHARE AND
SHAILESH P. BRAHME, JJ.

RESERVED ON : NOVEMBER 28, 2024

PRONOUNCED ON : DECEMBER 10, 2024

JUDGMENT :- (PER S.G. MEHARE, J.)

1. Rule. Rule made returnable forthwith. Heard finally with the consent of parties.

2. The petitioner is a contractor. The respondents had issued a notice inviting the tenders for Nanded Division-Purna-Akola section for supply and stacking of 50mm/gage hard and durable machine stone ballast at Washim ballast depot and bringing the same into hoping/traffic ballast wagon by mechanical means completion period 18 months. The petitioner participated and submitted his tender. On 29.06.2024, the financial bid of the petitioner was opened. The financial tabulation statement reveals that the bid of the petitioner is 5.00% below the estimated cost. Even then, the preference was given to financial bid of respondent no.5 which was above 12% of estimated cost. The petitioner has a case that violating the rule of equality, respondent no.4 has issued a letter of acceptance to respondent no.5 for executing the agreement. The petitioner did not receive the communication of the outcome of his bid. In the most arbitrary and non-transparent manner, the tender process is carried out. Hence, he prayed for directions to the respondents/authorities to allot the tender to the petitioner being the most eligible bidder in tender process being L-1.

3. Respondent nos.1 to 4 have filed affidavit in reply. They have denied the factual contentions of the petitioner. They have come

with a case that they did not receive the offer from the petitioner M/s. S.T. Agrawal in this tender. In this tender, five offers were received. As per uploaded tender document no.2 Para No. 18.3 of GCC 2022, “separate identity/name should be given to the partnership firm. The partnership firm should have PAN/TAN number in its own name and PAN/TAN number in the name of any of the constituent partners shall not be considered. The valid constituents of the firm shall be called partners. “While evaluating lowest tenderer offer, TC observes the following points :-

A) The lowest tenderer has participated the tender with the firm name M/s. MSST AGRAWAL-BHUSAWAL, Address is Plot No. 30, HINDU HOUSING SOCIETY, TAPI NAGAR, HUSAWAL425201, BHUSAWAL, Maharashtra.

B) As per GST firm name is S.T. AGRAWAL, Address is 30 SS 4330/39 TULSHI, TULSHI HINDU HOUSING SOCIETY, TAPI NAGAR, BHUSAWAL, Jalgaon, Maharashtra, 425201. (Sl. No/16)

C) As per submitted Audit Balance Sheet firm name is S.T. AGRAWAL, Address is 39, HINDU HOUSING SOCIETY, TAPI NAGAR, BHUSAWAL. (Sl. No/21)

D) As per submitted PAN firm name is S.T. AGRAWAL. (SI. No/17). Hence, TC observes that the tenderer M/s MSST AGRAWAL- BHUSAWAL offer is invalid offer as tenderer could not establish that M/s MSST AGRAWAL-BHUSAWAL S.T. AGRAWAL are same.

4. In sum and substance, the respondents have a case that the submissions of the petitioner does not match with the requirement of the tender conditions.

5. The petitioner has filed a rejoinder pursuant to the affidavit in reply of respondent nos.1 to 4. The rejoinder is predominantly filed to clarify certain points which are raised for the first time by the respondents. Respondent nos.1 to 4 for the first time disclosed in affidavit in reply that the respondent got deluded with the name M/s. S.T. Agarwal and S.T. Agarwal. The said confusion is without foundation. It is only on account of non soliciting any response from the petitioner had there been any genuine confusion prevailing in the mind of respondent nos.1 to 4. It is an artificial confusion that the nomenclature is non genuine and not born out from any record, as the entire bid was submitted on behalf of M/s. S.T. Agarwal. All necessary credentials were submitted along with the tender document. The inadvertent spelling mistake if any is liable to be appropriately resolved through clarification and in case it is trivial in nature, to be ignored. The correct documents were submitted. The variance in the name appearing on the PAN Card and Income Tax record are not within the control of the petitioner. The petitioner was never informed about the discrepancies as alleged. The prime reason

about difference of name is itself hyper technical and contrary to the tender norms. The conduct on the part of the respondents/authorities is clearly arbitrary, capricious and is not in accordance with law. The failure on the part of the respondents to communicate the alleged discrepancy to the petitioner to seek appropriate clarification from the petitioner is fatal in the matter.

6. Learned counsel for the petitioner has vehemently argued that for the first time, respondent nos.1 to 4 are explaining the reasons for rejection. Such reasons are not allowed to be supplemented before the Court. Till date, no disqualification has been intimated to the petitioner. The reasons assigned for the first time are imaginary and concocted. The bid of the petitioner has been declined for too hyper technical reasons. Though he is the L-1 bidder, the tender has been refused by allowing the higher tender. The government exchequer is burdened. The acts of the respondents are arbitrary and violating the rights of the petitioner. Hence, the petition deserves to be allowed.

7. Learned counsel for the petitioner has relied on the following case laws

(i) *Indian Medicines Pharmaceuticals Corporation Ltd Vs. Kerala Ayurvedic Co-operative Society Ltd and Ors, 2023 SC Online SC 5*.

(ii) *Commissioner of Police, Bombay Vs. Gordhandas Bhanji, 1951 SCC 1088*.

(iii) *New Horizons Limited and Another Vs. Union of Indian and Others, (1995) 1 SCC 478*.

8. Learned counsel Mr. Talhar for respondent nos.1 to 4 argued that the tender process was online. There was no human involvement in the tender process. Therefore, it cannot be said that the acts of the respondents are deliberate and with a view to deprive the petitioner. The documents did not match with the tender notice. The conditions in the tender notice was very specific (6.2) that the offer shall be evaluated only from the certificates/documents (as referred above) submitted along with the tender offer. Any certificate/documents offered after the tender opening shall not be given any credit and shall not be considered. Therefore, subsequent clarification of the petitioner considering their joint venture agreement by letter 25.06.2024 does not carry weightage. He also pointed out the work done certificate dated 29.12.2023 and vehemently argued that it is not the certificate pertaining to the petitioner. No joint venture was submitted with tender. Referring to clause 3.1 of the tender inviting notice, he would submit that respondent nos.1 to 4 had reserved their rights to verify all statements, information and documents submitted by the petitioner in his tender offer. He would submit that the case relied upon by the petitioner is on different facts. Therefore, it would not apply.

9. Learned counsel for respondent no.5 adopted the arguments of learned counsel for respondent nos.1 to 4.

10. Considering the submissions of the respective counsels, the case revolves around the documents filed with the tender were not in the name of the firm in whose name the tender was submitted. Admittedly, the document of joint venture to count the experience was not submitted with the tender notice. It was submitted after declaring the financial tabulation statement dated 14.05.2024. The documents filed along with the tender were not matching with the name of the firm in which name the tender was submitted. The joint venture has been claimed to satisfy the condition of the experience. The tender of the petitioner has been rejected on the above grounds as it was mandatory conditions. So, to simplify the dispute, it would be appropriate to reproduce certain conditions of the tender inviting notice. The respondents have referred to clause 6.1 and 6.2 of the tender notice which reads thus :

> "6.1 The offer of Tenderer(s) who do not enclose Experience Certificate and Turnover Certificate with requisite details and supporting documents as detailed under Para 2 & 3 above along with their Tender to establish their credentials shall be summarily rejected, even though they are working contractors or contractors on approved list.
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> 6.2 (i) The offer shall be evaluated only from the certificates/documents (as referred above) submitted along with the tender offer.

ii) Any Certificate/Documents offered after the tender opening shall not be given any credit and shall not be considered.

iii) Tenderer(s) shall note that conditional/alternate offer will not be considered and will summarily be rejected, even though such condition makes them as the lowest tenderer.

iv) Railway reserves the right to verify the authenticity of the documents/information furnished."

11. The tender notice was disclosing the various firms and proprietary firms including the joint venture in works who were entitled to participate. Clause 11 of the tender notice was about Joint Venture (JV) in Works Tenders. Clause 11 is relevant which is reproduced below :

"11.1. Separate identity/name shall be given to the Joint Venture.

11.11 On issue of LOA (Letter of Acceptance), the JV entity to whom the work has been awarded, with the same shareholding pattern as was declared in the MOU/JV Agreement submitted alongwith the tender, shall be got registered before the Registrar of the Companies under 'The Companies Act - 2013' (in case JV entity is to be registered as Company) or before the Registrar/Sub-Registrar under the 'The Indian Partnership Act, 1932' (in case JV entity is to be registered as Partnership Firm) or under 'The LLP Act 2008' (in case JV entity is to be registered as LLP). A separate PAN shall be obtained for this entity. The documents pertaining to this entity including its PAN shall be furnished to the Railways before signing the contract agreement for the work. In case the tenderer fails to observe/comply with this stipulation within 60 days of issue of LOA, contract is liable to be terminated. In case contract is terminated railway shall be entitled to forfeit the full amount of the Bid Security and other dues payable to the Contractor under this contract. The entity so registered, in the registered documents, shall have, inter-alia, following Clauses:

17.11.1 Joint and Several Liability - Members of the entity to which the contract is awarded, shall be jointly and severally liable to the Railway for execution of the project in accordance with General and Special Conditions of Contract. The members of the entity shall also be liable jointly and severally for the loss, damages caused to the Railways during the course of execution of the contract or due to non-execution of the contract or part thereof.

17.11.2 Duration of the Registered Entity It shall be valid during the entire currency of the contract including the period of extension, if any and the maintenance period after the work is completed.

17.11.3 Governing Laws - The Registered Entity shall in all respect be governed by and interpreted in accordance with Indian Laws."

12. Same way, sub-clause 17.14.1 of Clause 11.14 is also relevant which is reproduced thus :

"**17.14.1** In case one or more of the members of the JV is/are partnership firm(s), following documents shall be submitted:

(i) A notarized copy of the Partnership Deed or a copy of the Partnership deed registered with the Registrar.

(ii) A copy of consent of all the partners or individual authorized by partnership firm, to enter into the Joint Venture Agreement on a stamp paper,

(iii) A notarized or registered copy of Power of Attorney in favour of the individual to sign the MOU/JV Agreement on

> behalf of the partnership firm and create liability against the firm.
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> (iv) An undertaking by all partners of the partnership firm that they are not blacklisted of debarred by Railways or any other Ministry / Department of the Govt. of India from participation in tenders / contracts as on the date of submission of bids, either in their individual capacity or in any firm/LLP in which they were / are partners/members. Any Concealment / wrong information in regard to above shall make the bid ineligible or the contract shall be determined under Clause 62 of the Standard General Conditions of Contract."

13. Reading the terms of the tender notice, it was specifically cleared in the notice that all the relevant documents shall be filed along with the tender. Clause 6.2 (ii) is very specific that any certificate/documents offered after the tender opening shall not been given any credit and shall not be considered. Sub-clause (iii) of the said clause has given a caution to the tenderer that conditional/alternate offer will not be considered and will summarily be rejected, even though such condition makes them as the lowest tenderer. Clause 3.0 was an intimation to the tenderer that it shall be mandatorily incumbent upon that the tenderer to identify, state and submit the supporting documents duly self-attested/digitally signed by which they/he is qualifying the qualifying criteria mentioned in the tender document. It will not be obligatory on the part of tender committee to scrutinize beyond the submitted document of the

tenderer as far as his qualification for the tender is concerned. In view of Clause 2.2.2, it was incumbent upon the tenderer to submit the copy of relevant joint venture agreement attested by any gazetted officer along with the tender. When it was so submitted, the credentials proportionate to his share in joint venture was to be considered for experience. It also appears that the tender was done mechanically without human interference. The documents submitted by the petitioner were not found matching with the names of the tenderer. There was no joint venture agreement or document with the tender. The letter having joint venture for the purpose of experience was also not filed along with the tender. The terms of the tenders were specific and clear that after the tender is opened, no documents as such would be considered. The tenders would be strictly considered on the basis of the documents filed only with the tender notice.

14. Therefore, in view thereof, none of the case laws relied upon by the petitioner would assist him. We do not find any arbitrary decision of the tender inviting authority nor it is violating Article 14 of the Constitution of India. The petition is devoid of merit. Hence, it is dismissed.

15. Rule is discharged.

16. After pronouncement of judgment, learned counsel for the petitioner requested for continuation of the interim relief.

Considering the issue involved in the case, we have already expressed our opinion on merit that there is no substance in the petition. To protect the interest of public at large, we do not find it appropriate to continue the interim relief.

(SHAILESH P. BRAHME, J.) **(S.G. MEHARE, J.)**

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