



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

WRIT PETITION NO. 9564 OF 2024

M/s. Jay Constructions,
Through Its Partner,
Tukaram Tulshiram Dahite,
Age : 40 years, Occu.: Business,
R/o. House No.43 at Post Mahir,
Tq. Sakri, Dist. Dhule.

Petitioner...

Versus

1. The State of Maharashtra
Through its Secretary,
Tribal Development Department,
Mantralaya, Mumbai.
2. The Chief Engineer,
Construction Management Cell,
Tribal Development Department,
Mumbai.
3. The Superintendent Engineer, P.W. (Tribal),
Tribal Development Department,
Nashik Division, Nashik,
District Nashik.
4. The Executive Engineer, P.W. (Tribal),
Tribal Development Department,
Nashik Division, Nashik,
District Nashik.
5. The Deputy Engineer, P.W. (Tribal),
Tribal Development Department,
Sub Division, Dhule,
Tq. and Dist. Dhule.

6. Sharad Anandrao Deore,
Age : 50 years, Occu. Contractor,
R/o. 5-A, Sakharam Nagar, Sakri,
Tq. Sakri, Dist. Dhule.

Respondents...

- * **Mr. Amol S. Sawant**, Advocates for the Petitioner.
- * **Mr. A. S. Shinde**, AGP for Respondent Nos. 1 to 5/State.
- * **Mr. Vijay Bhalerao Patil**, Advocate for Respondent No.6.

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

RESERVED ON : 19 NOVEMBER 2024

PRONOUNCED ON : 28 NOVEMBER 2024

J U D G M E N T (Per Shailesh P. Brahme, J.) :

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

2. The petitioner is challenging the tender notice no.1 of 23.07.2024 to the extent of construction of Girls Hostel Building at Government Tribal Ashram School Complex, Sulwade Tq. Shindkheda, Dist. Dhule, rejection of its technical bid and issuance of work order in favour of respondent no.6 by filing present petition under Article 226 of the Constitution of India.

3. The tender process which is under challenge pertains to construction of Girls Hostel Building at Government Tribal Ashram

School Complex, Sulwade Tq. Shindkheda, Dist. Dhule. In pursuance of tender notice dated 23.07.2024, petitioner and other three bidders submitted the bids. Pre-bid meeting was conducted on 09.08.2024. The technical evaluation of the bids were held on 23.08.2024 and the petitioner was disqualified. Respondent no.6 emerged to be successful bidder. The work order was issued to him on 28.08.2024.

4. The petitioner's technical bid was rejected for not submitting site visit report as per Clause 3.4.13 and technical key person proforma. The grievance of the petitioner is that he was not communicated the reasons. It learnt the reasons during pendency of the petition. It was all the while interested in getting the site visit report and every attempt was made to secure report from Deputy Engineer Mr. Yogesh Kolte. Before submitting the tender on 06.08.2024, 10.08.2024, 12.08.2024 and 13.08.2024, the correspondence was made with the Superintendent Engineer for site visit report. The petitioner did not receive any response. Ultimately on 13.08.2024, partner of the petitioner went to the spot of the construction and had his photograph which was being uploaded alongwith bid. In this backdrop, the petitioner approaches this Court.

5. Learned Counsel Mr. Amol Sawant for the petitioner submits that the correspondence made by the petitioner through e-mail and applications from 06.08.2024 to 13.08.2024 were deliberately not responded to eliminate the petitioner from competition. It is submitted that the respondents/authorities

acted highhandedly and malafidely in rejecting the bid on the count of site visit report. Learned Counsel submits that in affidavit-in-reply false contentions were raised by the respondent nos. 1 to 4 that the petitioner was called upon by the Deputy Engineer Mr. Yogesh Kolte on 07.08.2024 and 12.08.2024 orally and he was absent. It is submitted that in-consistent stand has been taken by the respondent no.5.

6. Learned Counsel for the petitioner submits that the pleadings of the rejoinder of the petitioner has not been refuted. There was no mobile call from the petitioner to Deputy Engineer Mr. Kolte and our attention is adverted to Call Detail Records (CDRs). It is further submitted that the rejection of the technical bid of the petitioner is arbitrary and discriminatory. Learned Counsel would further submit that another ground for the rejection is misconceived because already the authorities were having relevant data of the technical personnel. There was non-compliance of Government Circular dated 17.09.2019. No opportunity was given to the petitioner to remove the shortfall. Learned Counsel relies on the judgment of the Supreme Court in the matter of Banshidhar Constructions Pvt. Ltd. Vs. Bharat Coking Coal Limited and Others, Special Leave Petition (Civil) No.17383/2024.

7. Learned AGP Mr. A.S. Shinde representing respondent nos. 1 to 4 opposes the submission and the claim of the petitioner on the basis of affidavit-in-reply. He submits that the petitioner's bid was not responsive for not uploading Site Visit Report. Therefore

he is rightly disqualified. He submits that Government Circular dated 17.09.2019 can be invoked only when the documents or the information supplied by the bidder is incomplete or doubtful. He further submits that the CDR produced by the petitioner alongwith his rejoinder is disputed. The petitioner did not respond to the call of the Officers of the respondents for remaining present for site inspection. It is further submitted that there are disputed questions of facts and the decision making process cannot be faulted with. The work order has been issued to the respondent no.6 on 28.08.2024.

8. Respondent no.5 has opposed the petition by filing separate affidavit-in-reply. It is contended by him that petitioner was called on for site visit on 07.08.2024 and on 12.08.2024 orally but he remained absent. It is submitted that application dated 12.08.2024 was received on 12.10.2024. Application dated 13.08.2024 has not at all been received. Thus, these two applications are bogus and were never received. It is further submitted that petitioner contacted him on 06.08.2024 and he was called upon to remain present on 07.08.2024. Again he was called upon to remain present on 12.08.2024. But on both the occasions, the petitioner was absent.

9. Learned Counsel Mr. V.B. Patil appearing for respondent no.6 adopts the submissions of learned AGP and respondent no.5. Additionally it is contended that he was issued with work order and he has commenced the work. He has made investments. He tenders on record additional affidavit to bring on

record the subsequent developments.

10. We have considered the rival submissions of the parties.

11. The grievance of the petitioner is that as to whether any fault can be attributable to him for not uploading site inspection report when repeatedly the attempts were made to secure presence of Deputy Engineer. Both shortfalls were curable but no opportunity was extended. In view of the questions raised it is necessary to quote the mandatory condition no.3.4.13 which is as follows :

“3.4.13 It is Mandatory for Bidders to obtain site visit report from Concern Deputy Engineer of P.W.(Tribal) Sub Division Office before submission of Bid.”

12. Before submission of the bids, it was expected from Deputy Engineer Mr. Yogesh Kolte to issue Site Visit Report. Our attention is adverted to the attempts made by the petitioner. On 06.08.2024, mail was sent to the concerned authority soliciting site visit report. Simultaneously letter was addressed to respondent no.3/Superintendent Engineer on the same date for issuing site visit report. There is acknowledgment on the letter dated 06.08.2024 of the respondent no.5/Deputy Engineer. The subsequent correspondence made by the petitioner on 12.08.2024 and 13.08.2024 through the letters is doubtful. The acknowledgment on the letter dated 12.08.2024 bears date as 12.10.2024. There is no stamp of the authority acknowledging the letter. The further letter dated 13.08.2024 does not bear any acknowledgment. Hence these two letters are unreliable.

13. The first letter dated 06.08.2024 appears to have been received by the respondent no.5. In paragraph no.6 of his affidavit, it is stated that the petitioner had contacted him on 06.08.2024 and petitioner was called on 07.08.2024 for the site visit, but he remained absent. In pursuance of letter dated 06.08.2024, respondent no.5 asked the petitioner to remain present on 07.08.2024.

14. The petitioner forwarded e-mails from 06.08.2024 to 13.08.2024 soliciting site visit report. It is not made clear from record that as to whether the respondent no.5 was designated officer for the purpose of site inspection report and apprised of e-mails by his Superior Officers and any such instructions were issued to him for attending the petitioner. There was no attempt on the part of the petitioner to contact respondent no.5 through his mobile number which was made available to the bidders. He also did not address any correspondence directly to the respondent no.5 who was the local authority. He was called upon to remain present on 07.08.2024 and thereafter on 12.08.2024, but he remained absent. There is no reason to doubt this defence of the respondents. We do not approve the submissions of the petitioner that there is inconsistency in paragraph no.4 and 6 of the affidavit-in-reply of the respondent no.5.

15. The CDR which is produced alongwith rejoinder by the petitioner is supported by statement on oath and cannot be doubted. It is not the case of the respondent no.5 that petitioner called from his registered call phone no. 9921344343 to

respondent no.5 on his 9421535030. The CDR placed on record would be of little help to the petitioner. The possibility of the respondent no.4 contacting the petitioner on some other self-phone number cannot be ruled out. We wonder as to how there could not be any outgoing call at all by Mr. Tukaram Dahite, Proprietor of the petitioner from 04.08.2024 to 10.08.2024.

16. The pre-bid meeting was conducted on 09.08.2024. The petitioner had opportunity to remain present and raise objection of non-cooperation of the respondent no.5. The minutes of the pre-bid meeting are available on record. Those minutes do not spell out the grievance of the petitioner. We find that there is no convincing material on record to support the theory of the petitioner that respondent no.5 deliberately did not make himself available and issue site inspection report. The petitioner was remained present for site visit on Village Lavki Taluka Shirpur, Dhule for erstwhile tender work on 16.08.2024 and the site visit report was generated. There is no reason for the respondent no.5 to be biased against the petitioner. The submission of the petitioner cannot be approved.

17. Another ground for disqualification is not submitting technical key person proforma. It was mandatory for bidders to submit the said proforma. The Government Circular dated 17.09.2019 makes provision for curable defects. If the petitioner has not uploaded the necessary documents to qualify the bid, no duty is cast upon the tendering authority to call upon the petitioner for the requisite documents. We are not inclined to

accept the submissions of the petitioner that there is arbitrariness in the decision making process.

18. For time being, even if the submissions of the petitioner are accepted that there were procedural lapses on the part of the tendering authority in respect of both the grounds of disqualification still the ratio laid down by the Supreme Court in the matter of **M/s N.G. Projects Limited Vs. Vinod Kumar Jain and Others**, 2022 AIR(SC) 1531 does not permit us to cause any interference. We are not the appellate authority and we cannot rectify the mistake of the tendering authority. The respondents have adverted our attention to paragraph no.23 of M/s N.G. Project which is as follows :

In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

19. The Honourable Supreme Court has cautioned the Writ Court that even if the Court finds that there is total arbitrariness or that the tender has been granted in malafide manner still the Court should refrain from interfering with the grant of tender but

instead relegate the parties to seek damages for wrongful exclusion rather than to injunct the execution of the contract. If this is the legal position then we are bound to relegate the petitioner to seek the damages.

20. We cannot be oblivious of the fact that respondent no.6 has been awarded contract and work has commenced and he has invested money, energy and man power. The present is not a fit case to cause any indulgence. It would be against public interest.

21. The petitioner is relying on the judgment in the matter of Banshidhar Constructions Pvt. Ltd. (supra). He has referred to paragraph nos. 22 to 27, 29 and 30. We are not reiterating those paragraphs, because various earlier judgments are referred. In the matter before the Supreme Court, it was infrastructural and also mega project. It was found by the Supreme Court that the decision of disqualifying the appellant was grossly arbitrary, legal discriminatory or violating the article of the Constitution of India. In paragraph no.20, following observations are made :

“20. Thus, the said action of the Respondent BCCL in rejecting the Technical bid of the Appellant on absolutely extraneous ground and accepting the Technical bid of the Respondent no.8 though submitted in utter noncompliance of the mandatory requirement of Clause 10 of the NIT, and subsequently calling upon the Respondent no.8 to furnish the shortfall of documents after the opening of technical bids of the Bidders, was totally arbitrary and illegal.”

22. The case in hand is distinguishable from the case which was before the Supreme Court. Therefore the ratio does not apply to the present case.

23. For the reasons stated above, we do not find merit in the petition. Writ petition is dismissed. Rule is discharged.

[SHAILESH P. BRAHME]
JUDGE

[S. G. MEHARE]
JUDGE

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