



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11597 OF 2023

Bhupendra Govindrao Jadhav,
Age 48 yrs., Occ. Agri. & Business,
R/o Maindane, Tq. Sakri,
Dist. Dhule.

... Petitioner

... **Versus** ...

- 1 The State of Maharashtra,
Through its Secretary,
Department of Planning,
Mantralaya, Mumbai – 32.
- 2 The Secretary,
Public Works Department,
Mantralaya, Mumbai.
- 3 Chief Engineer,
Public Works Region, Nashik,
Dist. Nashik.
- 4 Superintendent Engineer,
Public Works Circle,
Dhule.
- 5 Executive Engineer,
Public Works (North) Division,
Dhule.

... Respondents

...

Mr. S.S. Deshmukh, Advocate for petitioner
Mr. V.M. Jaware, AGP for respondent Nos.1 to 5

...

**CORAM : SMT. VIBHA KANKANWADI &
S.G. CHAPALGAONKAR, JJ.**

RESERVED ON : 08th FEBRUARY, 2024

PRONOUNCED ON : 28th FEBRUARY, 2024

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Rule. Rule made returnable forthwith. Heard learned Advocates for the parties finally, by consent.

2 Present petition has been filed for following reliefs :

“A) By issuance of the writ of mandamus or writ or orders in the like nature it be directed to the respondent authorities to decide the objection raised by the petitioner on 04.09.2023 viz-a-vis dated 07.09.2023 forthwith; and for that purpose issue necessary directions.

B) By issuance of writ of mandamus or writ or order in the like nature it be directed to the respondent authorities to act in conformity with the State Scheduled Rates in relation to hilly areas thereby increase of 10% of Basic Rates is made applicable in relation to E-tender works bearing No.17, 18 and 22 (Exh.D) forthwith; and for that purpose issue necessary directions.”

3 The facts giving rise to the petition are that the petitioner has

participated in relation to the Short Period E-tender notice bearing E-tender notice Nos.17, 18 and 22. However, the authorities have made departure with the mandate of Rate Analysis in the process of determining the Approximate value of works without undertaking the rate analysis and addition of 10% on basic rate as is contemplated in State Scheduled Rates (SSR). The petitioner states that the Government Resolution dated 18.01.2010 has issued various directions in respect of Hilly Area Development Programme in identified Hilly Areas. It includes the Tahsil Shirpur and Sakri of revenue district Dhule. The entire cluster of these two tahsils are included in hilly areas as per the said resolution. SSR was made applicable to the areas such as Corporate areas, Municipal Council areas, Sugarcane Factory areas, notified areas, hilly areas as indicated. After notification under those categories an increase by 10% in rates upon rate analysis was the consequence. The instructions indicated that it is for the Superintending Engineer to decide the necessary increase in the percentage in rate corresponding to the specific area. The instructions have been issued by corrigendum dated 30.11.2019, wherein it is stated that the approved instructions by the competent authorities are to be implemented. Objection was raised by the petitioner. The respondent authority put forth the clarification as notice inviting tender. The corrigendum dated 30.11.2019 obligates to comply with the instructions approved by the authorities, if

required may be by postponing the tender process. The petitioner had raised the said objection in pre-tender conference on 04.09.2023 and on 07.09.2023 a comprehensive objection was raised. The tendering authority, however, is adamant in not to interpret the condition of SSR as a tender condition, but reiterates the departure by them from the Government Resolution. Hence, the petition.

4 Initially affidavit-in-reply was filed by one Sandeep Bhausaheb Pandagale, working as Executive Engineer, Public Works (North) Division, Dhule, Dist. Dhule, wherein objection has been raised in respect of *locus standi* of the petitioner to file the petition. Tender notice Nos.17, 18 and 22 pertaining to Tq. Shirpur, Dist. Dhule, which is having 60% of area as tribal and 40% as non tribal. In order to consider the area to be hilly, the geographical slope of terrain shall be more than 30%. When the geographical slope is between 17% to 30%, then such area shall be treated as partially hilly area. Geographical slope of the taluka Shirpur is totally plain. Estimate of works in tribal areas is already having 10% additional rates as per the norms specified in SSR, however, the petitioner wants 10% additional rate to be considered while preparing the estimate in non tribal but notified hilly areas as per Government Resolution dated 18.01.2010 issued by the Planning Department. The said resolution on which the petitioner intends to

rely is issued by Planning Department and applicable to Hilly Area Development Programme. It is said that the works under construction was undertaken and rates quoted by L-1 have been given. Offers have been received from the bidders and it would show that all the bidders for those works non tribal but notified hilly area is less than the estimated rates. They have not found any ambiguity.

5 By way of re-joinder the petitioner has reiterated the same contentions.

6 Further, it appears that on the directions issued by this Court, Sandeep Bhausahab Pandagale, the Executive Engineer, Public Works (North) Division, Dhule, has filed reply and he explains as to how the hilly area came to be notified. He also submits that if we do not consider the 10% additional amount, the Public Works Department would be executed 10 % more work which ultimately benefits the common public at large. The said policy is being continued since last 13 years.

7 It will not be out of place to mention here that after the matter was heard on 04.01.2024, need was felt to have additional affidavit on behalf of respondent Nos.2 to 5, which was directed to be by a responsible higher authority. Thereupon, Prashant Shantirappa Auti, Chief Engineer, Public

Works Region, Nashik has filed additional affidavit, who tries to interpret the Government Resolution dated 25.07.2022, in his own way.

8 Heard learned Advocate Mr. S.S. Deshmukh for the petitioner and learned AGP Mr. V.M. Jaware for respondent Nos.1 to 5. In order to cut short, it can be said that they have argued in support of their respective contentions.

9 It is not in dispute that Planning Department of Government of Maharashtra issued various resolutions which appear to be in respect of development in hilly areas, directions or guidelines for the works to be done under the said programme. Though the Government Resolutions appear to be from 03.10.1988, since E-tender was issued in 2023, it is the said Government Resolution within that period. The background or preamble of said Government Resolution specifically mentions that it is the policy of the State Government to have development of all the areas in the State. It was highlighted that the needs of the hill development is different and a committee was appointed by the Government to set out guidelines. As per said Government Resolution, village Sakri and Shirpur from Dhule district are included in hilly area. Further, as regards State Scheduled Rates are concerned, important issues have been jot down, wherein for the rates in

Corporation areas, Municipal Council areas, notified tribal areas including hilly inaccessible areas an increase of percentage over the normal schedule of rates prescribed for the year 2022-23 were given and for hilly area the percentage in rates is quoted as 10%. The Note states Issue rates of Schedule 'A' materials for the notified area shall be increased by respective percentage. The above percentage shall be applied on the cost of those after deducting the cost of specified materials, if issued on Schedule 'A'. The notified hilly /inaccessible areas should be considered as per Government Resolution, Planning Department and applicable Government Resolutions of Planning Department vide Superintending Engineer, Public Works Department specifies the Sugar factory areas/Coal mine areas/notified tribal under their circles. However, this SSR states that for all districts excluding Gadchiroli the works which are pertaining to inside premises of Central Jail, Mental Hospital, Yerwada Printing Press as well as in Corporation area. an increase of percentage over normal scheduled rates shall be considered both simultaneously e.g. if Central Jail is situated in Corporation area an increase of 5% for corporation area and 15% of jail premises, total 20% shall be considered. Thus, the directions issued were specific; yet, it appears that while publishing the E-tender the Public Works Department, Division Dhule has not considered the Government Resolution. Now, respondent No.4 is coming with a case that they relied on the Circular issued by the Public Works

Department on 25.07.2022, wherein as regards the rates are concerned, the Executive Engineer was the proper person to take call as to what should be the rates. Guidelines were given to him to assess the same. The respondents also rely on the Maharashtra Public Works Manual. However, it is hard to believe that the Government Resolution issued by Planning Department will not be binding on the Public Works Department. The definition for hilly area or the criteria to consider a place/town, city in the particular category would differ from Department to Department. The said resolution dated 18.01.2010 does not say that it is not applicable to the other Departments, nor the respondents have placed on record any such resolution stating that the resolutions of other Departments are not binding on the Public Works Department. In fact, Planning Department is the main department which will take into consideration the various schemes/plan for the same and then that would be implemented through the respective departments. Here, we are mainly concerned with the directions issued under the Hilly Area Development Programme. When the objection is said to have been taken by the petitioner in pre-tender conference on 04.09.2023 and then comprehensive objection was taken in writing on 07.09.2023, respondent No.4 appears to have not taken care to answer the said objection. In the general notes for SSR, in fact, it is said that the Government Resolution of the Planning Department should be considered by the Superintending Engineers,

Public Works Department and this has been so accepted in paragraph No.5 of the affidavit filed by Mr. Sandeep Bhausaheb Pandagale, the Executive Engineer. Further explanation would then cannot be considered. He accepts that though the entire Shirpur taluka is notified hilly area, but then says that it is non tribal but notified hilly area having less than 17% geographical gradient. He puts forth that if we read the said provision in true context, then additional 10% rates are not required to be considered. Here, he cannot further supplement and take a different stand against the Government Resolution.

10 Even after giving an opportunity that some higher official should file the affidavit, who is empowered to take a policy decision, the affidavit of Chief Engineer has been filed. Government Circular of the Public Works Department will not override the Government Resolution. The supplement to the Government Resolution cannot be by way of a circular. The Government Resolution is the outcome of the decision taken by the Government i.e. by the Ministry or Ministers as such. But then circular giving power or jurisdiction to Superintending Engineer will not then supersede the decisions those have been taken at the highest level in the Government and, therefore, respondent authorities should act in conformity with the State Scheduled Rates in relation to hilly areas thereby increase of 10% of the basic rates should be

made applicable.

11 Here, it appears that the things have not moved further. Tender opening process for the works under consideration was carried out and by this time the work would have been allotted by issuing orders. It will not be then appropriate to undo the entire process. It will not be now possible to make those rates applicable in relation to E-tender works bearing Nos.17, 18 and 22. Another fact also to be noted is that many works were floated through the said E-tender process and out of those the petitioner had participated only in three works. It would be injustice to the other participants/bidders if respondent authorities are directed to re-float the tender. Petitioner will be having alternative efficacious remedy, in view of the observations by Hon'ble Supreme Court in **M/s. N.G. Projects Limited vs. M/s. Vinod Kumar Jain and others** [2022 LiveLaw (SC) 302], which was then relied by this Court in **M/s. Pharmaveda (I) Private Limited vs. Chief Executive Officer, Zilla Parishad, Nandurbar** in Writ Petition No.14938 of 2023 decided by this Court on 18.01.2024. In **M/s. N.G. Projects Limited** (supra) it has been held that -

“23. 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 mala fide 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.”

Therefore, we allow the writ petition partly. Hence, following order.

ORDER

1 The writ petition stands partly allowed.

2 The respondent authorities are directed to act in conformity with the State Scheduled Rates in relation to hilly areas in view of Government

Resolution dated 18.01.2010, henceforth.

3 Rest of the prayers stand rejected.

4 No order as to costs.

5 Rule is made absolute in the above terms.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

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