



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11687 OF 2023

Rishu Kichu Industries Pvt. Ltd.
Through it's Director
Sanjay Manikrao Thorat,
Age 53 yrs., Occ. Director,
R/o Sai Shankar, Parvati Nagar,
Parali (V), Tq. Parali (V), Dist. Beed.

... Petitioner

... Versus ...

- 1 The State of Maharashtra
Through Secretary,
Maharashtra State Power Generation
Department, Mantralaya, Mumbai – 32.
- 2 The Director Operation,
Maharashtra State Power Generation
Company Ltd., Prakash Gad, Mumbai.
- 3 The Chief Engineer,
Maharashtra State Power Generation
Company Ltd., Parali (V),
Tq. Parali (V), Dist. Beed.
- 4 Superintending Engineer Operation Unit-VIII,
Thermal Power Station, Parali (V),
Tq. Parali (V), Dist. Beed.
- 5 Superchem Techniques Office
Through it's Proprietor
TPS Road, Shivaji Nagar,
Parali (V), Tq. Parali (V), Dist. Beed.

... Respondents

...

Mr. P.R. Katneshwarkar, Advocate for petitioner

Mr. S.K. Shirse, AGP for respondent No.1

Mr. R.A. Tambe, Advocate for respondent Nos.2 to 4

Mr. S.C. Sardeshpande and Mr. V.V. Raje, Advocates for respondent No.5

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

RESERVED ON : 11th MARCH, 2024

PRONOUNCED ON : 03rd APRIL, 2024

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

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

2 The petitioner company, which has participated in tender No.3000036444 two-year annual work of contract for Operational Assistance in Plant Operation of Pre-Treatment Plant, D.M. Plant and Chemical Transportation, Handling and Charging of Chemical and Miscellaneous Work W.T. Plant Unit Hash tag 08, 250 M.W., TPS, Parali-V along with day-today activities of Colony/Domestic Water Supply for TPS Colony from PTP 210 M.W. Parali-V, challenges its disqualification by respondent No.3 and prays for

direction to consider it as successful and opening of its financial bid.

3 Heard learned Advocate Mr. P.R. Katneshwarkar for the petitioner, learned AGP Mr. S.K. Shirse for respondent No.1, learned Advocate Mr. R.A. Tambe for respondent Nos.2 to 4 and learned Advocates Mr. S.C. Sardeshpande and Mr. V.P. Raje for respondent No.5.

4 Learned Advocate Mr. P.R. Katneshwarkar appearing for the petitioner has taken us through the tender document i.e. the terms and conditions, the papers which have been produced by the petitioner and then submits that the petitioner has supplied all the necessary documents as required under the tender. He also submits that since respondent No.3 was not opening the technical bid, it had approached this Court by filing Writ Petition No.9685 of 2023, wherein by order dated 09.08.2023 respondent No.3 was directed to consider the representation dated 06.07.2023 by the petitioner in accordance with the policies applicable. Thereafter by communication dated 31.08.2023 it was informed through E-mail to the petitioner that the scrutiny is undergoing. Thereafter by further E-mail dated 12.09.2023 it was informed that the technical bid of the petitioner has been rejected, however, no reason was assigned. Petitioner could not come to know as to on what count his technical bid has been rejected. By

communication of the same date 12.09.2023 the petitioner had asked respondent No.3 to inform the petitioner the reasons for disqualification, however, there is no response. Hence, the writ petition has been filed.

5 The learned Advocate Mr. PR. Katneshwarkar further submits that in view of the reply that has been filed on behalf of respondent Nos.2 to 4 the petitioner has come to know that the reason for rejection is condition No.1.2 i.e. "Experience of having successfully completed similar works during last nine years ending last day of month previous to the one, in which applications are invited". According to respondent Nos.2 to 4, the petitioner has not completed the work of Chandrapur bearing No.4500119440 within the period of cut-off date as per qualifying conditions. However, by way of rejoinder the petitioner has explained the said situation. The performance certificate in respect of the said Chandrapur tender is issued on 08.06.2023. Respondent Nos.2 to 4 had extended the date for short fall of documents up to 15.06.2023 and, therefore, the petitioner ought to have been considered on the basis of certificate dated 08.06.2023. When the deviation submission date is extended, then the benefits ought to have been given. In tender No.72617 issued by the Department earlier the same situation had arisen and at that time when the time was extended and thereafter the performance certificate was submitted by the petitioner, he was held to be qualified.

Therefore, the ground of rejection appears to be with mala fide intention. He also submits that it appears that present tender is now given to respondent No.5. The petitioner has been wrongly disqualified and the benefit of the extended period has not been given. Further, there is no transparency in the execution of the entire tender work. The petition deserves to be allowed as it requires judicial interference.

6 Per contra, the learned Advocate Mr. R.A. Tambe appearing for respondent Nos.2 to 4 relied on the affidavit-in-reply of Dinesh Govindrao Kadam, Additional Executive Chemist, M.S.P.G.C.L., Parali T.P.S. and his further additional affidavit and submits that the tender notice was published on 27.03.2023 and the documents were to be submitted before 16.04.2023. The petitioner applied for the tender on the basis that he fits in qualifying condition of “three similar completed works each costing not less than the amount equal to 40% of the estimated cost of the one year”. However, upon the scrutiny of condition of 1.2 i.e. “Experience of having successfully completed similar works during last nine years ending last day of month previous to the one of the applications were invited” the petitioner failed to qualify it. In fact, after the tender documents are submitted by the bidders, the office of respondent No.3 collects necessary information and verifies all the facts and documents, that is, those documents are cross checked. It was

then realized that the petitioner has not completed the work of Chandrapur tender within the period of cut-off date as per qualifying conditions. The petitioner has not completed three similar works during the last nine years ending last day of month previous to the application. Though the work is not completed at Chandrapur; yet, the petitioner claimed that it is completed. As per the condition clause No.24.1, the office of respondent No.3 does not bind itself to assign any reasons for the rejection of any tender or part of tender and it is also not bound to disclose any analysis on the report to tender. The petitioner cannot blame respondent No.3. It is further submitted that in fact three extensions which were given to the tender were on the request of probable bidder like petitioner and four other bidders. When lastly no extension was sought the tender was opened on 26.05.2023 and then scrutiny was undertaken. After the scrutiny deviation period was given by the office of respondent No.3 of fulfilling short fall of documents from 31.05.2023 to 04.06.2023, even for that also there was an extension from 08.06.2023 to 15.06.2023 in view of the request made by the bidders and other two bidders. On 15.06.2023 deviation bids were open and kept for scrutiny and then the petitioner was found to be ineligible. The petitioner unnecessarily making communication one after the another, when it is stated in the tender condition itself that no unnecessary communication be made. Even the performance certificate dated 08.06.2023 produced by the

petitioner from Chandrapur tender would show that the work is still incomplete. Therefore, the equity does not lie in favour of the petitioner to ask for declaring him as successful in technical bid and allowing him to participate in the financial bid. After the financial bid was open the work has been assigned to respondent No.5.

7 Learned Advocate for respondent No.5 relies on the affidavit-in-reply of respondent No.5. It is submitted that respondent No.5 has placed on record all the necessary documents within the stipulated and extended period. It is denied that respondent No.5 is in collusion with respondent Nos.2 to 4 and with *mala fide* intention the technical bid of the petition has been rejected. Rejection E-mail dated 12.09.2023 given by respondent No.3 without giving reasons, is no ground for the petitioner to invoke writ jurisdiction of this Court. Learned Advocate for the petitioner relies on the decision in **M/s. N.G. Projects Limited vs. M/s. Vinod Kumar Jain and others** [2022 LiveLaw (SC) 302] and prays for dismissal of the writ petition.

8 As aforesaid, the petition is on two counts, firstly to challenge the petitioner's own disqualification and secondly, to challenge the qualification of respondent No.5. We would like to rely on the observations from the recent decision by the Hon'ble Supreme Court in **M/s. N.G. Projects Limited** (Supra), in which the earlier decisions have been taken note of and it

has been observed 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.”

9 We are aware of the decision in **Jagdish Mandal Vs. State of Orissa**, [(2007) 14 SCC 517], wherein Hon’ble Supreme Court has held that -

“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.”

10 Thus, taking into consideration the well settled law on this point, we have limited scope. We are to see whether the petitioner has demonstrated firstly that the petitioner was eligible, as it had complied with all the tender requirements, then only we can go to the second aspect i.e. challenge by the petitioner to the decision of respondent No.3 to qualify respondent No.5 in the financial bid, otherwise the course is open to the petitioner as aforesaid in **M/s. N.G. Projects Limited** (Supra) and **Jagdish Mandal** (Supra).

11 At the outset, we do not agree with the statements and submissions on the part of respondent Nos.2 to 4 that reasons are not required to be communicated. The clause No.24.1 of the tender document is against the principles of natural justice, wherein at least the reason for

rejection should be communicated to the person who has right to know the same. Respondent Nos.2 to 4 are the authorities of the “State” under the constitutional provisions and, therefore, it is expected that there should be transparency in the entire affairs of the working of respondent No.3 and especially when it floats a tender. We, therefore, hold that respondent No.3 is duty bound to inform the reasons for rejection in cases of tender which are floated through it. The reasons for rejection to be informed to the bidders, who participate in those tenders floated by it. This should be then followed in the subsequent tenders. We agree to the submissions on behalf of respondent Nos.2 to 5 that not informing the reason for rejection to the petitioner *per se* will not give any advantage to the petitioner unless the *mala fides* are clearly demonstrated. In other words, non informing those reasons for rejecting of the tender documents of the petitioner will not vitiate the entire tender process.

12 Now, turning towards consideration of the disqualification of the petitioner the reason which has now emerged is that petitioner has not completed three similar works during the last nine years ending last day of month previous to the one in which applications were invited. It is especially in respect of tender work of Chandrapur tender. The petitioner says that the performance certificate dated 08.06.2023 issued by the Chief Engineer,

C.S.T.P.S., Chandrapur was produced. The said document is produced before this Court also. However, it is to be noted that the said certificate says that the work order was placed to the petitioner of which details have been given and then it is said that the work order executed as above and the overall performance of the contractor is generally found to be satisfactory. There is no remark that the work is completed. The details would also show that the said work is not complete as there is difference between the amount of the work order (with and/or without taxes) with the actual value of work done with and without taxes. Therefore, the petitioner, who has tried to fit in the qualifying condition of “three similar completed works each costing not less than the amount equal to the 40% of the estimated cost of the one year” failed to establish that he has completed the three similar works during the last nine years as aforesaid. Therefore, we find that the disqualification of the technical bid of the petitioner was justified.

13 When we have arrived at the conclusion that the disqualification of petitioner was justified, it is not necessary for us to consider the other challenge by the petitioner. Unsuccessful bidder cannot be allowed to challenge the qualification of other bidders. Under the said circumstance, the petition fails. No case is made out for the exercise of constitutional powers by this Court and, therefore, the writ petition deserves to be dismissed.

14 At the time of issuing notice by order dated 20.09.2023 this
Court has observed that work order pursuant to the impugned tender shall be
subject to the final outcome of the petition. Now, we are deciding the
petition on its merits. Under the said circumstances, no necessity to interfere
with the work order issued in favour of respondent No.5.

15 The Writ Petition stands dismissed.

16 Rule stands discharged.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

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