

Shabnoor

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10529 OF 2024

M/s. Rajaram Construction,

A Proprietorship concern having its office at
E 85, Shree Mahavir Apartment CHS Ltd,
Ratan Nagar, Opp. St. Xavier School,
Dahisar East, Mumbai,
Maharashtra – 400068

Through its authorised signatory
MR. Nanjiram Chaudhari

... Petitioner

V/s.

1. State of Maharashtra

Through the Secretary of Urban
Development Department, Mantralaya,
Mumbai – 32

2. Nashik Municipal Corporation

Rajiv Gandhi Bhavan,
Sharanpur Road, District Nashik
Through Commissioner and Administrator

3. The City Engineer,

Public Works Department,
Nashik Municipal Corporation
Rajiv Gandhi Bhavan,
Sharanpur Road, Nashik

4. M/s. Kadlag Construction Pvt. Ltd.

Nashik.

5. Dr. Ashok Karanjikar

Commissioner Cum Administrator
Nashik Municipal Corporation
Nashik

... Respondents

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Mr. Yashodeep Deshmukh a/w Ms. Vaidehi Pradeep i/by
Vinod Sangvikar for petitioner.

Mr. P. P. Kakade, Government Pleader with Mr. O. A.
Chandurkar, Additional Government Pleader and Mrs. G.
R. Raghuwanshi, AGP for respondent No.1.

Ms. Chaitrali Deshmukh for respondent Nos.2, 3 and 5.

Mr. Sachin Gite for respondent No.4.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ &
AMIT BORKAR, J.**

RESERVED ON SEPTEMBER 10, 2024

PRONOUNCED ON : SEPTEMBER 19, 2024

JUDGMENT: (Per Amit Borkar, J.)

1. The present petition challenges the legality and propriety of the communication dated 14th March 2024, regarding the technical bid summary, which demanded details of bid capacity and technical manpower, as well as the communication dated 18th June 2024, rejecting the petitioner's bid and declaring the petitioner disqualified.

2. The petitioner, a proprietorship firm engaged in civil construction works for the past 15 years, has brought this petition. Respondents Nos. 2 and 3 issued e-Tender Notice No. 40 of 2001 (2023-2024), inviting bids for two works, which were published online from 15th February 2024 to 29th February 2024. The details of Notice No. 40 of 2001 (2023-2024) were made available on the respondents' website for the construction of a cement concrete road from Lekha Nagar

to Chhatrapati Shivaji Chowk in P. No. 24, New Nashik Division.

3. The estimated cost of the work was Rs. 5,47,68,859/-, with a completion period of 18 calendar months, including monsoons. As per the tender conditions, the date for opening the tender was fixed for 1st March 2024 at 3:00 p.m. Clause 12 of the tender outlined the necessary work experience qualifications as follows: "**12) Eligibility of Tenderer:-**

12.1. The tenderer must have eligibility in term of work experience as follows:-

A) Experience of having successfully completed similar works during last five years ending last day of month previous to the one in which applications are invited should be either of the following:

1. Three similar completed works costing not less than the amount equal to 40% of estimated cost each

OR

2. Two similar completed works costing not less than the amount equal to 50% of estimated cost each

OR

3. One similar completed works costing not less than the amount equal to 80% of estimated cost each

4. "Similar works means construction of concrete road and & allied work."

4. Clause 15-A required the average turnover of the parent company over the last three years to be 30% of the estimated cost, as certified by a Chartered Accountant. Clause 15-B provided a formula for calculating bid capacity as follows:

"15.A Required average turnover of parent company in last three years shall be 30% of cost put to tender of the work mentioned. Certificate issued by C.A. only will be considered.

B) Bid Capacity:-

Bidder who meet the minimum qualification criteria will be qualified only if their available bid capacity is more than the total bid value. The available bid capacity will be calculated as under.

Assessed available bid capacity= $(A \times N \times 1.5) - B$

Where:

A = Maximum Value of Annual Turnover executed in any one year during the last Five Years (updated to 2022-23 price level)

N + Number of Years prescribed for completion of the work for which bids are invited for 12(Twelve) Months for calculation of Bid Capacity) i.e. For 12 months N+1, for 6 months N + 0.5

B = Value of existing commitments and on-going works to be completed during the next 12 (Twelve) months, In support of this information should be submitted in Format No. III

Note :-Since all the data is pertaining to the contractors own performance, the contractors are requested to provide its bidding capacity for this work by furnishing the calculations and supporting documents duly certified by Chartered Accountant to prove its contents along with the application for issue of tender form."

5. The petitioner contends that the Government Resolution dated 7th December 2023 applies to the tender in question. On 14th March 2024, respondent No.3 informed the petitioner of failure to submit bid capacity and manpower details by 29th February 2024 and granted five days for compliance. The

petitioner asserts that the bid capacity certificate, certified by a Chartered Accountant, and the technical manpower certificate had already been uploaded prior to 29th December 2024. The petitioner argues that these certificates can only be issued prospectively, and it is impossible to obtain them with backdated signatures. Therefore, the requirement for compliance was impossible to fulfill. The petitioner requested that respondent No.3 be refrain from disqualifying him for the non-submission of minor documents and grant him an opportunity to comply with the bid capacity and technical manpower requirements as per the Government Resolution dated 7th December 2023.

6. On 19th March 2024, the petitioner issued a legal notice to respondents Nos.2 and 3 through his advocate, requesting that they should refrain themselves from disqualifying the petitioner without affording him a hearing and for minor technicalities. Respondent No.3 responded on 6th May 2024, reiterating the requirement to submit documents issued prior to 29th February 2024. Consequently, the petitioner issued a notice under Section 80 of the Code of Civil Procedure, 1908, on 7th June 2024, and filed Regular Civil Suit No.475 of 2024 before the Joint Civil Judge, Senior Division, Nashik, seeking a declaration of eligibility for consideration in the tender and an order to prevent the opening of the bids. On 18th July 2024, respondent No.3 informed the petitioner that his bid had been rejected during the technical evaluation at a meeting held on 16th July 2024.

7. On 19th July 2024, respondent No.3 conducted a meeting of the standing committee for the approval of the tender allotment in favour of respondent No.4, issuing a work order on 22nd July 2024, subject to specified conditions. The petitioner filed the present writ petition on 22nd July 2024. On 29th July 2024, this Court issued notice to the respondents and permitted the petitioner to amend the petition to challenge the work order issued in favour of respondent No. 5. On 21st August 2024, this Court ordered that the impugned work order issued in favor of respondent No.4 would be subject to further orders. On 9th September 2024, respondents Nos.2 and 3 filed their reply, contending that the last date for submitting tenders was 29th February 2024, and that the proof of bid capacity and manpower had to be submitted by that date. As the petitioner failed to submit the certificate issued prior to 29th February 2024, the submission was non-compliant with tender conditions. Additionally, they noted that the petitioner had filed Regular Civil Suit No.475 of 2024, which he had unconditionally withdrawn. Therefore, they prayed for the dismissal of the writ petition.

8. Respondent No.4 filed a reply asserting that, as the lowest bidder, it had been awarded the contract by respondents Nos.2 and 3. The respondent also provided photographs of the work in progress and prayed for the dismissal of the petition.

9. Mr. Deshmukh, learned counsel for the petitioner, argued that the petitioner's technical bid was deemed non-responsive due to non-compliance with the Government Resolution dated

7th December 2023. However, he contended that this was not a sufficient basis for the committee's decision to disqualify the petitioner's bid. He argued that there was no rational basis for requiring bid capacity and manpower certificates issued prior to 29th February 2024. He relied on the judgment in ***Ram and Shyam Company vs. State of Haryana and Others*, (1985) 3 SCC 267**, to support his contention.

10. In contrast, Ms. Chaitrali Deshmukh, learned counsel for respondents Nos.2, 3, and 5, opposed the petition, arguing that the petitioner was disqualified for failure to meet the mandatory tender requirements. She highlighted that the tender conditions required submission of documents by 29th February 2024, as stipulated in Clause 6. She also pointed out that the petitioner had unconditionally withdrawn Regular Civil Suit No.475 of 2024, thereby precluding him from pursuing the present writ petition. Additionally, respondent No. 4 had already commenced the work and incurred substantial expenses. Relying on the judgments in ***Silppi Constructions Contractors vs. Union of India* (2020) 16 SCC 489** and ***Sai Agencies, Jalna vs. State of Maharashtra* (2022) 3 Mh. L. J.**, she submitted that the petitioner was not entitled to any relief.

11. Mr. Gite, learned counsel for respondent No.4, submitted that the petitioner had not disputed respondent No. 4's eligibility. He argued that respondent No.4 had completed substantial work in furtherance of the work order dated 22nd July 2024, and in the absence of any public interest, interference with the tender process was unwarranted.

12. In *M/s Michigan Rubber India Limited vs. State of Karnataka & Ors.*, (2012) 8 SCC 216, the Supreme Court held that judicial review in tender matters is limited to two issues: (i) whether the process or decision is tainted by malice or irrationality, and (ii) whether public interest is affected. If both questions are answered in the negative, judicial interference is unwarranted.

13. In *N.G. Projects Ltd. v. Vinod Kumar Jain*, (2022) 6 SCC 127, the Supreme Court observed that the construction of a road constitutes an infrastructure project, and given the intent that such projects should not be subjected to injunctions, the High Court could have exercised prudence in refraining from staying the construction of such infrastructure projects. This principle must be borne in mind by the writ courts when exercising jurisdiction under Article 226 of the Constitution of India. Paragraphs 21 to 23 in *N.G. Projects* (supra) read as follows:

"21. Since the construction of a road is an infrastructure project, and considering the legislative intent that such projects should not be stayed, the High Court would have been well-advised to withhold its hand in staying the construction of the infrastructure project. Such provision should also be kept in mind by the writ court while exercising jurisdiction under Article 226 of the Constitution of India.

22. The determination of whether a bidder satisfies the tender conditions lies primarily with the authority inviting the bids. Such an authority is aware of the expectations from the bidders and can evaluate the consequences of non-performance. In the tender in

question, there were 15 bidders, and the bids of 13 were found to be non-responsive, i.e., they did not satisfy the tender conditions. The writ petitioner was one of these 13. It is not the case of the writ petitioner that the actions of the Technical Evaluation Committee were influenced by extraneous considerations or were mala fide. Thus, based on the same set of facts, the Technical Evaluation Committee could have reasonably arrived at different conclusions in good faith. Merely because the view of the Technical Evaluation Committee is not to the petitioner's liking does not warrant interference in the grant of the contract to the successful bidder.

23. In light of the aforementioned judgments of this Court, writ courts should exercise restraint in substituting their decisions for those of the employer regarding the acceptance of a bid. The Court lacks the expertise to scrutinize the terms and conditions of contemporary economic activities of the State, and this limitation must be considered. Courts should especially refrain from interfering in contracts involving technical issues that require specific expertise. Rather than attempting to scrutinize decisions with a magnifying glass, the Court's role should be to assess whether the decision-making process has complied with the procedures stipulated in the tender conditions. If the Court finds that there is gross arbitrariness or that the tender has been granted mala fide, it should not interfere by issuing an injunction but rather direct the aggrieved party to seek damages for wrongful exclusion, as injunctioning the contract would result in additional costs to the State and be contrary to public interest. Therefore, the State and its citizens suffer twice: first by incurring escalated costs, and second by being deprived of the intended infrastructure for which modern governments strive."

14. The above legal exposition by the Supreme Court serves as a cautionary guideline for exercising judicial review under Article 226 of the Constitution of India when assessing tender conditions. The Court has emphasized that the determination of whether a bidder meets the tender conditions rests with the authority inviting bids, which has the requisite expertise to evaluate the impact of non-compliance. Furthermore, the Court has advised against imposing its judgment on the decision of the Evaluating Authority concerning the acceptance of a bid, as courts lack the specialized expertise needed to assess the terms and conditions that govern the economic activities of the State. Courts should refrain from intervening unless there is clear evidence of arbitrariness or mala fide conduct in awarding the tender. Injunctions that interfere with the tender process result in additional costs to the State and are contrary to public interest.

15. If the facts and submissions made by the respective parties in the present writ petition are examined in light of the legal principles laid down by the Supreme Court, the key issue to be determined is whether the decision-making process of the Tender Evaluation Authority was so unreasonable and manifestly arbitrary that it warrants interference by this Court.

16. In the affidavit-in-reply filed by respondent Nos.2 and 3, it is stated that the petitioner had instituted Regular Civil Suit No. 475 of 2024, challenging his disqualification in the present tender process. During the pendency of the said suit, the petitioner filed the present writ petition on 23rd July 2024,

after the issuance of the work order. However, the petitioner subsequently withdrew the suit unconditionally, and therefore, the present writ petition is not maintainable.

17. We are now tasked with considering the legal implications of withdrawing a civil suit without obtaining permission from the civil court to file or proceed with a writ petition. Although the provisions of the Code of Civil Procedure, 1908, do not directly apply to writ proceedings, this Court generally follows the procedural framework outlined therein, to the extent applicable, while disposing of writ petitions. Order 23 Rule 1 of the Code of Civil Procedure, 1908, deals with the withdrawal of suits and the consequences thereof. After the amendment to the Code, the term "withdrawing" a suit was replaced with the term "abandon." Sub-rule (1) applies where no permission is granted to withdraw the suit with liberty to file a fresh suit. Sub-rule (3) allows the civil court to grant permission for a fresh suit under specified conditions. Therefore, if a plaintiff abandons or withdraws a suit without the Court's permission under sub-rule (3), they cannot institute another suit on the same subject-matter. The rationale behind this rule is that once a plaintiff has invoked a legal remedy by filing a suit, they should not be permitted to initiate another suit on the same cause of action after abandoning the earlier one. This prevents abuse of the court process by filing repetitive suits on the same cause of action without valid reasons.

18. The issue before us is whether the petitioner can file or continue with a fresh writ petition in this Court under Article

226 of the Constitution of India after withdrawing an earlier suit without obtaining the Court's permission. The principle that prompts us to apply this rule to writ petitions is to prevent the abuse of process and ensure that litigants are not vexed with repetitive petitions based on the same cause of action. We are therefore of the considered opinion that, based on public policy, the principle underlying Order 23 Rule 1 of the Code of Civil Procedure, 1908, should apply to writ petitions as well.

19. In the present case, the cause of action pleaded by the petitioner in the suit was the issuance of a letter by respondent Nos.2 and 3 declaring the petitioner's bid unresponsive due to the submission of an incorrect certificate regarding bid capacity and manpower. In the suit, the petitioner sought a declaration that he be declared eligible to participate in tender No.40 and also prayed for an injunction restraining respondent Nos.2 and 3 from opening the bids in the absence of the petitioner's participation. We are therefore satisfied that the subject matter and cause of action of the earlier suit, which was unconditionally withdrawn, are identical to those in the present writ petition. Consequently, we hold that, based on principles analogous to those under Order 23 Rule 1, the petitioner is not entitled to continue with the present writ petition seeking similar relief regarding his eligibility to participate in the tender process, which is the subject matter of this writ petition.

20. It is undisputed that the last date for submission of bids was 29th February 2024. It is also undisputed that the

certificate submitted by the petitioner to establish financial and manpower criteria was insufficient to meet the minimum qualification requirements. All other bidders submitted certificates issued prior to 29th February 2024, and the petitioner was well aware that he needed to submit a certificate issued by the Public Works Department at the time of filing the bid. It is not the case of the writ petitioner that the actions of the Technical Evaluation Committee were influenced by any extraneous considerations or were mala fide. Consequently, different conclusion could reasonably have arrived at in good faith by the Technical Evaluation Committee based on the same set of facts. Merely because the view of the Technical Evaluation Committee was not to the petitioner's liking, does not justify interference in the grant of the contract to the successful bidder, particularly in light of the fact that the successful bidder has already commenced work and made progress.

21. Furthermore, as held in the case of *N.G. Projects (supra)*, the subject-matter of the tender being the construction of a road, which is an infrastructure project, this Court should refrain from interfering in this writ petition in absence of gross arbitrariness or mala fide, as any interference would lead to additional costs to the State and would be contrary to public interest.

22. Therefore, no interference in the extraordinary writ jurisdiction under Article 226 is warranted.

23. Accordingly, the writ petition stands dismissed. No order as to costs.

(AMIT BORKAR, J.)

(CHIEF JUSTICE)