



WEB COPY



W.P.Nos.46 & 49 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	:	23.02.2024
PRONOUNCED ON	:	18.03.2024

CORAM:
THE HONOURABLE MRS.JUSTICE J.NISHA BANU

W.P.Nos.46 & 49 of 2024
and W.M.P.Nos.31, 32, 34, 35, 2311 & 2316 of 2024

Subaya Constructions Co.Ltd.,
Rep. By its Director Mrs.S.Meenakshi,
No.21, Soundarapandian Salai,
Ashok Nagar, Chennai 600 083

... Petitioner in both W.P.'s

Vs.

Salem City Municipal Corporation,
Represented by its Superintending Engineer,
Fort Main Road, Shevapet,
Salem 636 001

..Respondent in both W.P.'s

COMMON PRAYER: Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the entire records of the impugned order dated 29.12.2023 bearing Nos.CNT/SEW/NCB/AMRUT 2.0 & World Bank/ E.R.Nos.770 & 771/2023-24 passed by the respondent and quash the same and direct the respondent to consider the bid of the petitioner by opening their financial bid, evaluate and finalize the same as per the tender conditions and pass such other suitable orders.



W.P.Nos.46 & 49 of 2024

In both writ petitions:

For Petitioner : Mr.Muralikumaran,
Senior Counsel,
Assisted by
Mr.P.J.Sri Ganesh & Mrs.Ami Kataria

For Respondents : Mr.P.S.Raman,
Additional Advocate General
Assisted by M/s.N.Devi,
Standing Counsel

COMMON ORDER

Since the issue involved in both the writ petitions are one and the same, they are disposed of by this common order.

2.The Writ Petitions are filed challenging the disqualification of the Petitioner's tenders, before opening of the Price Bids.

3. The Impugned Orders were passed by the Respondent Corporation disqualifying the Petitioner on the grounds that;

- a. The Petitioner has wrongly declared the value of the remaining work;
- b. The work experience certificates provided by the Petitioner with regard to providing of UGSS to Karaikudi and Arakonam



W.P.Nos.46 & 49 of 2024

municipality cannot be considered as they are under litigation.

c. The records of the Petitioner establish poor performance in not completing the earlier contracts and there is inordinate delay in completion of the said contracts.

4. The learned Senior Counsel Mr.Muralikumaran, appearing for the petitioner contended that the action of the respondent is a motivated and a deliberate one, done to disqualify the Petitioner quoting unsustainable reasons. The respondent Corporation relied on the communication of the Tiruchirappalli City Corporation dated 06.12.2023 which states that the work details given by the petitioner is not correct and therefore the genuineness is rejected. It further states that the petitioner has been given extension of time thrice and it is unbecoming of a contractor. Similar two communications were also given by the Commissioner, Vellore City Municipal Corporation both dated 13.12.2023. Yet another communication which the respondent Corporation relies is that of the CMWSSB dated 20.12.2023, to hold that the petitioner has given wrong information and there is an inordinate delay in execution of contracts and therefore, by virtue of Clause 4.8 of the Invitation for Bids, the petitioner stands disqualified.



W.P.Nos.46 & 49 of 2024

5. The Impugned Orders further hold that the work experience certificates regarding the work executed for Karaikudi Municipality and Arrakonam Municipality cannot be taken into consideration as they are covered under litigation. To exclude the said work certificates the respondent Corporation again invokes Clause 4.8 of the Invitation for Bids.

6. Learned Senior Counsel appearing for the petitioner would submit that there is no misrepresentation by the petitioner. The remaining value of work quoted by the petitioner with regard to the ongoing contracts in Trichy and Vellore Municipalities and CMWSSB is based on their communications dated 27.10.2023, 17.07.2023 and 20.11.2023 respectively and the worksheets prepared based on the same would establish the information given by the petitioner, is correct. As, on the date of submission of the bid, the period for completion of the works were still available to the petitioner and the petitioner has not been black listed or has been held guilty of executing the contracts belatedly in a manner known to law. The contracts entered into between the petitioner and its employers, envisages an arbitral mechanism. Till the date of submission of the bid there is no communication of any nature from Trichy Municipality or Vellore Municipality holding that the petitioner is guilty of



W.P.Nos.46 & 49 of 2024

belated execution of the contracts awarded to it.

WEB COPY

7. The words “genuineness rejected” found similarly in the letters of both the Municipalities would clearly establish that the letters dated 06.12.2023 of the Tiruchirapalli Corporation and two letters dated 13.12.2023 of the Vellore Corporation were created with ulterior motives. The words “unbecoming of the contractor” found similarly, in the communications of both the Corporations would show that the letters were created purposefully to disqualify the petitioner under some ruse.

8. The learned Senior Counsel for the petitioner also pointed out the letter dated 18.12.2023 given by the same Commissioner of Tiruchirapalli Corporation given to the petitioner for successful completion of work up to 05.12.2023 and contended that, no such adverse observations were found in the subsequent letter. Moreover the said letters were obtained at the back of the petitioner without affording an opportunity to the petitioner to dispute its contents. The said letters were obtained after the deadline fixed by the respondent for the submission of the bid which is 16.11.2023 and therefore at any rate, the same cannot be relied on by the respondent, that too, without an



W.P.Nos.46 & 49 of 2024

opportunity being given to the petitioner to disprove the contents.

WEB COPY

9. When the extensions were given by the Trichy Corporation, Vellore Corporation and CMWSSB, no adverse remarks were made against the petitioner. The said letters of extensions are of the month of October, September and November, 2023. But however all of a sudden, after the submission of the bid by the petitioner to the respondent Corporation, at the back of the petitioner communications were sent with adverse remarks, which were not found in the communications granting extension of time for completion of the work. Therefore, the same is violative of the principles of natural justice. The requisitions made by the petitioner for extension of the said works would clearly establish that the extensions sought for were not due to the fault of petitioner but due to various external factors and the fault of the employer. And in many cases the sites were not handed over on time and necessary permissions from other authorities were not obtained.

10. The learned Senior Counsel for the petitioner further contends that, even if the wrong calculations given by the Trichy and Vellore Corporations and CMWSSB were adopted for calculating the bid capacity, still the petitioner



W.P.Nos.46 & 49 of 2024

fulfills the eligibility criteria.

WEB COPY

11. It is the further contention of the petitioner that the bid of the petitioner is less by approximately 40 crores compared to the other bids in each of the packages and therefore in order to purposefully award all the 4 packages to the very same person, the petitioner bid was rejected in a whimsical manner.

12. The learned Senior Counsel for the petitioner further contends that the litigation pending with regard to the work executed for Arakonam and Karaikudi Municipalities does not pertain to completion of work or quality of work but only relates to the non- payment of GST, which the said Corporations have not paid, in spite of the Order passed in the Writ Petition filed by the petitioner. The said order passed in the Writ Petition was confirmed by the Division Bench and the Hon'ble Supreme Court.

13. The petitioner relied on the following judgments to contend that the State must act validly for a discernible reason and not whimsically for any ulterior motive and that if the act of the state suffers from the vice of arbitrariness in tender matters the same is amenable to judicial review.



WEB COPY



W.P.Nos.46 & 49 of 2024

1. ***Kasturi Lal Lakshmi Reddy –vs- State of Jammu & Kashmir*** reported in (1980) 4 SCC 1;
2. ***Ram & Shyam Company –vs- State of Haryana & others*** reported in (1985) 3 SCC 267;
3. ***Tata Cellular –vs- Union of India*** reported in (1994) 6 SCC 651.
4. ***Reliance Energy Ltd. –vs- Maharashtra State Road Development Corporation Ltd.*** reported in (2007) 8 SCC 1
5. ***Radhakrishnan Industries –vs- State of Himachal Pradesh & others*** reported in (2021) 6 SCC 771
6. ***Macpower CNC Machines Ltd. –vs- Union of India.*** reported in 2020 SCC OnLine Del 1801
7. ***Siemens Healthcare Pvt. Ltd. –vs- Directorate General of Health Services*** reported in 2021 SCC OnLine Del 216
8. ***Montecarlo Ltd. & another –vs- National High Speed Rail Corporation Ltd*** reported in 2021 SCC OnLine Del 4112
9. ***JMC Projects Ltd. –vs- Union of India & others*** reported in 2022 SCC OnLine Del 3641
10. ***Kamala Agencies –vs- State of Odisha & another*** reported in 2022 SCC OnLine Ori 2451

14. The learned Advocate General appearing for the respondent Corporation vehemently argued placing reliance on various judgments to contend that the Writ Petition is not maintainable in matters of tender and the



W.P.Nos.46 & 49 of 2024

tendering authority is the best person to interpret the tender document. The

judgments relied by the learned Advocate General are as follows:

1. ***Agmatel India Pvt. Ltd. Vs Resoursys Telecom & Ors*** reported in (2022) 5 SCC 362 ;
2. ***Municipal Corporation, Ujjain & Another Vs BVG India Ltd. & Ors.*** reported in (2018) 5 SCC 462;
3. ***Master Marine Services Pvt. Ltd. Vs Metcalfe & Hodgkinson Pvt. Ltd. & Another*** reported in (2005) 6 SCC 138;
4. ***Silppi Constructions Contractors Vs Union of India & Ors.*** reported in (2020) 16 SCC 489 ;
5. ***Jagdish Mandal Vs State of Orissa & Ors.*** reported in (2007) 14 SCC 517;
6. ***Tata Motors Ltd VS Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & Ors*** reported in 2023 SCC Online SC 671 ;
7. ***M/s. Brandmidas hospitality & aviation Services Pvt. Ltd. Vs AAI & Another*** in W.P No. 35845 of 2019.
8. ***National High Speed Rail Corp. Ltd. Vs Monte Carlo Ltd. & Another*** reported in (2022) 6 SCC 401;
9. ***W.B. State Electricity Board Vs Patel Engineering Co. Ltd. & Others***



W.P.Nos.46 & 49 of 2024

reported in (2001) 2 SCC 451

10. *Tata Cellular Vs Union of India* reported in (1994) 6 SCC 651

15. The learned Advocate General further contends that it is not only the work that is completed qualifies the bidder but also the bid capacity (which takes into consideration of the existing work to be completed) is also an eligibility criteria. In the case of the petitioner, the information given by the petitioner are wrong as per the communication received from the corporations/ employers. The correctness of the said communication cannot be gone into by This Court in a Writ Petition, as the said communications are not under challenge before this Court.

16. The learned Advocate General further contends that the extensions given for completion of the work irrespective of the fact that the petitioner still has time to complete the work will not disentitle the respondent from holding that the extension of time given in other contracts to the petitioner amounts to delay in execution of work.



W.P.Nos.46 & 49 of 2024

17. However, the learned Advocate General fairly concedes that with regard to the issue of litigation cited in the Impugned Order for rejection of the petitioner's work experience, relates only to payment of GST and does not relate to completion of the contract or the quality of work.

18. If there is an infirmity in the decision making process, undoubtedly the same results in illegality and in such cases the judicial review cannot be denied even in contractual matters as the same is intended to prevent arbitrariness. If the action of the state is whimsical or for ulterior motives then the same is amenable to the powers of judicial review. The non-arbitrariness must characterize every governmental action.

19. In the judgment of the Hon'ble Supreme Court reported in **1985 3 SCC 257** in the case of **Ram & Shyam Company**, the Supreme Court held that:-

“12. ...On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the



W.P.Nos.46 & 49 of 2024

WEB COPY

welfare State may be able to expand its beneficent activities by the availability of larger funds.... ”

“18....The highest bidder whose bid was rejected on the ground that the bid did not represent the market price, was not given an opportunity to raise his own bid when privately a higher offer was received....”

20. In the present case, when the bid of the petitioner is contended to be lower by Rs.40 crores in each of the bid and when my predecessor while hearing the present Writ Petitions, taking note of the same has directed the opening of the bids of the petitioner and directed submission of the same in a sealed cover, the act of the respondent Corporation in not complying with the same while at the same time not challenging the said order supports the contention of the petitioner that the respondent is acting arbitrarily to confirm the tender is favour of a particular person, in the light of the submission of the petitioner that the very same person, who is shown as L1 in Package 3 and 4 after rejecting the petitioner's bid was also declared as L1 in Package 1 and 2.

21. The respondent did not give any valid reason for not opening of the bid of the petitioner and submitting the same as directed by this Court's Order dated 09.01.2024, wherein this Court taking note of the contention of the



W.P.Nos.46 & 49 of 2024

petitioner, that its price bid is far lower, passed the following Order;

WEB COPY

“...6. The petitioner submits that its price bid is far lower than the pricing that has been put forth in the bids that have been opened.

7. To test this proposition, the petitioner's price bid will be opened, the prices in the bids compared and a tabulation of the price comparison of the price bids be filed in a sealed cover before the Court on the date of next hearing.

8. Learned Advocate General has expressed apprehensions to the above directions on the ground that normally, the price bid will not be opened when the bidders technical bid is rejected.

9. I agree. This Court would also not normally direct the price bid to be opened if the bidder is found not to be technically qualified. However, in the case, the rejection of the technical bid contains various factual allegations that 7 are disputed by the petitioner and no notice was issued to the petitioner prior to the passing of the impugned order.”

22. The action of the respondent Corporation in refusing to comply with the direction given by this Court, not only establishes malafides but is also against the interest of the State exchequer. This action of the respondent



W.P.Nos.46 & 49 of 2024

Corporation vindicates the stand of the petitioner that the respondent Corporation is acting in a prejudicial manner to benefit a particular person.

23. With regard to the contention of the learned Advocate General that this Court cannot interfere with matters relating to auction, even if the said auction is violative of the principles of natural justice, arbitrary and whimsical cannot be accepted. If it is established that the action of the act of the state suffers from the vice of arbitrariness and is not supported by discernible reasons, the said action has to be interfered with in public interest.

24. The reasoning given in the Impugned Orders pertaining to the rejection of the bid on the issue of litigation having been accepted by the respondent, during the time of argument, as not relating to the execution of the previous contracts by the Petitioner, but only to the non-payment of GST, itself vitiates the impugned orders.

25. The contention of the petitioner, even if the figures given by the Trichy Corporation, Vellore Corporation and CMWSSB are adopted still the petitioner has got the bid capacity, being disputed either in the Counter or



W.P.Nos.46 & 49 of 2024

during the arguments, this Court is not willing to accept the contention, that the respondent has got absolute discretion to calculate the bid capacity and the same cannot be a subject the matter of judicial review, as such a contention on the admitted facts would be violative of the Wednesbury Principle.

26. The petitioner has also placed the working sheets in support of the data furnished by the petitioner, pertaining to the value of the remaining work, which was worked out on the basis of the communications dated, 27.10.2023 of the Trichy Corporation, 17.07.2023 of the Vellore Corporation and 20.11.2023 of CMWSSB therefore the information furnished relating to the value of the remaining work does not amount to false representation. Even otherwise a bare reading of the letters given by the Trichy Corporation and Vellore Corporation clearly indicates that it are motivated actions. In spite of the specific query raised by this Court on 02.01.2024 and 09.01.2024 as to whether any notice was given to the petitioner pertaining to the same, the only argument advanced by the learned Advocate General is that there is no necessity to give notice. This argument is against the principles of natural justice and if such a contention is accepted would also lead to undesirable consequence of approving arbitrariness. As held by the Division Bench of the



W.P.Nos.46 & 49 of 2024

Delhi High Court in *Macpower CNC Machines Ltd. –vs- Union of India*,

reported in **2020 SCC OnLine Del 1801**, the Tendering Authority cannot lightly and casually reject the bid as technically unqualified on unfounded and whimsical assumptions.

27. The respondent having concluded and recommended that the bids submitted by the petitioner are satisfactory and substantially responsive, has invented reasons to reject the petitioner's bid. The action of the respondent is also in violation of Rule 24 of the Tamil Nadu Transparency in Tender Rules, 2012, as once the bid is found to be substantially responsive the same cannot be rejected.

28. I am unable to accept the contention of the learned Advocate General that since there was extensions given to the petitioner in other contracts the same amounts to delayed execution of contracts and thereby the petitioner stands disqualified. In the extension letters as pointed out by the learned Senior Advocate for their petitioner, no adverse remarks are found. Therefore, in the absence of any determination in a manner known to law, that the delay in execution of the other contracts were due to the fault of the petitioner and the



W.P.Nos.46 & 49 of 2024

petitioner having not been blacklisted in connection with the earlier contracts, the respondent cannot merely take the extensions given by other Corporations as a reason to disqualify the petitioner.

29. Therefore, this Court has no hesitation to hold that the impugned orders are not only illegal but also perverse and therefore, they are quashed. The respondent is directed to open the price bid of the petitioner and proceed with the tender accordingly.

30. Accordingly, the Writ Petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.

18.03.2024

Index:Yes/No
Speaking/Non-speaking order
Internet: Yes / No

sts



WEB COPY



W.P.Nos.46 & 49 of 2024

J.NISHA BANU, J.,

sts

To:

The Superintending Engineer,
Salem City Municipal Corporation,
Fort Main Road,
Shevapet,
Salem 636 001

Common Order made in
W.P.Nos.46 & 49 of 2024

Dated:
18.03.2023