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W.P.No.11750 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.11750 of 2024
and
W.M.P.Nos.12828 & 12829 of 2024

M/s.Shirdi Sai Electricals Limited,
Being represented by Mr.Satish Kumar Inumpudi. ... Petitioner

Vs.

1. State of Tamil Nadu,
Represented by the Principal Secretary to Government
(Energy Department),
Secretariat, Fort St.George,
Chennai – 600 009.
2. Tamil Nadu Generation and Distribution Limited (TANGEDCO),
Being represented by is Managing Director.
3. Chief Engineer/IT & RAPDRP,
Tamil Nadu Generation & Distribution Corporation Ltd.,
6th Floor, Western Wing, NPKRR Maligai,
144, Anna Salai,
Chennai – 600 002. ... Respondents

Prayer: Writ Petition is filed under Article 226 of Constitution of India, for



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issuance of writ of Mandamus, directing the 1st respondent herein to decide on the appeal dated 21.03.2024 filed by the petitioner against order dated 11.03.2024 bearing No.CE/IT/SE/RDSS/EE3/AEE/RDSS/F.SM/D.249/24, passed by the 3rd respondent.

For Petitioner	: Mr.Sathish Parasaran, Senior Counsel for Mr.Rahul Balaji
For R1	: Mr.T.Venkatesh Kumar Special Government Pleader
For R2 & R3	: Mr.D.R.Arunkumar Standing Counsel for TANGEDCO

ORDER

The writ of mandamus has been instituted to direct the 1st respondent to consider the Appeal dated 21.03.2024, filed by the petitioner against the order dated 11.03.2024 passed by the 3rd respondent in accordance with Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998.

2. The facts in the present case are similar to those dealt in W.P.Nos.2911, 2912 etc., of 2024 that was disposed on 08.02.2024.

3. The petitioner had participated in a tender for appointment of



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Advanced Metering Infrastructure (AMI) Service Provider for Smart Prepaid Metering and Smart System Metering for the respondent on DBFOOT basis under Revamped Distribution Sector Scheme under Global Open Tender Two Part System, issued on 18.08.2023.

4. The tender itself had been the subject matter of litigation at the instance of the petitioner, since other prospective bidders challenged the reverse bidding process on which the tender was based. A learned Single Judge of this Court had accepted the submissions holding that reverse bidding process was not an appropriate methodology to be followed.

5. The order of the learned single Judge dated 04.01.2024 was carried in appeal by TANGEDCO and the First Bench of this Court, after hearing the parties, by order dated 31.01.2024, reversed the order of the learned Single Judge and allowed the appeals. As against the order of the Division Bench, Special Leave Petition is pending before the Hon'ble Supreme Court.

6. In the meantime, on 10.10.2023, the petitioner had participated in



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the bids and submitted the Bank Guarantee having validity of eight months.

As per Clause 12.3 of ITB, bid security produced along with the tender application shall be valid for 1 year inclusive of the bid validity period. Admittedly, the petitioner/company inadvertently submitted their bids on 10.10.2023 with bid securities valid for a period of 8 months, instead of 1 year as required under ITB 12.3.

7. The petitioner has immediately filed a representation on 14.11.2023 to the 3rd respondent requesting for an opportunity to be given to the consortium to correct the error and to extend the validity of the Bid Security/Bank Guarantee. The technical bid came to be rejected *vide* communication dated 16.12.2023 as non-responsive, as the accompanying bank guarantee was not in consonance with the tender conditions. Therefore, the petitioner had filed W.P.No.2524 of 2024 before this Court seeking a direction to the 3rd respondent to consider the representation dated 14.11.2023. This Court *vide* order dated 05.02.2024 directed the 3rd respondent to consider the representation of the petitioner in accordance with the law and all prevailing rules and regulations prior to the opening of the Financial bid.

8. As per the order of this Court dated 05.02.2024, the petitioner



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has submitted a representation dated 06.02.2024 along with a copy of the order passed in WP.No.2524 of 2024 and a copy of the extended bank guarantee. However, the 3rd respondent issued an order dated 11.03.2024, rejecting the extended bank guarantee.

9. Aggrieved by the order dated 11.03.2024, the petitioner preferred an appeal dated 21.03.2024 and also has filed the present writ petition seeking a mandamus directing the 1st respondent to dispose of the appeal dated 21.03.2024 filed by the petitioner as against the order dated 11.03.2024 as expeditiously as possible.

10. The first objection raised by Mr.D.R.Arunkumar, who appears for the 2nd and 3rd respondent is that the appeal itself is not maintainable. He points out that Section 11 of the Act provides for an appeal to be filed as against the order of the Tender Accepting Authority. The orders impugned in those statutory appeals are passed by the Tender Inviting Authority and do not constitute final orders.

11. In this regard, he would also draw attention to a judgment of the



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Hon'ble Supreme Court in the case of ***National High Speed Rail Corporation***

Limited v. Montec Arlo Limited and another (2022) 6 SCC 401, particularly

paragraphs 43.1 to 43.3, which is extracted hereunder:

“43.1 Thus, Clauses 28.1 and 42.5 reads as under:

“Option A – Section I. Instructions to bidders

Clause E. Evaluation and Comparison of bids

28. Confidentiality

“28.1. Information relating to the evaluation of bids and recommendation of contract award, shall not be disclosed to bidders or any other persons not officially concerned with such person until information on contract award is communicated to all bidders in accordance with ITB 42.

Clause F. Award of Contract

42. Notification of Award

42.5. After notification of award, unsuccessful bidders may request, in writing, to the employer a debriefing seeking explanations on the grounds on which their bids were not selected. The employer shall promptly respond, in writing, to any unsuccessful bidders who, after the notification of award in accordance with ITB 42.1, request a debriefing.”

43.2 The purpose of the aforesaid clauses appears to be to prevent a possible challenge to the multiple stage tender process midway. The High Court has construed that the said clauses would restrict the right of the bidders to seek judicial scrutiny of the tender process. However, the High Court does not seem to be wholly true. The High Court ought to have appreciated that first of all Clause 28 is



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a confidentiality clause. On general reading of the aforesaid two clauses, it can be said that it does not take away the right of the bidders to seek judicial scrutiny at all. Only the stage and time to know the reasons and thereafter if the unsuccessful bidder is aggrieved can seek the remedy, which is deferred till the final decision on award of contract is taken and communicated.

43.3 As observed hereinabove, the object and purpose would be no interference in the tender process in between till the final decision to award the contract is taken. By no stretch of imagination, it can be said that it takes away the right of the unsuccessful bidder to seek the judicial scrutiny of the tender process. After the final decision is taken to award the contract and the contract is awarded, thereafter it will always be open for the unsuccessful bidders to ask for the reasons to which the employer is required to furnish promptly and thereafter the unsuccessful bidder may avail the legal remedy, which may be available to it, may be claiming the damages.”

12. According to him, this judgment, would support aforesaid judgment. He states that the observations at paragraph 43.3 would result in a situation where there could be no interference in the various stages constituting tender process, till a final decision to award the contract is taken.

13. The order of rejection is dated 11.03.2024 and admittedly, had been passed without grant of an opportunity of personal hearing to the



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petitioner. Therefore, this Court is of the considered view that it was incumbent upon the respondents to have heard the petitioner prior to passing of order dated 11.03.2024.

14. Since that order itself is not the subject matter of challenge, nothing further need be said in regard to that, save observing that if, after hearing the petitioner and disposing representation dated 06.02.2024, the respondents choose to accept the same, order dated 11.03.2024 would, as a result lapse.

15. In fine, mandamus is issued to the respondents to hear the petitioner and dispose representation dated 06.02.2024, in accordance with tender documents and all relevant Rules and regulations, as expeditiously as possible. Let the financial bid not be opened till such time representation dated 06.02.2024 is disposed.

16. Accordingly, this Writ Petition stands **disposed of**. No costs. Connected miscellaneous petitions are closed.



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Index : Yes/No
Speaking Order : Yes/No
Neutral Citation : Yes/No
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To

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S.M.SUBRAMANIAM,J.

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