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Court : Chennai Madurai

Decided On : Nov-27-2015

Judge : K. Ravichandrabaabu

Appeal No. : Writ Petition (MD)No. 16107 of 2015 & Miscellaneous Petition(MD)Nos. 1 to 4 of 2015

Appellant : Haritha Constructions and Logistics

Respondent : The Block Development Officer (V pt) and Another

Judgement :

(Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the Tender No.Aa./2497/2015 dated 31.07.2015 on the file of the first respondent and quash the same and further quash the work order issued to the 2nd respondent dated 31.08.2015 consequently, direct the 1st respondent to conduct a fresh tender by calling for fresh notification.)

1. The petitioner challenges the tender notice, dated 31.07.2015, issued by the first respondent and the work order issued to the second respondent, dated 31.08.2015. Consequently, he seeks for a direction to the first respondent to conduct fresh tender by issuing fresh notification.

2. The case of the petitioner is as follows:-

The first respondent issued tender notice, dated 31.07.2015, inviting competitive bidders to participate in the tender process in respect of execution of six works at Radhapuram Union, Tirunelveli District. The notification stipulates e-tender process and the tender form and other tender documents were made available in the website on 25.08.2015 from 10.00 a.m to 05.00 p.m. Submission of tender documents through online was fixed at 4.00 p.m on 26.08.2015 and the date of opening of the tender was fixed on 26.08.2015 at 4.50 p.m. However, in the tender form, the deadline for submission of original document was fixed on 31.08.2015 at 3.00 p.m. If a competitive bidder fails to submit the original documents on or before 31.08.2015 at 03.00 p.m, his tender will be rejected as a non-responsible one. However, the first respondent extended the deadline for applying tender online by one day without making any mandatory publication. The petitioner applied for 5 works on 27.08.2015 through online. The EMD also was submitted on 27.08.2015 and the petitioner was prepared to submit other tender documents on 31.08.2015 other than those uploaded in the website. However, to the utter shock and surprise of the petitioner, he found from the website that the first respondent opened the bids on 29.08.2015 itself without the presence of the competing bidders and without any intimation and has rejected the petitioner's bid unilaterally. The petitioner is given to understand that all the six works were awarded to the second respondent, who has not even qualified to participate in the tender as he is not a class - I contractor. The second respondent has not executed any work in Radhapuram Union for the last 3 years, which itself is a disqualification. Therefore, the present writ petition is filed seeking the relief as stated supra.

3. The first respondent filed a counter affidavit, wherein it is stated as follows:-

The writ petitioner made his application for registration as a class -I contractor in the Panchayat Union only on 17.08.2015 and therefore, he has no experience for participating in the tender. On 31.07.2015, tenders were called for to execute six works and it was decided to have E "Tender, and the tender forms were made available in the website from 22.08.2015 onwards upto 26.08.2015. After

accepting all the terms and conditions, the writ petitioner submitted his tender and therefore, he cannot challenge the same subsequently. Due to the administrative reason and technical defect, which crept in the Internet, the processing could not be completed on 26.08.2015 and therefore, the date was extended upto 27.08.2015. The writ petitioner himself uploaded his bid only on 27.08.2015 utilizing the extended time. Though the petitioner submitted his bid for 5 works, he has not submitted all the documents as specified in the notification. He has submitted his original EMD, original affidavit regarding correctness of information furnished with bid document. The writ petitioner has furnished only the bid submission confirmation along with the demand draft and the other documents specified in clause 9.1 were not furnished by him. Even in the bid submission confirmation submitted by the petitioner, it is clearly stated that the bid opening date and time is 27.08.2015 at 04.30 p.m. The petitioner has not submitted the documents as per the tender schedule. The bid was opened on 29.08.2015 and as the petitioner was not qualified, his bid was rejected. The deadline referred to by the petitioner as 31.08.2015 is only an error while preparing the invitation for tender. The second respondent, who was declared as successful bidder, satisfied the qualification specified for participating in the tender. The second respondent is a Class -1 contractor of District Rural Development Agencies (DRDA), Tirunelveli. Therefore, he is eligible to participate in the tender. The second respondent also furnished experience certificate. As per Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998, the petitioner has to file an appeal before the Government within 10 days from the date of the order, if he has any grievance. Therefore, the petitioner has got an effective alternative remedy. The petitioner, having obtained the tender documents and submitted the same, is estopped from making the present claim. There is no favour or arbitrariness involved in opening the tender on 29.08.2015. After scrutinizing and analysing the bid submitted by the second respondent, work order was issued to him on 31.08.2015 and pursuant to the work order, an agreement was executed by the second respondent on 03.09.2015 and he has commenced the work on 04.09.2015.

4. The second respondent filed a counter affidavit, wherein it is stated as follows:-

The second respondent registered himself as a Contractor during 2010 and he is a class-I contractor. As per circular No.104657/98T.U.1, dated 08.11.2000, the second respondent is entitled to take work in any union of the District. The tender, in the present case, is by two covers system, that is, technical bid and price bid. In the technical bid, the contractors have to submit the details of machineries and other technical qualifications. Only when the technical bid is accepted, those contractors will be permitted to participate in the price bid. Having agreed to the terms and conditions, the petitioner submitted his tender on 27.08.2015 and on evaluation of his technical bid, the same was rejected as not qualified. Whereas, the first respondent, after considering the qualification of the second respondent, issued work order to him. Since the work is in relation to laying of road and bridge, the second respondent commenced the work on 04.09.2015, after entering into an agreement on 03.09.2015.

5. The learned counsel appearing for the petitioner submitted as follows:

There is a confusion with regard to the date of opening of the tender since the notification says it as 26.08.2015, whereas, tender document says it as 31.08.2015. Therefore, opening of the tender well before 31.08.2015 and rejecting the petitioner's technical bid without waiting for him to furnish the necessary documents, in the meantime, has vitiated the entire proceedings. The second respondent is not a class "I" contractor to execute the work in the Radhapuram Union and even before executing the agreement and furnishing the security deposit, the work order has been issued to the second respondent hurriedly, which shows that the first respondent has not followed the procedure contemplated under the tender notification. The circular relied on by the second respondent with regard to his eligibility as class -1 contractor applies only to NABAD work and not for the works covered under the present tender notification. As the first respondent has committed serious lapses, alternative remedy of filing an appeal before the Government does not arise.

6. In support of the above submission, the learned counsel relied on an unreported decision of the Honourable Division Bench of this Court made in W.A.Nos.712 and 713 of 2015 dated 07.09.2015, the decision reported in 2009-5 L.W. 858

(Consolidated Construction Consortium Ltd., vs. Tidel Park Coimbatore Ltd., and another) and the decision reported in (2007)¹⁴ SCC 517 (Jagdish Mandal vs. State of Orissa).

7. Per contra, the learned Government Advocate appearing for the first respondent contended that in all the places, the tender document clearly refers the date of opening of the tender as 26.08.2015 except in one place as 31.08.2015, which is nothing but an inadvertent/typographical mistake, which cannot be taken advantage by the petitioner, as no prejudice is caused to him, in view of the fact that he himself has submitted the tender on 27.08.2015 itself. Therefore, he contended that when the petitioner submitted the tender on 27.08.2015, he should have produced all the relevant and required documents along with tender form for considering his technical bid. In this case, the petitioner admittedly failed to produce working condition certificate and therefore, his technical bid was rejected and consequently, he was not eligible to be considered for price bid. Thus, he contended that the petitioner having participated in the tender process cannot questioned the notification.

8. Mr.M.Vallinayagam, learned senior counsel appearing for the second respondent submitted that the typographical error at one place with regard to the date of the opening of the tender cannot vitiate the entire proceedings, that too, at the instance of the writ petitioner who has admittedly participated in the tender and submitted the same on 27.08.2015 itself along with the second respondent. He further submitted that the petitioner is not having 5 years past experience as class “ I contractor as he himself registered his name only on 11.05.2015 as class “ I contractor. He further submitted that the second respondent is a class “ I contractor and fully qualified to participate in the tender process and that the petitioner is not materially affected as he himself is not qualified. Thus, he submitted that the petitioner cannot maintain the present writ petition. In support of the above said contention, the learned senior counsel relied on a decision reported in (2005)⁶ SCC 138 (Master marine Services (P) Ltd., vs. Metcalfe and Hodgkinson (P) Ltd., and another)

9. Heard both sides.

10. The first respondent issued tender notification inviting tender for execution of 6 works from the qualified contractors under two covers tender system, namely, technical bid (pre-qualification) and price bid (item rate tender). No doubt, in the tender notification issued on 31.07.2015, the date of opening of the tender was referred as 26.08.2015 at 4.30 p.m. However, it is contended by the petitioner that in the technical bid (pre-qualification) and price bid notice form of contract, which is otherwise called the tender form, the last date for submission of the tender form at one place was referred to as 31.08.2015 before 03.00 p.m. This discrepancy is strongly relied on and projected by the writ petitioner to contend that the entire proceedings are vitiated as the petitioner was reasonably prevented from submitting the relevant documents on or before 31.08.2015. Therefore, this Court has to see as to whether the petitioner was prevented from submitting his tender within the time stipulated.

11. Admittedly, in this case, the date of receipt of opening of tender originally fixed as 26.08.2015 was subsequently postponed to 27.08.2015 through notice dated 21.08.2015 issued by the Block Development Officer. It is seen that both the petitioner as well as the second respondent have submitted their respective tender only on 27.08.2015. There is no dispute to the said fact. It is also not in dispute that at the time of submitting the tender, the petitioner has not furnished the working condition certificate. According to the petitioner, such certificate was issued to him only on 28.08.2015 and therefore, even before submitting the same before the last date, namely, 31.08.2015, the first respondent rejected the petitioner's technical bid. Hence, it is contended that the petitioner was prevented from submitting the documents before the cut of date. I am unable to appreciate the said contention for the simple reason that the petitioner having received the tender form and having accepted the terms and conditions of the tender, ought to have submitted the tender form along with the necessary documents within the time.

12. Even otherwise, I would like to point out at this juncture that the petitioner has misconstrued the date 31.08.2015, referred to in the technical bid (pre-qualification) and price bid notice at one place, as last date for receipt of tender form along with the relevant required documents. In fact it is not so. Perusal of the

said notice would make it clear that the tender, namely, technical bid and price bid should be sent through electronic tendering system containing EMD (scanned copy) along with the documents and only the Original Earnest Money Deposit in the prescribed form should be submitted to the Block Development Officer in person before 3.00 p.m on 31.08.2015. Therefore, it is evident that at the time of submitting the tender, all the tender documents along with the scanned copy of the EMD should be submitted. Further, it is made clear 'in the important note' shown at the bottom of the check list that bidder must submit all the required documents without fail and bids received without supporting documents are to be rejected at the initial stage itself. Further, under the caption special attention of the bidder ?, referred to in the tender documents, it is clearly indicated that approval or otherwise of the technical bid (pre-qualification) will be strictly based on the detailed evaluation done on the basis of the Documents/Records/Evidences/Certificates produced by the applicant in the technical bid. Class 9.1 of the tender documents clearly contemplates that scanned copies of the documents referred to therein, shall be uploaded in the website at the appropriate places. One of such documents is in receipt of availability of construction equipments, machineries and other tools and plants owned/brought on hire. Therefore, it is very clear that what is to be furnished or submitted in person is only original EMD in the prescribed form and not any other documents, which are, on the other hand, necessarily to be sent along with the tender form itself by way of uploading the scanned copies of the same.

13. In this case, admittedly, the petitioner has given the EMD in the prescribed form on 27.08.2015 itself. Equally, it is an admitted fact that he has not sent all the necessary documents along with the tender form by scanning the same. Admittedly, he has received one of such documents, namely, working condition certificate only on the very next day of submitting the tender form. Therefore, the petitioner cannot harp upon the date, namely, 31.08.2015 as the last date for submitting the tender form. On the other hand, even though the date was mentioned as 31.08.2015 at one place wrongly, the said date was only intended as a last date for receiving the original EMD in the prescribed form and not for receiving the very tender form itself along with the necessary and relevant supportive documents.

14. Therefore, such mistake crept in one place with regard to the last date of submission of the original EMD will not be taken advantage of by the petitioner, in view of the fact that he has not waited till 31.08.2015 to submit his tender form itself. On the other hand, admittedly he has chosen to submit the tender on 27.08.2015 itself along with original EMD and therefore, he is not prejudiced or affected in any way by the wrong quoting of date at one place as 31.08.2015 for receiving the original EMD. Therefore, I find that the petitioner having not furnished the necessary documents along with the tender form on 27.08.2015, cannot find fault with the authority, namely, the first respondent in rejecting his technical bid.

15. Even otherwise, while considering the qualification of the petitioner, it is seen that the petitioner has not stated anywhere in the affidavit about his experience or technical qualification for executing the said work. On the other hand, a perusal of the tender notification and tender form would show that the bidder should be a class " I contractor, currently registered in Radhapuram Union and should have been in the Civil Engineering Construction field at least for the past five years. The petitioner has not stated anywhere with regard to the said experience qualification. On the other hand, as rightly pointed out by the learned senior counsel appearing for the second respondent, the petitioner himself registered his name as a class " I contractor only on 11.05.2015 i.e., just three months before the participation of the present tender process. This fact is evident from the counter affidavit filed by the first respondent stating that the petitioner has made his application for registration as a class " I contractor in the panchayat union only on 17.08.2015 and paid the challan for his registration on 19.08.2015 and therefore, he has no experience for participating in the tender. This categorical statement made by the first respondent is not disputed by the petitioner by filing any rejoinder. Therefore, when the very basic qualification for participating in the tender process is lacking on the part of the petitioner, I do not find any justification for entertaining this writ petition at the instance of the petitioner, who is otherwise not even qualified to participate in the tender process. It is to be noted at this juncture that this writ is not a PIL and on the other hand it is filed by a person who participated in the tender process. Therefore, only when this court finds that such person is a qualified person and consequently affected by the tender process and thus, is having locus standi, it can exercise its discretionary power under Article 226 of the Constitution of India.

16. It is contended by the learned counsel appearing for the petitioner that only to favour the second respondent, the tender was opened much ahead of the last date. As I have already pointed out that in all the places the date of the opening of the tender was referred to as 26.08.2015 and only in one place, it was referred to as 31.08.2015, that too, for receiving the original EMD, I do not think that this contention of the petitioner is having any bona fide. Further, the typographical mistake committed has in no way affected the petitioner, as he himself has submitted the tender on 27.08.2015 itself along with original EMD. When the petitioner as well as the second respondent have admittedly submitted their tender on the very same day, I do not think that the petitioner is right in contending that opening of the tender before 31.08.2015 is either to favour the second respondent in anyway or to affect the petitioner's right in any manner.

17. The learned counsel appearing for the petitioner relied on an unreported decision made in W.A.Nos.712 and 7113 of 2015 dated 07.09.2015 in support of his contention that when there is an uncertainty in the notification, the same cannot be sustained. I do not think that the above decision helps the petitioner in any manner in view of the fact that the petitioner herein having chosen to submit his tender form on 27.08.2015 knowing fully well that such being the last date for submitting the tender, as per the notice issued by the Block Development Officer dated 21.08.2015, he cannot be permitted to contend that there is an uncertainty. Even otherwise, it is not the case of the petitioner that he was waiting to submit his tender form on 31.08.2015, considering the said date as the last day for submitting the tender form. On the other hand, as already stated supra, he has submitted tender on 27.08.2015 itself. However, he failed to submit the necessary documents.

18. The decision reported in 2009-5 L.W. 858 (cited supra) is relied on by the learned counsel appearing for the petitioner that the appeal provision provided under the statute will not bar this Court from entertaining the writ petition. I do not think that the above decision is also relevant at this stage, as this Court, based on the facts and circumstances, has found that the petitioner cannot maintain this writ petition as a disqualified person.

19. The decision of the Honourable Apex Court reported in (2007)14 SCC 517 (cited supra) is relied on by the learned counsel for the petitioner to contend that this Court can interfere with the tender matters when the process adopted by the authority is mala fide or intended to favour some one. There is no quarrel about the said proposition. However, to apply the said proposition, facts and circumstances of a particular case should warrant such application. In this case, the factual aspects discussed earlier would show that there is no material placed before this Court to come to the conclusion that the authorities have acted only to favour the second respondent. On the other hand, the petitioner having not furnished the relevant documents along with tender form and got himself disqualified in the technical bid, cannot contend that such rejection is only to favour the 2nd respondent.

20. The learned senior counsel appearing for the second respondent relied on the decision of the Honourable Apex Court reported in (2006)5 SCC 138 (cited supra) to contend that in the absence of any public interest involved interference in the tender matters is not called for, merely because, a legal point is made out. The Honourable Apex Court in the said decision at paragraph 15 has observed as follows:-

15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd., v. Cochin International Airport Ltd* (2000)2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere. ?

21. In this case, except the present writ petition, it appears that no other person has filed any other writ petition questioning the confirmation of the tender and work order issued in favour of the second respondent. Therefore, this Court is of the view that except the petitioner, no other participant, if any, is aggrieved. No doubt, the learned counsel appearing for the petitioner has also pointed out that the work order has been issued to the petitioner even before execution of the agreement and making the security deposit. But the conditions stipulated in the work order would show that the petitioner is having time to execute the agreement and make the fixed deposit in pursuant to the issuance of the work order. Therefore, such contention of the petitioner cannot be accepted to conclude that the entire proceedings are vitiated. Even otherwise, assuming that there are some procedural lapses after confirmation of bid, if the same are not going to the root of the matter, they cannot vitiate entire proceedings, unless it is specifically pleaded and established that by such conduct the interest of the public is in any way affected.

22. Considering all these facts and circumstances, I find that this Court, while exercising the discretionary jurisdiction under Article 226 of the Constitution of India, need not interfere with the impugned tender proceedings. Therefore, the writ petition fails and consequently, the same is dismissed. The interim order already granted is vacated. No costs. Consequently, connected miscellaneous petitions are closed.