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Court : Chennai Madurai

Decided On : Nov-08-2016

Judge : V. Bharathidasan

Appeal No. : Writ Petition (MD) No. 17326 of 2016 & W.M.P(MD)Nos. 12579 & 12580, 14510 & 14363 of 2016

Appellant : I. Kezhson

Respondent : The Director, Rural Development and Panchayat Raj, Government of Tamil Nadu, Chennai and Others

Judgement :

(Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to the Tender Notice No.DIPR/3550/Tender/2016, dated 31.08.2016 under the Rural Development and Panchayat Raj Department Tamil Nadu Rural Roads Improvement Scheme (TNRRIS) on the file of the 1st respondent and quash the same and consequently direct the first respondent to conduct a fresh tender by calling for fresh notification.)

1. Challenging the tender notification issued by the first respondent dated 31.08.2016 inviting e-Bids from the prospective bidders for repairing roads in 31

Districts in Tamil Nadu, the present writ petition has been filed.

2. W.M.P(MD)Nos.14510 and 14363 of 2016 have been filed by the successful bidders in the above said tender process to implead them as party respondents in the writ petition and since they are proper and necessary parties, the above petitions are allowed and they have impleaded as respondents 4 and 5.

3. Heard Mr.G.V.Vairam Santhosh, learned counsel appearing for the petitioner, Mr.B.Pugalendhi, learned Additional Advocate General and Mr.T.Lajapathi Roy, learned counsel appearing for the respondents 4 and 5.

4. The case of the petitioner, in brief, is as follows:-

The petitioner is a State level class-1 Contractor for the Public Works Department and Highways Department. According to the petitioner, on 31.08.2016, the first respondent issued tender notification under the Rural Development and Panchayat Raj Department Tamil Nadu Rural Roads Improvement Scheme (TNRRIS) calling for prospective bidders to participate in works for repairing roads in 31 districts in Tamil Nadu. The said notification was published in the daily newspapers namely, in Dinamani and Indian Express wherein it was stated that for further details, the prospective bidders should visit the web-site namely, www.tntenders.gov.in. It was further stated that the tender documents shall be downloaded from the above web-site at free of cost from 31.08.2016 to 15.09.2016. According to the petitioner, since it was stated that the proposed tender was to be conducted in online mode fixing 15.09.2016 at 3.00 p.m as the cut off date for online submission of the bid documents, the petitioner visited the said web-site several times after the date of notification for downloading the tender documents but he could not get any result and therefore, the petitioner has approached the second respondent to issue tender documents informing about the irregularities. It is further stated that the whole tender was divided into packages and in respect of Kanyakumari District, there were 19 packages and each package will cover a particular stretch of road. It is further stated that incidentally, the petitioner came to know that tender documents for some packages were uploaded on 03.09.2016, for some other packages on 06.09.2016 and for other packages only on 07.09.2016 restricting the availability of documents for a shorter period

which was done preventing many people from participating in the tender process and it is in violation of Rule 16 read with Rule 20 of the Tamil Nadu Tender Transparency Rules, 2000 (for brevity, 'the Rules'). It is further stated that when he downloaded the tender documents, he found that it is contained certain unreasonable restrictions in the form of qualifications which are seemed to be tailor made to suit the men of the respondents. It is further stated that as per the tender conditions, the prospective bidder should get certificate from the third respondent but no direction has been issued to him to issue the said certificate and the whole tender process adopted by the respondents is in violation of the Rules and Articles 14 and 21 of the Constitution of India and therefore, the impugned tender notification is liable to be set aside.

5. The second respondent has filed a counter affidavit inter alia contending that the petitioner has not approached this Court with clean hands as he has suppressed many factual details before filing this writ petition. It is stated that the petitioner has collected e-tender document and pre-qualification application from the web-site and applied for package No.19 in Kanyakumari District vide his application dated 12.09.2016 along with the certificate obtained from the Executive Engineer, Rural Development, DRDA, Collectorate, Nagercoil and he uploaded his application on 13.09.2016 at 1.38 a.m. It is further stated that the petitioner has filed a writ petition in W.P(MD)No.17334 of 2016 through his friend before the Division Bench of this Court as public interest litigation, for the very same relief. However, the said writ petition was dismissed as not pressed. It is further stated that even though the petitioner participated in a tender package for Kanyakumari District, he had challenged the notification issued to all 31 districts with an intention to stall the entire developmental works. It is further stated that the first respondent issued notification for upgradation-strengthening of rural roads into package wise under two cover system and he has also issued direction to the prospective bidders to download the bid documents package-wise from 31.08.2016 to 15.09.2016. So far as Kanyakumari District is concerned, the details of 25 packages were uploaded in www.tntenders.gov.in. It is further stated that the process of uploading tender documents relating to 25 packages were commenced from 31.08.2016 but the process has not been completed before the scheduled date due to the fact that the said web-site is the only server for all the Government

Departments controlled by the National Informatics Centre and the electronic bidding system would not allow the uploading of document after 6.55 p.m to 9.00 a.m and during holidays also. It is further stated that a pre-bid meeting was conducted on 02.09.2016 wherein 50 persons including the representative of the petitioner were participated. It is further stated that the petitioner by obtaining certificate from the Executive Engineer on 12.09.2016 uploaded his e-tender bid for package 19 at 01.38 hours. It is further stated that when no malice could be attributable in the present e-tender process applicable to the whole parts of Tamil Nadu, the petitioner having participated in the tender process, it is not open to him to file the present writ petition challenging the said notification. It is further stated that the terms of the notice inviting tender are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice, it cannot be interfered.

6. Learned counsel appearing for the petitioner vehemently contended that the notice inviting tender is not published as contemplated under Rule 5 of the Rules and the documents are not supplied as contemplated under Rule 16 of the Rules. Apart from that, the conditions imposed in the Notice Inviting Tender (NIT) is also tailor made to suit the people favourable to the respondents and there is no proper invitation of tenders by the tender inviting authority which is in violation of Section 7 of the Tamil Nadu Transparency in Tenders Act, 1998 (for brevity, 'the Act') and therefore, the tender notification issued by the first respondent, dated 31.08.2016 is liable to be quashed. In support of his submissions, learned counsel appearing for the petitioner relied upon the following decisions:-

(i) In M.Saravanan Vs.The District Manager made in W.P.No.2190 of 2010 dated 26.02.2010 and

(ii) In James Vs.The President / Deputy Registrar of Co-operative Societies made in W.P.No.7640 of 2016 dated 02.03.2016 .

7. Per contra, learned Additional Advocate General appearing for the respondents submitted that the notice inviting tender has been issued properly by the first respondent who is the competent authority under Section 7 of the Act. He would further contend that the entire bid documents have been uploaded in the web-site. That apart, the tender documents were made available in the office of the second

respondent, however, the petitioner did not obtain the documents from the office of the second respondent.

8. He would further contend that the petitioner after downloading the documents and obtaining necessary certificate from the Executive Engineer uploaded his document for package work-19 on 13.09.2016 itself. Now, the petitioner cannot challenge the notice inviting tender on the ground that there is a delay in furnishing tender documents.

9. It is further contended that so far as the condition prescribed in the tender documents that the prospective bidders should get a certificate from the Executive Engineer regarding the available equipment, it has been incorporated in order to ascertain the capacity of the tenderers to execute the work and hence, there is no mala fide intention to favour some one. It is further stated that even in the pre-bid meeting held on 02.09.2016, some difficulties were expressed in uploading the documents, the same was explained by the authorities wherein the representative of the petitioner has also participated in the meeting who did not raise any objection. Apart from that as per Rule 16(4) of the Rules, the petitioner could very well obtain a tender document which was available in the office of the second respondent on payment of costs. But the petitioner did not avail the same, now he cannot raise objection stating that the delay in uploading the tender documents in the web-site which is in violation of Rule 20 of the Rules. He would further contend that the above writ petition has been filed only with a view to stall the entire work through out Tamil Nadu. In support of his submissions, learned Additional Advocate General relied on the following decisions:-

(i) In Global Energy Ltd., Vs. Adani Exports Ltd., reported in (2005) 4 SCC 435;

(ii) In G. Jayakrishnan Vs. Tamil Nadu State Marketing Corporation Ltd., reported in AIR 2006 Madras 81;

(iii) In R. Kumar Vs. Chief Engineer, Mettur Thermal Power Station reported in (2008) 3 MLJ 173

(iv) In Mukkulathor Sanga Abiviruthi Elementary School Vs. The Tahsildar, Kariapatti Taluk reported in 2011 Writ L.R.76

(v) In Michigan Rubber (India) Limited VS.State of Karnataka reported in (2012) 8 SCC 216

(vi) In Raja and Co., Vs.The Superintending Engineer made in W.P.No.35349 of 2013, dated 12.08.2014 and

(vii) In C.S.Traders Vs.The Managing Director, T.N.Civil Supplies Corporation reported in 2016(2) CWC 538 .

10. Learned counsel appearing for the respondents 4 and 5 would contend that they are the successful bidders in some of the tenders and work orders have also been issued to them and they have completed almost 80% of the work as per the work order issued to them. He would rely upon the decision of this Court in Keshson Vs.The Superintending Engineer, made in W.P.No.18883 of 2014, dated 15.12.2015, for the proposition that as 80% of the work has been completed, the only remedy open to the petitioner is to claim damages by establishing his case before the appropriate forum.

11. I have considered the submission made by the learned counsel appearing for the parties and perused the entire materials available on record.

12. So far as the contention of the learned counsel appearing for the petitioner that the tender documents were not supplied to the tenderers and only a minimum time has been granted for submission of the documents which are in violation of Rules 16 and 20 of the Rules is concerned, it is admitted case of the petitioner that the tender documents were available in the web-site from 02.09.2016 to 07.09.2016. The last date for submission of the tender documents was 15.09.2016 and after the tender documents made available in the web-site, the petitioner downloaded the tender documents and obtained necessary certificate from the Executive Engineer and uploaded his document for package work-19 on 13.09.2016 at 01.38 a.m itself. Hence, the petitioner cannot said to have suffered any prejudice even if Rule 20 of the said Rules was not strictly followed.

13. In a similar circumstance, a Division Bench of this Court in G.Jayakrishnan's case (supra) has held as follows:-

4. It may be mentioned that writ jurisdiction is discretionary jurisdiction vide Chandra Singh Vs.State of Rajasthan (2003) 6 JT (SC) 20: (AIR 2003 SC 2889) para 42. Hence, even if there is violation of law, this Court is not bound to issue a writ vide R.Nanjappa Vs. District Collector, Coimbatore (2005 Writ L.R.47).To obtain a writ, the petitioner must not only show violation of law, he must also show that he has suffered some prejudice on account of such violation of law. This is because writ jurisdiction is equity jurisdiction. To obtain a writ, the petitioner must satisfy the Court on both points, viz., (1) violation of law by the respondent and (2) on account of such violation, the petitioner has suffered some prejudice. If the petitioner only shows violation of law but fails to satisfy the Court that he has suffered some prejudice, no writ will be issued in his favour.

5. In this case, even assuming that Rule 20(1) of the said Rules has been violated, there is no prejudice caused to the petitioner inasmuch as admittedly the petitioner has submitted the tender application on 04.01.2005. After all the purpose of giving 15 days time is to give adequate time to people to submit their tenders. Hence, the petitioner suffered no prejudice due to violation of Rule 20(1). Hence, on this ground the petitioner cannot obtain a writ from this Court under Article 226 of the Constitution. This contention is, therefore, rejected.

14. In yet another case, this Court in Raja and co's case (supra) has held that as a person who claims to have downloaded the tender scheduled in respect of some items of work and participated in the tender, cannot raise objection on the ground of violation of Rule 20 (1) of the said Rules. Hence, the contention of the petitioner that sufficient time was not granted as per Rule 20 of the Rules cannot be accepted.

15. So far as the next contention of the learned counsel appearing for the petitioner that the prospective bidders should get a certificate from the Executive Engineer regarding available equipment is concerned, admittedly, the petitioner obtained certificate from the Executive Engineer and participated in the tender process and it is not the case of the petitioner that the Executive Engineer refused

to issue certificate to the petitioner. Hence, the contention of the petitioner that the above said condition is tailor made to suit the people who are favourable to the respondents is liable to be rejected. The above said condition is imposed only to find out capability of the tenderer with respect to the equipments available with the prospective bidders to carry out the work. Apart from the terms and conditions incorporated in the notice inviting tender are not open to judicial scrutiny unless it is shown as arbitrary or bias. It is relevant to refer the decision of this Court in C.S.Traders's case (supra) wherein this Court has held as follows:-

21. Above all, it is well settled proposition of law laid down by this Court as well as the Hon'ble Supreme Court in a catena of cases that invitation to Tender as well as the terms and conditions incorporated thereof are not open for judicial scrutiny. In contractual matters, judicial interference is limited. Unless it is shown that the decision making process is against the well settled principles of law, arbitrary or bias, this Court cannot interfere in exercise of powers under Article 226 of the Constitution of India.

16. In Michigan Rubber (India) Ltd.'s case (supra), the Hon'ble Supreme Court has held in paragraphs 23 and 24 which are extracted as under:-

23) From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24) 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 ; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.

17. Following the principles and the ratio laid down by this Court as well as by the Hon'ble Supreme Court in the above decisions, I find no infirmity or irregularity in the notification issued by the first respondent. Accordingly, the writ petition is dismissed. No costs. Consequently, W.M.P(MD)Nos.12579 and 12580 of 2016 are closed.

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