

(2001) 06 KAR CK 0057
In the Karnataka High Court
Case No : Writ Petition No. 8166 of 2001

Ashok V. Patil

APPELLANT

Vs

Karnataka Road Development Corporation Limited, Bangalore
and others

RESPONDENT

Date of Decision : 21-06-2001

Acts Referred:

Citation : (2001) 4 KarLJ 559 : (2001) 3 KCCR 2144

Hon'ble Judges : R. Gururajan, J

Bench : Single Bench

Advocate : Sri Umesh R. Malimath and Sr S.P. Kulkarni, \, for the Appellant;
Smt. Shoba Patil, Government Pleader, Sri V.N. Sathyanarayana and Sri
Kaleemulla Sheriff, for the Respondent

Final Decision : Allowed

Judgement

1. Petitioner is questioning the consideration and acceptance of the tender submitted by respondents 3 and 4 pursuant to a notification dated 21-12-2000 bearing No. 12 of 2000 appeared in Times of India and Samyukta Karnataka in this petition.

2. The respondent 1-Karnataka Road Development Corporation (for short, "Corporation") issued a notification calling for tenders for maintenance of contracts on State Highways for three years. The tender provided for eligibility and qualification of the parties in terms of Clause 11. Petitioner is one of the applicants to the said tender and so also respondents 3 and 4. Petitioner in the petition states that the respondents have violated Tender Condition 11 in the matter of consideration of tender submitted by respondents 3 and 4. According to the petitioner respondents 3 and 4 do not comply with the Tender Condition 11(4) and therefore they are not eligible for consideration of their case by the respondent 1. Petitioner states in the petition that instead of submitting a DD or banker's cheque they have submitted Fixed Deposit Receipts in favour of respondent. In the circumstances according to the petition averments their

tenders are to be rejected. Petitioner with these facts and contentions is before this Court questioning the consideration of the tender of the respondents 3 and 4 in the matter.

3. Notices have been issued, pursuant to which respondents have entered appearance.

4. Respondent 3 states that he as usual submitted FDRs for a sum of Rs. 3,17,500/- and he did not notice that in the present tender notification under Clause 11(4) the tenderers were required to pay EMD by way of DD or Banker's cheque. The respondent 3 further states that subsequently he has replaced FDRs by DD. Therefore, he states that the consideration of his tender is proper and legal.

5. Respondent 1 also has filed his statement of his objection, and it admits that no DD/cheque is submitted but what is submitted is FDR in the name of respondent 1. Respondent 1 contends that the FDR submitted in favour of respondent 1 can be equated with the DD since according to this respondent the intention behind obtaining DD/FDR is only for the purpose of earnestness in the case. No doubt in the case on hand according to respondent 1 the FDR is replaced by DD and there can be grievance on this issue.

6. Matter is heard for final disposal.

7. Mr. Umesh R. Malimath, learned Counsel invites my attention to the facts and grounds raised in this petition and also he invites my attention to the Tender Condition 11(4) and also to Annexure-E, evaluation of technical bids by the respondent. He relies on the judgment of this Court in W.P. Nos. 5907 and 5908 of 2000 in support of his case. Counsel also relies on a judgment of the Supreme Court in the case of Rajasekar Gogoi v State of Assam . He particularly refers to the observation made in para 11 in the judgment of the Apex Court.

8. Per contra Mr. Kaleemulla Sheriff and Sr. Shobha Patil, learned Counsels contend that the object in terms of Clause 11(4) of the tender condition is achieved on account of the replacement of the FDR by way of DD by the respondent. They also rely on a judgment of Supreme Court in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and another judgment in Tata Cellular Vs. Union of India, .

9. After hearing the learned Counsels on either side I pass the following order.

10. It is an admitted fact in the case on hand that Clause 11(4) provides for submission of DD/Banker's cheque drawn in favour of the Corporation. I would rather quote the very clause for proper understanding of the said clause in the case on hand. The said clause reads as under:

"Each tenderer must pay an Earnest Money of Rupees 3.12 lakhs in Demand Draft/Banker's cheque of any Bank drawn in favour of Karnataka Road Development Corporation Limited and payable at Bangalore and attach to his

Technical Bid in default of which his tender (Technical Bid) will be rejected".

11. It is an admitted fact that the contesting respondents have not provided the DD/Banker's cheque in terms of Clause 11(4). They have only submitted FDRs which, subsequently has been replaced by DDs. Whether such replacement on the facts of this case is sufficient compliance with the requirement of Clause 11(4) or not is to be considered. Clause 11(4) as quoted earlier categorically says in unmistakable terms that each tenderer must pay an earnest money of Rupees 3.12 lakhs in DD/Banker's cheque. The subsequent sentence provides for a consequence in the event of default. In the event of default the tender will be rejected in terms of Clause 11(4). The Corporation is emphatic in its need to obtain DD/Banker's cheque by using the word must in the said clause. The Corporation is also emphatic in saying that in case of default the technical bid will be rejected. When the Corporation itself has used a clause of "must pay in DD/Banker's cheque and rejection of tender in case of default; it does not lie in the mouth of respondent now to say that notwithstanding violation of Clause 11(4) the replacement is sufficient compliance of Clause 11(4) of the tender condition in this case. This argument I am not able to accept in the light of a clear language of Clause 11(4) of the tender conditions.

12. Counsels invited my attention to the object of introduction of Clause 11(4). No material has been placed under what circumstance the said clause is introduced. In fact the explanation of respondent 3 is that in the earlier tender they used to accept the cash/challan from the Government Treasury/deposit at call receipt/Bank guarantee/National Savings Certificate etc. The respondent 3 states that without noticing the terms in present tender notification it has submitted FDR as usual. If the argument in the light of the submission if properly understood it cannot be said that the object is achieved by replacement of FDR by DDs. On the other hand the earlier clause providing for acceptance of cash challan at call rate, bank guarantee etc., are replaced by the word "DD and Banker's cheque" by the Corporation. The Corporation having amended this clause cannot now say that notwithstanding the violation of Clause 11(4), state that the tender is to be accepted. This type of argument to say the least is unacceptable in a Court of law. Moreover, I am of the view that a proper understanding of this clause would show that the Corporation must have felt some difficulty in encashment of these EMDS which were in the form of FDRs etc., in the past. Probably after realising the need of immediate encashment of EMDS they must have thought it fit to introduce a clause of EMD only by way of banker's cheque/DD. Therefore, the theory of the object coming to the aid of the respondent factually and legally unsustainable.

18. I may also refer to Annexure-E, the evaluation report. While evaluating the tenders the respondents have noticed disqualification of respondents 3 and 4 in the following words:

"Three firms have tendered (1) M/s. Madhu Constructions, Bellary, have enclosed EMD in the form of FDR from M/s. Syndicate Bank with the previous tender. This

is not acceptable, as the EMD has to be furnished only in the form of Demand Draft/Banker's cheque. As otherwise the firm meets requirements, the Board of KRDC may consider the above facts.

(2) M/s. DEE DEE Infrastructure! Engineering Private Limited, Mumbai have shown six tippers out of which three have been repeated from Gadag Division. Hence, the firm is short by one tipper for this division. Further, the line of credit is not in the prescribed format. As otherwise the firm qualifies the Board of KRDC, may consider the above facts.

(3) M/s, Ashok V. Patil, Hubli (JV) meets all pre-qualifications requirements, Hence is qualified".

In the evaluation report the respondents have noticed that the petitioner's case requires consideration. When this was pointed out to the respondents' Counsel the respondents have no acceptable explanation to contend. The respondent 1 who is the authority nowhere denies the evaluation report in terms of Annexure-E. They do not dispute the contents in Annexure-E. Clause 11(4) and Annexure-E if read together would show that a case is made out by the petitioner for my interference.

14. This Court in somewhat identical circumstances in the case of Syed Yusuff v Corporation of the City of Bangalore and Others, has ruled as under:

"Contention in this Court is that Demand Draft and Banker's cheque which he submitted are one and the same as certified by the Bank filed at Annexure-C to the petition. That certificate is dated 21-5-1987 whereas the tender was much earlier. Even the scrutiny and rejection also was earlier than the certificate. Technically it may be true that the Demand Draft payable to the Executive Engineer or a Banker's cheque payable to the Executive Engineer of the Corporation, may ensure the payment of the money. But if the conditions stipulated a particular mode of payment (in this case two modes) it is not open to the tenderer to adopt a third mode of his choice and then contend that the authorities are wrong in rejecting his tender, though there is no evidence prima facie that his tender has been rejected for that reason only".

15. I, in my judgment dated 13-4-2000 in W.P. Nos. 5907 and 5908 of 2000, have ruled that the reasoning in the said case is equally applicable to the facts of this case. I further ruled that that tender condition provides for submission of a DD, parties cannot be permitted to submit FDRs and contend that FDR is equal to DD. Therefore, in the light of the judgment of this Court I have no hesitation in holding that there is a clear violation of Clause 11(4) by accepting tenders of respondents 3 and 4 in terms of Clause 11(4) of the Act.

16. I may also at this stage rely on a judgment in the case of Rajsekar Gogoi v State of Assam and Others. In the said case the Court was considering with regard to Rule 206(2) of Assam Excise Rules in the matter of tender. In the said case the Supreme Court culled out Rule 206 which provided for certain

requirements. The said Rule after 1981 provided for a further clause reading as under:

"Tenders not containing all the particulars shall be liable to be rejected".

In the case of Rajsekar Gogoi, *supra*, the Supreme Court was considering as to whether Rule 206(2) providing for rejection is mandatory or not. The Apex Court in para 11 categorically ruled that the observation of the High Court that Rule 206 is not mandatory is incorrect. The Court in para 11 which ruled as under:

"We are, therefore, of the opinion that as the tender itself of respondent 4 was liable to be rejected because of lack of particulars as stated hereinabove, no further question arises. We do not agree with the observation of the High Court that Rule 206 is not mandatory. The language of the said rule is clear and unambiguous. It not only says that the tenders must be in their required form but also stipulates the consequence of non-compliance thereto, the consequence being that the tenders not containing all the particulars shall be liable to be rejected".

17. When a stipulation provides for a consequent rejection for non-compliance, the same has to be followed and not breached by the very authority. Therefore, I have no hesitation in holding that on the facts of this case and in the light of the judgment of this Court and Supreme Court the acceptance of a tender in violation of Rule 11(4) required my interference.

18. At this stage I must consider the judgment of the Supreme Court in the case of Raunaq International Limited, *supra*. In the said case the Supreme Court was considering with regard to a tender providing for design, engineering, manufacture, supply, erection and commissioning of large diameter pipes and steel tanks with all accessories and auxiliaries as prescribed in the bid documents for Units 3 and 4 of Khaperkhada Thermal Power Station, Maharashtra. Tenders were received from 11 tenderers in the said case. One I.V.R. Construction Limited, made some offers and the grant of tender in favour of I.V.R. was challenged by another competitor as I see from the facts in the said case. The Court in the said case was considering as to when a writ Court has to interfere. The Court noticed with regard to theory of public interest in the matter of litigation. The Court also noticed the impact of public interest litigation. The Court was considering with regard to "decision making process". The facts in this case do not deal with any decision making process and on the other hand this case deals with a clear violation of requirement of tender notification in terms of Clause 11(4). Therefore, the said case is clearly distinguishable on facts. Even otherwise in the said case the Court was considering with regard to permissible relaxation in terms of the tender. No such relaxation is pointed out in the case on hand. Hence the judgment is totally inapplicable to this case.

19. Again the famous Tata Cellular case, *supra*, is not available to the petitioner. As I mentioned earlier I am not reviewing any decision making process in this case. I am only concerned as to whether the acceptance of the tender of the

respondent is contrary to Clause 11(4).

20. In the circumstances this petition is allowed. A direction is issued to respondents 1 and 2 to return the tenders submitted by respondents 3 and 4. A further direction is issued to respondent to consider the case of the petitioner, if the petitioner otherwise fulfils all other eligible criteria in terms of tender conditions.

21. Ordered accordingly.