

(2010) 08 MAD CK 0509

In the Madras High Court

Case No : Writ Petition No. 12962 of 2010 and M.P. No's. 1 and 2 of 2010

J. Senthilkumar

APPELLANT

Vs

The Special Chief Engineer (National Highways), The
Divisional Engineer, National Highways and The
Superintending Engineer, National Highways Division

RESPONDENT

Date of Decision : 25-08-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2010) 08 MAD CK 0509

Hon'ble Judges : D. Hariparanthaman, J

Bench : Single Bench

Advocate : B. Raveendran, for the Appellant; S. Ramasamy, A.A.G. assisted by
Lita Srinivasan, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

D. Hariparanthaman, J.—This writ petition has been filed challenging the tender notification dated 05.05.2010 of the first respondent and for a consequential direction to the respondents to furnish tender forms to the petitioner in order to enable him to participate in the tender relating to Highway No. 209 for the distance mentioned in the above said notification.

2. The petitioner states that he is a road contractor by profession and he is engaged in this business for several years. He is a regular participant in all the auctions and he has been regularly awarded the road contracts.

3. The petitioner further states that the first respondent issued a tender notification in the local newspaper on 05.05.2010 calling for tenders from the general public for the work of re-laying of roads in National Highway No. 209 for the distance mentioned therein. The project cost is Rs. 790 Lakhs. It is stated that the tender forms could be collected from the office of the second respondent, on submitting a demand draft drawn in the name of the second respondent for a sum of Rs. 15,600/-. The last date for the issuance of tender

forms was fixed as 11.06.2010. The last date for submission of the tender forms with all particular was fixed as 16.06.2010 upto 03.00 p.m. and the date of opening of tender was fixed at 03.15 p.m. on 16.06.2010.

4. According to the petitioner, he took a demand draft for a sum of Rs. 15,600/- on 03.06.2010 from HDFC Bank, Udumalpet in the name of the second respondent and gave a requisition letter together with the demand draft on 08.06.2010 in the office of the second respondent. The same also was accepted by the second respondent. However, the second respondent did not issue tender form to the petitioner for the reasons best known to them. The petitioner regularly sent his employees to the office of the second respondent to collect the tender form. But they were sent back on some pretext or other by the second respondent. Not only the petitioner, other contractors were also treated alike him and many were not given tender forms. The respondents indulged in a pick and choose policy to issue tender forms to selected persons at their own whims and fancies. Since 11.06.2010 was the last date for obtaining tender forms, the petitioner himself went to the second respondent's office to collect the tender form. It is alleged that the second respondent did not turn up on 11.06.2010 and that he was refused the tender forms by the second respondent's office. Hence, on 11.06.2010 itself, the petitioner sent a telegram to all the respondents and there was no response for the same.

5. Under such circumstances, the petitioner moved this Court by filing a writ petition in W.P. No. 12555 of 2010 and the same came up for hearing on 16.06.2010. The writ petition was allowed on 16.06.2010 at around 12.30 p.m. Since the last date for submission of tender form was on 16.06.2010 at 3.00 p.m, upon request of the learned Counsel for the petitioner, this Court directed the learned Government Advocate to intimate the order of this Court to the respondents immediately.

6. In spite of the said order being passed at 12.30 p.m., the respondents did not furnish tender form to the petitioner and they proceeded further to open the tender box at 3.15 p.m. on 16.06.2010. Though the tender box was opened, the cover containing the tender forms will be opened only on a particular day when all the high officials namely the Chief Engineer of the Highways Department of Government of Tamil Nadu and the Chief Engineer of National Highways Department, etc. are present. Hence, the tender process was not over on the same day.

7. In these circumstances, the petitioner filed the present writ petition seeking to quash the tender notification dated 05.05.2010 of the first respondent and for a consequential direction to the respondents to furnish tender forms to the petitioner in order to enable him to participate in the tender of re-laying of Highways 209 for the distance mentioned in the said notification.

8. Status quo was granted on 28.06.2010 and notice of motion was ordered on 07.07.2010. The respondents filed counter affidavit. In view of the interim order

of status quo, the tender process is not yet completed and the work is not allotted to anybody.

9. Heard Mr. B. Raveendran, learned learned Counsel for the petitioner and Mr. S. Ramasamy, learned Additional Advocate General for the respondents.

10. The learned Counsel for the petitioner submitted that deliberately the tender form was not issued before 11.06.2010, though the petitioner took a demand draft as early as on 03.06.2010 for a sum of Rs. 15,600/- and he took serious efforts to obtain the tender form. Hence, he was constrained to move this Court by filing the writ petition in W.P. No. 12555 of 2010 seeking for a direction to the respondents to issue tender forms to him so as to enable him to participate in the tender and auction for the contract of re-laying of road on National Highway 209 as mentioned in the tender notification dated 05.05.2010. In spite of this Court allowing the writ petition on 16.06.2010 and directed the respondents to furnish the tender form, the tender form was not issued to the petitioner. Hence, he was again constrained to file the present writ petition. The learned Counsel further submitted that usually about 15 to 20 contractors used to apply for the contract, but this time, only two tender forms were issued. Thus, the respondents are particular in picking and choosing their own man for awarding the contract.

11. On the other hand, the learned Additional Advocate General appearing for the respondents submitted that the petitioner has not come with clean hands and that therefore, he is not entitled to the discretionary relief under Article 226 of the Constitution. He has seriously disputed the very submission of the requisition letter along with the demand draft, as alleged by the petitioner. He has brought to the notice of this Court the categorical averments made in para 9 of the counter affidavit to the effect that neither the petitioner nor his representative approached the respondents requesting to issue them tender form. He relied upon the judgment in K.D. Sharma Vs. Steel Authority of India Ltd. and Others, .

12. The learned Additional Advocate General also pointed out that the falsity of the claim of the petitioner could be seen by going through paras 5 to 7 of the affidavit filed in the earlier writ petition in W.P. No. 12555 of 2010 and paras 4 and 5 of the affidavit filed in the present writ petition, as well as para 2 of the additional affidavit filed in the present writ petition. He took me through those paras and submitted that the petitioner has falsely made allegations, as if he was not given the tender form. He also submitted that the tender notification clearly states that the Demand Draft should be drawn in favour of the "Divisional Engineer (National Highways), Coimbatore. But the demand draft was said to have drawn in favour of the Divisional Engineer (National Highways)" for a sum of Rs. 15,600/-. According to the learned Additional Advocate General, the said sum of Rs. 15,600/- is the usual cost for almost all the tender forms and that therefore the demand draft taken on 03.06.2010 without the same being drawn in favour of "Divisional Engineer, National Highways, Coimbatore" it could not be stated that the petitioner obtained demand draft pursuant to the notification

dated 05.05.2010.

13. The learned Additional Advocate General also submitted that when the earlier writ petition in W.P. No. 12555 of 2010 was filed, there was no mention about the purchase of demand draft on 03.06.2010 and the submission of requisition letter on 08.06.2010. There is no evidence furnished by the petitioner for having submitted the covering letter together with the demand draft in the office of the second respondent except his mere ipse dixit. He also pointed out that the petitioner has taken three different stands at three places. According to the petitioner, the demand draft was accepted by the second respondent, but the tender form was not issued to him, as per the averments found in para 4 of the affidavit in the present writ petition. Secondly, in the additional affidavit filed in support of the present writ petition, it is stated that the petitioner took demand draft towards the cost of tender form. Thirdly, in the earlier writ petition, the petitioner stated in para 7 of his affidavit that he went to the office of the second respondent on 11.06.2010 to collect the tender application form along with cash towards cost of application, which is non-refundable. The learned Additional Advocate General further submitted that if the petitioner had really submitted the demand draft on 08.06.2010, he could not have come with money for the application form on 11.06.2010. Likewise, after the order that was passed by this Court on 16.06.2010, the petitioner could not have come with another demand draft, towards cost of tender form, had he really submitted the demand draft dated 03.06.2010. Citing these inconsistencies, the learned Additional Advocate General submitted that the petitioner has come with false plea and with unclean hands.

14. The learned Additional Advocate General also relied on para 9 of the counter affidavit wherein there is a categorical averment by the respondents that neither the petitioner, nor his representative, approached the second respondent for the tender form.

15. The learned Additional Advocate General also submitted that the respondents do not have the letter dated 08.06.2010 on their file. He expressed serious doubts about the letter dated 08.06.2010 that is enclosed in the typed set of paper filed along with the present writ petition. He further submitted that the typed copy of the letter dated 08.06.2010, without xerox copy, could indicate that the letter was fabricated for the purpose of this case. He also pointed out that there was no pleading in the earlier writ petition about this covering letter dated 08.06.2010.

16. The learned Additional Advocate General also produced the telegram which is said to have been sent by the petitioner. The said telegram was enclosed by the petitioner in the typed set filed along with the earlier writ petition. The said telegram was sent by one Advocate Mr. K.S. Venkatesamurthy on behalf of the petitioner and other contractors, who are all Members of the Coimbatore Circle Contractors Association. As per the original copy produced by the learned Additional Advocate General, the telegram was booked only on 12.06.2010 and

the same was received by the respondents on 13.06.2010. But the petitioner enclosed a receipt for having sent the telegram along with typed set that was filed in the earlier writ petition, which shows that the telegram was sent on 11.06.2010. The learned Additional Advocate General submitted that an unfortunate situation prevails, wherein the Contractors Association forms cartel and they only decide about the number of participants in the contract. He produced the files to show that on so many occasions, only two contractors were the applicants and the petitioner was one among those two applicants in more than one occasion. Therefore, if only two applications alone were made, the respondents could not be blamed.

17. The learned Additional Advocate General further submitted that the project has to be carried out based on the Central Government Assistance. If the contract is not awarded before 30.09.2010, the State Government could not get the assistance amounting to Rs. 790 Lakhs. He relied on the letter dated 31.03.2010 issued by the Government of India, Ministry of Road Transport and Highways, New Delhi, in this regard. He also submitted that the prayer in the writ petition is also illogical as the petitioner seeks to quash the tender notification dated 05.05.2010 and also seeks a direction for issuing the tender form to him. According to him, both prayer cannot go together.

18. The learned Additional Advocate General further submitted that the allegation of the petitioner that the respondents contravened the order of this Court dated 16.06.2010, has no merit. He further submitted that this Court directed the second respondent herein, to issue tender form to the petitioner, as per the tender notification dated 05.05.2010, before the closing date for the issuance of the tender form. According to him, the closing date for the issuance of the tender form as per the tender notification dated 05.05.2010 was on 11.06.2010. Therefore, there could not be any contravention of the order of this Court dated 16.06.2010 and the said order could render no assistance to the petitioner.

19. In reply, the learned Counsel for the petitioner sought to explain that on 16.06.2010, he did not go with a fresh demand draft and it was the demand draft that was drawn on 03.06.2010 itself.

20. In have considered the submissions made on either side and perused the materials available on record.

21. The penultimate para in the order dated 16.06.2010 of this Court directs the second respondent herein to issue tender form, before the closing date, as per the tender notification dated 05.05.2010. Admittedly, the closing date of the issuance of tender form was 11.06.2010 and the order of this Court was on 16.06.2010. The penultimate para of the order dated 16.06.2010 of this Court is extracted hereunder:

10. In the light of the above provisions and as there is an obligation on the part of the 1st respondent to issue tender documents to the petitioner, the 1st

respondent is directed to issue tender application forms to the petitioner as per the Tender Notification dated 05.05.2010 before the closing date for the issuance of the application.

Therefore, the learned Additional Advocate General is correct in his submission that there is no contravention of the order dated 16.06.2010 passed in W.P. No. 12555 of 2010 and the said order is of no assistance to the petitioner.

22. In my considered view, the learned Additional Advocate General is correct in his submission that the petitioner has not come with clean hands. In the earlier writ petition in W.P. No. 12555 of 2010, there is no mention about the purchase of demand draft on 03.06.2010 for Rs. 15,600/-. There is also no averment relating to the covering letter dated 08.06.2010, enclosing the demand draft, seeking tender form. The alleged covering letter dated 08.06.2010 that is enclosed in the typed set, is a typed one and it is not known as to why a xerox copy of the same was not enclosed. Further, it is stated in the present writ petition that on 08.06.2010, the second respondent accepted the demand draft that was offered by the petitioner, seeking tender form. If it is so, it is not known as to why the petitioner went to the office of the second respondent, with tender cost on 11.06.2010, as averred in the earlier writ petition. It is also not known why he went to the office of the second respondent on 16.06.2010, with the demand draft for Rs. 15,600/-, pursuant to the order of this Court dated 16.06.2010, towards the cost of tender form, had he handed over the demand draft on 08.06.2010.

23. Faced with the said situation, the learned Counsel for the petitioner made his submission during reply that on 16.06.2010 he did not go to the office of the second respondent with a new demand draft and it was the demand draft that was purchased on 03.06.2010. The reply was made without realising the averment that was made in the para 4 of the affidavit filed in the present writ petition that the demand draft was accepted by the second respondent on 08.06.2010. It is also not stated that the demand draft was returned and on the other hand, the categorical case of the petitioner is that after accepting the demand draft, the second respondent failed to give tender form.

24. All the aforesaid facts make it very clear that the petitioner has approached this Court with un-clean hands. Paras 5 to 7 of the affidavit filed in support of the earlier writ petition in W.P. No. 12555 of 2010 and paras 4 and 5 of the affidavit as well as as para 2 of the additional affidavit filed in support of the present writ petition are extracted hereunder.

Paras 5 to 7 of the Affidavit in W.P. NO. 12555/2010

5. I state that the last date for issue of tenders by the respondent is 11.06.2010. I state that the last date for submission of tenders is 16.06.2010 and the date for opening of the tender documents is 16.06.2010. I state that the petitioner has always been ready and willing to pay the money for receipt of tender application forms. I state that the petitioner visited the office of the 1st

respondent for the tender application form in the last week of May 2010. However, the tender forms were not issued to the petitioner and the petitioner was asked to come in the first week of June 2010.

6. I state that thereafter the petitioner had been regularly sending his employees to the office of the 1st respondent to receive the tender application forms but they were being sent back on some pretext or the other. I state that this has been the state of affairs not only for the petitioner but also in respect of several other contractors and the members of the Coimbatore circle contractor association, of which I am one of the members. I state that the tender application forms are not being given by the 1st respondent to all the contractors who approach him with the application money and instead the respondents have been indulging in pick and choose policy and issuing the tender application forms to a few select persons of their own choice at their own whims and fancies.

7. I state that suspecting some foul play, the petitioner and I personally went to the office of the 1st respondent to receive the tender application forms along with the non-refundable application money on 11.06.2010. Four other contractors had also come on the same for receipt of the tender application forms. I state that 11.06.2010 was the last date for issue of tender application forms and therefore the respondents are duty bound to issue the same to every person who applies on that date for the tender application forms. I state that as per the tender notification and advertisement, the tender application forms had to be obtained from the 1st respondent and therefore the petitioner approached the 1st respondent for the same.

Paras 4 and 5 of the Affidavit in W.P. NO. 12962/2010

4. I state that on seeing the above said advertisement about the tender notification, I contacted the second respondent for obtaining tender form. As per the impugned notification, I took a Demand Draft on 03.06.2010 from the HDFC Bank Ltd., at Udumalpet in the name of the second respondent. On 08.06.2010, I gave a requisition letter together with the demand draft towards the cost of the tender form and also all requisite documents. The same was accepted by the second respondent. However, the second respondent did not issue tender form to me for the reason best known to him. I state that I have been sending regularly my employees to the office of the second respondent to receive tender application forms but they were sent back on some pretext or the other by the second respondent. I state that this has been the state of affairs not only for me but also in respect of some other contractors. I state that the tender application forms were not given by the second respondent to all the contractors who approached him with the application and cost of the tender and instead the respondents had indulged in pick and choose policy in issuing tender forms to a few selected persons of their choice at their own whims and fancy.

5. I state that since 11.06.2010 was the last day for obtaining tender forms from the second respondent and since the second respondent was evading to furnish

the tender form till 10.06.2010, I myself went to the second respondent's office to receive the tender application form. However, the second respondent did not turn up on 11.06.2010 and I was refused the tender forms by the second respondent's men. Hence, on 11.06.2010 itself, I sent a telegram to all the respondents and there was no response for the same. Hence, I moved this Hon'ble Court by filing W.P. No. 12555 of 2010 and the same came up for hearing on 16.06.2010. I state that after hearing my Counsel and upon being satisfied that I was not given tender forms without any valid reasons, this Hon'ble Court by order dt. 16.06.2010 allowed the Writ Petition. Since the submission of tender form was at 3 P.M. and since the Hon'ble Court ordered the Writ Petition around 12.30 P.M., upon request by my counsel, this Hon'ble Court directed the Govt. Pleader to intimate the order of this Hon'ble Court to the respondent immediately. In spite of the said order, the respondents did not furnish tender forms to me. They have further proceeded to open the tender box at 3.15 P.M., on 16.06.2010. I state that even though the tender box was opened on 16.06.2010, the cover containing the tender forms will be opened only on a particular day when all the high officials viz., Chief Engineer of the State of Tamil Nadu, Chief Engineer of National Highways Department etc., are present. Hence, as on date the tender process is not over and if the respondents are directed to give a tender form on payment of the cost, the respondents will not be put to any loss or hardship and on the other hand I can also submit my tender form which can be opened together with other tender forms submitted by other tenderers.

Para 2 of the Additional Affidavit filed in W.P. NO. 12962/2010

2. I state that as directed by this Hon'ble Court I am filing this additional affidavit. I state that since 11.06.2010 is the last date for purchasing tender forms, and since the second respondent in one way or the other dodged to give tender forms to my representative, myself and six others i.e. one Robert Raja, a representative of R. Krishnasamy, a representative from M/s. K.C.P. Engineering & Fabricators, and a partner from M. Saravana Constructions went to the second respondent's office for purchasing the same. However the second respondent did not turn to the office the whole day and hence we were not able to purchase the tender form. Hence I moved this Hon'ble Court by way of writ petition in W.P. No. 12555 of 2010 and this Hon'ble Court on 16.06.2010 at about 12.30 p.m., allowed the writ petition and directed the Government Advocate to inform the second respondent about the order of this Hon'ble Court that the petitioner should be furnished with tender form immediately on payment of cost. As advised by my Counsel on 16.6.2010 from morning 10.30 a.m. till 2.30 p.m myself and one Mr. J. Rabert raja, contractor were present in the office of the second respondent together with D.D. towards cost of tender & D.D for a sum of Rs. 15,80,000/- towards E.M.D. But even on that date the second respondent did not turn up to his office till 2.30 p.m. However, the third respondent who came to the office of the second respondent at about 1.30 p.m informed me that he is going to Salem by 1.50 p.m by train and he is going to close the tender box by 3

p.m as per schedule. When I contacted the third respondent office in the evening, I was told that the tender box was opened by 4.30 p.m.

The apparent contradictions would make it very clear that the petitioner has approached this Court with un-clean hands:

25. The judgment of the Honourable Apex Court in K.D. Sharma Vs. Steel Authority of India Ltd. and Others, relied on by the learned Additional Advocate General squarely applies to the facts of this case. Para 34 of the said judgment is extracted hereunder:

34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim.

26. The learned Additional Advocate General is also correct in his submissions that even the alleged demand draft dated 03.06.2010 is not in accordance with the tender notification dated 05.05.2010. A xerox copy of the demand draft is enclosed in the typed set. As per the xerox copy, the demand draft is taken in the name of "Divisional Engineer (NH)" and there is no mention of "Coimbatore". But the tender notification makes it clear that the demand draft should be made in favour of "Divisional Engineer, National Highways, Coimbatore". Hence, the petitioner cannot get a tender form based on such a demand draft, even if he really submitted the demand draft.

27. In my considered view, the petitioner could have purchased the demand draft for some other purpose also. Even if he purchased the same, pursuant to the notification dated 05.05.2010, the same cannot be acted upon, as it is not in terms of the tender notification. Further, more importantly, it is not known as to why he approached this Court only on 16.06.2010 complaining that the tender form was not issued to him, if he purchased the demand drawn on 03.06.2010.

28. At this juncture, it is relevant to extract para 9 of the counter affidavit, wherein the respondents categorically denied the averment that neither the petitioner nor his representative approached the second respondent for obtaining tender form.

9. It is most respectfully submitted that the Petitioner has not approached the 2nd respondent up to the closing date of issue of tender forms on 11.06.2010 up to 5.45 pm. The statement of the Petitioner that he gave a requisition letter with the demand draft towards cost of tender form and the same was accepted by the second Respondent is a complete travesty of facts and is denied as totally false.

Neither the Petitioner nor any of his authorised representative, at no point of time approached the Second Respondent with the Demand Draft towards cost of Tender schedule as found in the type set of papers in W.P. No. 12962 of 2010. The Petitioner has tried to create a facade of record to mislead this Hon"ble Court. This will be abundantly evident from the copy of the demand draft purported to be towards the cost of tender documents filed in the type set of papers. It was made clear in tender notification that the Demand Draft should be drawn in the Official designation of "Divisional Engineer (National Highways) Coimbatore". The Demand Draft found in the typed set does not contain designation of the appropriate authority as notified and it is simply drawn in favour of "Divisional Engineer - N.H". The same could not be realized by the Second Respondent and brought to Government account because the Demand Draft is not drawn in favour of Divisional Engineer, National Highways, Coimbatore.

29. I have also perused the original telegram produced by the learned Additional Advocate General. It is clearly stated therein as follows:

Booking Time : 1830 Received Time: 1035 Booking Date : 12/06/2010 Received Date: 13/06/2010

Therefore, the plea of the petitioner that he sent a telegram on 11.06.2010 and since there was no response, he moved this Court by filing the writ petition in W.P. No. 12555 of 2010 that came up for hearing on 16.06.2010 is false. The typed copy of the telegram that was enclosed in the typed set filed along with the writ petition and the original telegram produced by the learned Additional Advocate General are one and the same. While the typed copy of the telegram enclosed in the typed set of the earlier writ petition in W.P. No. 12555 of 2010 do not contain as to when it was booked, the copy of the receipt enclosed in the typed set of earlier writ petition shows that the telegram was sent on 11.06.2010. Hence, the receipt is not relatable to this telegram. Thus the petitioner has not come with clean hands. The averment made in the additional affidavit filed in support of the present writ petition that there are two applicants only in the tender process and other contractors, including the petitioner, were deliberately not issued tender forms, cannot deserves acceptance, as the learned Additional Advocate General produced the records showing that on so many occasions the petitioner was one among the two applicants in tender auctions. The learned Additional Advocate General submitted that the Government is not able to break the cartel of contractors and that it is a common thing that only two applications are made pursuant to the decision made in the cartel.

30. I find force in the submissions made by the learned Additional Advocate General. As rightly contended by the learned Additional Advocate General, they should award contract before 30.09.2010, otherwise the Central assistance amounting to Rs. 790/- Lakhs could lapse.

31. In these circumstances, the writ petition deserves to be dismissed and

accordingly, the same is dismissed with a cost of Rs. 25,000/- (Rupees Twenty five thousand only) payable by the petitioner to the Tamil Nadu State Legal Services Authority. Consequently, connected miscellaneous petitions are closed.