(2017) 04 BOM CK 0182

In the Bombay High Court

Case No : 5790 of 2016

M/s. Joshi Freight Carriers APPELLANT

Vs

Central Ware Housing Corporation RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs
Income Tax Act, 1961, Section 194C, Section 194C, <a href=15200

Citation : (2017) 04 BOM CK 0182

Hon'ble Judges : B.P. Dharmadhikari, Swapna Joshi

Bench : DIVISON BENCH

Advocate : M.G. Bhangde, R.S. Kurekar, C.V. Kale, R.S. Parsodkar, R. Dawada, S.M. Ghodeshwar

Final Decision : Allowed

Judgement

1. By this petition filed under Article 226 of the Constitution of India, the petitioner - a Company, questions communication dated 09.09.2006 holding that petitioner does not satisfy experience criterion and therefore, is not eligible to participate in tender for handling and transportation work of food grains and allied materials at C.W. Washim. This warehouse at Washim is of respondent no.1.

2. On 04.10.2016, while issuing notice in the matter, this Court directed that financial bids shall not be opened. Thereafter applications for intervention were filed and the same were allowed. Those intervenors who are other participants in tender process have been added as intervenor/respondent nos. 2, 3 and 4 respectively.

3. As interim orders were operating and the matter pertains to contract of movement of food grains, as requested by the parties jointly it has been hard finally by issuing Rule and making the same returnable forthwith. Accordingly, we have heard Shri M.G. Bhangde, learned Senior Counsel with Shri R.S. Kurekar,

learned Counsel for the petitioner, Shri C.V. Kale, learned Counsel for respondent no.1, Shri R.S. Parsodkar, with Shri R. Dawada, learned Counsel for respondent no.3 and Shri S.M. Ghodeshwar, learned Counsel for respondent no.4.

4. Shri Bhangde, learned Senior Counsel invited attention to Clause 4 of the etender notice dated 31.05.2016 to urge that there eligibility conditions require at least completion of 25% of the estimated value of construction to be awarded in one single contract or 50% of the estimated value of contract to be awarded in different contracts. He submits that petitioner fulfills these conditions. Our attention is drawn to relevant minutes in which this eligibility of petitioner has been evaluated to show that the estimated value of contract was Rs. 11,25,19,000/. 25% of the value of the contract works out to Rs. 2,81,29,750/, while 50% of the value of the contract works out at Rs. 5,62,58,500/. He submits that necessary certificates issued by IFFCO and M/s. Orient Cement were enclosed along with the tender form. He contends that though some technical error was found in the initial certificate issued on behalf of M/s. Orient Cement, later correct certificate does not militate with the data contained in the first certificate, and therefore, fortifies competency and capacity of petitioner. Petitioner therefore fulfills Clause [b] of the qualifying conditions. He has taken up through the certificate dated 23.11.2015, issued by Orient Cement Limited, letter dated 21.01.2016 issued by the said Company through its General Manager, letter dated 22.02.2016 given by that Company and certificate of Chartered Accountant dated 26.01.2016. He submits that all these documents have been lost sight of and have not been properly appreciated. According to him reason for discarding these documents that income from M/s. Orient Cement of 201415 is not shown in ITR, runs counter to legal provisions. He has pointed out Section 194C of the Income Tax Act, particularly subsection [6] thereof, to urge that this finding is therefore, incorrect.

5. In the alternative and without prejudice, he states that certificate issued by Indian Farmers Fertilizer Cooperative Limited (IFFCO) dated 21.06.2016 independently establishes the eligibility of petitioner in terms of Clause [a] of the eligibility norms mentioned supra, and hence, those norms should have been looked into and commercial bid of petitioner needed to be opened and considered.

6. Further rejoinder filed by petitioner vide stamp no. 13732/2016, particularly its paragraph nos.3 to 9 are pressed into service by him to show how petitioner qualifies and fulfills the tender conditions. He submits that deliberately wrong and erroneous approach has been adopted and by ignoring correct provisions of Income Tax Act, 1961, petitioner is disqualified. Representation was moved on 10.09.2016 and it was followed by Lawyer''s notice, but, correct position of law mentioned therein has been deliberately overlooked. Though there is an incorrect approach and certificate issued by M/s. Orient Cement has been arbitrarily discarded, fact that petitioner qualifies because of independent certificate issued by IFFCO, could have been looked into by respondent no.1. Our attention is drawn to note appearing below the eligibility condition to point out how word

"year" needs to be understood. He invites attention to fact that certificate issued by M/s. Orient Cement was used in Writ Petition filed before the Aurangabad Bench vide Writ Petition Nos. 3393/2016 and 4349/2016. Stand that certificate produced by petitioner was not issued by an authorized person of M/s. Orient Cement, has been examined in paragraph nos. 40 and 41 of the judgment delivered therein. There, Maharashtra State Warehousing Corporation was party respondent. In the light of observations made in paragraph nos. 40 and 41, the Aurangabad Bench of this Court directed the Maharashtra State Warehousing Corporation to reconsider those documents. He urges for adopting the same course if on merits this Court is not accepting the eligibility of the petitioner.

7. Shri C.V. Kale, learned counsel for respondent no.1 submits that experience certificates produced by the petitioner are not in requisite format and do not show that it posses experience in terms of prescription thereof in tender conditions. Petitioner has given its own certificate based on some data which could not have been relied upon.

8. Inviting attention to note explaining how term "year" needs to be construed, he states that petitioner has deliberately avoided to produce any such specific certificate. He points out that documents tendered by M/s. Orient Cement and produced by petitioner are not certificates, but, letters only. Orient Cement has on 14.01.2016 issued a show cause notice to an employee who issued certificate dated 23.11.2015 to the petitioner. Our attention is also drawn to reply given by that employee tendering unconditional apology and letter dated 28.01.2016 issued by Orient Cement to Maharashtra State Warehousing Corporation, refusing to authenticate contents of the certificate dated 23.11.2015 and distancing itself from it.

9. He relies upon judgment of Hon''ble Supreme Court reported at 2016 (8) SCC 622 (Central Coalfields Ltd. Vrs. SLLSML [Joint Venture Consortium] and others), to urge that format prescribed by respondent no.1 is circumstances, is with some object and that object cannot be allowed to be defeated. Failure of petitioner to submit certificate in prescribed format is itself fatal.

10. To support the rejection of work with Orient Cement, he points out that provisions in Section 194C[6] of the Income Tax Act,1961 to urge that as petitioner has violated that provision, respondent no.1 has rightly refused to accept said document.

11. Shri Parsodkar, learned counsel submits that cancellation of certificate dated 23.11.2015 by M/s. Orient Cement was not pointed out to the Division Bench at Aurangabad. He relies upon tender conditions particularly clause [6][b] appearing at page no.39 of the Writ Petition to urge that for falsehood, the tenderer can be blacklisted and debarred from participation for next 5 years, besides forfeiture of earnest money deposit by him. He further adds that in tender process, petitioner has relied upon the certificate dated 21.06.2016 issued by IFFCO only. He further adds that IFFCO''s certificate is also not for a period of

a year. According to him, if entries of works at Sr. Nos. 1,3 and 5 appearing in that certificate are clubbed together, during period of 01.08.2013 to 31.03.2014, petitioner carried out work worth Rs. 1,80,16,000/only. Entries at Sr. Nos. 2,4 and 6 are for period from 01.04.2014 to 31.03.2015. Total work during this period is worth Rs. 1,05,00,000/only. Last entry for period from 01.04.2015 to 31.03.2016 is for work worth Rs. 80.92 lakhs. Even this certificate does not show completion of 25% of work and petitioner therefore, can not become eligible under clause [a]. He further adds that communication dated 21.01.2016 is a reply sent by Orient Cement to Maharashtra State Warehousing Corporation. It is therefore, not a certificate to be used for the purpose of present tender being a confidential letter between Oriental Cement and Maharashtra State Warehousing Corporation. Letter dated 22.02.2016 by Oriental Cement Limited to petitioner is again not a certificate, but, a letter and therefore, cannot be used. Similarly all transactions with petitioner stated therein also can not enter zone of consideration. It can not tantamount to a certificate as it cannot fasten desired responsibility upon M/s. Orient Cement. Without prejudice, he submits that value of work done directly for Orient Cement is less than Rs. 4 Crores, and it does not make petitioner eligible.

12. He relies upon judgment of Hon''ble Supreme Court dated 15.07.2016 in Civil Appeal No. 9078/2016 (Afcons Infrastructure Ltd .vrs. Nagpur Metro Rail Corporation Ltd and another) particularly paragraph no.9 to demonstrate how employers honest view in such matters needs to be sustained. Clause 16 of tender conditions is pressed into service to show that the employer [respondent no.1] has absolute power to reject any tender and there is no challenge to this power.

13. Shri Parsodkar, learned Counsel submits that petitioner has not filed any affidavit in support of certificate dated 21.06.2016 issued by IFFCO, certificate dated 21.03.2015 issued by Orient Cement and letter dated 21.01.2016 issued by the General Manager of Orient Cement to Maharashtra State Warehousing Corporation. There is no whisper about these documents in the petition.

14. Shri Bhangde, learned Senior Counsel, in reply, submits that in Writ Petition in paragraph no.8, petitioner has made its submissions on documents. Documents filed with tender are also pleaded in paragraph no.9. AnnexuresF, G, H and I are specifically pointed out with submissions, that without looking into these documents and without any application of mind, petitioner has been found disqualified on 09.09.2016. Minutes of Tender Committee are relied upon to urge that necessary documents were available, but, have not been looked into. The Committee finds that experience certificate in proforma prescribed at AppendixVI have been produced. Only for convenience, petitioner also gave an extract of works appearing in its own certificate. He also invites our attention to Civil Application No.253/2017 filed on 05.12.2016, seeking leave to amend the Writ Petition. According to him, position emerging from the audited accounts of petitioner is disclosed in those paragraphs.

15. In the light of these arguments, we have perused the records and considered the controversy. Though petitioner has been found disqualified and experience certificate of M/s. Orient Cement is thrown out of consideration as income earned from M/s. Orient Cement of 201415 is not shown in ITR, this application of mind by the tender committee is wrong. Tender has been floated on 31.05.2016 and documents submitted by petitioner and issued by M/s. Orient Cement was not for the year 201516. As per note appearing at page no.4 of the tender document, after qualification conditions, "year" for the purpose of experience is to be taken as financial year, excluding the financial year in which the tender enquiry is floated. Financial year runs from 1st April to 31st March, as stipulated in this note. Thus, the tender enquiry in the present matter is floated the year 201617. The said year therefore, gets excluded. Petitioner therefore, could have shown its competency and experience with reference to five financial year counted backwards i.e., prior to 31.3.2016. The documents looked into by the Tender Committee are for the financial year 201415. Tender Committee takes note of the fact that Orient Cement Limited has given experience certificate of Rs. 1205.69 lakhs for the financial year 201415. Thereafter the Tender Committee notes that income tax return reveals TDS deduction by Orient Cement only for work done worth Rs. 18.37 Lakhs and not for whole figure certified therein. Hence this certificate has been disbelieved. Reasons recorded by the Tender Committee are reproduced below for ready reference. "Experience criteria not met as experience certificate of M/s. Oriental Cement is not taken into consideration since income of M/s. Oriental Cement of 201415 is not shown in ITR. Technically disqualified."

16. This finding of the Tender Committee needs to be seen in the backdrop of Section 194C. Subsection [6] thereof has been amended w.e.f. 01.06.2015. Tender Committee was considering the period of 201415 when said amendment was not applicable. However, in present facts, impact of this consideration needs to be looked into in the backdrop of other submissions recorded supra. The judgment of Hon''ble Supreme Court in case of Central Coalfields Ltd. Vrs. SLLSML (Joint Venture Consortium) and others (supra), relied upon by Shri Parsodkar, learned counsel, reveals that the Court before interfering in tender or contractual matters in exercise of powers of judicial review, has to ponder over the issue whether process adopted or decision made by the employer is malafide or intended to favour some one, or then whether the process adopted or decision made is so arbitrary and irrational to enable the court to hold that it could not have been reached by any authority acting reasonably and in accordance with the relevant law. The judgment of Hon''ble Supreme Court dated 15.09.2016 in Civil Appeal No. 9078/2016 (Afcons Infrastructure Ltd .vrs. Nagpur Metro Rail Corporation Ltd and another), is delivered by the same Bench of Hon''ble Supreme Court. Therein from paragraph no.9 onwards the Hon''ble Supreme Court has explained the approach to be adopted. Judgment in case of Central Coalfields Ltd. vrs. SLLSML (Joint Venture Consortium) and others (supra), also finds mention in its paragraph no.11. After considering these judgments in

paragraph no.13, the Hon''ble Supreme Court points out that mere disagreement with the decision making process or the decision of the administrative authority, cannot constitute a ground to interfere therewith. Malafides, intention to favour some one or arbitrariness, irrationality or perversity must exist before the Constitutional Court interferes with such decisions. In paragraph no.15, again the same principle has been reiterated and Hon''ble Supreme Court states that owner or employer inviting tender may give an interpretation to the terms and conditions thereof which may not be acceptable to the Constitutional Court, but, that by itself is not a reason for interfering with the interpretation given. In paragraph no.18, opinion of High Court that all eligible bidders need not be impleaded in Writ Petition before it, and they were not entitled to be heard, is not accepted by the Apex Court. The Hon''ble Supreme Court finds that an eligible bidder can bring to the notice of the employer or owner of the project that the ineligible person was so disqualified even for additional reasons not within contemplation of such owner or employer. The Hon''ble Supreme Court therefore, has held that it would be more appropriate for the Constitutional Courts to insist that all eligible bidders be made parties to the proceedings filed by unsuccessful bidder. Though before this Court, there is no attempt to demonstrate that all eligible bidders are not impleaded, respondent no.2 has attempted to invite our attention to the letter written by M/s. Orient Cement Limited to Maharashtra State Warehousing Corporation disowning the certificate dated 23.11.2015 and distancing itself from that certificate. This letter dated 28.01.2016 is produced by the said respondent as AnnexureRIIF with its written submissions filed in this Court. It is not in dispute that this communication was not pointed out to the Aurangabad Bench of this Court which decided Writ Petition Nos. 3393/2016, 3578/2016, 3787/2016 and 4349/2016 on 11.07.2016. There the controversy regrading very same certificate dated 23.11.2015, has been looked into in paragraph no.40 and then in paragraph no.41 the Division Bench found it proper to leave it for reconsideration by Maharashtra State Warehousing Corporation.

17. Page No.3 of etender document, vide Clause4 lays down the qualification condition as under : "4.QUALIFICATION CONDITION(A) Tenderer should have experience of Rake Handling and/or Transportation duly obtained from manufacturer/PSU/Govt. Dept./Public Ltd. Company/ Private Limited Company dealing in the field of Fertilizer, Foodgrains, Cement, Sugar, Coarse grains or any other commodity. Tenderer should have executed in any of the immediate preceding five years the work of value; (a) At least 25% of the estimated value of the contract to be awarded, in one single contract. OR

(b) 50% of the estimated value of the contract to be awarded, in different contracts.

(B) Experience certificate in the proforma prescribed at AppendixVI shall be produced from customers stating proof of satisfactory execution and completion of the contract[s] besides duly certifying nature, period of contract, and value of work handled.

(C) Where the estimated contract value of Handling and Transport contract is less than Rs. Five Crores, tenderer without the requisite experience as mentioned above may also participate subject to providing an undertaking that an additional performance Guarantee in the form of Bank guarantee of 10% of the total contract value from SBI Bank or its Associate Bank or in other Public Sector Banks will be given, if selected. The format of the Bank Guarantee to be provided in such cases at AppendixV of AnnexureA.

(D) If the tenderer is a partnership firm, there shall not be any reconstitution of the partnership without the prior written consent of the Corporation till the satisfactory completion of the contract. Note : The year for the purpose of experience will be taken as financial year [1st April to 31st March] excluding the financial year in which tender enquiry is floated." According to petitioner it qualifies in terms of subclause [a], as also subclause

[b] of Clause (A). It is contended that certificate issued by IFFCO on 21.06.2016 needed independent evaluation and works therein make petitioner eligible in terms of subclause

[a], where 25% of the estimated value of the contract is shown to have been completed in one single contract. According to the petitioner, if period of 01.09.2013 till 31.03.2016 is included in preceding 5 years and total work done is of Rs.3,67,02,000/The other certificate issued by M/s. Orient Cement for period from 01.04.2014 to 31.03.2015 showing total quantity only and total amount paid, is also relied upon to urge that it shows fulfillment of subclause [b] i.e. 50% of the estimated value of contract to be awarded under different contracts. As there is some dispute about this certificate dated 23.11.2015, accompanying letters showing rendering of transportation services for an amount of Rs. 4 Crores in 201415 from Cement Plant of M/s. Orient Cement is also relied upon. According to petitioner this work worth Rs. 4 crores in the year 201415 again qualifies it and makes it eligible. Petitioner has also claimed that along with tender document, it has supplied all these letters as also certificate of its Chartered Accountant dated 26.01.2016. This specific assertion in Writ Petition has not been traversed by taking any express stand in relation thereto by respondent no.1.

18. Shri Bhangde, learned Senior Counsel submits that 25% of the estimated value in one single contract can be spread over the period of immediate preceding 5 years. Similarly 50% of the estimated value under different contracts should be shown to be discharged in a period spread over preceding 5 years. That period of 5 years expires on 31.03.2016. According to learned Senior Counsel, therefore, the work done under a single contract after 01.04.2011 upto 31.03.2016 or under different contracts during said period needs to be looked into. He claims that accordingly certificate issued by IFFCO or then by M/s. Orient Cement establish this quantum of work,

19. Respondents claim that 25% of the estimated value or 50% of the estimated

value must have been handled in one financial year in any of the preceding 5 years. According to them if this quantity is allowed to be spread over the period of 5 years, the entire scheme in paragraph no.4[A] reproduced supra, becomes arbitrary and unworkable. They therefore insist that experience certificate has to be in the prescribed proforma i.e. Form ''VI''. According to petitioner format used by it for certificate is proper and has not been objected by respondent no.1.

20. As already noted supra, the Tender Committee has given only one reason for holding that the experience criterion is not met with. It has eliminated experience certificate of M/s. Orient Cement and has not taken it into consideration. No fault is found with the proforma of certificates issued by IFFCO and with proforma of Orient Cement. While mentioning certificate of Orient Cement, the Tender Committee records that a certificate and accompanying letter were also enclosed. It has also given date wise break up of all these certificates with quantum of work. The Tender Committee expressly holds and notes that the experience certificate in proforma prescribed at AppendixVI has been supplied.

21. Only reason for not accepting the experience certificate of M/s. Orient Cement recorded by the Tender Committee is as under : " Experience certificate has been given by Oriental Cement Ltd. for Rs. 1205.69 lakhs for F.Y. 201415. However ITR doc. shows that Orient Cement Ltd has deducted the TDS amount for the work done Rs. 18.37 lakhs. Hence, the experience certificate from M/s. Oriental Cement does not reflect the true and fair view." This remark appears above the remark of Tender Committee already reproduced supra. The committee has found petitioner technically disqualified as there was no deduction of TDS amount for the work done over and above Rs. 18.37 lakhs. Impact of Section 194C[6] in force during the financial year 201415 has thus not been considered by the Committee. Not only this, but, the fact that said amendment requiring deduction of TDS has come into force w.e.f. 01.06.2015, is also lost sight of. Material on record i.e. note of Tender Committee however shows some inconsistency in the matter. If entire payment was for the period prior to 01.06.2015, TDS on any payment itself was not warranted. No light has been thrown before us on this aspect by any of the respondents. Unilateral wrongful deduction of TDS by M/s. Orient Cement from petitioner may be faulty, and therefore, may not be material in present tender process. We can not and need not conclude this aspect.

22. However, as we find that the certificate issued by IFFCO has not been discarded by recording any reasons and also, has not been independently looked into to consider the eligibility of petitioner in terms of paragraph no.4[A] [a]. Similarly, the certificate issued by M/s. Orient Cement has been eliminated from consideration on erroneous ground. Hence, we are not in a position to sustain the consideration by the tender committee. Any responsible body entrusted with such a vital duty would not have committed such an error by failing to evaluate the documents on record or by not applying the correct legal provisions. The

other bidders have pointed out some additional material alleging it to be adequate to disqualify the petitioner. Thus applying the yardsticks mentioned supra in the judgment of the Hon''ble Apex Court, the present exercise and consideration by the tender committee definitely calls for intervention by this Court. That exercise and the order disqualifying the petitioner is unsustainable. Respondent no.2 has pointed out to this court additional material i.e. letter dated 28.01.2016 sent by the Vice President, Human Resources of Orient Cement Ltd., to Maharashtra State Warehousing Corporation. This communication also needs due verification and its impact on the offer of petitioner deserves to be considered by respondent no.1 through its tender committee.

23. In this situation, taking over all view of the matter, we quash and set aside the order dated 09.09.2016, and restore the tender process back to the table of the Tender Committee for taking fresh decision on eligibility of petitioner in the light of material becoming available to it. Whether certificates made available by the petitioner are in proper format or not and how the period of preceding five years should be understood, implications emanating therefrom are the questions which we leave open for tender committee to ponder upon. This exercise be completed within a period of two weeks from today.

24. Writ Petition is thus partly allowed and disposed of. Rule is made absolute in the aforesaid terms, with no order as to costs.

