
(2016) 06 MAD CK 0065

In the Madras High Court

Case No : W.P. No. 1757 of 2016 and W.M.P. Nos. 1544 to 1547 of 2016

M/s South India Corporation Pvt. Ltd.

APPELLANT

Vs

M/s. Kamarajar Port Limited

RESPONDENT

Date of Decision : 01-06-2016

Acts Referred:

Citation : (2016) 2 CWC 585 : (2016) 5 MLJ 259

Hon'ble Judges : Mr. M.M. Sundresh, J.

Bench : Single Bench

Advocate : Mr. P.S. Raman, Senior Counsel for Mr. Rahul Balaji, Advocate, for the Appellant; Mr. G. Rajagopal, Senior Counsel and Mr. Ravindran, Senior Counsel for Mr. Krishna Ravindran, Advocate, Mr. AR.L. Sundaresan, Senior Counsel and Mr. Vijay Narayan, Senior. C

Final Decision : Dismissed

Judgement

Mr. M.M. Sundresh, J.—In the month of July, 2015, the 1st respondent had issued a Request for Qualification (hereinafter, referred to as "RFQ") bearing No.KPL/DBFOT/01/2015 for the selection of a developer seeking modification of existing Iron Ore Terminal on "as is where is" basis and to handle Common-User Coal at Kamarajar Port Limited on DBFOT basis. The petitioner was one of the bidders by forming a Consortium along with Chettinad International Coal Terminal Private Limited and Marg Limited. The petitioner made the bid based upon its own capacity qua the minimum eligibility criteria for financial capability as the lead Consortium member having net tangible asset of Rs.580 Crores. The petitioner's bid was rejected on the ground that it has failed to meet the minimum eligibility criteria, as the overdraft facility of Rs.98.01 Crores availed would come under "short term borrowing" as per Schedule III of the Companies Act, 2013. This communication dated 8.1.2016 was preceded by numerous correspondence between the parties.

2. Challenging the RFQ itself and the consequential notice dated 22.12.2015, by which, the Consortium of JSW Jaigarh Port Limited (JSWJPL) and JSW

Infrastructure Limited (JSWIL) was declared to be the eligible applicant as against the petitioner, followed by the communication dated 8.1.2016 sent by the 1st respondent indicating the basis for rejection, the present writ petition has been filed. The petitioner has also put into challenge Clause 7.4.1.2 of the RFQ condition prescribing Net Tangible Asset to not less than Rs.580 Crores with a consequential prayer to declare the rejection of the petitioner's RFQ as arbitrary and unreasonable and thus resultantly the 1st respondent will have to issue the Request For Proposal (in short, "RFP") for the purpose of participation in the tender process to be considered on merit.

3. After hearing the parties, this Court in W.M.P.Nos.1544 to 1547 of 2016 was pleased to pass the following order:

"...9. In such view of the matter, this Court is of the opinion that the petitioner has made out a prima facie case for grant of interim order. Hence, the respondent is directed to issue Request for Proposal (RFP) document to the petitioner by today. On receipt of the same, the petitioner is directed to submit his financial bid by tomorrow the 21st January 2016 before 5.00 p.m. The respondent is further directed to produce the price bid of the petitioner as well as the other bidders, before this Court in a sealed cover on 25.01.2016...."

However the petitioner did not comply with the said order on the ground that the fixation of the amount at Rs.580 Crores is illegal.

4. After filing this writ petition, the petitioner has filed another writ petition in W.P.No.2850 of 2016 calling for the records of the Kamarajar Port Limited, the 2nd respondent therein comprised in the tender for selection of a Developer for Modification of existing Iron Ore Terminal on "as is where is" and also to handle common user Coal at Kamarajar Port Limited, Chennai, including RFQ bearing No.KPL/DBFOT/01/2015, dated July 2015, and RFP bearing No.KPL/DEFOT/01/2015, dated December 2015, and all proceedings consequent thereto and quash the same as being wholly illegal, arbitrary and unreasonable.

5. Though M/s. Sical Iron Ore Terminal Limited (SIOTL) is not impleaded as a party respondent in this writ petition, this Court is inclined to suo motu implead it as respondent No.2, more so, when it has also been arrayed as party respondent in the other Writ Petition No.2850 of 2016. This is also for the reason that arguments have been heard at length from the counsel appearing for the said respondent without any objection and certainly the said respondent is a person interested and thus, a necessary and proper party.

6. All the counsels agreed that it would be appropriate to decide W.P.No.1757 of 2016 qua the petitioner's satisfaction of eligibility criteria for the RFQ with particular reference to the Financial Capability. The same is reiterated in the written arguments given by the petitioner in paragraph No.6.

7. Though the counsels appearing for the respondents raised a preliminary objection on the ground that the petitioner is seeking contrary prayers in seeking

to quash the RFQ and the consequential proceedings as against the satisfaction of minimum eligibility criteria of the financial capability by taking into consideration of the members of the Consortium, this Court does not want to stand on technicalities and thus, intends to proceed on merits. For the reasons mentioned earlier, this writ petition is disposed of without going in to the grounds of challenge made in W.P.No.2850 of 2016 and thus, restricting the present one to the validity and applicability of clause 7.4.1.2 of RFQ conditions, apart from the other proceedings, which are sought to be quashed.

8. Heard Mr. P.S. Raman, learned Senior Counsel appearing for the petitioner, Mr. G. Rajagopal and Mr. Ravindran, learned Senior Counsels appearing for the 1st respondent-Kamarajar Port Limited and Mr. AR.L. Sundaresan and Mr. Vijay Narayan, learned Senior Counsels appearing for the 2nd respondent - Sical Iron Ore Terminal Limited and perused the documents including the written submissions.

Submissions of Petitioner:

9. Learned Senior Counsel appearing for the petitioner submitted that the mere fact that the petitioner has participated in the bid would not amount to estoppel and thus, a right to challenge cannot be taken away. Similarly, the fact that the petitioner has reiterated time and again to consider the bid on its own strength also cannot disentitle it from seeking a direction to the 1st respondent in considering the total net asset of all the other members of the Consortium. The impugned clause in RFQ is contrary to the policy prescribed by the Government of India, Planning Commission as well as CVC Guidelines for improvement in procurement system for Government tenders. The Order passed by this Court in M/s. South India Corporation Limited v. M/s. Ennore Port Limited (W.P. No.23950 of 2004) dated 13.09.2005. as confirmed in W.A.No.2044 of 2005 dated 1.2.2006 would bind the 1st respondent, being the authority and having accepted it. The certification of the auditor ought to have been accepted. There is no transparency in the decision made by the 1st respondent. The entire proceedings lack fairness. Schedule III of the Companies Act, 2013, even if is made applicable, is in the nature of general instructions and thus, not mandatory. The entire process is meant to be used in favour of the 2nd respondent. Though this issue is to be decided in the second writ petition - W.P.No.2850 of 2016, the Court can see the background facts to understand the issues raised herein. A further submission has been made that non-compliance of the interim order passed also would not stand in the way of the petitioner in getting the relief prayed for, particularly, when a challenge has been made in this regard in the subsequent writ petition.

10. The learned Senior Counsels appearing for respondents submitted that the petitioner does not have the locus to maintain the writ petition after participating in the tender process through its bid. The other Consortium members are not made as parties. There is nothing wrong in condition No.7.4 of RFQ. It is the petitioner, who all along, reiterated through various correspondence to the 1st

respondent that it stands on its own financial capabilities. Though an averment has been raised in paragraph No.6 of the affidavit, it cannot stand to reason in view of the prayer sought for in this writ petition. The petitioner cannot be allowed to take mutually contradictory and destructive stand. The petitioner is also estopped from contending to the contrary, after making it clear its liability as current and borrowings as short term. The records of the petitioner also show that the borrowings are loans on demands, which would clearly fall under paragraph 3(d) of the General Instructions for Preparation of Balance Sheet of Schedule III of the Companies Act, 2013. Therefore, the liability was correctly classified as current. After knowing the weakness of its case, the petitioner has curiously taken a different stand. It is not as if the 1st respondent has taken a hasty decision. The decision was preceded by numerous communications. There was a conscious application of mind with the sufficient input from the expert competent to deal with the issue. In support of the contentions, reliance has been made on the following decisions:

1. Siemens Aktiengesellschaft and Siemens Limited v. Delhi Metro Rail Corporation Limited and others, ((2014) 11 SCC 288);
2. Tafcon Projects (I) (P) Ltd. v. Union of India and others, ((2004) 13 SCC 788);
3. Michigan Rubber (India) Limited v. State of Karnataka and others, ((2012) 8 SCC 216) and
4. Punj Lloyd Limited v. Oil and Natural Gas Corporation Limited and others, (Division Bench decision of Bombay High Court in W.P.No.644 of 2011) dated 19.10.2011.

11. As indicated above, this Court, consciously, is not going into the issues, either direct or indirect, to be decided in the subsequent writ petition filed in W.P.No.2850 of 2016. Since it is also agreed upon by the learned counsels to decide only the validity of clause 7.4.1.2 of RFQ and the consequential proceedings, the issues revolving around the same alone are dealt with. At the cost of repetition, this Court is also considering the other issue- the consideration of net available assets of the Consortium members put together qua the minimum eligibility criteria for financial capability, though there is no specific prayer in this regard, despite an averment having been made in the affidavit filed.

12. For the aforesaid reasons, the issue such as the entire proceedings are meant to give succor to the 2nd respondent and thus, hit by Article 14 is also left open to be decided in the other Writ Petition No.2850 of 2016 among other issues such as the reason for the petitioner not complying with the interim order, in the light of the alleged discrepancy between RFQ and RFP. Similarly, the reason behind the tender for selection of developer is also left open for the reason aforesaid.

13. The following facts are not in dispute: The petitioner did submit its bid in its letter dated 18.7.2015 in pursuant to the RFQ issued by the 1st respondent. The

communications between the petitioner and the 1st respondent, as seen from the documents filed by the petitioner would clearly show that it wants to stand or fall on its own financial capability. In fact, it has been specifically put to the petitioner by the 1st respondent in this regard, as seen from the communication dated 21.9.2015 followed by the reply of the petitioner dated 23.9.2015. In the said reply, the petitioner has stated as under:

".... In our RFQ we have not desired to consider strengths of any of the Consortium Member's Promoter(s), Affiliate(s) or Subsidiary(ies) for the purpose of evaluation.

Since the strengths of the Promoter(s), Affiliate(s) or Subsidiary (ies) of any of the Significant Consortium Members are not considered for the RFQ, we feel that "the Exhibit - 3: Letter of Commitment" is not applicable for the RFQ submitted by us."

14. According to the petitioner, it has satisfied the minimum eligibility criteria for financial capability in having the net tangible asset of Rs.580 Crores. The records of the petitioner, as seen from the typed set of papers, would also indicate that the petitioner has shown the sum of Rs.98.01 Crores as "current liabilities" and "short term borrowings". It also confirmed the query raised by the 1st respondent dated 27.11.2015 on the above said amount that the second audited accounts submitted by the petitioner was a overdraft facility for the sum of Rs.98.01 Crores. The petitioner did not provide any authentication from the Bank to the contrary. The financial statements made by the petitioner for the year 2013- 14 show "short term borrowing" under the caption "current liabilities", which is inclusive of overdraft amount. The records also show that the same amounts have been shown under the caption "loans repayable on demand from banks" for a sum of Rs.1,26,88,28,403/-. This figure, as mentioned in the document produced by the 2nd respondent, tallies with the figure mentioned under the caption "current liability" in Item A - "short term borrowings" at page No.84 of the petitioner's typed set of documents. Thus, the only contention in this regard by the petitioner is based upon the reliance of the certification of the Chartered Accountant, classifying it as "long term borrowing". It is also not in dispute that the holdings of the remaining two Consortium members is only 11% respectively. Thus, either one of them on their own strength does not have the minimum eligibility criteria of financial capability. With these undisputed facts, let us deal with the issues on hand.

15. As rightly submitted by the learned counsel appearing for the respondents, the petitioner cannot turn around and challenge the RFQ after voluntarily making its bid. At best, such an attempt can be termed as an after thought after due realisation of its weakness in the case. However, this Court does not want to dismiss the writ petition on that ground alone.

16. Clause 7.4 of RFQ speaks about minimum eligibility criteria for financial capability. This has been fixed for the bidding company or any one of its

promoters forming a separate category and a bidding Consortium and the lead Consortium member or any one of the promoters of a bidding Consortium. In other words, the criteria has to be complied with either by a bidding Company or any of its promoters or a lead Consortium Member or any one of the promoters of a bidding Consortium. For better appreciation, clause 7.4 along with the Margin Note is re-produced hereunder:

"7.4. Minimum Eligibility Criteria For Financial Capability

7.4.1. As on the last date for submission of the Request for Qualification, the Bidding Company or anyone of its Promoters OR for a Bidding Consortium, the Lead Consortium Member or anyone of its Promoters should satisfy ALL the following criteria:

7.4.1.1. Tangible Net Worth not less than Rs. 290 crores Tangible Net Worth as on 31/03/2015 (in case of entities with April to March accounting year) or 31/12/2014 (in case of entities with Jan to Dec. accounting year) would be considered. The Tangible Net Worth is defined as:

Tangible Net Worth = (Equity Capital + Free Reserves and Surplus - Revaluation Reserve) - (Accumulated Losses + Intangible assets).

And

7.4.1.2. Net Tangible Assets not less than Rs. 580 crores Net Tangible Assets as on 31/03/2015 (in case of entities with April to March accounting year) or 31/12/2014 (in case of entities with Jan to Dec. accounting year) would be considered. The Net Tangible Assets are defined as: Net Tangible Assets = Net "Fixed Assets (excluding revaluation reserves, intangible assets such as goodwill, etc.) + Investments + Net Current Assets + Loans & Advances

And

7.4.1.3. Bridge Financing Capability not less than Rs. 50 crores

The bridge financing capability would be assessed from the cash reserves and liquidation of marketable securities. Net Cash Accruals averaged over the last three financial years i.e. years ending 31/03/2013, 31/03/2014 and 31/03/2015 (in case of entities with April to March accounting year) or years ending 31/12/2012, 31/12/2013 and 31/12/2014 (in case of entities with Jan to Dec accounting year).

Amount of liquid assets such as inter corporate deposits held and the amount of marketable securities that could be liquidated as on 31/03/2015 (in case of entities with April to March accounting year) or 31/12/2014 (in case of entities with Jan to Dec. accounting year) would be considered. Net Cash Accruals = PAT + Depreciation + Other non-cash expenses. "

.....

For the purpose of Financial Eligibility, "Promoter" shall mean an entity holding

not less than 26% of the voting securities, either directly or indirectly, in the Bidding Company/Lead Consortium Member. Holding an indirect stake in a company implies a stake held in the company through a chain of other companies, in which event, the percentage holding would be considered on proportionate terms. In the event that there are more than one Promoters (each with not less than 26% stake) in the Bidding Company/ Lead Consortium Member, such Bidding Company / Lead Consortium Member should clearly designate one Promoter as the Lead Promoter whose financial strengths are sought to be credited in lieu of the Bidding Company / Lead Consortium Member.

Financial capability would be evaluated in respect of such Lead Promoter. The Lead Promoter shall be a corporate entity. If there is only one entity qualifying as "Promoter" and such entity is proposed for financial evaluation, then such Promoter shall have to be a corporate entity. Any bank or a financial institution would not be considered a Promoter."

17. This Court does not find any ambiguity in the above said clause qua a bidding Consortium. The criteria prescribed has to be satisfied either by a lead Consortium member or any one of the promoters of the bidding company or a lead Consortium Member, as the case may be. Now, in the case on hand, we are not concerned with the Lead Promoter of the petitioner. Here, the petitioner claims to be the Lead Consortium Member. Now, its contention is that the financial capability of the other two members of the petitioner will have to be taken into consideration and combined along with it and therefore, the combined capability of the members of the Consortium will have to be taken into account. This Court is afraid that such an endeavour on the part of the petitioner would amount to re-writing the very clause itself. Perhaps, that is the reason why the petitioner wants to challenge the clause. Suffice it is to state that the endeavour of the petitioner to read clause 7.4 as it wants cannot succeed, especially in the teeth of the margin note, which explains clause 7.4.1.

18. The learned Senior Counsel made substantial reliance on the judgment of this Court, in W.P.No.23950 of 2004, as confirmed by the Division Bench in W.A.No.2044 of 2005. The issue involved in the said writ petition is different. In that case, two other Companies were in a position to satisfy the financial capabilities having more than 26 percentage. Thus, this Court took into consideration of the financial capability of the promoter therein. Accordingly, a direction was issued to consider the minimum eligibility criteria of the promoter of the Consortium by name Portia Management Services Limited, being a promoter of the Consortium. The said concern was admittedly having 32% stake in the Consortium. Unfortunately, in the case on hand, the other two Consortium members are having only 11% and therefore cannot take advantage of the above said decision of this Court.

19. Further the petitioner cannot take advantage of the decision of the Apex Court in *New Horizons Limited v. Union of India*, ((1995) 1 SCC 478), which deals with the case of joint venture from the point of view of experience of its

various constituents as against the specific clause prescribed in Minimum Eligibility Criteria for financial capability before us. This position has also been clarified, if we peruse the order of the Division Bench, wherein, a specific query was raised on the interpretation of clause 7.4 from the point of view of the financial capability of any one of the promoters of a Consortium as against a Lead Consortium Member alone. After all, the status of the Lead Consortium Member is the prerogative of the Consortium. Thus, this Court does not find any application of the judgment rendered in W.P.No.23950 of 2004, as confirmed by the Division Bench.

20. This Court also does not find any ground to declare clause 7.4.1.2 as unconstitutional. The petitioner has not demonstrated any arbitrariness or illegality involved. The said clause has been introduced to satisfy with the capability of a bidder. The methodology adopted in fixation of net tangible asset by deducting the current liability from the current asset cannot be found fault with. As per the communication of the petitioner itself, it is agreed to undertake and abide by all the terms and conditions of the RFQ. This Court does not find anything wrong in the definition clause 7.4.1.2. The petitioner also participated in the pre-bid meetings, in which, clarifications were sought for and given. Thus, it is also non-suited on the ground of delay and acquiescence. There is no specific challenge to clause 7.4.1. In a commercial matter like this, the power of judicial review is very limited. This Court is neither an expert nor an appellate authority to sit in judgment over the conditions imposed by the 1st respondent. The petitioner, after having failed to satisfy the minimum eligibility criteria for financial capability, made a belated attempt. Thus, the challenge made on the validity of clause 7.4.1.2 of RFQ is rejected.

21. Coming to the alternative submission made, though no prayer is sought for, the same is also deserves to be rejected. The petitioner now takes a different plea contrary to the records produced before the 1st respondent. As discussed above, the petitioner has shown the sum of Rs.98.01 Crores as short term borrowings under the caption "current liabilities". The records also indicate the amount as "loan payable on demand from banks". Now, the petitioner wants to treat it as a long term borrowing based on the Certificate of his Chartered Accountant. This Court is afraid that as against the records produced by the petitioner itself, no sanctity can be given to the certification of the Chartered Accountant. As rightly submitted by the learned Senior Counsel appearing for respondent No.2, the petitioner itself has shown its balance sheet the amount inclusive of Rs.98.01 Crores as "short term borrowings". It is also shown that the sum of Rs.1,26,88,28,403, which is inclusive of Rs.98.01 Crores, is "loans repayable on demand". Admittedly, there are number of correspondence between the parties and thereafter only, a decision was made by the 1st respondent after due consideration with its own expert. One thing is clear, even as per the records of the petitioner, the sum of Rs.98.01 Crores was treated as "short term current liability" and "loan repayable on demand from banks". The petitioner has failed to throw any light from its bankers in this regard, though sufficient time was sought

for and given. A perusal of the general instructions for preparation of balance sheet coming under Schedule III of the Companies Act, 2013, particularly, with specific emphasis of clause 3(d) would show that the petitioner's liability for a sum of Rs.98.01 Crores is a current one. When it does not have an unconditional right to defer settlement of the liability for at least 12 months after the reporting date, it is for the petitioner to satisfy the 1st respondent in the teeth of records produced by it. The petitioner has not demonstrated before the 1st respondent of its unconditional right to defer the settlement of liability for at least 12 months after the reporting date. Thus, the case of the petitioner would come under the classification of "current liability". A faint attempt was made to convince this Court that the borrowing is a long term one. Even on a cursory look at clause C of the General Instructions for Preparation of Balance Sheet in Schedule III of the Companies Act, the case on hand would not come under the "long term borrowings". Such a clause has to be seen as a whole. The same clause has also been reiterated in the short term borrowing in clause (f) of Schedule III under the head "C. Long-Term Borrowings". Under the head "F. Short Comings, "loans repayable on demand" has been included. Therefore, the classification of the 1st respondent treating the borrowing as "short term borrowing" cannot be found fault with. The submission of the learned Senior Counsel for the petitioner that there is no statutory prescription also cannot be countenanced as we are more concerned with the nature of the borrowings. When once the borrowing would come under "short term and current liability" as indicated in the balance sheet of the petitioner itself, then it cannot make out a case in its favour. As rightly observed by the Division Bench of the Bombay High Court in *Punj Lloyd Limited v. Oil and Natural Gas Corporation Limited and others*, it is well within the jurisdiction of the 1st respondent to go into the said issue based upon documents submitted by the petitioner. The certification of the Chartered Accountant would not be binding on the 1st respondent. In other words, it will not prevent the said respondent from considering the materials placed before it to satisfy itself on the financial capability of a bidder. Thus, the contention raised in this regard is also rejected.

22. On the question of transparency and fairness also, the petitioner has not made out a case. The various communications between the 1st respondent and the petitioner alone would be sufficient factors that ample opportunities have been given to the petitioner. It is not as if the petitioner is not unaware. The petitioner is not a novice. The decision was put up in the website and thereafter, a reasoned order was passed. Hence, this Court does not find any lack of fairness on the part of the 1st respondent.

23. For the foregoing reasons, the writ petition stands dismissed. No costs. Consequently, the connected miscellaneous petitions also stand dismissed.