(2021) 09 KAR CK 0011

In the Karnataka High Court

Case No : Writ Petition No. 1430, 1438, 7373, 7374, 7375, 7395 Of 2021(GM-TEN)

M/S Yojaka India Private Limited APPELLANT

Vs

State Of Karnataka & Others RESPONDENT

Date of Decision : 17-09-2021

Acts Referred:

Karnataka Transparency In Public Procurements Act, 1999 — Section 16
Constitution Of India, 1950 — Article 12, 226, 227, 324

Citation : (2021) 09 KAR CK 0011

Hon'ble Judges : Krishna S.Dixit, J

Bench : Single Bench

Advocate : Venugopal M S, R Subramanya, Vinod Kumar, Venugopal M.S, R Subramanya, Vinod Kumar, Venugopal M.S, R Subramanya

Judgement

Krishna S.Dixit, J

1. The third respondent - Executive Engineer vide Notification dated 12.11.2020 had called for Public Tender for the construction of Sea Erosion Protection Wall at Someshwara, etc., places in Dakshina Kannada District; petitioner - Construction Company having participated in the tender process suffered rejection of its Technical Bids at the hands of Technical Committee; petitioner's Appeals filed u/s.16 of the Karnataka Transparency in Public Procurements Act, 1999 against the same having been negatived, is knocking at the doors of Writ Court.

2. After service of notice, the contesting respondents having entered appearance through the learned AAG assisted by the AGA, resist the writ petitions by filing Statement of Objections on 30.07.2021; learned AAG Mr. Subramanya makes vehement submission in justification of the impugned orders and thereby seeks dismissal of these writ petitions.

3. Having heard the learned counsel for the parties and having perused the petition papers, this Court is inclined to grant a limited & collateral indulgence in

the matter as under and for the following reasons:

a) There is force in the vehement contention of learned AAG that the examination of tender matters at the hands of the Writ Court by their very nature, is limited; Courts can scrutinize the award of Government contracts in judicial review under Articles 226 & 227 ordinarily on the grounds of arbitrariness or favoritism, is true; these matters in substance fall within the realm of contract; the decision to accept the tender and award the contract is reached by a process of negotiations through several tires and such decisions are made qualitatively by experts; in matters of the kind a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere; therefore the scope of scrutiny under Articles 226 & 227 of the Constitution of India is very restricted; the Courts have to recognize freedom of contract vesting in the Government almost at par with private citizens, subject to all just exceptions, vide CIVIL APPEAL No.2713/2019 between M/S. ICOMM TELE LIMITED vs. PUNJAB STATE WATER SUPPLY & SEWERAGE BOARD, disposed off on 11.03.2019; this decision has been rendered by the Apex Court after surveying the march of law in the field; keeping these broad principles in mind, the cases at hands need to be treated.

b) The technical bid of the petitioner has been rejected by the Technical Bids Evaluation Committee after examining his track record; the Fisheries Director, after obtaining the information from the Bank of Baroda, notified to the Committee as to petitioner being a defaulter; similarly, an alert has also been sounded by the Corporation Bank, Mangaluru; there is material on record to prima facie show that the petitioner failed to renew the Bank Guarantees despite requests and thus, certain other tender works of the respondents herein have remained incomplete; this apart, petitioner has not accomplished other works that were covered by the security deposit; in view of this, in a sense Condition 31 of the Tender Notification which has the following text becomes invocable.

"31. Corrupt or Fraudulent practices:

31.1 The GOK requires that the Tenderers/Suppliers/Contractors, observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, GOK:

(a) will reject a proposal for award if it determines that the Tenderer recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question;

(b) will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a GOK contract if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for, or in executing, a GOK contract".

c) Even in respect of works already allotted, such as desilting of sand in the deep sea, petitioner had left the lifted sand on the bank of the river and this resulted into the National Green Tribunal, Southern Zone, Chennai in Original Application No. 71/2017 making an order dated 27.07.2021 holding both the contesting respondent and the petitioner, guilty of certain lapses; in fact, the NGT has levied on the contesting respondent an 'Environment Compensation' of Rs.2,00,65,165/-; it has also permitted the recovery of this amount from the petitioner, of course, subject to certain conditions being fulfilled; the relevant parts of paragraphs 44 & 46 therein read as under:

"44. So, under such circumstances, we conclude that the Public Works Department, Port and Fisheries Department, Udupi and Minor Irrigation Department, Udupi along with 15th respondent have committed the violations and they are jointly and severely liable to pay the environment compensation of Rs.2,00,65,165/-(Two Crores sixty Five thousand one hundred sixty Five) and they are also liable to comply with the recommendations made by the Joint Committee as well.

45. .....

46. In the result the application is disposed of as follows:

1. The Public Works Department, Ports and Fisheries Division, Udupi District and Yokaja India Pvt.ltd (through whom the work was done) the 15th respondent have committed violations of CRZ Notification, 2011 and also caused environment damage to the riverine ecology of River Sita in Udupi District.

2. The Public Works Department, Port and Fisheries Department, Udupi and Minor Irrigation Department, Udupi are jointly and severely liable to pay the environment compensation primarily of Rs.2,00,65,165/-(Two Crores sixty Five thousand one hundred sixty Five) which can be deposited with the Karnataka State Coastal Zone Management Authority under the account of Coastal Environment Management Fund within a period of three months and they are at liberty to recover the amount from the 15th respondent who had done this, if they are liable to obtain necessary permission under the tender conditions and committed any violation of tender conditions, in accordance with law."

d) It is admitted before this Court and evidenced too, that petitioner has been facing recovery proceedings before the DRT in O.A. No.1602/2018 to the tune of Rs.275 crore owed to Corporation Bank, Mangaluru; this is reflected in Bank's W.A.No.328/2020 disposed off by a Division Bench of this Court vide judgment dated 06.04.2021 whereby, interim relief granted to the petitioner by the learned Single Judge has been set at naught permitting the Bank "to proceed ahead with the process of recovery"; it is true that this has not been specifically mentioned either by the Tender Evaluation Committee or by the Appellate Authority in their orders, which aspect is dealt with in paragraphs infra.

e) Petitioner as a part of requirement under the Tender Notification in question had produced certain documents allegedly obtained from the officials of the Government of Gujarat; they were pressed into service to prima facie show that he was a scrupulous contractor satisfying the requirement of conditions; however, the contesting respondents by interaction with the said Government has obtained the clarification that the documents produced by the petitioner were not issued by the concerned offices; even otherwise, the quantity of work accomplished by him in the said State was less than what was mentioned in the documents produced by him; this is going by the version of answering respondents; that being the position, this Court cannot readily undertake a deeper examination in the matter; such administrative decisions by their very nature, need to be left to the wisdom of the department concerned; the vehement contention of learned counsel for the petitioner that the proceedings whereby his client was proposed to be blacklisted, are quashed by the Dharwad Bench in W.P.No.102807/2021 disposed off on 16.09.2021, does not make much difference; merely because the proposal to blacklist is set at naught, does not per se strengthen the case of the petitioner, as rightly contended by learned AAG.

f) The vehement contention of petitioner's counsel that the grounds urged by the learned AAG are not the reasons on which the impugned orders have been structured and therefore they cannot be countenanced vide decision of the Apex Court in MOHINDER SINGH GILL VS. CHIEF ELECTION COMMISSIONER, AIR 1978 SC 851, does not much come to his aid; that was a case involving the examination of decisions of a constitutional authority namely, the Election Commission of India and they were taken in exercise of power under Article 324 of the Constitution of India; the Apex Court observed that the validity of orders of the statutory authorities have to be adjudged on the basis of the reasons assigned therein and that these reasons cannot be supplemented de hors, is true; however, case of the petitioner essentially relates to the realm of contract, as already mentioned above; it has been a settled position of law for more than a century that, a decision is an authority for the proposition that it actually lays down in a given fact matrix and not for all that which logically follows from what has been so laid down vide Lord Halsbury in QUINN vs. LEATHEM, (1901) AC 495; learned AAG is more than justified in banking upon a recent decision of the Apex Court in SILPPI CONSTRUCTIONS CONTRACTORS Vs. UNION OF INDIA, (2020) 16 SCC 489, to the effect that even in writ petitions, the grounds that are a bit a alien to the ones stated in impugned orders of the kind, can be urged to defeat a challenge thereto; at para 25, it is observed as under:

"25. That brings us to the most contentious issue as to whether the learned single judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a state within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. The Respondent nos. 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done."

g) Learned counsel for the petitioner vehemently submits that a huge amount running in crores due to him under other accomplished tender works, is being unjustifiably retained by the respondents and that prima facie substantiates an unfair treatment meted out to the petitioner, is only partly true; however, that per se does not substantiate his contention that the impugned orders suffer from the infirmity of bad faith, as rightly submitted by learned AAG Mr. Subramanya; the AAG is more than fair in showing another good gesture; on instructions from the officials present in the Court, he has filed a MEMO dated 17.09.2021 which reads as under:

" MEMO The Respondent-State submits that based on the instructions from Sri Ramacharya, Director of Fisheries, Bengaluru and Sri T.T.S. Phayde, Executive Engineer, Ports and Fisheries Division, Udupi, the total pending bills of the petitioner, regarding Fisheries Department works is Rs.12,97,04,000/-.

As per the order of National Green Tribunal, the PWD, Karnataka is liable to pay compensation of Rs.2,00,65,165/- to the Karnataka State Coastal Zone Management Authority which is directed to be recovered from the petitioner. Therefore, deducting the compensation amount, the total pending bill is Rs.10,96,38,835/- which will be paid to the petitioner within an outer limit of 3 months from 16.09.2021.

This memo may kindly be taken on record by this Hon'ble Court in the interest of justice and equity".

This stand of the answering respondents is really appreciable; the contention of the petitioner to link the issue of non-payment of amount has no relevance to the adjudication of these writ petitions; even otherwise, because of the tall stand taken by the respondents in the subject MEMO, the said contention of the petitioner pales into insignificance, apparently to his own advantage at least to the extent of getting the amount, which is not small in size; other contentions in this regard are kept open for being taken up in appropriate proceedings.

In the above circumstances, the challenge to the impugned orders being unmeritorious, fails; however, the answering respondents are directed to adhere to their undertaking by paying Rs.10,96,38,835/- (Rupees ten crore ninety six lakh thirty eight thousand eight hundred and thirty five) only to the petitioner within the period stipulated by themselves, failing which they shall pay to the petitioner interest at the rate of 18% per annum during the delayed period and the same may be recovered from the erring officials personally; non-adherence to the undertaking, may entail them with contempt proceedings, as well.

Now, no costs.

