

(2024) 01 BOM CK 0075

In the Bombay High Court

Case No : Writ Petition No. 14299, 14478 Of 2023

Nitish Kailash Kapadne And Others

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 03-01-2024

Acts Referred:

Constitution Of India, 1950 — Article 14, 226, 227

Citation : (2024) 01 BOM CK 0075

Hon'ble Judges : Vibha Kankanwadi, J;S. G. Chapalgaonkar, J

Bench : Division Bench

Advocate : S.B. Yawalkar, V.M. Jaware, Atul Pawar, B.S. Deshmukh, S.S. Patil, D.R. Kale, Bhushan Mahajan

Final Decision : Dismissed

Judgement

S. G. Chapalgaonkar, J

1. Rule. Rule made returnable forthwith. With consent of the parties, heard finally.
2. The petitioners, in both the writ petitions, approached this Court under Article 226 and 227 of the Constitution of India, assailing the orders of disqualification passed against them in tender no.15 of 2023, 16 of 2023 and 17 of 2023 dated 27.9.2023, published by Municipal Council, Bhusawal. The petitioners have also prayed to quash the work orders dated 24.11.2023 and 29.11.2023 issued to respondent nos.3 and 4 in pursuance of tender notice.
3. The respondent no.2-Municipal Council, Bhusawal had published three tender notices bearing no.15, 16 and 17 of 2023 for execution of works like construction of cement roads, RCC gutter, security wall, installation of Paver blocks and other sundry works. The tender notice specifies the bidders qualifications for technical bid. Condition 'F' specifically stipulates that the bidder must have RMC plant either owned by himself or on lease hold basis placed within 15 kilometers circumference of Bhusawal town. The documents in support of such compliance was required to be furnished in envelop for technical bid.

4. The petitioners, who are duly registered contractors with Public Works Department in requisite class responded to tender notice and submitted bids in two envelopes i.e. technical and financial bid. The preliminary scrutiny of the documents contained in technical bids was made by tendering authority during period from 18th October, 2023 to 20th October, 2023. Petitioners were called upon to clear the deficiencies regarding documents. It appears that on 31.10.2023, respondent no.2 Municipal Council issued a communication to the petitioners thereby calling explanation regarding functionality of RMC plant owned by M/s. Ayush Procon Pvt Ltd., with whom the petitioners had entered into an agreement of lease for supply of machinery. Although petitioners replied to said communication, respondent no.2 Municipal Council declared both the petitioners disqualified for the reason that the RMC plant of Ms. Ayush Procon Pvt Ltd was found to be non-functional eventually condition 'F' under technical bid has not been complied. The decision of the respondent no.2 disqualifying the petitioners has been served upon them on 8.11.2023 which is assailed before this Court. During pendency of these petitions, work orders dated 24.11.2023 and 29.11.2023 have been issued in favour of respondent nos.3 and 4 being the successful bidders, consequently, petitioners assailed those the work orders by incorporating the amended prayers.

5. The petitioners raised twofold challenge to the impugned orders. Mr. Yawalkar, learned advocate appearing for one of the petitioner would submit that decision of respondent no.2 is tainted with malafides. Condition requiring RMC plant itself was uncalled for, however, the petitioners complied same by producing the lease agreement dated 27.9.2023 between petitioner and M/s. Ayush Procon Pvt Ltd to provide machinery subject to payment of the hire charges during currency of the contract with the Municipal Council or other departments. The validity of the said agreement was for the period of one year. Accordingly clause 'F' in technical bid was complied, however, at the instance of the competitive bidders, the petitioners have been disqualified giving false and incorrect reasons.

6. Per contra, learned advocates appearing for the respondents would submit that specific complaint was received to Municipal Council stating that the ready Mix concrete plant (RMC) owned by M/s. Ayush Procon Pvt Ltd was not functional. Even, the machinery from the said plant has been shifted elsewhere. The petitioners could not offer satisfactory explanation although they were given show cause to explain the allegations in the complaint. As such, the petitioners have been rightly disqualified in technical bid.

7. Having considered the submissions advanced, it would be apposite to refer relevant observation of the Supreme Court of India in the matter of N.G. Projects Limited Vs. Vinod Kumar Jain and others reported in (2022) 6 Supreme Court Cases 127. Paragraph nos.22 and 23 of the judgment reads thus :-

22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the

tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

8. Similarly, in case of *Tejas Constructions and Infrastructure (P) Ltd., Vs. Municipal Council, Sendhwa* reported in (2012) 6 SCC 464 certain guidelines have been laid down for dealing with the challenge raised to the tender process. Paragraph no.23 of the said decision reads thus :-

"23 From the above decisions, following principles emerge :-

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as

awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

9. Bearing in mind aforesaid guidelines, if the facts of the case in hand are evaluated, it is apparent that petitioners have raised the challenge to the technical bid condition requiring RMC plant. Pertinently, such challenge is raised after the petitioners were declared disqualified owing to non-compliance of such conditions. If petitioners had any objection to such condition, it was open for them to challenge the tender notice itself before participation in the tender process. The challenge to the tender condition, particularly when petitioners were held to be disqualified, appears to be afterthought. Even otherwise, in the matter of formulating conditions of tender, the latitude is required to be conceded to the tendering authorities. In the present case, no malice or misuse of statutory powers could be brought to the notice of this court. Apparently, present tender is for construction of the cement concrete roads. The requirement of RMC plant cannot be branded as arbitrary or uncalled for. Tendering authority is competent to incorporate such conditions to ensure that contractor has capacity and resources to successfully execute the work under the contract. Therefore, this Court would not sit in appeal against the decision of tendering authority as regards to incorporating tender conditions. As observed, there is nothing to demonstrate that condition so incorporated is either irrational or arbitrary.

10. The next question that has been posed into service is based on factual matrix. The petitioners have relied upon lease agreement dated 27.9.2023 with M/s. Ayush Procon Pvt Ltd, who agreed to provide requisite machinery of RMC plant for carrying out the work under contract and contended that they were compliant of tender condition. Perusal of agreement shows that the description of the machinery or particulars of Hire charges are not specified. Although, the contract stipulate submissions of papers of Ready Mix Concrete Plant (RMC) alongwith the bond, such documents are not made part of the agreement. Pertinently, on receipt of the complaint dated 31.10.2023 from one of the bidder alleging RMC plant of M/s Ayush Procon Pvt. Ltd being non-functional, respondent no.2 Municipal Council made a communication to M/s Ayush Procon

Pvt. Ltd so also the petitioners to respond the allegations in the complaint. Pertinently, while replying said communication petitioners gave evasive reply stating that they need not explain the aforesaid circumstances. No affidavit from M/s. Ayush Procon Pvt Ltd has been produced on record to controvert the allegations made in the complaint or demonstrate RMC plant being functional. Even, M/s. Ayush Procon Pvt Ltd failed to respond the communication of the Municipal Council in this regard.

11. Pertinently M/s.Ayush Procon Pvt Ltd had entered into similar agreement with LMR Constrotek Pvt Limited Jalgaon. Similar issue arose in the tender submitted by LMR Constrotek. Explanation was called by respondent no.2 from M/s. Ayush Procon Pvt Ltd in relation to that tender, wherein, on 25.10.2023 M/s. Ayush Procon Pvt Ltd communicated that they have shifted 90% of machinery to different project and they are not in position to supply machinery to LMR Constrotek Pvt Limited. The aforesaid circumstances are sufficient to infer that the petitioners were not in a position to comply the requirement of RMC plant. On the basis of lease agreement with Ms. Ayush Procon Pvt Ltd., which appears to be sham document. In view of the aforesaid circumstances this court holds that no case is made out to interfere in the decision of the respondent authorities. Writ petitions sans merit. Hence, both the Writ Petitions are dismissed. Rule discharged.