(2017) 01 KAR CK 0024

In the Karnataka High Court

Case No : Writ Petition No. 921 of 2017 (GM-TEN)

Scania Commercial Vehicles APPELLANT

Vs

Government of Karnataka RESPONDENT

Date of Decision : 11-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Karnataka Transparency in Public Procurements Act, 1999 — Section 16(1)

Citation : (2017) 2 KantLJ 115

Hon'ble Judges : Ashok B. Hinchigeri, J.

Bench : Single Bench

Advocate : Sri. Uday Holla, Senior Advocate for Smt. Shwetha Ravi Shankar, Advocate, for the Petitioner; Smt. Prathima Honnapana, HCGP, for the Respondent Nos. 1 and 2; Sri P.D. Surana, Advocate, for the Respondent No. 3; S. Vijay Shankar, Senior Advocate for Smt. Nalma Mayegowda, Advocates, for the Respondent No. 5

Final Decision : Disposed Off

Judgement

Ashok B. Hinchigeri, J.—Smt. Prathima Honnapura, the learned Government Pleader is directed to take notice for the respondents Nos. 1 and 2.

2. The facts of the case in brief are that the respondent no. 3 issued the request for proposal on 20-7-2016 for design, manufacture, supply and commissioning of the buses. The uploading of the bid could not be completed on account of the display of the message ''unexpected error''. It is the assertion of the petitioner that it has also submitted the hard copy of the bid to the respondent 3. On the ground that the price bid was not uploaded, the respondent 3 was not considering the petitioner''s case. This made the petitioner to file W.P. No. 48493 of 2016 (Scania Commercial Vehicles India Private Limited, Achhatanahalli Village, Narasapura Hobli, Kolar District v. Government of Karnataka, Bengaluru and Others 2017(1) Kar. L.J. 357. This Court, by its order dated 10-11-2016 (Annexure-D) disposed of the said petition with a direction to the (respondent 4 to make the provision for the respondent no. 3 to access the bid submitted by

the petitioner. The respondent no. 3 was directed to consider the petitioner''s bid on e-tender mode without permitting any other additions or alterations and evaluate the same as per the terms and conditions of the tender in comparison with the other bids received.

3. Sri Uday Holla, the learned Senior Counsel appearing on behalf of Smt. Shwetha Ravishankar for the petitioner submits that the respondent 3 has violated the order dated 10-11-2016 passed by this Court in W.P. No. 48493 of 2016. He submits that the respondent 3 by not acting in compliance with the said order has undermined the rule of law. He submits that the presence of at least two bidders would made the tender arena competitive. He submits that the public would be benefited, if the petitioner''s bid is considered and accepted. He would assert that by accepting the bid of the respondent 5, the loss of Rs.75 Crores is caused to the respondent 3. He submits that the petitioner''s price bid is in the PDF format. If it is only ordered to be retrieved, it would establish that the petitioner''s uploading its bid online is completed before the deadline.

4. Sri P.D. Surana, the learned Counsel appearing for the Caveator-respondent 3 submits that the determination of the lowest evaluated price has taken place as per Rule 25 of the Karnataka Transparency in Public Procurements Rules, 2000 (''Transparency Rules'' for short). He places on record the letter dated 22-11-2016 (Annexure-E) issued by the Centre for e-Governance, which states that the data pertaining to any particular bidder, who has not submitted its formal offer against any notice inviting the tender, should not be visible for the Tender Inviting Authority. He submits that a decision is already taken to award the contract in question to the respondent 5 on 6-1-2017 vide CPC Resolution No. 7340.

5. Sri S. Vijay Shankar, the learned Senior Advocate appearing for the Smt. Nalina Mayagowda for the respondent No. 5 submits that this petition is filed in gross abuse of the process of law. He submits that even now the petitioner''s price is not disclosed. The information downloaded from the e-platform does not contain the price offered by the petitioner. He submits that till 5.30 p.m. on 25-8-2016, the petitioner had not given the digital signature. Thus, as the petitioner''s bid was incomplete, it is liable to be rejected.

6. The learned Senior Counsel submits that the petitioner''s main prayer itself is for holding a roving enquiry, which is not permissible in the proceedings under Article 226 of the Constitution of India. He brings to my notice the averments made in paragraphs 17 and 18 of the memorandum of writ petition. It reads as follows:

"17.............Though the petitioner has uploaded the Price Bid document to e-portal, the same has been deliberately made to be missing in the price bid CD.........

18......... The petitioner apprehends that the insiders in the e-procurement portal have meddled with the tender data to ensure safe passage to respondent

5........"

7. Such being the nature of averments, the petitioner has to initiate appropriate proceedings invoking Section 43(e) and 43(i) of the Information Technology Act, 2000 (T.T. Act'' for short), for claiming the damages. He also read out the provisions contained in Sections 46, 48, 57 and 62 of the IT Act, which contain the complete mechanism for adjudicating such disputes. He would therefore contend that the petitioner has to avail of the remedies under the said provisions.

8. He submits that if the petitioner has any grievance over the acceptance of tender of the respondent 5, its remedy would be to file an appeal invoking Section 16(1) of the Karnataka Transparency in Public Procurements Act, 1999 (''Transparency Act'' for short).

9. The submissions of the learned Counsel have received my thoughtful consideration. The prayers made by the petitioner in the writ petition are as follows:

"(i) Issue an order or direction or a writ by appointing an independent forensic science expert having expert knowledge in software applications and technologies to investigate the illegalities, if any, which are taken place due to deviation from the respondents 3 and 4 while implementing the direction of this Hon''ble Court as per Annexure-D in retrieving/downloading/ extracting the documents/information from the server of the e-portal for the purpose of tender invitation as in Annexure-B.

(ii) Consequently, issue a writ of mandamus or any other writ, order or direction directing the respondent 3 to consider the price bid as extracted/downloaded afresh from the uploaded documents of the petitioner from the e-portal which are available in the e-portal in the form of "DRAFTS" and to consider the said document for tender evaluation in accordance with the terms and conditions of the tender bearing No. BMTC/ME(P)/03/2016, dated 20-7-2016 produced as per Annexure B and also to consider the representation made by the petitioner vide letter dated 5-1-2017 produced as per Annexure-L.

(iii) Issue a further order or writ or direction to respondent 3 to ensure that the terms and conditions relating to the time within which buses required to be supplied is remained equal to the duration which would have been available to the petitioner, if the petitioner has not gone through the litigation processes as in this petition as well as in the previous writ petition bearing W.P. No. 48493 of 2016.

(iv) Pass such other order or orders as this Hon''ble Court deems fit to grant in the circumstances of the case in the interest of justice and equity."

10. To examine as to whether prayer (i) can be acceded to, an advertence may have to be made to what the Apex Court has said in the case of State of Kerala and Others v. M.K. Jose (2015)9 SCC 433. It is held therein that the writ petition under Article 226 of the Constitution of India is not the proper remedy for

adjudication of contractual disputes. Para 21 of the said decision reads as follows:

"21. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a public interest litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court.

11. The prayer (i), if acceded to, would virtually result in the holding of a roving enquiry, which practise has been deprecated by the Apex Court. Prayer (ii) is not grantable, because no one can ask for a mandamus without a judicially enforceable right as well as a legally protected right. In saying so, I am fortified by the Apex Court''s judgment in the case of Mani Subrat Jain and Others v. State of Haryana and Others (1977)1 SCC 486. In the cases of Chingleput Bottlers v. Majestic Bottling Company reported in (1984)3 SCC 258 and Oriental Bank of Commerce v. Sunder Lal Jain and Another (2008)2 SCC 280, it is held that the mandamus will not lie where the duty is clearly discretionary. The existence of a right is the foundation of a petition for mandamus. The Apex Court in the case of Rajasthan State Industrial Development and Investment Corporation and Another v. Diamond and Gem Development Corporation Limited and Another (2013)5 SCC 470, has held that the writ cannot be granted unless it is established that there is an existing legal right of the applicant or an existing duty of the respondent.

12. Whether the petitioner has uploaded the price bid, whether any insiders have meddled with the tender data, whether the vital tender data has been deliberately made to be missing, etc. are all seriously disputed questions of facts.

13. Thus, the prayers made by the petitioner cannot be acceded to. The petitioner has to avail of the remedy of seeking the adjudication under the Information Technology Act, 2000 and/or prefer an appeal invoking Section 16(1) of the Transparency Act. If the petitioner files the appeal under Section 16(1) of the Transparency Act and makes an I.A. for stay, etc. within one week from today, the Appellate Authority is directed to dispose of the I.A. for stay, etc. within three days from the date of their filing. Further, the Appellate Authority is also directed to dispose of the main matter (appeal) itself within two weeks from the date of its filing and after affording an opportunity of hearing to all the parties.

14. All the contentions are left open to be urged before the appropriate forums.

15. No order as to costs.

