(2017) 03 AP CK 0062

In the Andhra Pradesh High Court

Case No : Writ Petition Nos. 30105 of 2016 and 1508 of 2017

Smt. Radha Konduri APPELLANT

Vs

State of A.P. RESPONDENT

Date of Decision : 20-03-2017

Acts Referred:

Citation : (2017) 3 ALT 345 : (2017) 3 AndhLD 486

Hon'ble Judges : Sri. Challa Kodanda Ram, J.

Bench : Single Bench

Advocate : Sri. N. Subba Rao, Advocate, for the Petitioner; G.P for Endowments, for the Respondent Nos. 1 to 3; Sri. A. Sreekantha Reddy, Advocate, for the Respondent Nos. 4 and 5

Final Decision : Disposed Off

Judgement

Sri. Challa Kodanda Ram, J.—These two writ petitions involve principally same question of law and arising from the same set of facts. The petitioner in W.P.No.30105 of 2016, is also the Proprietrix of the concern in W.P.No.1508 of 2017. Sri Kalahastheeswara Swamy Vari Devasthanam, Sri Kalahasthi (hereinafter referred to as "Temple") for convenience sake. In W.P.No.30105 of 2016, circular dated 10.03.2016, in stipulating the earnest money deposit as 10% of the value of the goods to be procured by the temples under its administrative control, is questioned apart from the tender notification dated 14.8.2016. The yet another relief claimed is also to declare that the 5th respondent in W.P.No.30105 of 2016, is not competent to hold the post of Executive Officer of the temple. W.P.No.1508 of 2017 is filed by a propriety concern, represented by its Proprietor questioning tender notification dated 04.01.2017. It may be noted that the petitioner in W.P.No.30105 of 2016, is the proprietor of the petitioner in W.P.No.1508 of 2017. In both the writ petitions, the common question is the reasonableness of the fixation of earnest money deposit as 10% of the tender value and whether the same is arbitrary, excessive and illegal. It is conceded by the petitioners that so far as the incompetency of the

5th respondent in W.P.No.30105 of 2016, is concerned, this writ petition no longer survives on account of subsequent developments.

2. It is the contention of the petitioners as pleaded in the affidavit and as articulated by the learned senior counsel Sri P. Gangaiah Naidu and Sri N. Subba Rao that all through the years the temple was procuring various items like sugar, rice, pooja items, groundnut, Udar dal and horse gram, Bio-degradable covers, different kinds of fruits and various other provisions from traders were being procured under a single tender and the earnest money that was being stipulated never exceeded Rs.2,00,000/- at any point. In the impugned tenders, Rs.10,00,000/- for each of the items was fixed as E.M.D with the result a tenderer who is willing to supply all the items would be required to provide earnest money of about Rs.70,00,000/- to Rs.1.3 crores. This stipulation of E.M.D at 10% of the proposed contract value is totally arbitrary, unreasonable and there is no rational and the same is purely invented by the respondents to eliminate and prevent the small traders from participating in the tendering process. The elimination of competition would only benefit the traders with huge capital and thereby eliminating the competition to their sole benefit. There is no basis for fixing 10% of the tender value as E.M.D. Learned counsel while placing reliance on the tender notification dated 14.08.2016, issued by the 3rd respondent temple wherein the E.M.D has been fixed at 10% of the tender value contended that the different yardstick is being followed by the temple in an arbitrary and whimsical manner. Learned counsel for the petitioner submits that for procuring the rice, the temple authority had specified that a particular brand of rice to be supplied and if a particular brand is required, there would be no requirement for calling of the tenders as the tendering authority as well directly would approach the original producer and procure the same.

3. On the other hand, Sri A. Sreekanth Reddy, learned counsel appearing for the 3rd respondent temple, contends that the temple has no discretion other than to follow the circular issued by the Commissioner and it is not the 3rd respondent temple concern as to why the other temples are not following the circular. The reasons and the circumstances under which the other temples are not following the circular by fixing the EMD amount less than as stipulated are not known to the temple and at any rate the adherence of the instructions issued by the superiors cannot be found fault. He further contends that on account of the experience gained over the years the temple has consciously decided to invite offers for different items, so as to enable larger participation of the traders, who exclusively deal in each of the commodity/product. For example a trader dealing in rice may not be dealing in doll, coconut and covers etc., and vice versa. Learned counsel also contended that the Supreme Court as well as this Court had repeatedly held that it is exclusive prerogative of the tendering authority to fix the conditions of tender and unless such fixation of the norms and conditions are malafide, the Courts would not interfere and substitute its opinion. He cited the following citations:

Michigan Rubber (India) Limited v. State of Karnataka and others (2012) 8 Supreme Court Cases 216

Directorate of Education and others v. Educomp Datamatics Limited and others (2004) 4 Supreme Court Cases 19

Raunaq International Limited v. I.V.R. Construction Limited and others (1999) 1 Supreme Court Cases 492.

Global Energy Limited and another v. Adani Exports Limited and others (2005) 4 Supreme Court Cases 435.

4. The facts are not in dispute. The only question that falls for consideration is whether the fixation of earnest money at 10% of the tender value is arbitrary and unauthorized calling for interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The value of goods procured by the temple from year to year is estimated to about Rs.12.00 to Rs.15.00 crores. Broadly the items that are procured by the temple are rice, various types of fruits, pooja material and there are as many as 68 items within the said category. There are various types of cloths, Bio-degradable covers, Bengal gram, black gram and horse gram and other miscellaneous material. It is not in dispute that in earlier years, the E.M.D was being fixed at about Rs.2,00,000/-. However, after the circular instructions of the Commissioner, E.M.D is being fixed approximately at 10% of the value of the goods that are to be procured. Unlike in earlier tenders an intending tenderers may chose to offer only one or more items independently depending on their strength and expertise in dealing with a particular commodity. In other words, the present system provides an opportunity for any one to participate and offer one or more products unlike in earlier times where an intending bidder as necessarily to quote for and supply all the items though they may not be dealing with such commodities/products in the normal course of business. Viewed in that angel, the contention of the petitioners that the present system enables only big traders participate in the tender as no basis and this Court has no hesitation to reject such arguments as the facts point out other wise. Now the question with regard to fixing of 10% as an earnest money to be deposited is excessive or arbitrary. At the outset, it may be noted that the Supreme Court had categorically held as far back as in 2007 in M/s. Puravankara Projects Limited v. M/s. Hotel Venus International & others 2007 (10) SCC 33=2007 (6) ALT 1.1 (DN SC) that "Tender terms are contractual and it is the privilege of the Government which invites its tenders and Courts do not have jurisdiction to judge as to how the tenders terms should be framed." The Supreme Court after referring various earlier judgments had categorically held that the tender terms are contractual and it is the privilege of the Government which invites its tenders and Courts do not have jurisdiction to judge as to how the tender terms would have to be framed. It is not necessary for this Court to multiply various other judgments which have reiterated this fundamental principle. It may be noted that it is not the case of the petitioners that the respondents are not entitled to fix a condition

of earnest money deposit at all and the objection is only in relation to the quantum. What is reasonable, is to be left to the discretion of the 1 2007(10) SCC 33 at pages 36 and 45 authority. In the present case, though hypothetically, if an intending bidder desires to bid, he may have to deposit a sum of Rs.70,00,000/- to Rs.1.03 crores and there may be many number of bidders who may bid only for certain of the commodities. Further, the temple is entitled to experiment by dividing the contract into different components and in the event they are not successful, they may adopt the earlier procedure. The opportunity of experimenting to the tendering authority cannot be denied by this Court by substituting its opinion what is reasonable. In those circumstances, so far as the fixation of 10% as the earnest money deposit cannot be said to be arbitrary or excessive. This Court can also take judicial note of the fact that in large number of tenders 10% of the tender value as E.M.D or as a security deposit to be provided is not uncommon. The Supreme Court in recent judgment reported in Michigan Rubber (India) Limited v. State of Karnataka and others (2012) 8 SCC 216=2013 (1) ALT 18.3 (DN SC), had reiterated the scope of interference of the Courts to be minimal and had held that a freehand had to be given to the tendering authority in setting terms of the tender and only if they are arbitrary, discriminatory, malafide, actuated by bias, the Courts would interfere. In those circumstances, there are no merits in the writ petitions and both the writ petitions are liable to be dismissed.

5. However, the argument of the learned counsel for the petitioners to the extent of their objection for notifying a particular brand of product deserves consideration as except in exceptional circumstances, where there is no other producer/supplier of the commodity required, it is impermissible to specify a branded item to be supplied through tendering system. It may be noted that such situation would arise where, an exclusive patented item or commodity is required to be procured and not in other cases. In those circumstances, so far as issuance of tender for procurement of rice with specified brand is liable to be interfered with. The tendering authority strictly following the circular cannot be found fault merely on the ground other temples adhere to the circular instructions. Further, it is unnecessary for this Court to probe into the reasons for the respective temples fixing EMD at variance in the circular instructions.

6. Accordingly, both the writ petitions are dismissed, except to the extent of specifying with respect to the procurement of branded rice with costs of Rs.10,000/- (Rupees ten thousand only) in each case, payable by the petitioners to the Temple authority. No order as to costs.

7. Miscellaneous Petitions, if any, pending in this writ petition, shall stand closed.