

BOMBAY HIGH COURT

B.D. Yadav and M.R. Meshram

Vs.

Administrator

Writ Petn. No. 2568 of 1981

(Tulpule and Padhye, JJ.)

18.03.1982

JUDGEMENT

Tulpule, J.

1. The Administrator for the City of Nagpur introduced an advertisement dated- 1-9-1981 in the Nagpur Times inviting tenders' for the unfinished work of the Yeshwant Stadium. The tender forms were to be taken away from the office of the Corporation on or before 28-9-1981 "on production of eligible valid registration". The tenders were invited from persons "approved eligible contractors" approved by the Municipal Corporation (City Administration). State, P. W. D. and Central P. W. D. and who had qualified engineers to execute the works and were experienced in similar works. As initially advertised, the cost of the works was Rs. 25,00,000/- and earnest money of Rs. 25,000/- was required to be deposited. The time for completion allowed was 18 months. The earnest money deposit was required to be paid "in the form of deposit at call or Demand Draft, or National Savings Certificates to be pledged in the office of the Development Engineer in a separate cover".

2. To this, advertisement, a corrigendum was issued subsequently by which the time of completion, the earnest to be deposited and the cost of works were changed. From 25 lakhs the cost was raised to Rupees 42,70,000/- necessitating a corresponding change in the earnest money from Rs. 25,000/- to Rs. 42,700/-. The time for completion was enhanced to 24 months.

3. The petitioner is a contractor registered with the Nagpur Municipal Corporation and in the classification which prevails in the Nagpur Corporation for such registered contractors was an A-class contractor. Pursuant to this advertisement, the petitioners and respondent 2 M/s. J. B. Construction Building Contractors (hereinafter referred to as J. B. Constructions') offered their tender for this contract. The petitioner's contention is firstly that J. B. Constructions ought not to have been issued the tender form at all because they did not hold a valid registration and were

still issued on the 28th September, 1981 the tender form. His allegation is that no such eligibility certificate or registration was produced at the time of taking away the tender forms.

4. The second contention advanced by the petitioner is that J. B. Constructions was not an approved eligible, contractor. It was not an eligible contractor, in the sense it was not registered with the City Administration, and though it may have been registered as a contractor With the P. W. D. or the State of Maharashtra, it was registered as a B-Class contractor permitting it to contract or to tender involving a sum of Rs. 30 lakha and not more. Therefore, he was not an "approved eligible contractor".

5. The third contention which was raised was that the earnest money required to be deposited in terms of the advertisement was also not deposited by respondent J. B. Constructions. The tender notice required that it shall be deposited in the form of a call deposit or demand draft or national savings certificate. What, respondent 2 did was to deposit a time deposit receipt which was pledged in the office of the Development Engineer along with the tender forms.

6. The tender forms were opened as stipulated on 30-9-1981 in the presence of the petitioner as well as respondent 2, but no decision was taken at that time. It was also discovered, according to the petitioner, that respondent J. B. Constructions had not signed the tender form at page 3. Some correspondence was entered into between the petitioner and Municipal Commissioner with which we are not at present concerned. On 9-11-1981 the petitioner was informed that its tender has not been accepted, while that of respondent J. B. Constructions was accepted. The petitioner was called upon, therefore, to collect and take away its earnest money deposited with the tender. Aggrieved by this decision of this Commissioner to accept the tender of J. B. Constructions and awarding the contract to it, present petition is filed.

7. An interim relief of injunction was obtained and rule was ultimately issued on 10-12-1981. Pursuant to the rule respondents 1 and 2 filed their return. Respondent 2 did not file a return subsequent to the rule which was issued, but has prayed that the submissions filed may be taken on record and read as return to the rule. Both the respondents submit that the tender has been properly accepted and that there was no illegality in accepting the tender of J. B. Construction. The Municipal Commissioner, who is also the Administrator, since the term of the elected body has expired and no fresh elections have taken place is in charge of and appointed as such. The Administrator in his return has also further stated that the office of the Municipal Corporation appeared to be favourably disposed towards the petitioner. That he found that respondent. J. B. Constructions had been allotted work up to a crore of rupees by the Vidarbha Housing Board. Respondent 2 was financially stable and that the complaints made and defects pointed out by the petitioner are technical and can be ignored. He also submitted that he had obtained legal opinion the matter and produced both the legal opinion obtained by him as well as the notes put up to him by the office indicating why the petitioner's tender should be accepted and that of J. B. Constructions rejected. In his view, the technical omissions were not such, making the tender

liable to be rejected and, therefore, the tender came to be accepted.

8. The petition is clearly based upon the ratio of the decision in *Ramana v. international Airport Authority*¹ to which a reference specifically was made in the petition itself. The gravamen of the petitioner's contention as set out earlier was clearly that respondent 2

¹(AIR 1979 SC 1628)

was not an eligible contractor while the petitioner was, and since respondent 2 was not an eligible contractor, and since he had not tendered in accordance with the tender notice and had not complied with the conditions of the tender notice, his tender was not liable and entitled to be considered. If a tender was not in accordance with the tender notice, then such a tender in preference to another, which was in accordance with the tender notice and fulfilling all the requirements, had to be accepted and the earlier one rejected. Sri Rajkarne appearing for the petitioner contended, amongst other contentions before us, that where an act is required to be done in a particular manner, it is that manner alone in which the act must be done and no other. His contention, therefore, was that if respondent 2 had not deposited the earnest money as required by the tender notice, then his deposit in any other manner was not in accordance with the tender notice and the tender itself was liable to be rejected. His second contention in that behalf, which he substantiated at the time of the hearing of this petition, was that the substance of the tender which is itself an offer was un signed by the respondent. In law and in fact, therefore, it 'was his contention that there was no tender at all capable of being accepted.

9. We would firstly deal with the first contention which was raised, namely, that the respondent is not an eligible approved person or contractor. It is no doubt true that the words "approved eligible contractor" appear in the advertisement. In the context of the advertisement, the contractor must be and can be approved either by the authorities mentioned in the advertisement, namely, the City Administration, the State, P. W. D. and Central P. W. D. He can, therefore, be a contractor approved with any of these authorities and must be eligible to do the work which is expected to be done.

10. It may be stated that the facts in this case are not disputed. Though it is not disputed that respondent J. B. Constructions is an approved contractor with the Maharashtra State, it is not disputed that he is a B-Class contractor. B-Class contractor in the Maharashtra Public Works Manual has a work limit up to 30 lakhs this can be seen from the entry in Appendix IX to the Public Works Manual. Respondent 2, therefore, so far as Maharashtra State was concerned was entitled to tender for works up to 30 lakhs and not beyond. The present works as amended by the corrigendum involves a sum of Rs. 42 lakhs and was, therefore, obviously beyond the limit of the respondent-Contractor of 30 lakhs of rupees as a B-class contractor. It is also not disputed that by way of earnest money deposit, what the respondent did was to pledge a time deposit receipt for the required amount maturing on 31-12-1981. The tender notice required that the call deposit or bank draft or national savings certificates were to be pledged. It is also, therefore, clear that there was no compliance in terms of the tender notice. With regard to the contention that the

tender form was issued without producing eligible valid registration by the respondent, we have no material and that is not pressed before us. It is, therefore, common ground firstly that respondent 2 as a B-class contractor was entitled to tender so far as Maharashtra State was concerned up to a limit of 30 lakhs and had not complied with the requirement relating to the deposit. The question is whether on that account, respondent 2 becomes disqualified to tender.

11. The provisions relating to registration of contractors with the City Municipal Corporation are to be found in the Bye-laws made on 18-2-1959, subsequently amended in 1966. A-class contractor therein was entitled to execute works more than Rs. 50,000/- before the amendment and subsequent to the amendment more than Rs. 2,50,000/-. There is no upper limit and this seems to be the contractor contemplated as an A-class contractor whose lower limit is Rs. 2,50,000/-. Since there is no limit to an A-class contractor, Shri Rajkarne is right in contending that he was an approved eligible contractor. On the other hand, respondent J. B. Constructions was eligible to tender up to Rs. 30,00,000/-. The present works being 30 lakhs of rupees at the time when the tenders were invited, the respondent was also not in terms an approved eligible contractor. Shri Rajkarne, therefore, is right in contending that the respondent did not qualify and fulfil two conditions which were noted in the tender notice, namely, eligibility and payment of deposit as required. Shri Rajkarne referred us to some other contentions to submit that there was no real tender in the appropriate sense of the term made by the respondent. There was no valid tender as such and that the Commissioner was not entitled to accept the tender made by the respondent.

12. We may at once state that the manner and the form of challenge lastly raised during the trial does not find a place in the petition. What was attempted to be submitted before us, however, was that a tender notice in the form could not have been issued and even if issued, the tender submitted by the respondent was not entitled to be accepted in law and the Commissioner had no powers to do so. For that Sri Rajkarne relied upon byelaws Nos. 3 (b), 4 and 13 of the Byelaws of the Corporation. He also made a reference to Sections 63 and 64 of the Act, but we do not think that those sections are in any way applicable. The stage for applying those sections and their attraction comes only when a contract as a consequence of the acceptance of the tender is made. No such contract has so far been entered into. Therefore, there is no scope for inviting the provisions of either Section 63 or Section 64 upon which reliance is placed by Sri Rajkarne. We have, therefore, to examine the efficacy of his contentions only with reference to the byelaws relying upon which he contends that the tender in the present case was not entitled to be accepted at all.

13. Considerable reliance was placed upon the definition of the words "approved contractor" in byelaw 1 (b) and provisions of byelaw 3 (b). An "approved contractor" in terms of the byelaws means a contractor, syndicate or a firm who is borne on the register of contractors maintained by the Corporation subject of course to his name not being disqualified. An approved contractor, therefore, according to Sri Rajkarne was he only whose name was borne on the list of registered

contractors maintained by the Corporation. It is only these approved contractors to whom as Shri Rajkarne interprets the byelaws that a tender or contract work can be given by the Corporation or its Chief Executive Authority. Byelaw 3 (b) in this behalf is material and says: "No person, whose name is not borne on the list of approved contractors, shall be entitled to submit a tender for any work."

14. Sri Rajkarne's submission was that the tenders could not be invited from others and no person who is not on the approved list of approved contractors can tender or was entitled to tender in respect of works of the Nagpur Municipal Corporation. Byelaw 13, according to him, is only an exception to this prohibition or embargo contained in Byelaw 3 (b). Byelaw 13 reads as follows :

"No tender may be accepted from, or contract given to, any person, syndicate or firm, whose name is not borne on the register of contractors referred to in byelaw 8, without the orders of the Standing Committee :

Provided that if, on tenders being invited, no registered contractor tenders, and the work cannot conveniently be undertaken departmentally, it may be given by the Municipal Commissioner to an unregistered contractor. Each such case shall be immediately reported to the Standing Committee."

15. It is not in dispute that the powers of the standing committee in the circumstances are vested in the Commissioner, the elected body not being in existence. What was, however, submitted was that the proviso to byelaw 13 imposes two conditions in which the Commissioner can award a contract to a non-approved contractor or tenderer. These were : (1) no registered contractor has tendered and (2) the work cannot be conveniently undertaken departmentally. Sri Rajkarne submitted that it is only if these two conditions exist that the Commissioner or the Standing Committee as the case may be and the powers of the Standing Committee being vested in the Administrator in the present case the Administrator can award a contract to a non-approved contractor if these two things and conditions are satisfied. He submitted that there was nothing to show that the work could not be departmentally taken up conveniently and that in any event a registered contractor had tendered. His submission, therefore, was that Byelaw 13 prevented the Administrator from accepting the tender of the contractor.

16. Now a close look at Byelaw 13 will indicate that it does not enact a complete prohibition upon the powers of the Standing Committee or the Commissioner in the circumstances may be, to award a contract to a non- approved contractor. The opening words of Byelaw 13 are: "No tender may be accepted from or contract given to any person". It is, therefore, clear that the word "may" confers a discretion upon the authority concerned either to award or not to award a contract to a non-approved tenderer. Apart from that, we think that there is a more compelling valid reason to reject this contention and that is, the terms of the invitation to tender in the advertisement issued on 1-9-1981. It seems to be clear that when this advertisement was introduced the authority had made up its mind to award a contract, if the question arose, not only

to the approved contractor, but also if he was so considered suitable and necessary to unapproved contractor; unapproved in the sense of the bye-law prevailing. Had it not been so, then it is clear to us that the condition that in case an approved contractor tenders, the offer or tender submitted by an unapproved contractor would not be accepted would have been made clear in the advertisement itself. If an unapproved contractor were to tender along with an approved contractor, pursuant to the advertisement and if his tender were to be subsequently rejected on the ground that under Byelaw 13 since an approved contractor had tendered, the other tenderer who is an unapproved contractor could not be accepted, the decision would have been liable to be struck down on the same principles and ratio as was relied upon for the petitioner and enunciated in Ramana Shetty's case (supra). There was, therefore, no justification and no cogency in the contention that Byelaw 13 in the circumstances could not be waived and the acceptance of the tender of an unapproved contractor in the circumstances was against the provisions of the byelaw and, therefore, beyond the powers of the Commissioner. We think that this contention in the circumstances must be rejected. We may also point out that a contention in this form has not been raised in the petition. The respondent, therefore, had no opportunity to meet this contention. Nevertheless we have considered the contention as it was sought to be supported on the provisions of the bye-law. We may also point out that it has not been pointed out to us that the tender form says that the tender form is issued subject to the bye-laws which are prevailing in the Nagpur City Corporation.

17. We will then deal with the other deficiencies upon which the petition is principally based. The contention advanced is, as we pointed out, that the two conditions which related to eligibility and the payment of the deposit as stipulated are not satisfied. We think a distinction must be made, where tenders are invited subject to certain conditions, between the conditions which are essential to the performance of the contract and conditions which are ancillary or subsidiary to the main object of the contract. The object of the contract and the nature of the work for which tender was invited construction and conclusion of the unfinished work of the Yeshwant Stadium. It is not contended that the respondent in this case was not qualified to undertake or complete a work of this kind. As has been stated in the return of respondent 1 and annexures produced, the respondent had been awarded works costing over one crore of rupees by the Vidarbha Housing Board and the Nagpur Area and Housing Development Board. There is, therefore, no contention that respondent 2 was not qualified or did not possess the capacity to undertake the essential part of the work, or the principle object of the tender, namely, complete and construct the unfinished work of Yeshwant Stadium. What is complained is 'that certain other conditions have not been fulfilled. As we stated above, we think that these are conditions which are ancillary and subordinate and do not deal with the essential character of the work, which was contemplated. In Ramana Shetty's case (supra) the absence of the qualification was with regard to the essential character of the work which was to be undertaken by the contractor. We think that there is a clear distinction between conditions which are essential to the performance of the work involved and undertaken and those which are ancillary, subordinate and subsidiary to it.

18. A number of contentions were raised in connection with the non-fulfilment of the other terms of the tender. It was submitted that the respondent not having signed page 3, which is really the tender or the offer, there was no offer at all. We think that that is taking too technical a view of the matter. It is true that page 3 is not signed and contains the tender or offer itself. But there are several other indications and there are several other pages of the tender form which do bear the signatures of the respondent. Even the details of that offer or tender have been filled. What has remained is the signature below that offer or tender. In the circumstances that the respondent had signed at other places, had filled the tender completely and fully, had even gone to the extent of pledging a deposit receipt for Rs. 42,500/-, taking away the tender form and submitting it and remaining present on 30-9-1981 when the tenders were opened, leads to the conclusion that the respondent did intend to tender and had in fact tendered. It could not have been said in the circumstances merely because page 3 was not signed that respondent 2 had no intention to tender. If the intention to tender is clear in the circumstances which are attendant, then the fact of such an offer can be readily spelt out notwithstanding want of signature on the document. The accompanying circumstances can always be looked into. We have no hesitation in coming to the conclusion that respondent J. B. Constructions must be deemed to have and did intend to tender and did in fact tender pursuant to the invitation dated 1-9-1981. Similar is the situation in regard to the non-payment of the earnest money in the manner in which it was required. The deficiency is undoubtedly there. The question is whether that deficiency relates to a non-essential character of the tender or its non-essential part. If it related to the essential part of the tender work, then following the rule enunciated by the Supreme Court, it would not have been possible for the authority to accept the tender. It is an entirely different matter where the conditions which are not entirely fulfilled in accordance with the requirement related to an unessential part of the tender. We think, therefore, that in the present case, non-compliance related to only ancillary and subsidiary matters of the tender, and did not refer and relate to the essential character of the contract or work to be undertaken. Consequently, they should be ignored and would not interfere with the consideration of such a tender. The tender, therefore, of respondent 2 was entitled to be taken into consideration and was rightly taken into consideration.

19. We may point out that there is a considerable difference between the two tenders. The petitioner had tendered for this work is a sum of Rs. 47,00,000/- and odd, while the tender of J. B. Constructions, respondent 2 approximated nearabout the cost of construction estimated by the Corporation authorities. If that tender was, therefore, accepted in preference to that of the petitioner, in the background set out by the Administrator in his return, and considering the notes, extracts of which were filed, we think that the administrator was justified in accepting the tender of respondent 2.

20. The petition, therefore, fails and is dismissed. Rule is discharged. With regard to costs, we do not think that the petitioner should be awarded any costs. We assume that the petitioner's interest in the matter was actuated by a desire to secure compliance with law.
Petition dismissed.

