

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.1787/2021

M/s. V.N.Reddy,

..... **PETITIONER**

..V E R S U S..

- 1] The Superintending Engineer,
Vidarbha Irrigation Development Corporation,
Office at Water Resources Department,
Civil Lines, Nagpur.
- 2] The Executive Engineer,
Lower Wardha Project Division,
Wardha.
- 3] Shri Mahesh Reddy,
M/s. Om Gurusai Construction Company
through its Managing Director,

Amended as
per Court's
order dated
07.01.2022

Sd/-Counsel
for petitioner
dt.12.01.2022

..... **RESPONDENTS**

Shri S.D.Chopde, Advocate for petitioner.
S/Shri S.G.Jagtap with Shri H.D.Marathe, Advocates for respondent nos. 1 & 2.
Shri Tushar Tathod, Advocate for respondent no.3.

CORAM : A.S.CHANDURKAR and G.A.SANAP, JJ.

ARGUMENTS WERE CLOSED ON : 25th FEBRUARY, 2022.

JUDGMENT IS PRONOUNCED ON : 25th MARCH, 2022

**AS PER CHAPTER XI RULE 1 OF THE BOMBAY HIGH COURT APPELLATE SIDE RULES,
1960).**

JUDGMENT (Per A.S.CHANDURKAR, J.)

1. **Rule.** Rule made returnable forthwith and heard the learned counsel for the parties.

2. The challenge raised in this writ petition is to the issuance of work order dated 07.05.2021 by the Executive Engineer, Lower Wardha Project, Division Wardha- second respondent in favour of the third respondent.

3. The facts relevant for considering the challenge to the issuance of the work order are that the second respondent on 18.01.2021 issued a tender notice calling upon interested bidders to submit their bid documents with regard to three works. The work at serial no.1 which is “construction of land development works (Part-I) of Gadegaon main minor offtaking @ R.D. 4995 M on Nandgaon Dy” is the subject matter of the writ petition. Pursuant to the tender notice three bidders submitted their bids. The technical bids were opened on 08.02.2021 and the bids submitted by the petitioner and the third respondent were found to be eligible. On opening of the financial bid on 12.03.2021 it was found that the financial bid of the third respondent was lowest and therefore as required by Clause 2.22.0 the third respondent was required to furnish additional performance security within a period of two working days. According to the petitioner, the third respondent furnished such additional performance security on the third working day and hence the third respondent ought to be debarred from the tender process for failure to submit the

additional performance security within the prescribed time. Ancillary grounds also raised pertain to certain shortcomings in the documents submitted by the third respondent. In the aforesaid factual backdrop, the petitioner has challenged the issuance of work order to the third respondent as having been issued disregarding the mandatory tender conditions.

4. Shri S.D.Chopde, learned counsel for the petitioner has invited attention to various tender conditions and especially Clause 2.22.0. According to him, as per sub-clause (ix) thereof the lowest bidder was required to submit the additional performance security in the form of Demand Draft/Bank Guarantee or Fixed Deposit Receipt within two working days of opening of the financial bid. This period of two working days was not liable to be relaxed under any circumstances and therefore since the third respondent furnished such additional performance security beyond the period of two working days, the second respondent was not justified in issuing the work order to the third respondent. It was submitted that the financial bid was opened on 12.03.2021. 13.03.2021 was a Saturday and 14.03.2021 was a Sunday. The next two working days were 15.03.2021 and 16.03.2021. The third respondent submitted the additional performance security in the form of a Fixed Deposit Receipt on 17.03.2021 which was beyond the period of two working days. The learned counsel submitted that with regard to other works that were the subject matter of the same tender notice wherein the bids were to be submitted as per similar schedule, the bidders for other two works had furnished

additional performance security within a period of two working days. Inviting attention to the Government Resolution dated 23.06.2020 which was also referred to in Clause 2.22.0 it was submitted that reading of paragraph 18 thereof indicated that the mandatory period of two days was not liable to be extended for any reason whatsoever. The third respondent had sought to rely upon a communication dated 11.05.2021 that was issued by the Branch Manager of the Bank of Maharashtra that on 15.03.2021 and 16.03.2021 there was a strike of bank employees due to which there were no banking transactions. Since the third respondent had approached the bank on 17.03.2021, the Fixed Deposit Receipt was issued on that date. On the aforesaid basis, it was submitted that the Executive Engineer had no authority to accept the additional performance security beyond the period of two working days. If the bid of the third respondent was liable to be rejected for this reason the petitioner would be entitled to seek the work order since his bid was the next lowest bid. The learned counsel also invited attention to the communication dated 12.04.2021 issued by the Assistant Superintending Engineer to the second respondent to submit his report in the light of the grievance made by the petitioner in that regard on 30.03.2021. The second respondent had come up with the stand that on account of strike of the bank on 15.03.2021 and 16.03.2021, the request for extension of time to submit the additional performance security came to be accepted. Referring to the provisions of Section 25 of the Negotiable Instruments Act, 1881 (for short, the

Act of 1881), it was submitted that only a “public holiday” was liable to be excluded while construing Clause 2.22.0. As 15.03.2021 and 16.03.2021 were not declared as public holidays, those days could not be excluded from consideration. Reference was made to the provisions of Section 42(2A) of the Reserve Bank of India Act, 1934 in that regard. Thus when other bidders could submit the additional performance security either on 15.03.2021 or on 16.03.2021, there was no reason for the second respondent to have extended the time to furnish the additional performance security by a period of one day to enable the third respondent to furnish the same when the same was not permissible under Clause 2.22.0 of the tender document.

It was also submitted by the learned counsel for the petitioner that various documents as required by Clause 2.23.0 and especially income tax returns for the last five years as per sub-clause (v), scanned copy of the deed of partnership as per sub-clause (vii) and scanned copy of the power of attorney duly registered/notarised as per sub-clause (xii) had not been validly submitted by the third respondent. Though one of the two partners of the partnership firm of the third respondent had expired on 05.05.2020, the said deed of partnership was submitted which amounted submitting false and misleading information. If the income tax returns as submitted indicated ‘nil’ income of the third respondent, the same reflected its financial capacity. Referring to the communication dated 04.02.2022 that was issued by the third respondent for seeking extension of time for a period of one year for completing the work in

question, it was submitted that as per the tender notice the work awarded to the third respondent was required to be completed within a period of six months as per commencement order dated 24.05.2021 issued to the third respondent. This period of six months had expired in November 2021 and further extension sought was for a period of one year which was even beyond the period prescribed in the tender notice. On this count it was submitted that the work order issued to the third respondent was liable to be revoked and the work order ought to be issued to the petitioner. In support of aforesaid contentions, the learned counsel placed reliance on the decisions in ***Ramana Dayaram Shetty vs. The International Airport Authority of India and others AIR 1979 SC 1628*** and ***Jagdish Mandal vs. State of Orissa and others (2007) 14 SCC 517***. It was thus prayed that the petitioner was entitled to the reliefs as prayed for.

5. Shri S.G.Jagtap, learned counsel for the first and second respondent-Tender Issuing Authority submitted that the work order was issued to the third respondent in accordance with the tender notice itself. Referring to paragraph 2 of the additional affidavit filed on behalf of the first and second respondent, it was submitted that the third respondent on 15.03.2021 had informed the second respondent that on account of strike of the bank, it would not be possible to furnish the additional performance security. That request was accepted and the Fixed Deposit Receipt in that regard was accepted on 17.03.2021. It was further submitted that the objection raised by the petitioner

on 17.03.2021 was only with regard to the extension of time that was granted to the third respondent to furnish the additional performance security. No other objection with regard to the documents submitted by the third respondent was raised by the petitioner at that point of time. After verifying the documents submitted by the third respondent, it was found that the same were in order. Since the third respondent was the lowest bidder, the work order was issued to it. There were no *mala fides* on the part of the first and second respondent in granting the work order to the third respondent.

Shri Tushar Tathod, learned counsel for the third respondent opposed the submissions as urged on behalf of the petitioner. It was submitted that since the banks were closed on 15.03.2021 and 16.03.2021, it was not possible for the third respondent to furnish the additional performance security as required. The same was furnished immediately on re-opening of the bank on 17.03.2021. The request made by the third respondent having been duly accepted by the second respondent, there was no reason to doubt the grant of such permission by the second respondent. In absence of any arbitrariness or a plea of *mala fides* there was no reason to interfere with the decision of the second respondent of granting time to the third respondent to furnish the additional performance security. The learned counsel placed reliance on the decision *Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers vs. New J. K. Roadways, Fleet Owners and Transport Contractors and others 2020 SCC Online SC 1035* in that regard. It was further submitted

that on 23.10.2020 the partnership firm of the third respondent that was re-constituted was duly registered. After acceptance of the additional performance security, the work order in question was duly issued to the third respondent and the work in question had commenced. It was thus submitted that there was no reason to interfere with the action of the second respondent in accepting the additional performance security as furnished by the third respondent. The writ petition was therefore liable to be rejected.

6. We have heard the learned counsel for the parties at length and with their assistance, we have also perused the tender conditions and other documentary material relied upon by the parties. The principal challenge raised by the petitioner to the acceptance of the financial bid of the third respondent is that the additional performance security that was required to be submitted within two working days of opening of the financial bid and which period was not liable to be relaxed/extended was accepted by extending the period of one day which was not permissible.

It is not in dispute that the financial bids of the bidders were opened on 12.03.2021. 13.03.2021 was a Saturday and 14.03.2021 was a Sunday. As per Clause 2.22.0(ix) read with Government Resolution dated 23.06.2020 two working days within which the additional performance security was required to be submitted were 15.03.2021 which was Monday and 16.03.2021 which was Tuesday. The third respondent sought to submit the Fixed Deposit Receipt dated 17.03.2021 for amount of additional performance security along with his

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covering letter dated 17.03.2021. The said letter bears 'Inward No.1009 and date 19.03.2021". In effect, the additional performance security has been submitted after two working days as contemplated by Government Resolution dated 23.06.2020. The questions therefore to be considered are (a) whether it was open for the Tender Issuing Authority to have accepted the additional performance security from the third respondent on 17.03.2021 which was the third working day ? and (b) if it is held that the Tender Issuing Authority had no power to relax the time stipulated by Clause 2.22.0(ix), whether it would be in public interest to interfere in exercise of writ jurisdiction under Article 226 of the Constitution of India ?

7. To consider the aforesaid questions it would be necessary to first refer to Clause 2.22.0 and sub-clause (ix) thereof :

“2.22.0 Additional Performance Security in case of offer below the cost put to tender as per Government of Maharashtra WRD Government Resolution No. Tender 0417/C.No.247/17/M.P.-1 Mantralaya Mumbai Date 30/11/2018 and PWD Government Resolutions Act 2017, on Dated 7/3/2019 & WRD Government Resolution No.0417/(subj.247/17/MP/1) on dated 23/06/2020.

(ix) L-I shall submit the demand draft/BG or FDR additional performance security in the office of the Executive Engineer, Lower Wardha Project Division, Wardha within 2 days of opening of envelope-2. This duration of 2 days will not be relaxed under any circumstances. Failure to do so will result in forfeiture of EMD and the contractor/ Joint Venture (jointly or individually) shall be debarred from participating in any bid of Water Resources Department / VIDC, Nagpur for two years from date of opening of

envelope-2, if L-1 fails to submit to additional performance security within prescribed time period then Executive Engineer ask L-2 in writing and if L-2 bidder agree to do work at the rate quoted by L-1 then L-2 bidder shall be considered for acceptance". (emphasis supplied)

The aforesaid Clause refers to Government Resolutions dated 30.11.2018, 07.03.2019 and 23.06.2020. A perusal of the Government Resolution dated 23.06.2020 indicates reference to the earlier Government Resolutions dated 30.1.2018, 12.12.2018 and 13.09.2019. It has been stated in the Government Resolution dated 23.06.2020 that as per the earlier Government Resolutions a period of eight days had been provided for submitting the additional performance security deposit. It was noticed by the Government that granting such period of eight days resulted in causing delay in issuing the work order for commencement of the work. In that view of the matter, it was resolved to reduce the earlier period of eight days and it was decided that period of two days would be granted to furnish the additional performance security deposit to the Executive Engineer. It was further stated that this period of two days would not be relaxed for any reason whatsoever. Failure to submit the additional performance security deposit would result in forfeiture of the earnest money of the bidder and such bidder would stand disqualified for a period of two years from participating in future tenders of the Department. It was stated that in such contingency without calling for fresh bids, the second lowest bidder should be called upon to carry out the work in question at the rates quoted by the lowest bidder. If the second lowest bidder was willing

to carry out the work on the same terms and conditions, the bid of the second lowest bidder could be accepted.

Thus from the contents of the Government Resolution dated 23.06.2020 which finds specific reference in Clause 2.22.0 of the tender notice, it is clear that the earlier period of eight days was reduced to two days with a further condition that this period of two days would not be relaxed/extended under any circumstances whatsoever. The consequence of failure to comply with the aforesaid conditions to result in forfeiture of earnest money deposit and debarment in participating in any bid for a period of two years from the opening of the financial bid. Thus, the condition imposed by sub-clause (ix) of Clause 2.22.0 is clearly of a mandatory nature considering the background in which the period of eight days was reduced to two days. The consequence of non-compliance also having been prescribed, there is no doubt whatsoever that submission of the additional performance security deposit within a period of two days of opening of the financial bid is a mandatory and essential condition prescribed by the notice inviting tenders.

8. Once it becomes clear that Clause 2.22.0(ix) was a mandatory condition prescribed by the tender notice, it follows that the Tender Issuing Authority was prevented from extending the duration of two working days under any circumstances whatsoever. In this regard, reference can be made to the decision of the Hon'ble Supreme Court in *B.S.N.Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and others, (2006) 11 SCC 548* and especially paragraph 66

thereof wherein it has been held as under :

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under :

(i) If there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied wherein it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.” (emphasis supplied)

9. In *Tata Cellular Ltd. vs. Union of India (1994) 6 SCC 651* it has been held by the Hon'ble Supreme Court that in contractual matters the Court ought to confine itself to the question of legality and one of the concerns should be whether the decision making authority has exceeded its powers. It is in that context that the decision of the Tender Issuing Authority to relax the time stipulated by Clause 2.22.0(ix) would have to be examined. In that regard, the power of relaxation/extension of time must be stipulated in the tender document itself and in absence thereof the principle of strict compliance is required to be adhered to. In this context, the petitioner has sought to rely upon the submission of additional performance security deposit by another bidder who had submitted his bid in another work under the same tender notice. M/s. Sai-Aniruddha Construction had on 15.03.2021 itself furnished the additional performance security deposit vide demand draft dated 15.03.2021. In other words, it was possible for a bidder under the same tender notice to furnish the additional performance security deposit on 15.03.2021 as per Clause 2.22.0.

The Principal (Tender Issuing Authority) no doubt has sought to rely upon the communication dated 11.05.2021 issued by the Branch Manager, Bank of Maharashtra, Gandhinagar Branch, Wardha. It was stated that on 15.03.2021 and 16.03.2021 there was a strike of bank employees due to which there were no banking transactions. However, in the light of the clear stipulation in Clause 2.22.0 read with Government Resolution dated

23.06.2020 there was no scope for the Executive Engineer to extend the period of two working days and hence the consequence provided in Clause 2.22.0(ix) of the tender condition would have to operate.

10. Thus having been found that the period of two days as prescribed by Government Resolution dated 23.06.2020 as well as Clause 2.22.0(ix) was not liable to be relaxed under any circumstance with further stipulation that failure to comply with the time prescribed would result in forfeiture of the earnest money deposit as well as the debarment from further participation, Question (a) is answered by holding that it was not open for the Tender Issuing Authority to have accepted the additional performance security from the third respondent on 17.03.2021 which was the third working day from opening of the financial bid.

11. Having found that there was no power with the Tender Issuing Authority to relax the time stipulated by Clause 2.22.0(ix), that by itself would not entitle the petitioner to relief. It would be necessary to consider whether it would be in public interest to exercise writ jurisdiction under Article 226 of the Constitution of India on that ground. In *Bharat Coking Coal Limited and others vs. AMR Dev Prabha and others (2020) 16 SCC 759* the Hon'ble Supreme Court has held that in such contractual disputes the power of judicial review should not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. In addition to the grounds of

arbitrariness, illegality or discrimination, involvement of public interest is also required to be demonstrated before the remedy is sought. It has been further observed that although the threshold for the public interest to exist need not be high nevertheless it is essential to prevent bypassing of civil Courts and use of constitutional avenues for enforcement of contractual obligations. Reference was made to the decision in *Shobikaa Impex (P) Ltd. vs. Central Medical Services Society (2016) 16 SCC 233* that even when some defect is found in decision making process, the Court must exercise its discretionary powers under Article 226 of the Constitution with caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. Keeping this aspect in mind, the question as to whether discretion should be exercised will have to be considered.

12. The work order in question was issued to the third respondent and on 24.05.2021 the Tender Issuing Authority issued the work commencement order. It was stated therein that the duration for completion of the work in question was six months and the period for rectification of deficiencies therein was twenty-four months. It is thus clear that the work allotted to the third respondent was to be completed within a period of six months. That work therefore was to be completed by the end of 2021. It is however pertinent to note that on 04.02.2022 the third respondent issued a communication to the second respondent stating therein that it could not complete the work as allotted and it sought extension of time to complete the same till 31.03.2023.

In other words, the work order having been issued on 24.05.2021 with the stipulation that the work was required to be completed within a period of six months, the same was not so completed and a further extension of almost 18 months was sought by the third respondent. The work in question is for construction of land development works and the Tender Issuing Authority therefore required the same to be completed within a period of six months. From the communication dated 04.02.2022 issued by the third respondent itself it becomes clear that the third respondent has not been able to meet the time limit prescribed in the work order and has sought further extension of almost eighteen months. This would naturally result in cost escalation in normal course. In our view therefore the third respondent by its own conduct has indicated that it is not in a position to adhere to the time framed as per the work order and in fact has sought extension much beyond the original period permitted under the work order. It would therefore definitely be a reason to interfere in public interest since the extension of time for completion of the work much beyond what was prescribed would naturally result in an increase in the amount of expenditure. We are therefore satisfied that there is an element of public interest involved thus making out a case for interference under Article 226 of the Constitution of India. Question (b) is answered accordingly.

13. For the aforesaid reasons, we find that the Tender Issuing Authority could not have extended the period of two days for furnishing the additional

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performance security under Clause 2.22.0(ix). The consequences for not furnishing the additional performance security within a period of two days having been provided in that Clause itself, the Tender Issuing Authority would be required to act accordingly.

14. Accordingly, the following order is passed :

(I) The work order dated 07.05.2021 issued to the third respondent by the second respondent is quashed and set aside. Consequentially, the work commencement order dated 24.05.2021 would not survive.

(ii) The second respondent is free to take further steps in accordance with Clause 2.22.0(ix) and proceed further.

Rule is made absolute in aforesaid terms with no order as to costs.

In the facts of the case, this judgment shall operate after a period of four weeks from today.

(G.A.SANAP, J.)

(A.S.CHANDURKAR, J.)

Andurkar...