

In the High Court of Judicature at Madras

Dated: 30.04.2010

Coram:

The Honourable Mr. Justice R.SUBBIAH

Writ Petition No.4304 of 2010
and M.P.Nos.1 to 3 of 2010

Roots Multiclean Ltd.,
A company registered under the
Companies Act, represented by its
Vice President Mr.Kavidasan,
R.K.G.Industrial Estate,
Ganapathy, Coimbatore-641 006.

..Petitioner

..vs..

1. Coimbatore City Municipal Corporation,
represented by its Commissioner,
Big Bazaar Street,
Coimbatore-641 001.
2. Kam-Avida Enviro Engineers (P) Ltd.,
Plot No.2, Survey No.255/1, Hinjewadi Taluk,
Mulshi District, Pune-411 057. ..Respondents

Writ petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus, for the reasons stated therein.

For Petitioner : Mr.R.Krishnamurthy,
Senior Counsel for
Mr.R.Bharath Kumar

For Respondents : Mr.R.Yashod Vardhan,
Senior Counsel for
Mr.R.Sivakumar (R1)
Mr.Razhaq for M/s.Razhaq Associates
(R2)

ORDER

This Writ Petition is filed for issuance of a writ of

Certiorarified Mandamus, to call for the records of the 1st respondent relating to the Resolution No.231 dated 18.02.2010 passed by the Corporation Council, pursuant to the proceedings in Na.Ka.No.1072/2010/MC8 dated 15.02.2010 and quash the same and also for a direction to the 1st respondent to award the contract for supply and delivery of Road Sweeping Machines to the petitioner, they being the lowest bidders.

2. The brief facts, which are necessitated to decide the issue involved in the writ petition, are as follows:

The petitioner company is the manufacturer of cleaning equipments, auto components, etc. The 1st respondent Corporation is one of the Mission Cities under the Jawaharlal Nehru National Urban Renewal Mission, a Scheme of Government of India and is eligible for grants from Central/State Government. The 1st respondent got an approval of its Detailed Project Report on Municipal Solid Waste (MSW) Management with a budget of 96.51 crores of rupees. The 1st respondent is the agency responsible for collection, transportation and disposal of the Municipal Solid Waste generated in the Coimbatore City. The waste generated at each of the households had to be collected in a segregated manner from each of the households, transporting it upto the transfer station points, for being transported from there to the compost plant and sanitary landfill facility to be established at the Vellore site. For this purpose, the 1st respondent invited tenders for the work of supply and delivery of three Nos.of road sweeping machines as per the technical specifications mentioned by the 1st respondent. The tenderers requiring any clarifications on the contents of the tender documents, were called upon to notify the 1st respondent in writing before the pre-bid meeting. Further, it was mentioned that the tenders submitted by the tenderers will be evaluated into a two stage process. The first stage will be an evaluation of the Technical and Financial capabilities of the interested tenderers. The second stage will be with regard to the opening of final bid of those tenderers whose technical proposals are accepted. Further, it was also mentioned that the 1st respondent would receive the tenders upto 15.00 Hours on 30.10.2009 and the tenders will be opened at 15.30 Hours on the same day in the presence of tenderers or their authorized persons.

3. Pursuant to the same, the petitioner has also submitted their tender and on 30.10.2009, all the technical bids were opened in the office of the 1st respondent and the petitioner was found to have complied with the requirements of the tender conditions in respect of the technical bid along with the 2nd respondent and one TPS Infrastructure Private Limited. So far as the price bid is concerned, the same was opened on 20.11.2009 and the petitioner's bid was found to be the lowest, namely, Rs.1,13,00,000/- for all the three machines. Hence, when the petitioner was expecting the confirmation

of the bid, they received a communication dated 14.12.2009 from the Commissioner of Coimbatore City Municipal Corporation, pursuant to certain issues raised by the 2nd respondent that the machines offered for sale by the petitioner were not of European Origin Technology since the general specification of the tender says that the sweeper equipment should be a proven technology preferably of European origin technology. The 1st respondent called the petitioner to obtain a certificate of origin from the Chamber of Commerce of Australia to ensure that the road sweeping equipments would be imported from Australia. Even though the petitioner clarified the same, the 1st respondent ignored the same and issued the proceedings dated 15.02.2010 informing that a final decision on this issue along with other subjects would be taken up in the Council Meeting. In the council meeting which took place on 18.02.2010, the 1st respondent decided to reject the lowest bid submitted by the petitioner and award the contract to the 2nd respondent. Hence, aggrieved over the same, the present writ petition is filed to quash the resolution passed on 18.02.2010 pursuant to the proceedings of the 1st respondent dated 15.02.2010 and consequently, direct the 1st respondent to award the contract for supply and delivery of road sweeping machines to the petitioner since they are the lowest bidders.

4. Learned Senior Counsel appearing for the petitioner submitted that the petitioner is manufacturing cleaning machines of proven technology, viz., of European technology. One of the bid conditions mentioned in the tender notice is, to supply a road sweeping equipment of a proven technology preferably of a European Origin technology mounted on an Indian Chassis. So far as the petitioner company is concerned, they are the market leaders in the field of mechanized cleaning machines in India since 1993. They have been associated in designing, developing and manufacturing of cleaning machines with European technology through their joint venture partner HAKO Werk Germany since 1993. Apart from manufacturing the cleaning machines locally with the collaboration of German company, the petitioner has also been importing cleaning machines from M/s. Schwarze Industries Australia Private Limited. They are also exporting their cleaning machines to various countries including USA, Japan, Australia, etc. The petitioner is the exporter of the largest cleaning machines in India. The tender condition does not specify that the equipment should be an imported one. On the other hand, it says that the cleaning machine should be preferably of European origin. When the petitioners are manufacturing the cleaning machines through their joint venture partner HAKO Werke of German company, it cannot be said that their machines are not of European origin. Moreover, after opening all the tenders, by letter dated 09.11.2009, the 1st respondent had intimated the petitioner that the technical bid offered by the petitioners was found to be responsive. When the petitioner company is the lowest tenderer and when they satisfied all

the bid conditions, the contract ought to have been awarded in their favour. On the contrary, the 1st respondent had awarded the contract in favour of the 2nd respondent merely for the reason that the cleaning machines of the petitioner are not of European origin and the petitioners are importing the machines only from Australia. But the fact remains that the petitioner never intended to supply the machines imported from M/s.Schwarze Industries Australia Private Limited to the 1st respondent; but on the other hand, they intended to supply the machines manufactured by them in India through their joint venture partner of German company. Under such circumstances, the 1st respondent ought to have accepted the tender bid of the petitioner, who quoted a lower price than the 2nd respondent. Therefore, the proceedings dated 18.02.2010 in pursuance of the resolution dated 15.02.2010 is liable to be quashed.

5. Per contra, the learned Senior Counsel for the 1st respondent contended that it is not the actual issue before this Court as to whether the petitioner intended to supply the cleaning machines of European origin to the 1st respondent but the actual issue before this Court is, whether the petitioner had submitted a tender expressing their intention to supply the cleaning machines manufactured by them locally with German collaboration or to supply the same which they are importing from M/s.Schwarze Industries Australia Private Limited. In this regard, the learned senior counsel invited the attention of this Court to clause 9.3 "Essential Pre-qualification criteria" of the tender conditions, which consists of seven sub-clauses of which sub-clauses (1) and (2) are as follows:

1. The tenderer who are either equipment manufacturers or their authorized dealers/distributors located in India alone can participate in the tender.
2. If the manufacturers authorized dealers/ distributors participate in the tender, the notarized copy of the dealership/distributorship Certificate issued by the manufacturers concern should be enclosed along with their technical bid".

The learned senior counsel submitted that had the intention of the petitioner been to supply the equipments only in the capacity of authorised dealer/distributor of the foreign companies manufacturing the road sweeping equipment, they ought to have filled up the clause No.1 in "Essential pre-qualification criteria", whereas they filled up clause No.2 by attaching the notorised copy of the Australian manufacturers, thereby created an impression to the respondents as if they are going to supply the cleaning machines imported from Australia. But, when the 2nd respondent sent a letter dated 21.11.2009 to the 1st respondent, for the first time, the petitioner has come forward with the reply that the tender conditions do not specify that the machine must be an imported one and therefore, the

question of certificate of Australian origin does not arise and thereby the petitioner expressed their intention to supply the machines they are manufacturing in India with German collaboration. Since the letter was found to be in total contrary to the tender conditions submitted by them, it was correctly rejected. Under such circumstances, no fault could be found in the impugned resolution passed by the 1st respondent Corporation. Further, the learned senior counsel for the 1st respondent has also relied upon the judgment reported in (2010) 1 SCC 139 (BECIL ..vs.. ARRAYCOM INDIA LTD., AND OTHERS) in support of his contention that when an ambiguous proposal was submitted and when the Government authority had taken reasonable and possible interpretation, the High Court should not have intervened. That apart, the learned senior counsel has also relied on (2007) 14 SCC 517 (JAGDISH MANDAL ..vs.. STATE OF ORISSA AND OTHERS).

6. By way of reply, the learned senior counsel for the petitioner submitted that the certificate issued by M/s.Schwarze Industries Australia Private Limited was enclosed only for the purpose of establishing the capability of the petitioner company in supplying the cleaning machines and not otherwise. Therefore, a different interpretation cannot be given at this length of time by the 1st respondent, particularly when they have accepted in their letter dated 09.11.2009 that the technical bid offered by the petitioner was found to be responsive.

7. Heard the learned counsel for the parties and perused the materials available on record.

8. It is the case of the petitioner that on 21.10.2009, the 1st respondent Corporation has called for the tenders for supply of 3 Nos.of road sweeping machines. As per the terms of the tender, the sweeping machine should be of a proven technology, preferably of European origin. So far as the petitioner is concerned, they are manufacturing the sweeping equipments with European technology through their joint venture of partner HAKO Werke Germany since 1993. Therefore, the petitioner company have satisfied the requirements of the conditions of the tender. Apart from manufacturing the cleaning machines in India, the petitioners have also been importing machines from M/s.Schwarze Industries Australia Private Limited. While submitting the tender form, the petitioner had enclosed the notarised copy of the dealership certificate issued by the manufacturers concern i.e. from M/s.Schwarze Industries Australia Private Limited. According to the petitioner, the dealership certificate issued by the manufacturer concern was annexed only for proving their capability along with other documents, such as certificate issued by the Greater Hyderabad Corporation, Letter of award issued by the Municipal Corporation, Kadapa, etc. But they never intended to supply the imported cleaning machines and on the other hand, their intention was only to supply the cleaning machines manufactured by

them in India with German collaboration. When it is not the condition that the cleaning machine should be an imported one, no fault could be found in the tender form submitted by the petitioner expressing their intention to supply the cleaning machines manufactured by them in India through their joint venture of German company. Under such circumstances, the bid amount quoted by the petitioner being the lowest, the 1st respondents ought to have accepted the same.

9. Per contra, it is the contention of the 1st respondent that had the intention of the petitioner been to supply the machines manufactured by them in India with German collaboration, they would have filled up the same in the relevant column, namely, clause 9.3, whereas they filled up clause 9.3 "Essential Pre-qualification criteria" by annexing the notarised copy of the manufacturer concern i.e. M/s.Schwarze Industries Australia Private Limited, thereby creating an impression to the 1st respondent Corporation as if they are going to supply the imported machines. Subsequently, pursuant to the letter dated 21.11.2009 sent by the 2nd respondent, the 1st respondent addressed a letter to the petitioner on 14.12.2009 requesting to clarify and confirm whether the road sweeping equipments imported from Australia would be supplied to them. Then only, for the first time, by a letter dated 30.12.2009, the petitioner has informed that they are intending to supply the machines manufactured in India with European collaboration. Therefore, by the impugned resolution dated 15.02.2010, the 1st respondent Corporation had decided to cancel the contract and award the same in favour of the 2nd respondent.

10. Now, in view of the submissions made by the 1st respondent, it could be inferred that the actual issue involved in the writ petition is, whether the petitioner company have put forth their intention in the tender form that they are going to supply the machines manufactured in India and not the imported machines.

11. On going through clause 9.3 of the tender, I find that under sub-clause(1) which is meant for supplying the machines manufactured in India, the petitioner did not mention anything. On the other hand, he filled up clause No.2 in respect of supplying imported machines, saying that he had annexed the notarised copy of the dealership certificate i.e. from M/s.Schwarze Industries Australia Private Limited, thereby creating an impression to the 1st respondent Corporation that they are going to supply the imported machines. With regard to the submission so made by the learned senior counsel for the petitioner that the certificate along with other documents were enclosed to prove their capacity and their actual intention is only to supply the machines manufactured in India, a mere reading of the tender form filled up by the petitioner would not convey such a meaning which now the learned senior counsel for the petitioner is

now advancing. When the tender form has not spelt out the intention of the petitioner in clear terms, now a different interpretation cannot be given, according to the convenience of the petitioner. Though a submission was made by the learned senior counsel for the petitioner that by letter dated 09.11.2009 the 1st respondent had informed that the technical bid offered by the petitioner was found to be responsive, I find that the said letter was written by the 1st respondent before knowing the actual intention of the petitioner with regard to the supply of machines manufactured in India and not the machines imported from Australia. Under such circumstances, no significance could be attached to the said letter. Moreover, as contended by the learned senior counsel for the 1st respondent, even in the pre-bid meeting, no clarification was sought for by the petitioner on this aspect and when the proposal given by the petitioner is ambiguous and the Government authority have taken a reasonable and probable interpretation on the proposal, there cannot be any interference.

12. In this regard, it would be appropriate to rely on the judgment relied on by the 1st respondent in (2010) 1 SCC 139, wherein the relevant paragraphs read as follows:

"8. In our opinion, the whole controversy is about the interpretation of the second paragraph submitted by Respondent 1 (Arraycom). According to the High Court, the bid of Rs.51.57 crores was an inclusive bid and no amount of Central sales tax could have been added to that amount. We regret we cannot agree.

9. It may be seen that Para 2 of the bid of Arraycom consists of two sentences. The first sentence, no doubt, states that the Central sales tax is inclusive in the price of Rs.51.57crores. Had Para 2 stopped there, the submission of learned counsel for Arraycom would have been correct. However, in Para 2, there is a second sentence to the effect that AIR (All India Radio) will have to give a concessional Forms C/D. Thereafter there is no third sentence in Para 2 of the bid that even if the concessional forms are not given, yet the bid of Rs.51.57 crores is an inclusive bid and nothing can be added to the bid. Thus, in our opinion, Para 2 of the bid of Arraycom is ambiguous and this is the fault of Arraycom itself by giving such an ambiguous proposal. Respondent 1 should have given a clear-cut bid either by stopping after the first sentence, or by adding another sentence after the second sentence that even if the concessional Forms C/D are not given the bid of Rs.51.57 crores is an inclusive bid.

10. Thus, Para 2 of Arraycom's bid has two interpretations (i) it is an inclusive bid; and (ii) that sales tax can be

added to that bid. Prasar Bharti, who has to make the payment, has taken the second interpretation which, in our opinion, is a reasonable and possible interpretation.

11. In administrative matters, the scope of judicial review is limited and the judiciary must exercise judicial restraint in such matters, as held by this Court in TATA CELLULAR .vs.. UNION OF INDIA ((1994) 6 SCC 651). Moreover, the view of Prasar Bharti also appears reasonable because Prasar Bharti has to pay the amount inclusive of sales tax, since there are no concessional forms. If Prasar Bharti has taken up one possible interpretation, the High Court should not have intervened. The scope of judicial review in administrative matters is limited".

Therefore, I do not find any infirmity in the impugned order passed by the 1st respondent Corporation warranting any interference with the same.

Accordingly, the writ petition fails and is dismissed. No costs. Consequently, connected M.Ps. are closed.



g1

To

The Commissioner,
Coimbatore City Municipal Corporation,
Big Bazaar Street,
Coimbatore-641 001.

+1cc to Mr.R.Sivakumar, Advocate Sr 29742
+1cc to Mr.R.Bharathi Kumar, Advocate Sr 29641

PUR(CO)
km/3.5.

W.P.No.4304 of 2010