

---

**(2007) 02 MP CK 0093**

**In the Madhya Pradesh High Court**

**Case No : Writ Petition No. 741 of 2007**

B.S.N. Joshi and Sons Ltd.

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

---

**Date of Decision : 09-02-2007**

**Acts Referred:**

**Citation :** (2008) ILR (MP) 1671 : (2007) 2 MPLJ 589

**Hon'ble Judges :** Abhay M. Naik, J

**Bench :** Single Bench

**Advocate :** S.C. Sharma, with Abhay Pandey, for the Appellant; R.N. Singh, Advocate General with A.J. Pawar and Vivek Pandey, for the Respondent

**Final Decision :** Allowed

---

## **Judgement**

Abhay M. Naik, J.

Petitioner is a registered Company dealing with the supply of coal to various Thermal Power Corporations and has worked with the State of Madhya Pradesh by doing liaisoning work in respect of quality and quantity materialization and shortage minimization including supervision of loading and movement of coal. The Petitioner-Company is also engaged in the business of washing of coal.

A tender was floated by the Respondents for award of contract of liaisoning work in respect of quality and quantity materialization and shortage minimization including supervision of loading and movement of coal through rail for Sanjay Gandhi Thermal Power Station Birsinghpur. Copy of the Notice Inviting Tender is on record as Annx. P/1. Last date for issuance of tender document was 3-1-2007 and for their submission was 4-1-2007. Relevant clause contained in the Notice Inviting Tender for the purpose of this writ petition is Clause (iv) which reads as under:

(iv) Firm which has successfully executed the work contract of similar type awarded to it during last three years. Documentary evidence/certificate issued by the concerned power utility to this effect shall be submitted by the tenderer.

According to the Petitioner, it was qualified for the tender in question. It submitted an application for supply of tender document with the requisite earnest money on 5-12-2006. The application was rejected on the ground that as per the aforesaid clause, the Petitioner-Company was not entitled to be considered even for issuance of tender documents. This was challenged before this Court in Writ Petition No. 18991/2006 which was disposed of on 2-1-2007 with the following observations:

In this view of the matter, the Petitioner cannot be debarred from participating in the tender process. Considering the same, this petition is disposed of with the direction that the tender documents may be supplied to the Petitioner in accordance with the terms and condition contained in N.I.T. and the same be not denied on the ground contained in condition (iv) of Annexure-P/3, if has successfully executed the requisite work. However, it is made clear that the rights of the Petitioner will not be enlarged on the basis of this order and Respondent No. 3 shall be free to take decision in the matter of acceptance of tender in accordance with law.

Order of this Court is on record as Annx. P/10. The Petitioner-Company pursuant to Annx. P/10 made an application on 3-1-2007 with a request for issuance of tender documents to Respondent No. 3 who vide the impugned order Annx. P/12 found that the Petitioner was not qualified to receive the tender documents. This compelled the Petitioner to approach this Court by way of the present writ petition.

Shri S.C. Sharma, learned Senior Counsel, contended that the Petitioner fulfils the qualifying conditions of tender and cannot be prevented from participating in the tender process in pursuance of Annx. P/1.

Shri R.N. Singh learned Advocate General, drew attention of this Court to Annx. IA72 which is a decision of this Court rendered on 5-8-2004 in Writ Petition No. 2910/2004 submitted by the Petitioner itself. Referring to the said document, learned Advocate General contended that the past experience of the Respondents with the Petitioner-Company has not been satisfactory and the Petitioner was found responsible by this Court for non-performance in two earlier contracts and such non-performance was found sufficient to oust the Petitioner from tender process.

The order marked as Annx. IA/2 has been further confirmed by the Division Bench of this Court in Letters Patent Appeal No. 931/2004 marked as Annx. LA/3. The M.P. State Electricity Board on account of non-performance of the contract by the Petitioner-Company has suffered a huge loss and a suit for recovery of Rs. 80,67,347/- towards damages has been instituted against the Petitioner which is pending in the Court of District Judge Jabalpur as Civil Suit No. 5-B/2005. One more suit bearing Civil Suit No. 35/05 is also pending against the Petitioner-Company with a claim for damages to the tune of Rs. 1,62,01,202.28 ps. Accordingly, it has been contended by the learned Advocate

General that the Petitioner has been rightly denied the tender form since it does not fulfill Condition No. (iv) of the tender.

Shri Vivek Pandey, learned Counsel has appeared on behalf of Nair Coal Services Limited, as intervener. He submitted an application for intervention with documents Anx. IA/1 to IA/6. He, too, has been allowed to address the Court on the question of merits of the writ petition.

It is true that the Petitioner on account of his non-performance was not permitted to participate in the tender process at earlier occasion which was held valid by this Court vide Annx. IA/2 and IA/3. However, this was with reference to Condition No. (v) of the then Notice Inviting Tender which is reproduced below:

(iv) Firm which has successfully executed the work contract of similar type awarded to it not found defaulter during last three years. The certificate to this effect has to be submitted.

This Court vide its order dated 5-8-2004 rendered in Writ Petition No. 2910/04 found that the Petitioner was a defaulter on account of non-performance by it in earlier contracts. He was adjudged as a defaulter, and accordingly, his ouster from the tender process was found justified.

The words "not found defaulter" are missing from Condition No. iv) of Notice Inviting Tender marked as Annx. P/1. Condition No. (iv) is reproduced below for convenience even at the cost of repetition:

(iv) Firm which has successfully executed the work contract of similar type awarded to it during last three years. Documentary evidence/certificate issued by the concerned power utility to this effect shall be submitted by the tenderer.

It may be seen that while issuing Notice Inviting Tender Annx.P/1 the Respondent No. 2 in his best wisdom did not choose to retain the words "not found defaulter". These words have been omitted by Respondent No. 2 while issuing Annx. P/1 for the reasons best known to himself. Obviously, the effect of non-inclusion of the words "not found defaulter" in Annx. P/1 cannot be ignored in the present case and qualifying conditions for the subject tender shall have to be examined in the light of the conditions mentioned in Annx. P/1. The words "not found defaulter" having been omitted from Annx. P/1 cannot be supplied and/or inserted by implication merely on the strength of earlier decisions of this Court which were admittedly rendered by construing the Notice Inviting Tender containing the condition of "not being defaulter". In view of the substantive variation in the tender, the Respondents did not get any advantage of the earlier decisions and cannot oust the Petitioner from tender process on their basis.

Now it is to be examined that whether the Petitioner qualifies the condition of Annx. P/1 or not. This is to be obviously examined in the light of the condition mentioned in it. The issuance of tender document has been denied vide Annx. P/12 on the following ground:

It is a fact that M/s B.S.N. Joshi and Sons Ltd. has not completed the earlier Liaisoning contracts successfully. It may also be recalled that non-grant of contract to M/s B.S.N. Joshi and Sons Ltd. was upheld by the Hon''ble High Court in W. P. No. 2910/04 on the ground that M/s B.S.N. Joshi and Sons Ltd. had not successfully completed the earlier contracts.

It is also a fact that due to the failure of M/s B.S.N. Joshi and Sons Ltd. to successfully execute the earlier Liaisoning contracts, an amount of Rs. 1,62,01,202.28 and Rs. 80,87,347.00 is outstanding towards the firm for which recovery Suits No. 35 of 2005 and 5-B of 2005 respectively are pending in the Court of District Judge, Jabalpur. It is, therefore, clear that M/s B.S.N. Joshi and Sons Ltd. is a defaulter and not qualified as per qualifying Condition No. (iv) of subject NIT to receive the tender documents. The Bankers Cheque No. 532545 dated 2-1-2007 amounting to Rs. 1000/- payable at Jabalpur is therefore returned herewith in original.

13-14. On perusal of the aforesaid, it is clear that the Respondent No. 2 has refused to issue tender on the grounds that (i) Petitioner has not completed earlier liaisoning contracts successfully (ii) suits for damages instituted by Respondent No. 2 against the Petitioner are pending in Civil Courts and (iii) Petitioner was found to be defaulter and his ouster from tender process was upheld by this Court. Accordingly, the Petitioner was held to have not qualified as per Condition No. (iv) of Notice Inviting Tender (Annx.P/1).

Though the Petitioner was held unqualified for the earlier tender on account of being a defaulter, the pivotal words occurring in Condition No. (v) i.e. "not found defaulter" are missing from the subject Notice Inviting Tender contained in Annx. P/1. Respondent No. 2 has failed to take into consideration the aforesaid crucial change in the present Notice Inviting Tender wherein no disqualification is acquired by the prospective tenderer on account of being defaulter during a period of preceding three years. Condition No. (iv) of Annx. P/1 merely requires that a prospective tenderer must have successfully executed the work contract of similar type awarded to it during last three years. Annx. P/1 has been issued with 3-1-2007 as the last date for issuance of tender. In view of this, the execution of the work contract of Petitioner of similar type awarded to it during preceding three years i.e. 2004, 2005 and 2006 was liable to be taken under the scanner. The Petitioner is stated to have not executed successfully the contract awarded to it in the year 1999-2000 as revealed in Annx. IA/4 and IA/5. These contracts not having been awarded during the three years preceding Ann. P/1 could not have been taken into consideration for preventing the Petitioner from participating in the tender process. Right of the Petitioner to participate in the tender process would, obviously, flow from the factum of his fulfilling the qualifying conditions contained in Annx. P/1. This right cannot be snatched away on any ground extraneous to Annx. P/1. It is a different thing that the Respondent No. 2 in exercise of its right reserved under Annx. P/1 may accept or reject the tender of the Petitioner. However, the Petitioner having qualified as per

the qualifying conditions of the subject Notice Inviting Tender cannot be prevented from participating in the tender process. The Petitioner is definitely entitled to obtain the tender documents and submit them which will have to be considered in accordance with law. The impugned order contained in Annx. P/12 is totally illegal on account of having been passed without taking into consideration the effect of omission of the words "not found defaulter" from the subject NTT. Considering the effect of this drastic change in the Notice Inviting Tender, this Court vide its earlier order Annx. P/10 expressly observed that the Petitioner cannot be debarred from participating in the tender process and the tender documents be not denied on the ground contained in Condition No. (iv) of the subject NIT. if the Petitioner has successfully executed the requisite work.

Shri Vivek Pandey, learned Counsel placed reliance on the decision of the Supreme Court reported as *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , *M/s. G. J. Fernandez Vs. State of Karnataka and others*, and *Tata Cellular Vs. Union of India*, . In none of these cases, it is held that a tenderer may be prohibited from participating in the tender process on a condition de hors the NIT.

It is not the case of the Respondents that the Petitioner has failed to execute the contract successfully during the preceding three years. On the contrary, the tender documents have been denied vide Annx. P/12 on the ground that the Petitioner has not qualified as per qualifying Condition No. (iv) of the subject NTT. Thus, the Respondent No. 2 has refused to issue tender documents on account of non-fulfillment of Condition No. (iv) despite clear direction of this Court that the tender documents be not denied on the grounds contained in Condition No. (iv). Thus, Annx. P/12 is not only illegal and arbitrary but it equally amounts to contempt of Court. Registry is directed to issue a notice to Respondent No. 2 in person as to why the proceedings for contempt be not initiated against him for acting deliberately and/or knowingly in violation of Annx. P/10.

In the result, the writ petition is, hereby, allowed. Petitioner is held entitled for issuance of tender documents and further to participate in the tender process pursuant to subject NIT contained in Annx. P/1. The order contained in Annx. P/12 dated 8-1-2007 is, hereby, quashed being illegal and arbitrary. Needless to say that the tender documents shall be issued to the Petitioner by the Respondents No. 1 to 3 who shall be permitted to participate in the tender process. However, it is made clear that this Court has not put any restriction on the discretion of the Respondents in the matter of acceptance or rejection of tender, in accordance with law, and this order may not be construed except to the extent indicated above. No order as to costs.