

(2020) 11 OHC CK 0003

In the Orissa High Court

Case No : Writ Petition (Civil) No. 9603 Of 2018

H.L. Infrastructure

APPELLANT

Vs

State Of Orissa & Others

RESPONDENT

Date of Decision : 24-11-2020

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2020) 11 OHC CK 0003

Hon'ble Judges : Mohammad Rafiq, CJ; Biswanath Rath, J

Bench : Division Bench

Advocate : Jashobanta Dash, Suman Pattanayak, S.K. Rout

Final Decision : Allowed

Judgement

Mohammad Rafiq, CJ.

1. This writ petition has been filed by H.L. Infrastructure challenging the action of the opposite parties-Tender Inviting Authority in awarding the work

order in respect of Construction of HL Bridge over river Baitarani at 1/500 Km on Kasia-Kasia-Kendughati Road in the district of Keonjhar

mentioned at Sl. No.8 of the Tender Call Notice dated 23.12.2017, in favour of opposite party No.5-Sailabala Infrastructure Private Ltd. by treating

O.P. No.5, even though the petitioner was the 1st lowest tenderer.

2. The dispute pertains to Tender Call Notice (TCN) dated 23.12.2017 under Annexure-1 issued by the opposite party No.2 (Tender Inviting

Authority) for execution of work at Sl. No. 8 of the TCN i.e. Construction of HL Bridge over river Baitarani at 1/500 Km on Kasia-Kasia-

Kendughati Road in the district of Keonjhar under Biju Setu Yojana. The petitioner along with other tenderers participated in the online bidding

process. The price bid was opened on 26.05.2018 at 04.42 P.M. The petitioner having quoted Rs.7,19,14,892.1 i.e. 2.38 % more than the estimated cost was found to be the lowest bidder. However, as per the contention of the petitioner, the opposite party No.5 quoted Rs.7,31,23,073.5 i.e. 4.10% more than the estimated cost. Yet the Tender Inviting Authority, on the basis of circular dated 11.10.1977 treated the opposite party No.5 as the lowest bidder and issued the work order in his favour.

3. The contention of Mr. Jashobanta Dash, learned counsel for the petitioner is that the Tender Inviting Authority (TIA), as per the tender conditions mentioned in the TCN, is required to issue work order in favour of the 1st lowest bidder i.e. the petitioner but it has in complete violation of the tender conditions and even without any intimation to the petitioner, decided to award the contract in favour of opposite party No.5, which is wholly illegal and arbitrary and beyond the jurisdiction of the TIA. Mr. Jashobanta Dash, learned counsel for the petitioner further submitted that a special provision was introduced by the Government by the circular dated 11.10.1977 with an aim and object for advancement of the people of socially and educationally backward class whereby a relaxation to the extent of 10% has been given to the bidders of SC/ST category. But in the instant case, that circular is not at all applicable for the simple reason that TCN nowhere specifies about the applicability of circular for giving weightage to the SC/ST bidders. Therefore, it is submitted that decision of the TIA in awarding the contract to O.P. No.5 is discriminatory and violative of Article 14 of the Constitution of India.

4. Mr. Jashobanta Dash, learned counsel for the petitioner in support of his arguments placed reliance upon judgments of this Court in Tarun Mohanty Vs. State of Odisha & Ors. (W.P.(C) No. 20802 of 2017) decided on 18.12.2017; and in Suresh Chandra Sahoo Vs. State of Odisha, 2018(1) ILR Cuttack 475 and submitted that the controversy raised in the instant case is squarely covered by the aforesaid judgments of this Court, wherein it has been clearly held that if the applicability of the Notification dated 11.10.1977 granting benefit of preference to the Scheduled Caste and Scheduled Tribe contractors is not specifically mentioned in the Tender Call Notice, the said benefit cannot be given. Granting such benefit in the absence specific mention in the TCN was in that case held to be illegal.

5. Mrs. S. Pattnayak, learned Addl. Government Advocate argued the decision taken by the TIA is in accordance with law and as per the provisions

of Clause 2.6.7 of the Detailed Tender Call Notice (DTCN) dated 23.12.2017, which provides that in case of Government Undertakings or Co-

operative Societies, the Diploma or Degree Holder in Engineering and SC & ST Contractors, who are registered with the State Government, the rules

framed by the Government from time to time regarding Earnest Money Deposit (EMD), initial security deposit will apply. Therefore, in the instant

case the Circular dated 11.10.1977 is applicable according to which 10% price preference should be given to a bidder of S.C. or S.T. category. The

TIA has rightly decided to award the contract in favour of the opposite party No.5 even though he is the 2nd lowest bidder granting the benefit of said

circular.

6. Mr. S.K. Rout, learned counsel appearing on behalf of the opposite party No.5 supporting the argument advanced by the learned Addl. Government

Advocate submitted that since the opposite party No.5 belongs to SC/ST community and having quoted Rs.7,31,23,073.5 i.e. 4.10% more than the

estimated cost is the 2nd lowest bidder, which is just more than 1.72% of the petitioner's quoted price. The authority has

therefore rightly decided to award the contract as per the Circular dated 11.10.1977 of the Government in the Works Department. Therefore, it

submitted that the petitioner has no case and the writ petition deserves to be dismissed.

7. We have given our anxious consideration to rival submissions, gone through the cited judgments and examined the materials on record. For better

appreciation of the case, it is necessary to reproduce Clause 2.6.7 of the DTCN, which reads as under:

2.6.7. The earnest money deposit & initial security deposit, should be in shape of pledged NSC/POTD/POSB/KVP/Deposit receipt of Scheduled Bank. The

EMD/ISD shall be pledged in favour of the Executive Engineer concerned as mention in Col.* in Annexure of TCN in respect of the work. In case the actual cost of

work exceeds the original cost of work as per the accepted tender, the amount to be recovered from bills of the contractors will be such as to make together with

deposits already realized an amount equal to the prescribed percentage of the actual cost of work executed.

Besides the Earnest Money Deposit & initial Security Deposit, contractors of B class & above will be required to furnish security deposit by way of deduction from their bill at the rate of 5% of the gross amount or each bill where as in case of C&D class contractor such deduction will be made at the rate of 3% of gross amount of each bill.

In the case of Govt. Undertakings, Co-operative Societies, Diploma or Degree holders in Engineering and SC&ST Contractors who are registered with the State Govt., the rules framed by the Govt. from time to time regarding earnest money deposit, initial security deposit will apply.â??

8. On perusal of the aforesaid Clause 2.6.7, it is clear that the rules framed by the Government from time to time in respect of (i) Earnest Money

Deposit (EMD) and (ii) Initial Security Deposit, are applicable to the contractors of specified categories i.e. Govt. Undertakings, Co-operative

Societies, Diploma or Degree holders in Engineering and SC and ST category. However, nothing has been mentioned therein about applicability of the

circular dated 11.10.1977 in regard to SC/ST tenderers or giving preference to the SC/ST tenderers, who have quoted within 10% of the rate quoted

by the lowest tenderer.

9. This Court in Tarun Mohanty (supra) while dealing with a similar controversy, in paragraphs 6, 7 and 8 of the judgment, held as under:

â??6. As regards the first submission of learned counsel for the petitioner, it is a matter of record and not disputed by learned counsel for parties that the tender

call notice in question does not specify or contemplate the applicability of notification dated 11.10.1977 . A benefit which is to be given to a party, or a class of

persons, can be so given only when the same is provided for in the notice inviting tenders. In the absence of there being any mention of such benefit to be given to

the class of persons as specified in the notification date d 11.10.1977, in our view, the said benefit cannot be extended. The party or authority issuing the tender

call notice has to be fair to all the persons by notifying the specific conditions of the tender call notice, and since in the present case no such condition of the

applicability of the notification dated 11.10.1977 was provided for in the tender call notice or in the terms and conditions of the tender, we are of the clear view

that the notification dated 11.10. 1977 would not be applicable in the present

case.

7. It has been brought to our notice that in some tender call notices, the condition of the applicability of notification dated 11.10.1977 is incorporated by the

State bodies inviting tenders, and in certain other tender call notices, such condition is not provided for. As such, the same also makes it clear that the State Government or its agencies do not take it by presumption that the notification dated 11.10.1977 would be applicable to all the tender call notices. Such conduct also clearly shows that the notification in question is to be made applicable only to such tender call notices, where it has been made applicable and duly notified in the notice inviting tender, and not to all tenders.

8. In view of the aforesaid, the writ petition stands allowed to the extent that the benefit of the notification dated 11.10.1977, as has been given in the case of opposite party no.6, has wrongly been given and the same deserves to be set aside. Accordingly, the decision of the State opposite party in treating opposite party

no.6 to be the lowest tenderer after granting the benefit of the notification dated 11.10.1977, is quashed. The State opposite party shall take a fresh decision in accordance with law and in the light of the observations and directions given here in above.â??

10. Similarly, in M/s. Rutuparna Construction Vs. State of Odisha & ors, 2018 (II) ILR - CUT- 19, 7 this Court was considering a case where

challenge was made to the award of contract in favour of second lowest bidder on the ground that the second lowest bidder was a Schedule Caste

Contractor. The said award was made by applying the benefit as enumerated in Govt. Notification dated 11.10.1977. In that case also , there was no

mention about the applicability of the said notification in the DTCN. This Court, by relying on its earlier judgment in Tarun Mohanty (supra), in

paragraphs 10 and 11 of the judgment, held as under:

â??10. A Division Bench of this Court has, by judgment and order dated 18.12.2017 passed in W.P.(C) No. 20802 of 2017 (Tarun Mohanty Vrs. State of Odisha

and others), specifically held that in the absence of the Tender Call Notice specifying the applicability of the notification dated 11.10.1977 granting benefit of

10% price preference to the Scheduled Caste and Scheduled Tribe contractors, the said benefit cannot be given.

11. Nothing has been placed on record with regard to applicability of the codal provision, notification issued by the Government granting relaxation to

Scheduled Caste and Schedule Tribe contractors nor the learned Additional Government Advocate has pointed out for extension of benefit to the Scheduled Caste

and Scheduled Tribe contractors with reference to DTCN issued by opposite party no.3. In such view of the matter, when the notification dated 11.10.1977 is not

applicable in the present case, no such benefit could have been given to the opposite party no.5, who is a Scheduled Caste contractor. Once the price offered by

the petitioner was the lowest, which was 3.06% less than the estimated cost, there was no occasion for the State-opposite parties to invite opposite party no.5 for

negotiation and thereafter on the opposite party no.5 matching the price offered by the petitioner, award the contract in favour of opposite party no.5. As such,

the acceptance of the offer of opposite party no.5 to work at 3.06% less than the estimated cost put to tender is totally illegal and liable to be quashed. The

contract if any, awarded to opposite party no.5 is thus to be quashed and is accordingly quashed, and it is directed that the petitioner would be entitled to be

awarded the said contract.â??

11. In the instant case, admittedly the DTCN is completely silent with regard to applicability of the notification dated 11.10.1977 issued by the

Government for granting relaxation to Scheduled Caste and Schedule Tribe contractors. The benefit of the said notification can be given to the SC/ST

contractors only when it is specifically so provided for in the DTCN/Notice Inviting Tender. Therefore, the action of the opposite parties-authorities in

taking decision to award the contract in favour of the opposite party No. 5, even though the petitioner is the lowest tenderer, has to be held illegal and

is liable to be quashed.

12. In the above view of discussion, the present writ petition deserves to be allowed and is accordingly allowed. The award of work in question, if

already awarded in favour of opposite party no.5, is quashed. The opposite parties-authorities are directed to take a fresh decision in the matter for

awarding work in respect of the tender in question within a period of two weeks, to whoever is the lowest bidder, from the date of receipt of a copy of

this order.

As restrictions are continuing for COVID-19, learned counsel may utilize the soft copy of this order available in the High Court's website or print

out thereof at par with certified copies in the manner prescribed, vide Court's Notice NO.4587, dated 25.03.2020.