(2017) 03 OHC CK 0032

In the Orissa High Court

Case No : 3572 of 2017

KAUSTUVA SAHU APPELLANT

Vs

STATE OF ODISHA & OTHERS RESPONDENT

Date of Decision : 27-03-2017

Acts Referred:

Citation : (2017) 03 OHC CK 0032

Hon'ble Judges : Vineet Saran, K R Mohapatra

Bench : DIVISION BENCH

Advocate : Prabodha Ch Nayak, S K Rout, B P Pradhan

Final Decision : Allowed

Judgement

1. In response to the Tender Call Notice dated 15.12.2016 issued by the Chief Engineer, Rural Works, Odisha, Bhubaneswar-opposite party No.3, the petitioner had also applied for one of the eight items which had been advertised. To be more precise, the petitioner had applied for "Construction and maintenance of P.R. road to Brahmantal road in the district of Bargarh under MMSY 2016-2017", which was at Serial No.5 of Annexure-1 of Tender Call Notice, relating to the list of works. The petitioner had submitted his tender on 30.01.2017. Then, on 23.2.2017, the technical bids of all the bidders were opened and by order of the same day, it was uploaded in the website. Out of five bidders, three bidders were found to be qualified. The bid of fourth bidder was rejected for ''insufficiency of machineries'', and the bid of the petitioner was rejected on the ground of ''wrong affidavit''. Challenging the said order of rejection of his tender, the petitioner has approached this Court.

2. We have heard learned counsel for the petitioner as well as learned Additional Government Advocate appearing for the opposite parties. By order dated 01.03.2017, time was granted to the learned Addl. Government Advocate appearing for opposite parties to obtain instructions in the matter or file counter affidavit. Learned Additional Government Advocate states that he has received

instructions in the matter. As such, with the consent of learned counsel for the parties, the matter is taken up for final disposal on merit at the stage of admission.

3. Perusal of the affidavit filed by the petitioner along with the application, which has been annexed as Annexure-7 to the writ petition, would go to show that the same has been sworn before the Notary Public, Nuapada which was "In the matter of an affidavit to be filed before the Executive Engineer, R.W. Division, Padampur", which is clearly mentioned at the top of the affidavit. In paragraph-2 of the said affidavit, it has been stated that the tender paper has been submitted by the petitioner before the Executive Engineer, R.W. Division, Padampur on 15.12.2016. However, in paragraph 7 of the said affidavit, it has been stated that the tender paper along with other documents have been submitted before the Executive Engineer, M.I. Division, Padampur.

4. Learned Additional Government Advocate has submitted that though the statement made in paragraph-7 is that the tender paper along with other documents have been submitted before the Executive Engineer, M.I. Division, Padampur (instead of Executive Engineer, R.W. Division, Padampur), but in fact, all the documents mentioned in paragraph-7 were actually presented before the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur. The Notary Public, Nuapada has also written to the Superintending Engineer, R.W. Circle, Sambalpur (Annexure-10) that all the documents were actually given by the petitioner in his presence to the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur and further stated that a mistake had occurred in paragraph-7 of the affidavit filed by the petitioner due to inadvertence.

5. Since it is not disputed that the documents required to be submitted by the petitioner were all in order and the same were actually submitted before the Executive Engineer, R.W. Division, Padampur, we are of the opinion that it is a clear case of typographical mistake. The mention of "Executive Engineer, M.I. Division, Padampur" is clearly a mistake, which had occurred in the affidavit, especially keeping in view the communication thereafter made by the Notary Public, Nuapada and also the fact admitted by the opposite parties that the tender paper, along with required documents mentioned in paragraph-7 were actually presented before the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur. From the other contents of the said affidavit also, it is clear that everywhere the reference has been made to the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur.

6. While considering a case where the tenderer had not deposited the earnest money by Banker''s cheque of the State Bank of India as was required, and instead submitted a cheque of Union Bank of India which was duly authenticated by the bank and the bank''s assurance to honour the same was obtained, the Apex Court in the case of M/s Poddar Steel Corporation vs. M/s. Ganesh

Engineering Works, AIR 1991 SC 1579 held in paragraph-6 that "It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause No.6 of the tender notice was not obeyed literally, but the question is as to whether the said noncompliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categoriesthose which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

7. Further, the Apex Court in the case of Rashmi Metaliks Ltd. vs. Kolkata Metropolitan Development Authority, 2013 (6) Supreme 521, while dealing with a case where the requirement of the tender document was that the tenderer should file the latest Income Tax Return which had not been filed, held that the Income Tax Return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In paragraph-13 of the said judgment, the Apex Court observed that such a clause is not an essential element or ingredient or concomitant of the subject NIT. In such facts, it was held that "............the filing of the latest Income Tax Return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the Appellantcompany and if even thereafter no rectification had been carried out, the position may have been appreciably different..........."

8. Applying the aforesaid principle of law laid down by the Apex Court to the facts of the present case, we are of the opinion that a mistake which occurred in the affidavit filed by the petitioner, which is merely typographical in nature and possibly by inadvertence, could have either been ignored or permitted to be corrected by the petitioner by allowing him to file a fresh affidavit.

9. In the given circumstances, considering the fact that it is admitted that all the papers had actually been submitted before the appropriate authority, as such the mistake which occurred in the affidavit was by inadvertence and did not materially affect the case or adversely affect the interest of any of the parties, and thus the same ought to have been condoned and the rejection of the tender of the petitioner was unjustified and liable to be quashed.

10. Accordingly, we allow this writ petition and quash the order of rejection of the tender of the petitioner. The financial bids of three qualified bidders were the same, as all had quoted 14.99% less than the estimated cost. In such view of the matter, we direct that the rejection order under Annexure-8, so far as it

relates to the technical bid of the petitioner, is quashed. The financial bid of the petitioner shall be opened, and if the bid of the petitioner is at par with that of other qualified bidders and the selection is to be done by draw of lottery, the case of the petitioner shall also be considered along with other bidders.

11. The writ petition is, accordingly, allowed to the extent indicated above.

