
(2021) 02 OHC CK 0011

In the Orissa High Court

Case No : Writ Petition (Civil) No. 2850 Of 2021

M/s. Ashirbad Industries & Others

APPELLANT

Vs

State Of Odisha & Others

RESPONDENT

Date of Decision : 18-02-2021

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Citation : (2021) 02 OHC CK 0011

Hon'ble Judges : S. Muralidhar, CJ;B. P. Routray, J

Bench : Division Bench

Advocate : U.C. Mohanty, S. Palit

Final Decision : Dismissed

Judgement

B.P. Routray, J

1. Three petitioners, viz., M/s.Ashirbad Industries, M/s.Poojarini Enterprisers and M/s.Bhagabati Industries have jointly filed the present writ petition challenging

the cancellation of Tender Call Notice No.1W/2020-21 invited through e-Tender by the Executive Engineer, Mechanical Division, Bhubaneswar to execute the

Hydro Mechanical Gate works under different Civil Divisions.

2. The Petitioners state that they all are registered small scale industrial units and in pursuance to Tender Call Notice No.1W/2020-21, they participated in the

tender process for Fabrication, Supply, Transportation and Erection of hydro mechanical gate works under Opposite Party No.5, i.e. the Executive Engineer,

Mechanical Division, Bhubaneswar. The tender was available from 21st May, 2020 to 30th May, 2020 through e-Tender with stipulation for opening of the

technical bid on 1st June, 2020. The Petitioners are the successful L-1 bidders for 24 nos. of works as per the tender notice. On 10th June, 2020, Opposite Party

No.5 recommended the case of the Petitioners for the work to the Superintending Engineer (Opposite Party No.4) and thereafter the Superintending Engineer

further recommended the same to the Chief Engineer (Opposite Party No.3). As there was delay in finalizing the tender process, the Petitioners filed W.P.(C)

No.17602/2020, W.P.(C) No.17593/2020 and W.P.(C) No.17594/2020 individually, which were disposed of by this Court with direction to Opposite Party No.5 to

consider and dispose of the representation of the Petitioners by passing a reasoned and speaking order after affording reasonable opportunities of hearing to the

Petitioners. Since the direction of this Court has not complied in time, CONTC No.3706/2020, CONTC No.3702/2020 and CONTC No.3707/2020 have been

preferred by the Petitioners.

3. In the meantime, the Superintending Engineer and the Chief Engineer in their orders dated 10th September, 2020 (Annexure-7) and 15th September, 2020

(Annexure-6) intimated Opposite Party No.5 for rejection of the tender as the tender documents are found defective and the discrepancies regarding â?? Structure

and Organizationâ??, â??Plant and Equipmentâ?? and â??Performance recordâ?? are noticed during re-scrutinization.

4. Getting information of such letters of the Superintending Engineer and the Chief Engineer, the Petitioners filed three writ petitions in W.P.(C) No.29174/2020, W.P.(C) No.29192/2020 and W.P.(C) No.29194/2020 individually challenging such instructions of the Superintending Engineer and the Chief Engineer as well as

for a direction to Opposite Party No.5 to finalize the tender process in favour of the Petitioners. In W.P.(C) No.29174/2020, Opposite Party No.5 filed his counter

stating that, submission of details about â??Structure and Organizationâ?, â??List of Plant and Equipmentâ? and â??Performance recordâ? are mandatory

requirements as per Form-B, Form-E and Annexure-A of the Tender Call Notice and non-submission of the same were noticed after re-verification of the bids.

5. While the matter stood as thus, the order under Annexure-1 cancelling the tender was issued by the Opposite Party No.5-Executive Engineer.

6. Mr. U.C. Mohanty, learned counsel for the Petitioners contends that when the writ petitions filed by the Petitioners in W.P.(C) No.29174/2020, W.P.(C)

No.29192/2020 and W.P.(C) No.29194/2020 praying for finalizing the tender are pending adjudication, the order of cancellation passed by the Executive Engineer

under Annexure-1 is erroneous and hit by the principles of *lis pendens*. His further contention is that, when the Petitioners have been selected as successful bidders, the unilateral action of the Opposite Parties in cancelling the tender without giving any opportunity of hearing to the Petitioners is illegal, arbitrary and not

sustainable in the eye of law. To substantiate his contention, he cites two decisions of this Court in the case of *Homogenomics Private Ltd. vs. State of Odisha and*

others, reported in 2017(I) ILR-CUT-31 and *Sampad Samal vs. State of Odisha and others*, reported in 2017 (I) ILR-CUT-262.

7. On the contrary, Mr. Palit, learned Additional Government Advocate for the State-Opposite Parties submits that mere acceptance of the bid of the Petitioners

by the Executive Engineer without approval of the higher authorities, i.e., the Superintending Engineer and Chief Engineer does not create any right in their favour

for execution of the work. He further submits that as per the Tender Call Notice, the authority reserves the right to reject any order or all of the bids even without

assigning any reason. Mr. Palit continues to submit that upon re-verification of the bids at the level of Superintending Engineer and Chief Engineer since error was

noticed in evaluation of bids, the same needs to be rectified by taking a conscious decision in cancelling the tender process and thus no illegality is involved in the

same. Further, since no agreement has been executed with the Petitioners, no right of the Petitioners can be said to have been violated by such cancellation.

8. Undoubtedly the selection of the Petitioners as L-1 bidders for 24 nos. of works as per the Tender Call Notice by the Executive Engineer has not been

questioned by the Opposite Parties. But during re-verification of the bid documents by the Opposite Party Nos.3 and 4, some defects and discrepancies were

noticed resulting cancellation of the tender process. It is not the case of the parties that the tender was cancelled in order to grant the work in favour of any other

person. It is also not the case of the parties that the tender was cancelled without any reason. What is to be seen is whether such cancellation of the tender

violates any right accrued in favour of the Petitioners or such cancellation of the tender is so unreasonable or illegal that will not stand the test of law.

9. In the case of Jagdish Mandal vs. State of Orissa and others, reported in (2007) 14 SCC 517, the Honâ??ble Supreme Court considering the scope of the Court

to interfere in tender and contractual matters in exercise of powers of judicial review has held as follows:

â??22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or

decision is made â??lawfullyâ? and not to check whether choice or decision is â??soundâ?. When the power of judicial review is invoked in matters relating to tenders or award of

contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions.

Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of

judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be

invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil

court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural

violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up

public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual

matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

Or

clause-10 of the terms and conditions of the tender paper and giving them their plain meaning, as the authority concerned has passed the impugned order of cancellation, without

any proper and adequate ground, rather, as it is clear, in an arbitrary manner because of pendency of frivolous petition, the same cannot be sustained in the eye of law.â??

12. Therefore, both the above cases, as cited by the Petitioners do not lend any help to the Petitioners being distinguishable on facts.

13. Coming to examine the other contention of the Petitioners, the doctrine of lis pendens as envisaged in Section 52 of the Transfer of Property Act, denotes the operation of common-law maxim pendent lite nihil innovetur. It is based on equity, good conscience and justice because it will be impossible to bring an action or

suit to a successful termination if changes are permitted to prevail.

14. In the present case, the facts are clear that the tender process was not finalized and no agreement of execution of work has been issued. The bid documents

offered by the Petitioners has been accepted at the level of Executive Engineer which is subject to further approval by the Superintending Engineer and Chief

Engineer and while undergoing such stage of approval at the higher level due to revelation of defects and discrepancies, the tender was cancelled. Therefore, there

was no creation of right accrued in favour of the Petitioners to execute the work for which the Tender Call Notice was issued. Since no such right can be

construed which can be said to have accrued in favour of the Petitioners, the cancellation of the tender process in entirety in no way affects the Petitioners and

thus, nothing can be said to have changed by such cancellation. Since by mere acceptance of the bid documents on the part of the Executive Engineer would not create any right in favour of the Petitioners, the cancellation of the tender also cannot be said to have attracted the doctrine of lis pendens.

15. The reasons as assigned by the Opposite Party Nos.3 and 4 in Annexures-6 and 7 regarding defects and discrepancies in the bid papers which is regarding non-submission of the mandatory requirements as per the Tender Call Notice cannot be said as illegal or arbitrary by any stretch. The higher authorities have rectified the errors noticed in the evaluation process resulting cancellation of the tender. Since no other intention or mala fide purpose is found from the action of

the Opposite Parties in cancelling the tender, we do not find any merit in the submission of the Petitioners to interfere in the action of the Opposite Parties in cancelling the tender.

16. In view of the discussions made above, no merit is found to warrant interference in the action of the Opposite Parties in cancelling of the e-Tender under

Annexure-1 and as such, we do not incline to interfere with the same.

17. Accordingly, the writ petition is dismissed. There shall be no order as to costs.