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**(2021) 09 UK CK 0141**

**In the Uttarakhand High Court**

**Case No : Writ Petition (M/S) No. 1804 Of 2021**

M/s Kanti Prasad Mittal

APPELLANT

Vs

Uttarakhand Peyjal Nigam And Another

RESPONDENT

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**Date of Decision : 10-09-2021**

**Acts Referred:**

Constitution Of India, 1950 — Article 226

**Citation : (2021) 09 UK CK 0141**

**Hon'ble Judges : Sharad Kumar Sharma, J**

**Bench : Single Bench**

**Advocate : Hitendra Nahata, D.S. Patni, Bhupendra Singh Bisht, Dharmendra Barthwal**

**Final Decision : Disposed Of**

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## **Judgement**

Sharad Kumar Sharma, J

1. Initially, the petitioner has preferred this writ petition, praying for the following reliefs:-

"a. Issue an appropriate writ or direction or any other order in nature of certiorari to quash/set aside impugned letter dated 11.08.2021 bearing no. 580/PIU(NIVIDA)/65 issued by the Respondent (Annexure No. 2).

b. Issue an appropriate writ or direction or any other order directing the Respondent to open/allow the technical and financial bid of the Petitioner.

c. Kindly pass any other and further appropriate order/s as deemed fit by this Hon'ble Court.

d. For any other just and reasonable orders to meet the ends of justice."

2. In fact, the tender document, which was supplied by the petitioner, was not a complete document, which was placed on record by the petitioner, because as per clause 33.1 of the contract, the dispute between the Operator and the

Engineer/Authority, was to be resolved in accordance with the procedure contemplated under clause 25 and 26 of the General Conditions of the Contract, as it was provided under Section IV of the bidding document. Relevant clause 33.1 is extracted hereunder:-

"33.1 Disputes between Operator and Engineer/Authority shall be resolved as per the provisions of Cl. 25 & 26 of General Condition of Contract (Section IV)."

3. The said Section IV was not made part of the record and hence the petitioner was directed to place the same on record. The same has been supplied by the petitioner by way of a supplementary affidavit, where the general condition of the Contract, which constituted of the Section IV of the bidding documents, provides the Disputes Redressal Forum. Clause 25, 26 & 27 of Section IV of the bidding documents are extracted hereunder:-

"25. Appointment of the Adjudicator or Dispute Review Expert

25.1 The Adjudicator/Dispute Review Expert (DRE), named in Contract Data shall be appointed jointly by the Authority and the Operator, at the time of the Authority's issuance of the Letter of Acceptance. If, in the Letter of Acceptance, the Authority does not agree on the appointment of the Adjudicator/DRE, the Authority will request the Appointing Authority designated in the Contract Data, to appoint the Adjudicator/DRE within 14 days of receipt of such request.

25.2 The Adjudicator/DRE should be in position before "notice to proceed with work" is issued to the Operator and an agreement should be signed with the Adjudicator/DRE jointly by the Authority and the Operator in the form attached - Appendix 1.

26. Disputes

26.1 If the Operator believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision.

27. Procedure for Disputes

27.1 The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

27.2 The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Authority and the Operator, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

27.3. The arbitration shall be conducted in accordance with the arbitration

procedure stated in the Contract Data. The Arbitrator(s) shall give a decision in writing within 120 days of start of the proceedings unless otherwise agreed to by the Parties. The Arbitrators shall entertain only those issues which have been earlier referred to the Adjudicator/Dispute Review Expert and either party is dissatisfied with the decision given by the Adjudicator/Dispute Review Expert.

4. In fact, clause 25 of the bidding document, may not be much relevance at present, because it only lays down the procedure for appointment of an Arbitrator or a Dispute Review Expert. But, what would be of a relevant consideration, for this Court, would be the implications of clause 26, which the petitioner's counsel contends though in contradiction to his own arguments, that the procedure for redressal of dispute, would only apply in the present case, because it is attracted only when there is a letter of intent or concluded contract executed between the contractor and the employer.

5. On one hand, the learned counsel for the petitioner raises this plea in order to interpret clause 26, in the manner referred above, while on the other hand, he submits that the objection, which has been raised by him on 18.08.2021 (Annexure-5), which has been appended with the writ petition, falls to be as an objection under clause 26 of the bidding document in reply to show cause dated 11.08.2021, issued by the respondents. In that eventuality, a very peculiar situation emerges for consideration as to, which part of the argument of the learned counsel for the petitioner is to be accepted since being self contradictory interpretation of clause 26 of the General Condition of Contract.

6. The answer to the argument of the learned counsel for the petitioner, would be, that so far as clause 26 of the bidding documents is concerned, which relates to the disputes, it has been classified into two parts or two stages of Dispute Redressal Forum i.e. based on a dispute which is emanating from a concluded contract and "or", on a decision wrongfully taken by the Engineer. The use of word 'or', under clause 26, bifurcates the entertainment of disputes prior and after the execution of contract.

7. The learned counsel for the petitioner later on submits, that since once he has already raised a dispute on 18.08.2021, then in that eventuality, under clause 26 of the bidding documents his objection ought to have been referred to an Adjudicator, who was supposed to be appointed under clause 25 of the bidding documents for its determination on merits.

8. In fact, this magnitude and tenacity of argument of the learned counsel for the petitioner, would confine the grievance of the petitioner, that he is rather aggrieved by an inaction of non reference of his dispute to an Adjudicator for its decision rather than pressing the relief over here before this Court, in the writ jurisdiction, which is not amenable under Article 226 of the Constitution of India.

9. Clause 26 of the bidding documents, in itself, which, according to my view, deals with an adjudication of the disputes at two distinct levels, is further fortified from the rationales to be drawn from the implications of clause 27.2 of

the bidding documents of Section IV, where as against the adjudication made by an Adjudicator a reference is required to be made to an Arbitrator as contemplated therein. Meaning thereby, as per the terms of bidding document, the role of an Adjudicator and that of an Arbitrator, are entirely distinct, under the terms of the Contract and the power to adjudicate by an Adjudicator, would be inclusive of the petitioner's objection, which has been raised by him on 18.08.2021, pertaining to the controversy, raised by him by virtue of his compliant, as registered by him through email on 18.08.2021.

10. In view of the aforesaid arguments, the contention of the learned counsel for the petitioner is, that despite the fact that he has responded to the respondents by way of his complaint, which was registered by him on 18.08.2021, no reference has yet been made to the Adjudicator to decide the dispute.

11. Thus, in view of clause 33.1 to be read with clauses 25 and 26 of the general conditions of the contract, the complaint, which has been sent by the petitioner would fall to be a dispute, which is under clause 26, on which the call has to be taken by the Adjudicator, hence, this writ petition is disposed of with a direction to the Adjudicator, thus appointed under clause 25 of the bidding documents and General Conditions of Contract therein, to consider and decide the dispute, which had been raised by the petitioner on 18.08.2021, which was sent by the petitioner through mail, within a period of two months from the date of production of the certified copy of this order; it goes without saying that obviously, in terms of the procedure contemplated under clause 27 of the Section IV of the bidding documents.

12. Subject to above, the writ petition stands disposed of.