

(2024) 04 OHC CK 0082
In the Orissa High Court
Case No : Writ Petition (C) No. 8012 Of 2024

M/s. Mahapatra Enterprises, Sambalpur	APPELLANT
Vs	
State Of Orissa & Others	RESPONDENT

Date of Decision : 09-04-2024

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2024) 04 OHC CK 0082

Hon'ble Judges : Dr. B.R.Sarangi, J;G. Satapathy, J

Bench : Division Bench

Advocate : S.K.Dalai, P.K.Muduli, D.Mohanty, P.Rath, S.Tibrewal

Final Decision : Dismissed

Judgement

G. Satapathy, J.

1. M/s. Mahapatra Enterprises, a business entity registered as Mess Contractor has filed this writ petition through its proprietor Susanta Kumar Mohapatra praying therein to quash the Tender Call Notice No.VSSUT/OOR/872/2023 under Annexure-1 and consequential result awarding contract to OP No. 15 under Annexure-5 series in exercise of extra ordinary writ jurisdiction of this Court.

2. Briefly stated, the facts involved in this writ petition are, on 25.11.2023 OP Nos. 3 & 4 floated an advertisement inviting interested and eligible firms, companies, proprietors and individuals to provide mess catering service to Hall of Residences at Veer Surendra Sai University of Technology at Burla(VSSUT) on terms and conditions detailed described in Detailed Tender Call Notice (DTCN) under Annexure-2 and the last date of submission of such tender was fixed at 5P.M. on 08.12.2023 and the Technical Bid was scheduled to be opened at 3P.M. on 11.12.2023. Pursuant to such DTCN, the petitioner along with 12 other bidders applied for and participated in the tender process and as per the schedule, the Authority opened the bids and awarded marks to the respective bidders in terms of their eligibility. Much after completion of bid evaluation

process and cutoff date, the Authority of VSSUT issued notice on 10.02.2024 vide Annexure-4 requesting all the bidders to come prepared at 3.30PM on 15.02.2024 to rectify the defects in fulfilling their shortcomings and to verify the awarded marks. Accordingly, all the bidders appeared before the Tendering Authority, but the petitioner approached the Tendering Authority through its Manager on 15.02.2024 and the Tender Inviting Authority have allowed all the bidders to rectify the defects in their bids and allowed ineligible bidders to fulfill their shortcomings by inserting new documents of qualification to enhance their awarded marks. It is alleged the petitioner was not allowed to fulfill its shortcomings and the Tendering Inviting Authority did not communicate the result of the tender to it and the entire selection procedure was completed in a pick and choose method by allowing the favoured bidders which is illegal and contrary to law. It is also alleged by the petitioner that for the selfsame work, the Authority had also earlier invited application on 24.08.2023, but the same was cancelled for the reason being that their own choice bidder could not qualify and thereafter, the Authority brought the present DTCN by relaxing the conditions only to suit their own favored bidders which is never permissible in the eye of law. The petitioner, however, has stated in the writ petition that he had earlier approached this Court in W.P.(C) No. 7315 of 2024 and W.P.(C) No. 7395 of 2024 challenging the tender evaluation process, but the petitioner was permitted to withdraw both the writ petitions with liberty to file better application by way of order passed by this Court on 02.04.2024 and 28.03.2024 respectively in these writ petitions. Asserting the claim of illegality and adoption of illegal tender procedure against the Authority-cum-Opposite Party Nos. 3 & 4 in allowing ineligible bidder to fulfill their shortcomings after cutoff date, the writ application is filed.

3. Mr.S.K.Dalai, learned counsel for the petitioner by drawing attention of the Court to the last date of submission of tender and opening date of Technical Bid, has submitted that although the Technical Bid was opened at 3P.M. on 11.12.2023 and after making evaluation of Technical Bid of all the bidders on the same date, the Tender Inviting Authority had issued another notice on 10.02.2024 under Annexure-4 which is near about two months after the evaluation of Technical Bids, requesting the bidders to attend for Technical Bid evaluation in board room of VSSUT, Burla at 3.30PM on 15.02.2024 to rectify their shortcomings and ascertain their status, but the very issuance of Annexure-4 is not only manifestly arbitrary, illegal, but also it was evil designed to favour certain bidders to fulfill the shortcomings after cutoff date of 11.12.2023 and facilitated them to enhance their points in the technical evaluation process which is impermissible in the eye of law. It is further submitted that the Tender Inviting Authority have not only changed the terms and conditions of DTCN by issuing Annexure-4 inviting bidders to make good for the deficiency, but also allowed the ineligible bidders to become eligible with mala fide intention to favour the bidder of their own choice and therefore, such procedure adopted by the Authority is contrary to law since the rule of game

cannot be changed after commencement of the game and in the process the Authority had rendered the DTCN manifestly unjust, arbitrary, unreasonable and illegal and consequently, awarding the contract to OP No. 15 pursuant to such DTCN by changing the terms of contract through Annexure-4 makes its selection in the bid unsustainable in the eye of law. In summing up his argument, Mr.S.K.Dalai has prayed to quash Annexure-1 and Annexure-5 by relying upon the decisions in (i)M/s. Monarch Infrastructure(P) Limited vrs. Commissioner, Ulhasnagar Municipal Corporation and others; AIR 2000 SC 2272,(ii)West Bengal Electricity Board(WBEB) v. Patel Engineering Co. Ltd. and others; AIR 2001 SC 682,(iii) Central Coalfields Limited and another vrs. SLL-SML(Joint Venture Consortium) and others; AIR 2016 SC 3814, (iv)Ramana Dayaram Shetty vrs. the International Airport Authority of India and others; AIR 1979 SC 1628 and (v)Radhamohan Patra v. State of Orissa and others; AIR 1992 ORISSA 221.

4. Mr.P.K.Muduli, learned AGA highlighting the ineligibility criteria of the petitioner for want of required annual turnover, has further submitted that the Tendering Authority having rightly considered and evaluated the bid of respective bidders, there is hardly any scope to interfere in the decision making process of the Tender Inviting Authority, accordingly has prayed to dismiss the writ petition.

5. Mr.D.Mohanty, learned counsel appearing for OP No. 16 on caveat by taking this Court through the eligibility criteria stated in para-4 of Annexure-1 has submitted that in order to become eligible for the bid, the bidder must have the minimum average turnover of Rupees one crore during last two financial years, but the petitioner in this case as per his own document attached under Annexure-3 series discloses that the petitioner has only an annual average turnover of Rs.59,59,127/- which is much less than the eligibility criteria as fixed by the Tender Inviting Authority. It is further submitted by him that when the petitioner learnt that his bid is not going to be qualified, he brought this writ petition with a mala fide intention to prohibit the successful bidder from enjoying the fruits of the contract. It is also submitted by him that the petitioner having participated in the bid and having attended the office of the Tendering Authority at the scheduled time at 3.30PM on 15.02.2024 to fulfill shortcomings, if any by supplying the relevant and certified documents, he having remained unsuccessful in such Technical Bid Evaluation cannot afterwards challenge the same and he is thereby estopped to challenge Annexure-4 which is the sequel of DTCN under Annexure-2 and the Tendering Authority have absolutely not changed any of the terms and conditions of the DTCN, but with mala fide intention, the petitioner is creating hindrance in issuing work order to the successful bidder by the Tendering Authority taking an imaginary plea that the Tender Inviting Authority have changed the terms and conditions of the contract and therefore, the writ petition of the petitioner merits no consideration. Mr.Mohanty by relying upon the decision in M/s. S.Mund Constructions Private Limited vrs. State of Odisha and others; 2023(III) ILR-CUT 59, has prayed to dismiss the writ petition.

6. Mrs.P.Rath, learned Senior Counsel along with Mr.S.Tibrewal, learned counsel

appearing for OP No.13 on caveat has submitted that Annexure-4 was issued on 10.02.2024, pursuant to which the petitioner participated in the tender evaluation process on 15.02.2024, but Annexure-4 was issued by the Tendering Authority seeking clarification from the Bidders in the tender evaluation process basing on the documents of the Bidders, however, the petitioner remained silent till two weeks after 15. 03.2024, on which date the contract was awarded to the successful bidder and the petitioner first approached this Court by filing writ petition bearing No. W.P.(C) No. 7315 of 2024 which was withdrawn by him by order dated 02.04.2024 and thereafter, the petitioner again approached this Court for selfsame relief in W.P.(C) No. 7395 of 2024 which was also withdrawn by order dated 28.03.2024 for the reason best known to him and lastly, the petitioner came before this Court by filing present writ application on 04.04.2024 and therefore, the claim of the petitioner suffers from delay and laches inasmuch as neither the petitioner has objected to the issuance of Annexure-4 at any point of time rather participated in the process without any protest till coming to the Court nor was he deprived by the Authority from removing his own shortcomings which he has as admitted in his writ petition, and therefore, the claim of the writ petitioner having suffered from delay and laches, as also for want of eligibility, deserves no consideration, and accordingly prayed to dismiss the writ petition.

7. After having considered the rival submissions upon going through the records, it appears to the Court that the petitioner's only grievance emanates from the issuance of Annexure-4, as the petitioner alleges that the Tender Inviting Authority had issued Annexure-4 to facilitate the bidders of their choice to fulfill/rectify the shortcomings, which amounts to change of terms and conditions of contract. Taking into consideration the nature of relief sought for on the basis of pleading available on record, this Court decides to conclude the proceeding on the basis of argument advanced by the petitioner, State Counsel and counsel appearing on caveats in not proposing to issue notice to the Tendering Authority OP Nos. 3 & 4, and dispose of the matter with the consent of the parties at the admission stage.

8. Adverting to such claim of the petitioner, this Court feels the necessity of reproducing some terms and conditions of the DTCN. Clause 12 and part of the Clause 13 of the DTCN under Annexure-2 which are very much relevant and essential to answer the claim of the petitioner are reproduced as under:-

"12. CLARIFICATION ON TECHNICAL BID EVALUATION

12.1. The technical bids shall be evaluated based on the available documents submitted by the bidder. To assist in the examination, evaluation, and comparison of the bids, and qualification of the bidders, the University may, at its discretion, ask any bidder for a clarification of its bid. Any clarification submitted by a bidder that is not in response to a request by the University shall not be considered. The University's request for clarification and the response shall be in writing through e-mail.

12.2. If a bidder does not provide clarifications of its bid by the date and time set in the University's request for clarification, the bid may be rejected.

12.3. University also reserves right to seek confirmation/clarification from the issuer agency, on the supporting documents submitted by the bidder.

13. TECHNICAL BID EVALUATION

xxx xxx xxx	xxx xxx	xxx xxx
xxx xxx xxx	xxx xxx	xxx xxx

The University shall follow quality and cost based selection bid evaluation system (QCBS) where both the technical bid and financial bid shall be considered for evaluation after qualifying in the technical bid as per prescribed criteria. For technical bid evaluation, points will be given on the basis of the criteria as listed in table below. The technical bid shall have 60% weightage out of 100 marks. The bidders securing 60% of the total marks assigned to technical bid (i.e. 36/60) shall be declared qualified in the technical evaluation. Marks assigned to bidders by the appropriate committee and approved by competent authority, VSSUT, Burla shall not be questioned by any bidder. The bidders who qualify in the technical evaluation may be present at the time of opening of financial bids. Technical evaluation would be based on the following criteria."

S/N

Description

Score

1

Profile of Company & number of years in catering Business; Max Score: 15

2 marks for each year in operation for every year beyond minimum requirement of 1 year of operation in

similar work

2

No. of catering Works Executed by the agency (Last 5 years) Max Score: 10

1 Mark for each work order

3

No. of persons served in a single catering order (Last 5 years) Max Score: 15

upto 500 persons- 5 marks

501-1000 persons - 7 marks

More than 1000 persons-10 marks

4

Experience/Profile of Manager (Last 5 years); Max Score: 5

1 mark for each year of experience

5

Average Annual Turnover (During Last 3 years) Max Score: 15

1 to 5 crores-3 marks

Above 5 crores and less than equal to 10 crores-5 marks

Above 10 crores and less than equal to 20 crores-7 marks

Above 20 crores-15 marks

Total Technical Score:60

9. A careful perusal of Clause 12 & 13 as reproduced above makes it ample clear that the Authority have not relaxed any of the conditions of the DTCN under Annexure-2 and it is indisputable that Annexure-4 was very much available in DTCN under Annexure-2. A further perusal of Annexure-1 would go to suggest that the opening of Technical Bid of tender was scheduled on 11.12.2023 at 3P.M., but it was not stated therein that the bid was to be evaluated on the very same day. Further, it is also not possible for a Tender Inviting Authority like VSSUT to evaluate the Technical Bid of all the bidders which are 13 in this case, on the very same day. It cannot be disputed that Annexure-4 was issued in terms of the DTCN and it was only meant for seeking clarification from the bidders and the University was having the discretion to seek clarification which is one of the essential conditionalities of DTCN, pursuant to which petitioner participated along with other bidders without any objection.

10. It is, however, claimed by the petitioner in the writ petition that the Tender Inviting Authority have allowed almost all the bidders to rectify the defects and also allowed the ineligible bidders to fulfill their shortcomings by inserting new documents of qualification and thereby, allowed them to enhance their awarded marks, but interestingly, the petitioner was not allowed to fulfill the shortcomings, such as it has not fulfilled an annual average turnover of Rs.59,59,127/- as against the eligibility criteria fixed by the Tender Inviting Authority as per the document available on record and it is, therefore, very clear on one hand that the petitioner was having some shortcomings, but the petitioner could not be able to substantiate clearly in the averments of the writ petition as to which bidder has been allowed by the Authority to insert new documents to make him eligible and what was the documents by which the bidder was made eligible. Had the petitioner been not allowed to clarify his bid in terms of Clause- 12 & 13 of DTCN, he could have raised objection there before the Authority on the very same day on 15.02.2024, but there is absolutely no averments made by the petitioner in the writ petition that the petitioner has

raised any objection before the Tender Inviting Authority for depriving him and allowing other bidders to rectify their bids by producing new documents. On the contrary, Annexure-4 is a part of Annexure-2 and thereby, it cannot be said that the Authority had changed the terms and conditions of the DTCN. It is, therefore, very clear that the petitioner has not been able to establish that the Authority had changed the rules of the game after it had begun.

11. On the other hand, the petitioner having attended the Office of Tender Inviting Authority pursuant to issuance of Annexure-4 along with other bidders and having participated in the process to verify and ascertain their status (points awarded on the basis of the criteria) on the Technical Bid Evaluation without any demur, he after having been declared unsuccessful in the Bid Evaluation Process, cannot turn around and afterward challenge the validity of Annexure-4. The above principle is based on the principle of estoppel which prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. In other words, estoppel is a principle applicable when one person induces another or intentionally causes other person to believe something to be true and to act upon such believe as to change his/her position. In such a case, the former shall be estopped from going back from the word given. In this regard, this Court considers it apt to refer to the decision in *Madan Lal and others. Vrs. State of Jammu & Kashmir and others*; AIR 1995 SC 1088 wherein the Apex Court held that if a candidate takes a calculate chance and appears at the interview, then only because the result of the interview is not palatable to him, he cannot turn around and subsequently contend that the process of interview was unfair or selection committee was not properly constituted.

12. The petitioner of course has relied upon the judgment in *M/s. Monarch Infrastructure (P) Ltd. (supra)* to urge that rules of the game cannot be changed after it had began, but the aforesaid dictum is distinguishable in the factual scenario of the case inasmuch as not only the petitioner, but also the other bidders had participated in the process pursuant to issuance of Annexure-4, however, only the petitioner has challenged the validity of Annexure-4 after it returned unsuccessful in the Technical Bid Evaluation Process. On the other hand, the decision as relied on by OP No. 16 in *M/s. S Mund Constructions Pvt. Ltd (supra)* appears to have some force in this case because this Court in the said decision has categorically held at paragraph-24 that the petitioner having participated in the process of tender should not have turned around and challenged the conditions of tender by filing the writ petition. On a respectful consideration of the decisions in *Central Coalfields (supra)*, *Ramana Dayaram Shetty(supra)* and *Radhamohan Patra(supra)*, the same are found distinguishable from the facts of this case inasmuch as in *Central Coalfields*, the issue therein was unequal treatment to respondent no.4, but the same issue is not here in this case; the issue in *Ramana Dayaram Shetty* was for want of eligibility of respondent no.4 whose bid was entertained by respondent no.1, but no such issue crops up in this case, rather the petitioner was not having requisite

eligibility criteria in respect of financial capacity as per his own document under annexure 3 series and lastly, the issue involved in Radhamohan Patra was receipt of the tender ten minutes beyond prescribed time which is not at all the issue in the present case. In order to make it abundantly clear that the challenge of the petitioner in the present writ is with regard to issuance of annexure 4 by interpreting the same to be change in terms and conditions of the tender pursuant to issue of DTCN, but as it is already held by this Court that annexure 4 being part of the DTCN which was issued at the time of floating of tender, was only issued to reaffirm the tender conditions and, therefore, such challenge of the petitioner having found to be unmerited, there is no need of any interference by this Court for issuance of annexure 4 by the Tender Inviting Authority.

13. It is, however, alleged by the petitioner that the Authority have come up with present DTCN by relaxing the conditions only to suit to the bidder of their own choice, but no material or document has been produced by the petitioner to substantiate such allegation. Further, the petitioner at paragraph-19 of the writ petition has stated "there is no such document available with the petitioner to demonstrate all those illegalities, except Annexure-4, but the records will show the irregularities committed by the Authority if the record will be produced before this Court". On a plain reading of the above averments of the petitioner, it goes without saying that the petitioner's allegation is only on the basis of Annexure-4, but the same being a part of DTCN, it can by no stretch of imagination be said that Annexure-4 has been issued to facilitate any particular ineligible bidder to become eligible, since all the bidders including the petitioner have been provided with fair opportunity to clarify their bids pursuant to issuance of Annexure-4. The petitioner making a speculative averment tries to make a fishing and roving enquiry without substantiating the same by furnishing any material thereof, which is not permissible. It is also indisputable that the petitioner has submitted the bid pursuant to Annexure-1 wherein one of the condition stipulated at paragraph-4(II) under the heading Financial capacity is that the bidder should have minimum average annual turnover of Rupees One Crore during the last two financial years, but it appears from the documents annexed to by the petitioner under Annexure-3 series at page-60 of the writ petition that the annual turnover of the petitioner in last three years was for Rs.37,75,270/- in 2020-21; Rs.38,27,283/- in 2021-22; and Rs.80,90,970/- in 2022-23 and, therefore, as per his own document, the petitioner is not having the minimum eligibility criteria of financial capacity in terms of Annexure-1.

14. Another important aspect as involved in this writ petition is the time gap to challenge Annexure-4, which cannot be lost sight of in the present context, inasmuch as Annexure-4 was issued on 10.02.2024, pursuant to which the petitioner participated without any objection, but challenged Annexure-4 on 4.04.2024 by filing this writ petition. Even otherwise, the other two writ petitions filed by the petitioner, if taken into consideration, still then the timing of challenge is very much important inasmuch as had the petitioner being aggrieved by issuance of Annexure-4 on 10.02.2024, he could have approached the Court

at the earliest, but the petitioner preferred to challenge the same sometime after issuance of contract to successful bidders and even that is done after participating in the entire tender process and coming out unsuccessful thereon. The claim of the petitioner, therefore, suffers from delay and laches, otherwise also the petitioner has not come to the Court with clean hands.

15. The petitioner, however, has relied upon another decision in WBEB (supra) to contend that issuance of Annexure-4 was only meant to facilitate the ineligible bidders to rectify their defects and, thereafter, evaluating their bids after making them eligible, but Annexure-4 being part of DTCN under Annexure-2, it was well within the knowledge of all the bidders including the petitioner since the date of floating of advertisement inviting application from eligible bidders in terms of DTCN and by issuance of Annexure-4, no relaxation in terms and conditions of contracts have been provided by the Authority, rather it was issued only to reaffirm the tender conditions and seek clarification from all the bidders and thereby, the reliance to the decision in WBEB (supra) is of no consequence for the petitioner, since in the present case, no material has been produced by the petitioner to establish that the terms and conditions of the tender have been changed/relaxed by the Tender Inviting Authority. On the other hand, in *Balaji Ventures Pvt. Ltd. Vs. Maharashtra State Power Generation Company Ltd.*; 2022 LiveLaw (SC) 295, the apex Court in paragraph-5.1 of the decision has held that:

" xx xxx xxx xxx xxx xxx Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document."

16. Further, in *Silppi Constructions Contractors Vs. Union of India*; (2020) 16 SCC 489, the apex Court at paragraph-20 of the said judgment has observed as follows:

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realize that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

17. On a conspectus of materials placed on record keeping in view the discussions made hereinabove and on a critical analysis of the facts involved in this case, this Court does not find any illegality or perversity in the decision making process of Tender Inviting Authority and by no stretch of imagination, the issuance of Annexure-4 can be considered as change in terms and conditions of the tender, rather the petitioner being found to have not satisfied the eligibility condition as stipulated in Annexure-1 at least in respect of financial capacity and, therefore, the claim of the petitioner to hold the action of the Authority in issuing Annexure-4 to be arbitrary, illegal and unreasonable merits no consideration and consequently, the Authority issuing work order to successful bidder vide Annexure-5 cannot be quashed on the imagination of the petitioner.

18. In the result, the writ petition being devoid of any merit stands dismissed on contest, but no order as to costs.

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