

(2023) 03 CHH CK 0022

In the Chhattisgarh High Court

Case No : Writ Petition (Civil) No. 5655 Of 2022

M/S Rajesh Kumar Agrawal

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 09-03-2023

Acts Referred:

Citation : (2023) 03 CHH CK 0022

Hon'ble Judges : Arup Kumar Goswami, CJ;P. Sam Koshy, J

Bench : Division Bench

Advocate : Sourabh Sharma, Gagan Tiwari

Final Decision : Dismissed

Judgement

1. Aggrieved by the Order dated 13.12.2022 (Annexure P-1) and the Order dated 8.12.2022 (Annexure P-2), the present Writ Petition has been filed by the Petitioner.
2. Vide Order dated 8.12.2022 (Annexure P-2), the Petitioner was declared ineligible in the tender proceeding initiated by the Respondents and vide Order dated 13.12.2022 (Annexure P-1), the representation submitted by the Petitioner has been rejected by the Respondents.
3. Factual matrix of the case, in brief, is that on 19.10.2022, a Notice Inviting Tender (for short, "NIT") was published by the Respondents in respect of civil construction works of Kasdol Bhainapara (Bhainsgadi) Badgaon-Barliya Road Lane 14.40km.
4. The Petitioner, being a Class-A contractor, along with others, had participated in the said tender process and submitted his tender documents as per the requirements of the NIT. As per the NIT, the last date for submission of bid was 11.11.2022 by online mode and 15.11.2022 by physical mode. The Petitioner on 31.10.2022 had submitted his tender documents consisting of other documents as per the requirements, including the Pre-Qualification Certificate (for short,

P.Q. Certificate) valid for the period from 24.6.2022 to 31.10.2022.

5. On 8.12.2022, the Respondent No.3, the Chief Engineer, PWD, communicated to the Petitioner that his technical bid was rejected since the P.Q. Certificate that he had submitted for the year 2021-22 was not acceptable. The Petitioner immediately thereafter submitted a representation and along with the representation, he had also produced a P.Q. Certificate valid up to 31.10.2023 issued by the authorities on 21/22.11.2022. Subsequently, the Respondent authorities rejected the representation of the Petitioner vide Annexure P-1, dated 13.12.2022, stating that in terms of the NIT, along with the technical bid, the Petitioner did not submit a valid P.Q. Certificate.

6. It is these two orders dated 8.12.2022 (Annexure P-2) and 13.12.2022 (Annexure P-1) which are under challenge in the present Writ Petition.

7. Learned Counsel for Petitioner submits that the P.Q. Certificate as such is not to be considered as an essential mandatory document for the purpose of finalising the tender and for scrutinizing the credentials and capabilities of a tenderer. According to him, the Petitioner had submitted a valid P.Q. Certificate. He submits that on the date when the Petitioner had submitted the tender documents on 31.10.2022, the Petitioner had a valid P.Q. Certificate which is the P.Q. Certificate for the year 2021-22 valid up to 31.10.2022. He further submits that for the renewal of the same, the Petitioner had already taken steps and since it was the inaction on the part of the Respondents themselves in not timely issuing the P.Q. Certificate, the Petitioner should not have been penalized by declaring him ineligible.

8. Learned Counsel for Petitioner, in support of his contentions, has relied upon the decision of the Hon'ble Supreme Court in the case of "Rashmi Metaliks Ltd. Vs. Kolkata Metropolitan Development Authority", reported in (2013) 10 SCC 95, and also the decision of the Division Bench of this High Court rendered in the case of "M/s Tiwari Construction, District Surguja (CG) Vs. Union of India & Ors.", reported in (2016) ILR 4 1939. Learned Counsel for Petitioner has further relied upon the decision of the Hon'ble Supreme Court rendered in the case of "B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. & Ors.", reported in (2006) 11 SCC 548.

9. Upon Notice, the Respondent-State entered appearance and has filed reply taking a categorical stand that when the tender was floated at the first instance on 19.10.2022, it was made known to all the interested persons that it was mandatory to submit the following documents online:-

"(A) Copy of valid registration in CGPWD.

(B) Valid bank solvency.

(C) PQ documents.

(D) Financial offer.

(E) Affidavit (in prescribed format in annexure 13 of P.Q.

(F) Alternate GAD/consent letter for Departmental GAD."

10. The NIT also had certain special conditions which are reflected in Clause-9. The relevant portion of the said Clause-9 is reproduced herein under:-

"9. Special Condition

(1)a) xxx xxx xxx

b) xxx xxx xxx

c) Contractors are advised to go through the Notice Inviting Tenders & the tender/ P.Q. document thoroughly. Certificates, annexure, enclosures as mentioned in the document will have to be submitted by the tenderers strictly in the prescribed format, at the time of submission of Technical/Financial Bid, failing which the contractor shall disqualify for the work & his financial offer shall not be opened and no representation, appeal or objection, whatsoever in this regard shall be entertained by the department.

d) It is mandatory to submit online by the contractor the list of on-going Works/ works in hand. If any work is found delayed beyond one year from the Stipulated date of completion due to Contractor's fault, the contractor will be disqualified for the reason of poor performance.

e) It is mandatory for contractor to submit an affidavit in prescribed format in Annexure - 13 of P.Q. Documents."

11. It is the further stand of the Respondent-State that the document "Annexure-3" enclosed along with the NIT, which was supposed to be furnished by the bidders, also carried a specific note in respect of the requirement of the valid P.Q Certificate issued by the Engineer-in-Chief, PWD. For ready reference, the Note attached to Annexure-3 also is reproduced herein below:-

"Note:

(i) Contractors registered in C.G. PWD will have to attach valid P.Q. certificate issued by Engineer in Chief PWD Committee.

(ii) In case of tenders more than Rs.30 Cr., the contractors not registered in C.G. PWD will have to furnish certificate showing year wise value of work done too, issued by the competent authority (Engineer In Charge not below the rank of Executive Engineer) of the employer.

(iii) The bid shall be treated as not responsive in the absence of certificates mentioned in (i) or (ii) above.

(iv) T.D.S. Certificate or any other certificate (e.g. CA certificate) shall not be considered for the purpose of year wise value of work done in this format."

12. Further stand of the Respondent-State is that the P.Q. Certificate is issued

based upon the financial turnover of the contractor in respect of the work that he had executed in a particular financial year. As per Annexure-1 of the NIT, the applicants have to provide the financial turnover of civil engineering construction works carried out by the contractor of the immediate five years preceding the year the tenders are invited. It is the P.Q. Certificate in respect of the financial turnover of the preceding five years which the Petitioner had failed to submit which rendered him ineligible. Thus, according to Respondent-State, since there was an admitted deficiency on the part of the Petitioner in not furnishing the P.Q. Certificate along with the bid that he had submitted, the action on the part of the Respondents in declaring the Petitioner as ineligible cannot be said to be arbitrary or illegal as it was made known to the Petitioner through the NIT itself that non-furnishing of the P.Q. Certificate would lead to disqualification. The Respondents thus prayed for rejection of the Writ Petition.

13. From the pleadings in the petition as also from the documents enclosed along with reply filed by the State, the admitted position as it stands is that the P.Q. Certificate that the Petitioner had enclosed along with his tender documents was for the year 2021-22 and which showed the financial turnover for the year from 2016-17 to 2020-21. This P.Q. Certificate for the year 2021-22 was valid up till 31.10.2022. The renewed P.Q. Certificate for the year 2022-23 was not enclosed by the Petitioner. The P.Q. Certificate for the subsequent year, i.e. 2022-23, was obtained by the Petitioner only on 21.11.2022 and which was valid for 31.10.2023. In the said certificate, the financial turnover was reflected from the year 2017-18 to 2021-22. This document has been enclosed as Annexure P-8 along with the Writ Petition. This was served upon the Respondents only on 22.11.2022 which would establish that till the last date of submission of the tender documents, i.e. 11.12.2022, the Petitioner was not in possession of a valid P.Q. Certificate. Even on the date of opening of the technical bid on 16.11.2022, the Petitioner did not have the valid P.Q. Certificate for the year 2022-23. Annexure-3 of the NIT, seeking necessary details and information, which was supposed to be furnished by the bidder, had a specific note with an insistence for a valid P.Q. Certificate and it was also emphatically made known to the bidders that bid shall be treated as non-responsive in the absence of the P.Q. Certificate.

14. Hon'ble Supreme Court in the case of "TATA Cellular v. Union of India", reported in (1994) 6 SCC 651, while dealing with the issue of interference in public contracts and tenders and the scope of judicial review in such matters had outlined the powers and duties of the State and its instrumentalities. The relevant principles laid down are as under:-

"94. The principles deducible from the above are:

- (1) xxx xxx xxx
- (2) xxx xxx xxx
- (3) xxx xxx xxx

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides."

15. The Courts of law, particularly the Courts exercising writ jurisdiction, have to see whether in the course of taking a decision, the Respondent/State have acted arbitrarily or the decision is actuated by mala fides. It is also open for the Courts to look into the aspect as to whether the decision under challenge is one which is contrary to the terms and conditions of the NIT itself.

16. In "Reliance Airport Developers Pvt. Ltd. Vs. Airport Authority of India & Ors.", reported in (2006) 10 SCC 1, the Hon'ble Supreme Court has held that in matters of judicial review, the basic test that has to be seen is the decision making process and not the decision itself and whether there is any infirmity on the part of the Respondent/State in the decision making process.

17. The pleading in the petition itself would give a clear indication that there is an admission on the part of the Petitioner in not having furnished the requisite P.Q. Certificate. The Petitioner has stated that he had submitted the P.Q. Certificate for the year 2021-22 and that he could obtain the subsequent P.Q. Certificate only on 22.11.2022, i.e. much after the technical bid was opened.

18. In the given circumstances, if the Respondents have taken a decision strictly in accordance with the conditions stipulated in the NIT, which specifically spelt out the consequence also on the non-furnishing of the P.Q. Certificate, the decision of the Respondents can neither be said to be in any manner arbitrary nor can it be said to be actuated by mala fides and above all, it also cannot be said to be in violation of the tender conditions.

19. As regards the judgments cited by learned Counsel for Petitioner, i.e., "Rashmi Metaliks Ltd." (supra), "M/s Tiwari Construction" (supra) and "B.S.N. Joshi & Sons Ltd." (supra), the plain reading of the factual narratives on the basis of which the said judgments were passed would clearly show that those decisions were made under an entirely different contextual backdrop and the principles laid down and the ratio decidendi of the said decisions cannot be applied in a straightjacket formula to the facts of the present case.

20. The Hon'ble Supreme Court in the case of "Central Coalfields Limited & Anr. Vs. SLL-SML (Joint Venture Consortium) & Ors.", reported in (2016) 8 SCC 622,

referring to "TATA Cellular" (supra) and also the subsequent decision in the case of "Jagdish Mandal v. State of Orissa", reported in (2007) 14 SCC 517, has held as under in the following paragraphs:-

"37. ... It is not for the employer or this Court to scrutinize every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be re-arranged or asked to be re-arranged during the bidding process to affect the right of some or deny a privilege to some.

xxx xxx xxx

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-introducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision in Tata Cellular v. Union of India which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular) in Jagdish Mandal v. State of Orissa in the following words:

"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 "lawfully" and not to check whether choice or decision is "sound". 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."

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* followed in *Michigan Rubber*."

21. Given the aforesaid legal position as has been settled by the series of decisions referred to in the preceding paragraphs, on perusal of the records, it is established that the Respondents, while issuing the NIT, had made the conditions explicit and that there was no ambiguity in the conditions stipulated. The Petitioner knew his deficiency and it was for this reason that he had applied for the issuance of the P.Q. Certificate for the year 2022-23 on 28.10.2022 and which he could obtain only on 22.11.2022 and by that time the bid had already been opened. At no point of time did the Petitioner challenge the mandatory requirement of a valid P.Q. Certificate as envisaged in the NIT.

22. Under the circumstances, if the Respondents have, in terms of the conditions stipulated in the NIT, declared the Petitioner disqualified, the same cannot be said to be unreasonable or an act of arbitrariness and in any view of the matter, the right of the Petitioner for participating in the subsequent tenders has not been foreclosed.

23. For the aforesaid reasons, this Court is of the opinion that no case for interference with the impugned orders dated 13.12.2022 (Annexure P-1) and 8.12.2022 (Annexure P-2) has been made out.

24. The Writ Petition, thus, is found to be without merit and the same is, accordingly, dismissed.