(2020) 10 OHC CK 0005

In the Orissa High Court

Case No : D.B. Writ Petition (Civil) No. 18509 Of 2020

M/s Zplus Surakhya Seva — APPELLANT

Vs

State Of Odisha And Others — RESPONDENT

Date of Decision : 19-10-2020

Acts Referred:

Income Tax Act, 1961 — Section 194(c), 194 C(1)
Drugs And Cosmetic Act, 1940 — Section 27

Citation : (2020) 10 OHC CK 0005

Hon'ble Judges : Mohammad Rafiq, CJ;B.R. Sarangi, J

Bench : Division Bench

Advocate : B.P. Pradhan, B.R. Sahu, S. Rath, P.K. Muduli, M/s (Er.) N.K. Mohanty, B.K. Mohapatra, B.K. Mohanty, A. Mohanty

Final Decision : Dismissed

Judgement

,,,,,,,

Dr. B.R. Sarangi, J",,,,,,,

1. M/s Zplus Surakhya Seva, a partnership firm indulged in business of providing manpower services, has filed this writ petition to quash financial bid",,,,,,,

evaluation dated 02.06.2020 (Annexure-3) declaring opposite party no.5-M/s AP Manpower Consultancy & Security Pvt. Ltd. as L-1 bidder, and",,,,,,,

consequential work order dated 30.06.2020 (Annexure-4), and issue direction to opposite parties no.2 to 4 to award the tender in its favour.",,,,,,,

2. The factual matrix of the case, in hand, is that Managing Director, Odisha State Warehousing Corporation (OSWC)-opposite party no.3, vide tender",,,,,,,

call notice no. ADMN/MISC/414/2020/268 dated 18.01.2020, invited sealed tenders from the reputed registered manpower service providers for",,,,,,,

providing 46 number of watchman (non-armed) on contract basis for watch and ward of materials stored at different warehouses in the State. It was,,,,,,,

stipulated in the said tender call notice that the interested manpower service providers may submit their tender documents complete in all respect along,,,,,,,

with EMD and other requisite documents on or before 12.02.2020 up to 5.00 PM addressed to the Managing Director, OSWC by registered",,,,,,,

post/speed post/courier only. The tender was invited under two bids system, i.e., technical bid and financial bid. The interested agencies were advised",,,,,,,

to submit two separate sealed envelopes superscribing â??Technical Bid for providing watchman (Non-armed)â? to OSWC and â??Financial Bid for,,,,,,,

providing watchman (Non-armed) to OSWC. Both sealed envelopes should be kept in another sealed envelope superscribing â??Tender for providing,,,,,,,

watchman (Non-armed) to Odisha State Warehousing Corporationâ?. The tender should be addressed to the â??Managing Director, OSWC, Plot",,,,,,,

No.2, Cuttack Road, Bhubaneswar-751006. The date of opening of technical bid was fixed to 14.02.2020 at 4.00 P.M. in the conference hall of",,,,,,,

OSWC, Bhubaneswar. It was stipulated in the tender call notice that the date, time and place of opening of financial bid in respect of technically",,,,,,,

qualified bidders would be communicated after evaluation of technical bid.,,,,,,,

2.1 Pursuant to the above tender call notice, the petitioner, along with 15 other registered manpower service providers, submitted its bid on 10.02.2020",,,,,,,

before the cut-off date. The technical bids of all the bidders were opened on 18.03.2020. During scrutiny, the tender committee found that 6 bidders,",,,,,,,

out of 16, had not submitted required documents. Therefore, the tender committee took a decision to provide an opportunity to those six bidders who",,,,,,,

had not submitted the required documents. Consequentially, they were intimated to submit such documents for consideration of their bids. After",,,,,,,

receipt of the documents from those bidders, technical evaluation was conducted on 20.04.2020. Out of 16 manpower service providers, two",,,,,,,

registered manpower service providers, namely, M/s Samari Empowerment Associates Pvt. Ltd. and M/s Seven Stars Intelligent Security Pvt. Ltd",,,,,,,

could not submit the required documents. Therefore, they did not qualify during the technical evaluation and rest 14 bidders were qualified in technical",,,,,,,

bid evaluation. As per clause-12 of the â??scope of work and general instructions to biddersâ?, the financial bid of only those tenderers would be",,,,,,, opened whose technical bids are found in order. As such, the date, time and place of opening of financial bid would be communicated after evaluation",,,,,,,

of technical bids. Adhering to the aforesaid clause, the financial bids were evaluated by the tender committee on 02.06.2020 and, as such, during the",,,,,,,

financial bid evaluation, the tender committee rejected the bid of M/s Bisweswar Rout Security Agency on the ground that service charge quoted by it",,,,,,,

was less than 2% of the gross amount. Consequentially, the tender committee prepared a comparative statement of rest 14 technically qualified",,,,,,,

bidders, excluding M/s Bisweswar Rout Security Agency. From the comparative statement, it would be evident that opposite party no.5 quoted gross",,,,,,,

amount of Rs.10420.33 paisa per person and, as such, 2% of aforesaid gross amount comes to Rs.208.40 paisa. But opposite party no.5 quoted",,,,,,,

service charge of Rs.204.33 paise, which is less than 2% of the gross amount. Despite that, the tender committee declared opposite party no.5 as L-1",,,,,,,

bidder. Aggrieved by such selection of opposite party no.5 as L-1 bidder, this writ petition has been filed.",,,,,,,

3. Mr. B.P. Pradhan, learned counsel appearing for the petitioner, referring to the financial bid of opposite party no.5 at Annexure-5 series, contended",,,,,,,

that opposite party no.5 having quoted gross amount of Rs.12295.98 paisa per person, 2% of such amount comes to 245.97 paise, but instead of that",,,,,,,

opposite party no.5 has quoted Rs.204.33 paise towards service charges, which is less than 2% of the gross amount, and thereby opposite party no.5",,,,,,,

has failed to satisfy note no.3 of the financial bid. Consequentially, the selection of opposite party no.5 is contrary to note no.-3 of the financial bid. It is",,,,,,,

further contended that opposite parties no.2 to 4 have illegally selected opposite party no.5 as L1 bidder and issued work order on 30.06.2020,",,,,,,,

therefore the same should be quashed.,,,,,,,

4. Mr. P.K. Muduli, learned Additional Government Advocate appearing for the State opposite parties contended that since the tender in question has",,,,,,,

been issued by opposite parties no.2 to 4, the State has nothing to do with the matter as the action of opposite parties no.2 to 4 is under challenge in",,,,,,,

this writ petition.,,,,,,,

5. Er. N.K. Mohanty, learned counsel appearing for opposite parties no.2 to 4 justifying the selection of opposite party no.5 as L1 bidder contended",,,,,,,

that the petitioner has tried to mislead the Court and has not come to the Court with clean hands, for which the writ petition is liable to be dismissed in",,,,,,,

limine. It is further contended that in its financial bid opposite party no.5 has quoted gross amount of Rs.10,216/- which includes remuneration of",,,,,,,

Rs.8788/-, employer share of EPF 13% Rs.1142.44 rounded to 1142/-, employer share of ESI 3.25% Rs.285.61 rounded to 286 and other statutory",,,,,,,

dues as nil. If 2 % of service charges on gross amount Rs.10,216/- is taken into consideration, it comes to Rs.204.32 paise whereas opposite party",,,,,,,

no.5 has quoted Rs.204.33 paise, which is not less than 2% of service charges but more than 2% of the service charges. Thereby, opposite party no.5,",,,,,,,

being selected as L1, work order has been issued in its favour on 30.06.2020. Therefore, no illegality or irregularity has been committed by opposite",,,,,,,

parties no.2 to 4 by awarding contract in favour of opposite party no.5, pursuant to decision taken by the tender committee. As such, the writ petition",,,,,,,

is liable to be dismissed with cost.,,,,,,,

6. Mr. A. Mohanty, learned counsel appearing for opposite party no.5 contended that the petitioner is not a deserving organization to be considered for",,,,,,,

award of contract, so far as financial bid evaluation under Annexure-3 (page 48 of the brief) is concerned. The financial bid evaluation discloses that",,,,,,,

the financial bids of the petitioner and other bidders, who had quoted EPF and ESI towards fraction prices, were not considered by the tender",,,,,,,

committee. The opposite party no.5, by quoting 2% of service charges, i.e., Rs.204.33 paise, which is the lowest price in respect of services charges,",,,,,,,

its gross amount being Rs. 10,420.33 paise, was selected as L1 bidder notwithstanding the fact that opposite party no.6 had quoted Rs.204.32 towards",,,,,,,

service charges but was disqualified because it quoted EPF and ESI on fraction basis instead of round up manner. But so far as petitioner is,,,,,,,

concerned, its case could not be considered as it had quoted higher price than that of opposite party no.5. Therefore, question of awarding contract in",,,,,,,

favour of the petitioner does not arise.,,,,,,,

7. This Court heard Mr. B.P. Pradhan, learned counsel appearing for the petitioner, Mr. P.K. Muduli, learned Additional Government Advocate for",,,,,,,

the State opposite parties, Er. N.K. Mohanty, learned counsel appearing for opposite parties no.2 to 4 and Mr. A. Mohanty, learned counsel appearing",,,,,,,

for opposite party no.5 on virtual mode. Pleadings have been exchanged between the parties and with their consent the matter is being disposed of,,,,,,,

finally at the stage of admission.,,,,,,,

8. For just and proper adjudication of the case, the relevant notes contained in the financial bid, on which much reliance has been placed, are quoted",,,,,,,

below:-,,,,,,,

Notes:,,,,,,,

Name of

the bidder",Monthly rate per employee,,,,,,Remarks

2,3,4,5,6,7,8,9

M/s AP

Manpower

Consultancy

& Security

Pvt. Ltd",8788.00,1142.00,286.00,Nil,204.33,10420.33,L-1

â??â?¦â?¦â?¦â?¦. For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get",,,,,,,

any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him,",,,,,,,

on which this Court takes a serious view. â?¦â?¦..â??,,,,,,,

17. Therefore, applying the above ratio to the present case, this Court is of the considered view that by giving distorted facts the petitioner has tried to",,,,,,,

mislead the Court and, as such, it has not come to this Court with clean hands. Therefore, the petitioner is not entitled to get any relief.",,,,,,,

18. Much reliance has been placed on Section 194 C (1) of the Income Tax Act, 1961, which is extracted hereunder:-",,,,,,,

â??Any persons responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any,,,,,,,

work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person,,,,,,,

shall, at the time credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or",,,,,,,

draft or by any other mode, whichever is earlier, deduct an amounts equal to:-",,,,,,,

(i) One percent where the payment is being made or credit is being given to an individual or a Hindu undivided family;,,,,,,,

(ii) Two percent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided,,,,,,,

family.â??,,,,,,,

But fact remains, note no.3 of the financial bid does not require to be interpreted in this manner as has been mentioned in the rejoinder affidavit filed",,,,,,,

by the petitioner. On perusal of note no.3 of the financial bid, it is evident that â?? as OSWC is to deduct TDS (IT) @2% of the gross billed amountâ??,",,,,,,,

â??the service charges quoted should not be less than 2% of the gross amountâ?. Both are two different and independent clauses separated by giving,,,,,,,

punctuation, i.e., â??commaâ?, and, as such, the same cannot be read together, as has been mentioned in paragraph-10 of the rejoinder affidavit filed",,,,,,,

to the counter affidavit of opposite party no.5.,,,,,,,

19. In Aswinikumar Ghose v. Arabinda Bose, AIR 1952 SC 369 ,the apex Court held that it would appeal, at any rate, with respect to modern",,,,,,,

statutes that if the statute in question is found to be carefully punctuated, punctuation though a minor element, may be resorted to for purposes of",,,,,,,

construction.,,,,,,,

20. In Mohd. Shabbir v. State of Maharastra, AIR 1979 SC 564, while considering Section 27 of the Drugs and Cosmetic Act, 1940, the apex",,,,,,,

Court held that whoever â??manufactures for sale, sells, stocks or exhibits for sale or distributes? a drug without a licence, is liable for punishment. In",,,,,,,

holding that mere stocking is not an offence, within the section, the apex Court pointed out the presence of comma after â??manufacturers for sale?",,,,,,,

and â??sells? and absence of any comma after â??stock?. It was, therefore, held that only stocking for sale could amount to offence and not mere",,,,,,,

stocking.,,,,,,,

21. Therefore, two clauses of note no.3, referred to above, being independent to each other and separating the same by giving â??commaâ?,",,,,,,,

necessary inference can be drawn that service charges quoted should not be less than 2% of the gross amount, as has already been discussed above.",,,,,,,

Thereby, the reliance placed on Section 194 (c) of the Income Tax Act may not have any application to the present context.",,,,,,,

22. In view of the factual and legal aspects, as discussed above, this Court does not find any merit in the writ petition, which is accordingly dismissed.",,,,,,,

However, there shall be no order as to costs.",,,,,,,

As COVID-19 situation is continuing, learned counsel for the parties may utilize the soft copy of this judgment available in the High Court?s official",,,,,,,

website or print out thereof at par with certified copies in the manner prescribed vide Court?s Notice No.4587 dated 25.03.2020.,,,,,,,

