
(2009) 04 OHC CK 0013

In the Orissa High Court

Case No : Writ Petition (C) No. 19871 of 2008

Nabadurga Construction Pvt. Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 30-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2009) 2 ILR (Ori) 67

Hon'ble Judges : B.P. Ray, J;B.P. Das, J

Bench : Division Bench

Judgement

B.P. Ray, J.—The Petitioner, M/s Nabadurga Construction Private Limited, Managing Partner and Pravakar Mohapatra as partner, in short named as "N.D.C.-P.K.M. Joint Venture" has filed this writ petition challenging the legality and validity of the action of opp. party Nos. 1 & 2 in rejecting the bid submitted by it for the work "providing cement concrete lining to Salandi Left Main Canal from RD 3365M to 6840M of integrated Anandapur Barrage Project under A.I.H.P." for which Invitation For Bids (IFB) was issued vide Annexure-1.

2. The case of the Petitioner in short is that M/s. Nabadurga Construction Private Limited, a super class contractor, with Pravakar Mohapatra as partner, submitted the bid consisting two parts i.e. pre-qualification bid and financial bid. The pre-qualification bid was opened by opp. party No. 2-Chief Construction Engineer, Anandapur Barrage Project on 28.9.2007 and he found that the Petitioner as well as opp. party No. 3 has submitted their bids. The opp. party No. 2 evaluated both the bids and found that both were substantially responsive towards criteria stipulated in the bid document. As the value of the work was more than Rs. 7 crores, the bids were submitted to the State Govt. in the Department of Water Resources for approval. The Tender Committee in its meeting held on 20.11.2007 considered the proposal of opp. party No. 2. The Government rejected the technical bid of the Petitioner and issued instruction in favour of opp. party No. 3-M/s. Orissa Construction Corporation Limited to open its financial bid.

Accordingly, the only financial bid of Orissa Construction Corporation Limited was opened and was found to have 16.966% excess over the amount put to tender. Since the Government did not approve the technical bid of the Petitioner, its financial bid was not opened by opp. party No. 2.

The plea of the Petitioner is that opp. party No. 2 having found the pre-qualification bid of the Petitioner to be responsive, the action of the State Government in rejecting the tender of the Petitioner is illegal and without any authority of law.

3. A counter affidavit has been filed on behalf of opp. party Nos. 1, 2 & 4 stating therein that since the Petitioner has suppressed vital material facts and has not approached this Court with clean hands, he is not entitled to any equitable relief under the writ jurisdiction. It is further stated in the counter affidavit that on the basis of the tender call notice in respect of the work in question which was floated through Government website as well as local and national dailies, two bidders i.e. the opp. party No. 3, and the Petitioner submitted their bids. The bid was invited only from Super Class Contractors registered with the State Government of Orissa/Central Government/Military Engineering Service/Railways. The language employed in the tender call notice was very clear and there was no ambiguity in the same to the effect that the Super Class Contractor registered with State Government of Orissa/Central Government/Military Engineering Service/Railways only were eligible to participate in the tender process. The Petitioner firm being a joint venture (partnership firm) had no valid licence registered under the State Government/Central Government/M.E.S./Railway as mentioned in the tender call notice. That apart, as per the terms and conditions of tender call notice, M/s. Nabadurga Construction Private Limited was only considered for evaluation and at the same time his partner Pravakar Mohapatra was not at all coming under the evaluation zone. The Petitioner filed a writ application being W.P.(C) No. 5672 of 2008 on 11.4.2008 and obtained interim order on 18.4.2008 staying settlement of tender and issuance of work order. Thereafter, the Petitioner took time and the interim order was extended from time to time. On 5.12.2008 when the aforesaid writ petition came up for final disposal and the pleadings were complete the Petitioner prayed for withdrawal the writ petition and the writ petition was accordingly dismissed as withdrawn. Thereafter, on 31.12.2008 the Petitioner filed the present writ application without there being any change of circumstances. Further, the Petitioner has not taken any leave from this Court to file a fresh writ application while withdrawing the previous one. Therefore, the writ application is not maintainable.

4. On consideration of the submission of the parties, the following questions come for decision of this Court: (i) whether on withdrawal of a writ petition without reserving the right to file a fresh one, the Petitioner can file a subsequent petition on the same cause of action merely because he has made a representation, and (ii) Whether there is any infirmity in the decision making

process of the Tender Committee.

5. Mr. Bijan Ray, learned Senior Counsel appearing for the Petitioner, submitted that the Chief Construction Engineer, Anandapur Barrage Project opp. party No. 2 having found the bid of the Petitioner responsive, the State Government committed gross illegality in awarding the tender work in favour of opp. party No. 3-Orissa Construction Corporation Limited.

6. Learned Government Advocate and Mr. Pangari, learned Counsel appearing for opp. party No. 3, submitted that the Petitioner having not come to this Court with clean hand, the writ application is not maintainable. They further submitted that opp. party No. 3 being a public sector undertaking, no malice can be attributed to the decision of the Tender Committee. They further submitted that the Chief Construction Engineer, who found the bid of the Petitioner to be responsive, did not have the power to accept the tender. Therefore, there is no infirmity in the decision making process in the present case. As the decision was taken by the State Government in favour of a public sector undertaking, it is not subjected to any judicial review.

7. In the instant case, there is a clear-cut condition that the tenderer should be a super class contractor. The Chief Construction Engineer found the bid of the Petitioner responsive and recommended it to the Tender Committee, which was framed under the rules, and the Tender Committee accepted the tender considering the recommendation of the Chief Construction Engineer. Therefore, no finality can be attached to the recommendation made by the Chief Construction Engineer. Under such circumstance the ultimate authority is the Tender Committee which was to consider as to whether the bid of the Petitioner and the opposite party No. 3 can be validly accepted or not. The Tender Committee did not accept the tender of the Petitioner as the Petitioner did not satisfy the conditions of the tender. Under such circumstances, no fault can be found with the Tender Committee in not accepting the tender of the Petitioner. Therefore, we hold that there is no infirmity in the decision-making process in the present case.

8. Keeping in view the aforesaid circumstances, we have made a recapitulation of the events as above for the purpose of showing that the Petitioner has absolutely no case in the present writ application. The Petitioner can not at any rate challenge the decision of the State Government in awarding the work in favour of opp. party No. 3, which he challenged the same decision of the State Government after withdrawing the previous writ petition being W.P.(C) No 5672 of 2008 without obtaining leave of the Court to move a fresh petition. The aforesaid ban for filing a fresh case is based on public policy. The apex Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (See *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*,). The reasoning for adopting it in writ jurisdiction is that very often, when the Petitioner or his counsel finds that the Court is not likely to pass an order admitting the writ petition after it is heard for

some time, it so happens that the Petitioner or his counsel seeks withdrawal of the writ petition without seeking permission to institute a fresh one. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition. In this regard, we may quote here the observations made by the Supreme Court in *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, :

We are of the view that the principle underlying Rule 1 of Order 23 of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of *res judicata* but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a Petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to *res judicata*, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the Petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission.

9. For the aforesaid reasons, we do not find any merit in the writ application and accordingly we dismiss the same with cost of Rs. 10,000/- (Rupees Ten Thousand). The interim order passed in this case stands vacated and Misc. case is disposed of.