(2024) 06 OHC CK 0144

In the Orissa High Court

Case No : Writ Petition (C) No. 29923 Of 2023

Santosh Sasmal	APPELLANT
Vs	
State Of Odisha And Others	RESPONDENT

Date of Decision : 27-06-2024

Acts Referred:

Citation : (2024) 06 OHC CK 0144

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

Bench : Division Bench

Advocate : S.K. Dalai, Tarun Patnaik, Subir Palit, P. Panda, D.K. Mohapatra

Final Decision : Allowed

Judgement

G. Satapathy, J.

1. The petitioner who is a Special Class Contractor has approached this Court by way of this writ petition praying to quash the order dated 31. 08.2023 under Annexure-10 by which the Chief Construction Engineer, R & B Circle, Cuttack (OPNo.4) has cancelled the bid of the petitioner after declaring him as L-1 by invoking Clause-21.5 of the Instruction To Bidders (ITB) of the Detailed Tender Call Notice (DTCN).

2. The short facts involved in this case are that the petitioner is a registered “Special Class” Contractor under the PWD Contractors Registration Rules, 1967 and he has been registered as “Super Class” Contractor. On 24.05.2023, OPNo.4 issued a e-Procurement Notice, Bid Identification No.CCE, Ctc.(R&B) (6/2023-24) inviting bids for nine numbers of different works including the bid for work “Widening and strengthening to Biridihat Sompur Kisannagar road (Sompur to Kisannagar) from 0/0 km to 5/740 km in the district of Jagatsinghpur for the year 2023-24 under Annexure-1 series. In response to such bid, the present petitioner and four others bidders bided for the work and on 18.07.2023, the technical bid of the bidders were scrutinized in terms of provision of ITB of DTCN. In the technical evaluation, the petitioner and OPNos.5 to 8(five bidders) were

found qualified which was followed by opening of financial bid on 20.07.2023, wherein the petitioner, OPNo.5 and OPNo.6 were found to be L1 for having been quoted the same rate which is 14.99% less than the tender amount, but since the three bidders had quoted the same rate, a lottery was drawn on 24.07.2023 in which the petitioner was found successful and declared as L1 (Lowest Bidder). Accordingly, OPNo.4 by letter No.4548 dated 24.07.2023 (Annexure-4) requested the petitioner to produce the original documents in support of the scan copy and statement uploaded in the portal for verification along with a work programme and milestone basing on financial achievement by 27.07.2023. However, one written complaint was received from OP No.5 that the petitioner had furnished fake tax invoice of "Wet Mix Plant", but the petitioner on 21.08.2023 wrote a letter to OPNo.4 intimating his bonafides and the petitioner while awaiting to execute the agreement, was issued with a letter by OPNo.4 on 23.08.2023 to produce the original way bill invoices of "Wet Mix Plant" purchased by him from OPNo.9 within three days, but the petitioner gave reply on 25.08.2023 by Annexure-7 expressing his inability to produce the way bill for not being available with him. On 28.08.2023, OPNo.4 issued a show cause notice to the petitioner under Annexure-8 as to why his tender for the above work would not be cancelled together with forfeiture of EMD and blockage of registration portal on the grounds inter-alia stating therein that OPNo.9 has informed the office of OPNo.4 through e-Mail dated 24.08.2023 that no such machine was given to the petitioner by the company (OPNo.9) and, thereby, he (petitioner) has uploaded false and fabricated documents regarding purchase of "Wet Mix Plant". The petitioner was, accordingly, granted three days' time to give his reply to the aforesaid show cause notice with stipulation that in case of no reply is received within the stipulated time, it is to be presumed that the petitioner has nothing to say. The petitioner, however, with much difficulty, gave his reply to the show cause notice on 31.08.2023 by way of Annexure-9 denying the allegation and praying to grant some days for submission of suitable invoices, but OPNo.4 proceeded to cancel the bid of the petitioner by Annexure-10 invoking the Clause-21.5 of the ITB of the DTCN. According to the petitioner, after evaluation of technical bid followed by opening of financial bid with declaration of petitioner as L1 in the lottery, the subsequent cancellation of bid of the petitioner invoking Clause-21.5 of ITB of DTCN is not only illegal, but also bad in the eye of law and therefore, the action of O.P. No.4 in cancelling the bid of the petitioner is unsustainable and liable to be quashed. On the above pleadings, the petitioner has approached this Court in the above writ petition with the relief indicated supra.

3. In response to the notices of the writ petition, only O.P. Nos.1 to 4 and 5 have filed their two separate counter affidavits, but in essence they have resisted the claim of the petitioner by inter alia averring in their respective counter affidavits that the petitioner had uploaded tax invoice of a "Wet Mix Plant" procured by it from "Himalaya Engineering Company, Gujurat", but the said invoice of "Wet Mix Plant" which was uploaded by the petitioner in his technical bid is false and

fabricated one, since Himalaya Engineering Company has not issued such invoice as per its reply vide e-Mail dated 24.08.2023 to O.P. No.4 and thereby, the cancellation bid of the petitioner by invoking the Clause-21.5 of ITB of DTCN is necessitated and, therefore, the authority has not committed any illegality in cancelling the bid of the petitioner. In addition, O.P. No.5 in his counter affidavit has stated that after cancellation of bid of the petitioner, he being the L1 in the lottery and the contract having been awarded to him, a right has accrued in his favour and thus, it is claimed that the claim of the petitioner cannot sustain and liable to be rejected.

4. Be it noted, none appears for O.P. Nos. 6 to 8 despite valid service, but O.P. No.9 although entered appearance through its counsel, but has not filed any counter affidavit and it has taken part in the hearing of the writ through its counsel.

5. In the course of hearing of the writ, Mr. S.K. Dalai, learned counsel for the petitioner has submitted by taking this Court through the conditions stipulating the "opening and evaluation of bid" placed at Clause-21 of the ITB of DTCN that the petitioner was not only successfully qualified the technical bid, but was found to be L1 in the financial bid which was opened after the evaluation of technical bid and although three bidders had quoted same price, but the petitioner had won the bid in the lottery and accordingly, was the successful bidder to the tender, however, the authority being hand in gloves with O.P. No.5 had subsequently cancelled the bid by invoking Clause-21.5 of ITB which was successfully qualified by the petitioner followed by opening of financial bid. It is further submitted by Mr. Dalai that after evaluation of "technical bid", petitioner being found successful in such technical bid, the subsequent invocation of Clause-21.5 of ITB after knowing the financial bid of the petitioner appears to be contrary to the provision of law and the conditions of the contract, since Clause-21.5 relates back to the time of evaluation of technical bid, but the authority after having declared the petitioner as the successful bidder in the lottery had subsequently invoked Clause-21.5 of ITB to cancel the bid of the petitioner without providing any opportunity of hearing to the petitioner violating the principle of natural justice. It is further submitted by Mr. Dalai that the petitioner has never furnished any false or fabricated document, rather the authority concerned without verifying the factual position and at a belated stage, after opening of financial bid sought for clarification regarding genuineness of the invoice, but the bid of the petitioner was cancelled without really verifying the document by relying upon the e-Mail, whose genuineness is doubtful and thereby, the order passed by O.P. No.4 under Annexure-10 cancelling the bid of the petitioner invoking Clause-21.5 of ITB is not only illegal in the eye of law, but also cannot sustain since O.P. No.4 had cancelled the bid of the petitioner unilaterally without verifying the material documents and coming to an erroneous conclusion that the petitioner had furnished fake tax invoice of "Wet Mix Plant" and therefore, such order cannot sustain in the eye of law. In summing up his argument, Mr. Dalai has prayed to quash Annexure-10 for the aforesaid reason.

5.1. In reply to the submission of the petitioner, Mr. T. Patnaik, learned Addl. Standing Counsel appearing for O.P. Nos.1 to 4 has submitted that although the petitioner was declared successful in the lottery, but he having been found uploaded the scanned copy of documents was asked to submit the original copy of the documents of "Wet Mix Plant", but the petitioner not only has failed to produce such document, but also has failed to justify any ground for producing such document which was later on verified from O.P. No.9 to be a fake one and therefore, the authority concerned has not committed any illegality in invoking Clause-21.5 of ITB which provides for cancellation of bid and blacklisting of bidder in case the information/ statement/ documents furnished by the bidder is found to be false, fabricated and bogus and in this case, the document i.e. tax invoice of "Wet Mix Plant" as produced by the petitioner is being found to be fake one in terms of the reply e-Mail received from O.P. No.9 vide e-Mail dated 24.08.2023 which reveals that no machine is given to the petitioner and the petitioner has misused the name of the company and therefore, the action of O.P. No.4 in cancelling the bid of the petitioner does not call for any interference by this Court in this writ. It is accordingly prayed by OP Nos. 1 to 4 that the writ petition may kindly be dismissed.

5.2. In supporting the stand of O.P. Nos.1 to 4, Mr. Subir Kumar Palit, learned Senior Counsel appearing on behalf of O.P. No.5 has submitted that the petitioner has not only misused the name of O.P. No.9, but also has produced fake document in support of his claim of the bid which was earlier decided in his favour as L1, but subsequently the document as produced by the petitioner in support of purchase of "Wet Mix Plant", is found to have been false as clearly indicated in the reply e-Mail of the of O.P. No.9, the cancellation of bid of the petitioner is within the four corners of the conditions of the DTCN and thereby, the authority concerned has not committed any illegality in passing the order under Annexure-10. Mr. Palit has further submitted that since O.P. No.5 having been declared successful in the lottery after the bid of the petitioner having cancelled, it would be harsh to O.P. No.5, if the contract which has already been awarded to O.P. No.5 is subsequently snatched away from him by quashing Annexure-10. Mr. Palit has accordingly prayed to dismiss the writ.

5.3. Mr. D.K. Mohapatra, learned counsel appearing on behalf of O.P. No.9 has submitted that neither he is having any document to throw any light in the matter nor is he in a position to submit that the document which was produced by the petitioner was false or fake one and accordingly, it is prayed by him to the Court to pass appropriate order.

6. After having bestowed an anxious and careful consideration to the rival submission upon perusal of record, this Court finds the real dispute between the parties is with regard to invocation of Clause-21.5 of ITB of DTCN which is extracted herein below:-

"The Technical evaluation of all the bids will be taken up as per the information furnished by the Bidders. If any of the information/ statements/documents/

certificates furnished by the bidder is found to be false/fabricated/bogus, his EMD/ Bid Security shall stand forfeited and his registration in the portal shall be blocked and the bidder is liable to be blacklisted”.

A plain glance of the aforesaid condition of ITB would go to reveal that at the time of technical evaluation of the bid, the information furnished by the bidder is required to be verified and in case any information/ statements/ documents/ certificates furnished by the bidder is found to be false/ fabricated/ bogus, his EMD/bid security shall stand forfeited and his registration in the portal shall be blocked and the bidder is liable to be blacklisted. In this case, however, it is found that the petitioner was qualified in the technical bid which was not disputed by any of the parties and the petitioner was further found to have quoted lowest price along with O.P. Nos.5 & 6, but the admitted position is that the petitioner was successful in the lottery and accordingly was declared as L1. Hence, the stage of Clause-21.5 of the ITB of the DTCN has not only been over, but also subsequently the financial bid was opened and the petitioner was declared successful as L1 in the lottery. The factual position reveals that after the petitioner was declared successful as L1 in the lottery, he was asked to produce certain documents, but the petitioner has prayed for time to produce such documents and on receipt of written complaint from OP No.5 on 07.08.2023, the O.P. No.4 on the same date has forwarded the tax invoice of the “Wet Mix Plant” uploaded by the petitioner to Himalaya Engineering Company, Gujurat (O.P. No.9) for verification, which is found from paragraph-20 of the counter affidavit of O.P. Nos.1 to 4 which is extracted as under:

“20. That the averments made in paragraph No.14 of the writ petition are disputed and denied. It is humbly submitted that the petitioner had uploaded Tax Invoice of a Wet Mix Plant procured by it from Himalaya Engineering Company, Gujurat. For further authentication a copy of the Tax invoice of the wet Mix Plant uploaded by the petitioner with his Technical Bid was forwarded to "HIMALAYA ENGINEERING COMPANY, 38 G.I.D.C ESTATE, DEDIYASAN, MEHSANA, GUJURAT" vide letter No.4979 dated 07.08.2023 of the C.C.E, Cuttack (R&B) Circle, Cuttack with a request to authenticate the genuineness of the Tax Invoice issued by it in favour of M/s Sasmal Distributor. In response to the request the "HIMALAYA ENGINEERING COMPANY, replied to the C.C.E vide e-mail dated 24.08.2023 that no such machine is given by this Company. He has misused our Company name. From the response of M/s. Himalaya Engineering Company there remains no doubt that the petitioner has not procured the Wet Mix Plant from the "HIMALAYA ENGINEERING COMPANY of Gujurat and the Tax Invoice submitted by him is false and fabricated.”

It is, however, stated by OP Nos. 1 to 4 that O.P. No.9 has forwarded an e-Mail dated 24.08.2023 to O.P. No.4 stating therein that no such machine is given to this company (petitioner), but such e-Mail having been annexed to the counter affidavit of OP Nos.1 to 4 under Annexure-I/4 has not been acknowledged to have been issued by O.P. No.9 as per the submission made by Mr. D.K.

Mohapatra, learned counsel appearing for O.P. No.9.

7. Be that as it may, it is not in dispute that the petitioner was found qualified in the technical bid as revealed from Annexure-2 Series to the writ petition which was the proceeding of the Technical Evaluation Committee meeting held on 18.07.2023 at 11.30 P.M. wherein the petitioner was declared as qualified at Sl. No.2 and pursuant to such evaluation of Technical Committee, the financial bid was opened on 20.07.2023 and the petitioner was found successful as L1 in terms of Annexure-3 and accordingly, O.P. No.4 had proceeded further in the bid, but O.P. No.4 subsequently issued Letter dated 24.07.2023 under Annexure-4 requesting the petitioner to produce documents in support of scanned copy and statement uploaded in the portal for verification along with work programme & milestone basing on financial achievement on or before 27.07.2023. The aforesaid facts clearly goes to reveal that the petitioner had successfully qualified in the technical bid, but Clause-21.5 clearly speaks about documents required to be evaluated at the time of technical bid and therefore, after the petitioner was found successful in the technical bid, how come the authority concerned would review the evaluation of technical bid subsequent to declaring the petitioner as qualified and knowing his price bid. Further, Clause-21.5 of ITB of DTCN only relates to the time of evaluation of technical bid of the bidders and it cannot be invoked after declaring the bidder as successful in the financial bid. It is, however, not in dispute that O.P. No.5 has also quoted the same price, but he was not found successful in the lottery in which the petitioner won and thereafter, the authority concerned had taken into account the written complaint of O.P. No.5 to proceed further and cancel the bid of the petitioner without providing him a reasonable opportunity and unilaterally proceeding to get the documents which was uploaded by the petitioner verified by O.P. No.9, but the facts remains that O.P. No.9 having been made as a party has never acknowledged to have issued such e-Mail which was relied on by O.P. No.4 to cancel the bid of the petitioner. O.P. No.9 has neither produced any document nor filed his reply to the writ petition in shape of any counter affidavit, rather at the time of hearing, the learned counsel appearing for O.P. No.9 has stated that he has got no document to say anything about the e-Mail issued by O.P. No.9. In such situation, the act of O.P. No.4 in cancelling the bid of the petitioner unilaterally invoking Clause-21.5 of ITB of DTCN which relates to the stage of evaluation of document at the time of technical bid is erroneous and unsustainable.

8. In proceeding to scrutinize Annexure-10 by which the bid of the petitioner is cancelled, this Court considers it profitable to refer to the relevant parts of the contents of Annexure-10, which is extracted as under:-

“You have submitted the bid for the above mentioned work Bid Identification No.CCE. Ctc.(R&B)06/2023-24”. During evaluation, it is revealed that the tax invoice for the machine Wet Mix Plant is false and fabricated which has been show caused you vide letter under reference. Though the stipulated dated is elapsed, still no reply has been received. Hence, it is confirmed that you have nothing to say.

Hence, your bid submitted for the above work is hereby cancelled as per clause no.21.5 of the Instruction to Bidders (ITB) of the DTCN."

On a plain reading of contents of Annexure-10, it appears that OP No.4 has cancelled the bid of the petitioner by invoking Clause No. 21.5 ITB of DTCN, but the undisputed fact is that Clause No. 21.5 of the ITB can only be invoked at the time of evaluation of technical bid, but in this case the Technical Committee has already evaluated and decided the same in favour of the petitioner to be qualified in technical bid. Had the petitioner furnished any fake document, the Tender Evaluation Committee would have taken note of it at the time of evaluation of technical bid for invoking Clause No. 21.5 of the ITB, but once the petitioner was declared qualified in technical bid and he was found L1 in the financial bid which was opened just two days after the evaluation of technical bid, the petitioner's bid cannot be cancelled on 31.08.2023 which is more than a month after the evaluation of technical bid by invoking the conditions for disqualification of technical bid as enumerated in Clause No. 21.5 of ITB. It is also stated in paragraph-13 of counter affidavit of OP Nos. 1 to 4 that there was no scope at the stage(technical) to verify the authenticity of the documents uploaded by the bidders for reason that Clause No.21.5 of ITB of DTCN prescribes that technical evaluation of all the bids will be taken up as per the information furnished by the bidders, but law is well settled that the evaluation of the technical bid has to be done on the terms and conditions as prescribed in the ITB of DTCN. Once the authority concerned has found the petitioner to be qualified in the technical bid, his bid cannot be cancelled on the reason that he has furnished fake documents by invoking the conditions prescribed for evaluation of technical bid which stage was already over and the petitioner was subsequently declared as L1 bidder.

9. It appears that the reasoning assigned by the authority in Annexure-10 to cancel the bid of the petitioner appears to be unacceptable since after declaring the petitioner as L1 bidder after finding him qualified in technical bid to invoke the conditions stipulated for evaluation of technical bid as prescribed under Clause-21.5 was not available to the authority, but OPNo.4 has tried to justify his action that the petitioner has furnished fake document which in fact was considered to be not established since the learned counsel for OPNo.9 did not endorse to the document/e-mail in his oral submission nor OPNo.9 has filed any reply to the contents of the writ petition to suggest that the petitioner has produced any fake documents. This Court is unable to buy the subsequent explanation of OPNo.4 that the petitioner has not been qualified in technical bid for furnishing fake document, by invoking Clause-21.5 of the ITB much after declaring the petitioner qualified in technical bid and that too, when he was already been declared as L1. Thus, the decision of OPNo.4 appears to be not only arbitrary, but also is found short of legal scrutiny for not affording any reasonable opportunity to petitioner to vindicate his stand on the issue. Hence, the OPNo.4

cannot make out a different case to cancel the bid of the petitioner by invoking Clause-21.5 of the ITB which was meant for evaluation of technical bid, once he was found qualified in the technical bid by the Technical Evaluation Committee held its meeting on 18.07.2023. In this regard, this Court considers it profitable to refer to the decision in Mohindhr Singh Gil and another Vrs. Chief Election Commissioner, New Delhi and others; (1978) 1 SCC 405, wherein a Constitutional Bench of five Judges of Apex Court has been pleased to hold by reiterating the law laid down in Commissioner of Police, Bombay Vrs. Gordhandas Bhangi; 1951 SCC 1088 as under:

8. Xxx xxx xxx xxx xxx

"Public Orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

10. In M/s. Sical Logistics Ltd. v. Mahanadi Coalfields Ltd., 2017 (II) ILR CUT 1035, wherein a Division Bench of this Court consisting Hon'ble Dr. Justice B.R. Sarangi, as a member, has held in paragraphs-14 and 20 as under:

"14. In view of the aforesaid facts and circumstances, this Court is of the considered view that by way of subsequent explanation given in the counter affidavit the communications dated 17.03.2017 in Annexures-5 and 6 cancelling the tender in question without assigning any reason cannot sustain in the eye of law. More so, in view of the Central Vigilance Commission guidelines dated 24.03.2005, the tender accepting authority is not free to take any decision in an arbitrary manner and is bound to record clear and logical reasons for any such action of rejection/recall of tenders on the file. In view of such position, in absence of any reason communicated to the petitioner, the order so passed in Annexures-5 and 6 dated 17.03.2017 cannot sustain."

20. In view of the factual and legal discussions made above, this Court is of the considered view that the orders of cancellation of tender dated 17.03.2017 passed in Annexures-5 and 6 cannot sustain in the eye of law and the same are hereby quashed. Consequentially, the retender notice dated 20.03.2017 issued by opposite party no.1 in Annexure-7 also cannot sustain in the eye of law and the same is accordingly quashed."

11. In view of the facts and law, as discussed above upon conspectus of the documents as annexed to this writ petition, this Court does not find any justifiable reason for cancelling the bid of the petitioner and the order passed by OPNo.4 under Annexure-10 to cancel the bid of the petitioner by invoking the Clause-21.5 of ITB which is meant and prescribed for evaluation of technical bid, after declaring the petitioner to be L1 is bereft of any reason. Hence,

Annexure-10 by which the bid of the petitioner has been cancelled cannot sustain in the eye of law and is liable to be quashed. Accordingly, Annexure-10 is hereby quashed by this Court in exercise of extraordinary writ jurisdiction under Article 226 of the Constitution of India.

12. Resultantly, the writ petition is allowed on contest, but in the circumstance, there is no order as to costs..

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