
(2004) 01 OHC CK 0015
In the Orissa High Court
Case No : Writ Petition (C) No. 784 of 2003

Siba Prasad Padhi

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 14-01-2004

Acts Referred:

Citation : (2004) 1 OLR 200

Hon'ble Judges : Sujit Barman Roy, C.J;A.S. Naidu, J

Bench : Division Bench

Advocate : Sanjit Mohanty, for the Appellant; Additional Government Advocate For Opp. Parties 1 to 4 and B. Ray and B. Mohanty For Opp. Party 5, for the Respondent

Judgement

A.S. Naidu, J.—The petitioner, a Special Class Contractor, seeks to challenge the decision of opposite party Nos. 1 to 4 date 21.1.2003 to award the contract work for execution of "Improvement to Huma Tail Distributory from R. D. 00 K.M. to R. D. 8.00 K.M. including Piplipali Minor" mainly on the ground that the said decision was tainted with extraneous considerations and was otherwise illegal and arbitrary.

2. Admittedly the Tender Call Notice (Annexure-1) was issued by the Executive Engineer, Hirakud N.W.M.P. Division, Bargarh inviting sealed tenders in the prescribed form to be eventually drawn in P.W.D. Form No. F2 from the Super Class and Special Class Contractors, registered under the Water Resources, Works or other Department of Government of Orissa for the aforesaid work along with other works as enlisted in the table contained in the said notice. The work in question appears at serial number 13 of the Tender Call Notice. The said Tender Call Notice was published in the Daily "Samaj" dated 10.8.2002. In response to the said Notice Annexure-1, the petitioner along with three other Contractors submitted their respective tenders and performed all other paraphernalia stipulated in the Tender Call Notice. The tenders were opened in presence of the representatives of the tenderers on 20.9.2002. The respective prices quoted by

the four tenderers were as follows :

(1) W. Bitumen 77.84 i.e. 28.14% less 1st lowest lacs (2) Biswanath 1.03 i.e. 4.96% less 2nd lowest Subudhi crores

(3) Siba Prasad 1.23 i.e. 13.35% excess 3rd lowest Padhi crores (Petitioner)

(4) Subash 1.36 i.e. 23.94% excess 4th lowest. Panda crores

According to the petitioner, he had offered unconditional rebate of 20% for executing the contract work in question in his letter to the authorities enclosed to his tender papers, but the same was not taken into consideration. It is contended that if the said letter would have been taken into consideration then the petitioner's offer would have been second lowest, and not the third lowest.

Opposite party No. 4, the Executive Engineer, Hirakud N.W.M.F. Division, Bargarh invited M/s. W. Bitumen, the first lowest tenderer to execute the work in question, but the said company failed to execute the agreement and therefore his tender was rejected with forfeiture of the earnest money deposit on 18.11.2002. Thereafter on 2nd February, 2002. the second lowest tenderer, i.e. opposite party No. 5, was called upon to execute the agreement by reducing the rate quoted by him to Rs. 77.84 lakhs which was quoted by the first lowest tenderer, but then he expressed his inability. Then on 2nd December, 2002 opposite party No. 4 called upon the petitioner, the third lowest tenderer, to execute the agreement reducing his rate to Rs. 77.84, lacs, equivalent to the rate of the first lowest tenderer.

According to the petitioner, he negotiated with opposite party No. 4 on 6.12.2002 and agreed to reduce his rates itemwise as per his letter Annexure-3. Thereafter, the Superintending Engineer, opposite party No. 3 called upon the petitioner for further negotiation and the petitioner agreed to reduce his rate further in respect of certain item of work as per his letter dated 10.12.2002, Annexure-4. It is alleged that thereafter the Chief Engineer, opposite party No. 2, called upon the petitioner for still further negotiation and the petitioner after negotiation again reduced his rates in respect of certain items of work as per his letter dated 16.12.2002, Annexure-7.

On 18.12.2002, the Chief Engineer, opposite party No. 2, recommended to the State Government the lowest negotiated bid offered by the petitioner, being Rs. 98, 22, 766.00, for acceptance.

The grievance of the petitioner is that such recommendation of opposite party No. 2 was not accepted by the State Government without any rhyme or reason and it was directed to award the work in question in favour of opposite party No. 5. It is alleged that the action of the State Government deliberately ignoring the recommendation of the Chief Engineer was without any justifiable reason and the said decision having been taken behind the back of the petitioner, occasioned gross procedural impropriety and illegality and vitiated the entire decision-making process. On the basis of such averments, the petitioner seeks to quash

the decision of the State Government to award the work to opposite party No. 5.

3. After receiving the Rule, a counter-affidavit has been filed on behalf of opposite parties 1 to 4, having been shown to by opposite party No. 4 Executive Engineer. The sub-para to para-3 of the said counter affidavit reads as follows :

"It is submitted that no decision has yet been taken to issue work order in favour of the opposite party No. 5. Only the Government, vide letter No. 2784 dt. 22.1.2003, has written to the Chief Engineer and Basin Manager, Upper Mahanadi Basin, Burla that the above noted work may be awarded in favour of opp.party No. 5, if he is interested to reduce his offer to Rs. 98,22,766/- and if the opp. party No. 5 declines to reduce his rate the work may be awarded to the petitioner. On the basis of the aforesaid letter of the Government, the Chief Engineer, vide letter No. 742 dt. 25.1.2003 has directed the Executive Engineer to give the offer to the opp. party No. 5 seeking his consent as to whether he is prepared to execute the work at a cost of Rs. 98,22,766/- if he declines to execute the work at that rate, the work may be awarded in favour of the petitioner and till today, nothing has been finalised to allot the work either to the petitioner or to the opp. party No. 5. In view of the aforesaid facts, the Writ Application is devoid of merit and as such the same is liable to be quashed".

Most of the factual events narrated in Writ Petition are admitted in the said counter affidavit. For the sake of brevity and better understanding the fifth sub-para-5 is quoted hereunder:

"The tender work being an emergent nature of work, the 2nd lowest tenderer Sri Biswanath Subudhi, Special Class Contractor was requested to offer his willingness to reduce the quoted rates to bring the total amount within the amount of Rs. 77,84,008.00 i.e. the lowest tendered value. Sri Subudhi, Special Class Contractor {opp. party No, 5 herein) expressed his inability in his letter dt. 2.12.2002 to reduce his rate from Rs. 1,02,95.273.00 and requested to consider his tender. Then the present petitioner Sri Siba Prasad Padhi, Special Class Contractor who was the 2nd lowest tenderer was called for vide letter No. 6845 dt. 2.12.2002 to offer his willingness to reduce the quoted rate to bring the total amount within Rs. 77,84,008.00 i.e. the 1st lowest tender value. Sri Padhi the present petitioner also expressed his inability in his letter dt. 6.12.2002 to reduce the quoted rates to Rs. 77,84,008.00. But Sri Padhi reduced his itemwise quoted rates vide his letter dt. 6.12.2002 on negotiation and also vide his letter dt. 10.12.2002 and 16.12.2002 at different levels. Such negotiated rates have been reflected in comparative statement and the final round of negotiated tender value came to Rs. 98,22,766.00 being 9.318% less than the estimated cost. After the recommendation of the Superintending Engineer, the file was put up before the Government by the Chief Engineer."

It further appears from the counter-affidavit that during the process of consideration opposite party No. 5 submitted a memorandum to Government stating therein that he being the second lowest tenderer was entitled to get the

work.as per his quoted rate which was most competitive, workable and effective compared to the prevalent market rates. The said memorandum of opposite party No. 5 was considered by Government.

4. Opposite party No. 5 has also appeared in the case and has filed a detailed counter affidavit almost agreeing to the factual backdrop of the case. In para-5 of his counter affidavit, opposite party No. 5 has admitted that when he was requested to offer his willingness to reduce the quoted rate to bring the total amount within Rs. 77,84,008.00 i.e. the offer by the first lowest tenderer, he expressed his inability by his letter dated 2.12.2002. However after coming to know that the petitioner had agreed to execute the work at a negotiated rate of Rs. 98,22,766.00, he submitted a representation to Government/Hon''ble Minister, Water Resources Department to consider his case also as he was the second lowest tenderer.

5. Mr. Sanjit Mohanty, learned Senior Advocate appearing for the petitioner, in course of hearing forcefully submitted that if the letter of the petitioner annexed to his tender papers offering an unconditional rebate of Rs. 20% would have been considered, he should have been the second lowest tenderer and the authorities have acted illegally in treating him as the third lowest tenderer. He further submitted that in view of the admitted fact that opposite party No. 5 had declined to reduce his rate after negotiation with the concerned authorities, the State Government, opposite party No. 1, acted illegally and with material irregularity in giving another opportunity to opposite party No. 5 on the basis of his representation.

6. Learned counsel for opposite party No. 5 at the other hand submitted that opposite party No. 5 being the second lowest tenderer, he had a right to be negotiated and as he agreed to execute the work at the same rate as agreed to by the petitioner on negotiation, he should be given the first opportunity to execute the work.

7. Learned counsel for the State, relying upon the averments made in the counter-affidavit sworn to by opposite party No. 4, fairly submitted that the representation of opposite party No. 5 was only considered by Government and no decision has been taken yet, and as such the writ petition is premature.

8. To appreciate the submissions advanced on behalf of all the parties, we called upon the learned counsel for the State to produce the original file dealing with tender matter and the same was produced before us. A perusal of the file reveals that after the first lowest tenderer declined to execute the agreement, opposite party No. 4 called upon opposite party No. 5, the second lowest tenderer, to bring the rate quoted by him to Rs. 77,84,008.00. By letter dated 2.12.2002 of the Executive Engineer, uide Annexure- P/I, opposite party No. 5 was asked to intimate his willingness in writing by 9.12.2002 positively. On 2.12.2002 itself, vide letter Annexure-8, opposite party No. 5. intimated in writing to opposite party No. 4 that he was unable to reduce his rate from Rs. 1,02,95,273.00. Only

thereafter negotiation with the petitioner, who was the third lowest tenderer, started.

9. Para-30 of the Executive Instructions, Appendix-IX to the Orissa Public Works Department Code, Vol.11 stipulates as follows :

"30. If an office inviting tender considers it necessary in the interest of Government, to negotiate with a tenderer with a view to reduce rates or to withdraw special conditions imposed by a tenderer, negotiations may be conducted by him or by an officer authorised by him in writing, first with the lowest tenderer and if he refuses to negotiate, then the next lowest tenderer may be called for and so on".

10. The word "negotiate" in the Webster Dictionary defines as "to deal or bargain with another or others as in the preparation of a treaty or in preliminaries to a business deal". The word "negotiation" according to the said Dictionary means "mutual discussion and arrangement of the terms of a transaction or agreement". Admittedly, opposite party No. 5 was called by opposite party No. 4 to reduce his rate which he failed to avail of. Thus he is precluded from putting up his claim once again. Only after opposite party No. 5 failed to avail of the opportunity, in consonance with Para.30 of the Executive Instructions supra, the process of negotiation started with the petitioner.

11. A perusal of the file reveals that the concerned authorities sacrosanctly followed the provisions of the Executive Instructions contained in Appendix-IX to the Orissa Public Works Department Code. When the first lowest tenderer did not come forward to execute the agreement, rightly negotiation started with opposite party No. 5 who was the second lowest tenderer. But then a perusal of different letters reveals that opposite party No. 5 declined to reduce his rate and negotiation with him failed. Thereafter the authorities rightly started negotiation with the present petitioner. In course of negotiation, the petitioner agreed to execute the work at the negotiated rate and the matter was thereafter recommended to State Government for acceptance. While the matter stood thus, on the basis of a representation filed by opposite party No. 5, the entire negotiation process was reopened.

12. The file further reveals that opposite party No. 5 at one point of time, vide Annexure-8 dated 2.12.2002, declined to reduce the rate quoted by him. Having declined to reduce his rate from Rs. 1,02,95,273.00. When opportunity was given to him, he forfeited his right and cannot put forth his claim once again. The consideration would have been different if opposite party No. 5 while not agreeing to do the work at Rs. 77,84,008.00 would have agreed to reduce the rate to some extent, but then Annexure-8 clearly reveals that opposite party No. 5 intimated the authorities that he was unable to reduce his rate from Rs. 1,02,95,273.00. The statement being unambiguous, there was no scope to give further opportunity to him.

13. Be that as it may, in view of the unambiguous statement made on solemn

affirmation at page-3 of the counter-affidavit sworn to by opposite party No. 4 that till date no final decision has been taken for allotting the work in question either to the petitioner or to opposite party No. 5, and only on the basis of a Government letter the Chief Engineer has directed opposite party No. 4 to give offer to opposite party No. 5 seeking his consent as to whether he is prepared to execute the work at a cost of Rs. 98,22,766.00, we feel that the writ petition is premature as no final decision has been taken.

14. Accordingly we dispose of the Writ Petition directing the opposite party-authorities to consider the tender matter in question in the light of the observations made by us and in consonance with the Orissa Public Works Department Code and take a final decision.

Sujit Barman Roy, C.J.

I agree.