

(2012) 08 OHC CK 0013

In the Orissa High Court

Case No : Writ Petition (C) No. 29194 of 2011

Sri Nigamananda Jena

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-08-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2012) 114 CLT 976

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : J. Patnaik, M/s. Smita R. Patnaik, N.P. Parija, S.K. Nayak, P.K. Mohanty, Miss M. Mohapatra, for the Appellant; R.K. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This Writ Petition has been filed with a prayer to quash Annexure-5 by which Opp. Party No. 1-Secretary, Department of Water Resources, Govt. of Orissa, Bhubaneswar, Khurda has cancelled the tender pertaining to "construction of Spur at RD 3.55 KM on Devi Left Embankment of Alipada (Protection to Scoured bank on Devi Left Embankment from RD 3.260 KM to 4.257 KM by providing launching apron & stone revetment) under NABARD Assistance-RIDF-XV" & directed for re-tendering of the said work. Further prayer of the Petitioner is to direct Opp. Party Nos. 1 & 2 to accept the bid of the Petitioner. On 17.11.2011, the matter was heard at length & this Court after hearing Learned Counsel for the Petitioner, State & Opp. Party No. 4, represented by Shri R.K. Mohanty, Advocate reserved the matter for Judgment. Learned Counsel appearing for the State was simultaneously directed to produce the original record of the case.

2. On 1.8.2012, while the matter was listed under head "To Be Mentioned", the Writ Petition was disposed of after hearing Learned Counsel for the Petitioner & State & without hearing Mr. R.K. Mohanty, Learned Counsel for Opp. Party No. 4-Narayan Pradhan. Thereafter, Misc. Case No. 12533 of 2012 was filed by Opp.

Party No. 4 to recall the Order Dated 01.8.2012 & rehear the Writ Petition. While hearing the said Misc. Case on 10.08.2012, this Court noticed that on 1.8.2012 when the matter was disposed of, certain important aspects of the case were not brought to the notice of this Court either by Learned Counsel for the Petitioner or by Learned Additional Government Advocate appearing for the State. Therefore, the Order Dated 1.8.2012 which was passed without hearing Mr. R.K. Mohanty, Learned Advocate representing Opp. Party No. 4 was recalled & Judgment was reserved.

3. The present litigation is pertaining to a tender relating to a civil work mentioned supra. Petitioner-Nigamananda Jena, Opp. Party No. 4-Narayan Pradhan & two others had submitted tenders to the Executive Engineer in respect of the work in question. After submission of tender, Opp. Party No. 4 filed W.P.(C) No. 749 of 2011 before this Court challenging the implementation & interpretation of some non-essential clauses in the tender document on the ground that the said clauses are aimed to preclude bona fide tenderers like Opp. Party No. 4 & the interpretation of the said clauses by the State Government in the Department of Water Resources is highly unreasonable & arbitrary. In the said W.P.(C) No. 749 of 2011 this Court by an interim Order Dated 18.1.2011 directed that the tender document of Opp. Party No. 4-Narayan Pradhan shall not be discarded only for the said clauses which are challenged in the Writ Petition. Pursuant to the said order, the Executive Engineer opened the technical bid of all the tenderers & submitted the evaluation report. As per the said evaluation report, in the technical bid the Opp. Party No. 4-Narayan Pradhan was declared disqualified on the ground of non-fulfilment of those non-essential clauses which were challenged in the said Writ Petition. Since during the pendency of the W.P. (C) No. 749 of 2011, Opp. Party No. 4-Narayan Pradhan was declared" disqualified on technical grounds, he was advised to withdraw the said Writ Petition & this Court vide Order Dated 23.3.2011 dismissed the said Writ Petition as withdrawn with the liberty to challenge the order of non-acceptance of the tender. Thereafter, Opp. Party No. 4-Narayan Pradhan filed W.P.(C) No. 7927 of 2011 in this Court challenging the evaluation report of Executive Engineer by which his tender was rejected on technical ground. During pendency of W.P.(C) No. 7927 of 2011 this Court vide Order Dated 31.3.2011 directed the Executive Engineer to open the financial bid of all the tenderers & furnish detail particulars. On opening of the financial bids it was found that while the Petitioner Nigamananda Jena quoted the price at Rs. 6,73,19,663.65, Opp. Party No. 4-Narayan Pradhan quoted Rs. 5,21,91,401.23. Although the difference in the price quoted by both the parties was highly excessive i.e. Rs. 1,51,28,262.42, yet the Executive Engineer recommended the State Government in the Dept. of Water Resources to award the disputed work to the Petitioner Nigamananda Jena as the tender submitted by Opp. Party No. 4-Narayan Pradhan has been rejected on technical ground in the technical bid. W.P.(C) No. 7927 of 2011 was finally disposed of on 25.7.2011 inter alia giving liberty to the Opp. Party No. 4 to file representation before Opp. Party No. 1 highlighting the grievance as have been

made in the Writ Petition & Opp. Party No. 1 was directed to decide the award of tender taking into consideration the objections raised by the Petitioner & pass necessary order in this regard.

4. Pursuant to the order of this Court dated 25.07.2011, Opp. Party No. 4-Narayan Pradhan filed representation to the State Government in the Department of Water Resources with a prayer to award the disputed work to him which will save the government revenue to the tune of more than Rs. 1.5 crores. In the representation it was further stated that Nigamananda Jena is trying to get the work as a single tenderer with an excess rate of more than Rs. 1.5 crores by depriving the Opp. Party No. 4-Narayan Pradhan who has offered to execute the disputed work with a less value & further alleging that the recommendation of Executive Engineer qualifying the Petitioner as the single successful tenderer & rejecting the tender of Opp. Party No. 4 is mala fide, motivated & has caused loss to Govt. Revenue & hence such recommendation should be turned down by the State Government. While the matter stood thus, the Executive Engineer negotiated with the Petitioner, who reduced the bid value to Rs. 6,17,32,874.23 in place of previously quoted bid value of Rs. 6.73,19,663.65 paise. Thus, the modified bid value quoted by the Petitioner is excess by about Rs. 1 crore in comparison to price quoted by Opp. Party No. 4-Narayan Pradhan. However, the State Government in the Water Resources Department rejected the tender & directed for retender by impugned order passed under Annexure 5.

5. Being dissatisfied with the order passed under Annexure-5, the present Writ Petition has been filed.

6. Mr. J. Patnaik, Learned Senior Advocate appearing on behalf of the Petitioner submitted that Opp. Party No. 1 has taken arbitrary decision by cancelling the tender & directing for re-tender without giving opportunity of personal hearing to the Petitioner which is not only mala fide but also non-application of judicial mind. Opp. Party No. 1 has lost sight of the fact that Opp. Party No. 4 did not satisfy the minimum quality criteria under Clause IV(A), (b) & (c) of the bid document, for which his tender paper was rejected & he became non-responsive bidder. In the bid document, the bid value put to tender was Rs. 5,87,94,339.44 & the Petitioner quoted Rs. 6,73,19,663.65 & on negotiation the same was reduced to Rs. 6,17,32,874.23 which is approximately 5% extra of bid value. Once Opp. Party No. 2 called for negotiation & in the minutes of the tender call meeting held on 14.10.2011, the negotiation was finalized & the committee referred & requested to consider the negotiation of bid value, it was not proper on the part of Opp. Party No. 1 for cancelling the tender & directing process of re-tender. The Petitioner has deposited an amount of Rs. 6,00,000 (one percent of the amount put to tender) for participating in the tender & sustained irreparable loss due to harassment by the Opp. Parties. Opp. Party No. 1 had no material before him to come to the conclusion that the bid is not competitive even after the negotiated amount is finalized. Every action of the Govt. must be founded upon sound reason otherwise the action becomes arbitrary & offends Article 14

of the Constitution of India. It is not a legal postulation that merely because the other tenderers became non-responsive, the lowest tenderer becomes less competitive, more particularly, when the Petitioner was called upon for negotiation.

The opinion of the technical persons should be given due weightage unless found unreasonable. Since the period of one year has elapsed from the date of tender & there has been escalation of price on every commodity, & if there will be re-tender, the estimated price would never be less than the negotiated price. Therefore, the retendering may cost the Government more & cause delay in the execution of work.

7. Mr. Patnaik further placing reliance upon the Judgment in the case of Tata Cellular Vs. Union of India, submitted that the tender is an offer, it is something which invites & is communicated to notify acceptance. The duty of the Court is to confine itself to the question of legality as to whether a decision-making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice, reached a decision which no reasonable Tribunal would have reached; or abused its powers.

8. Mr. R.K. Mohanty, Learned Counsel appearing on behalf of Opp. Party No. 4 submitted that the decision taken by Opp. Party No. 1 under Annexure-5 is legally valid. Public work must be executed in a fair manner & after due competition among the eligible participants. Merely because the Petitioner submitted the tender satisfying all the qualifying criteria, the authorities are not bound to accept his tender. Submission of tender paper is not absolute. The tender inviting authority has to take a reasonable decision on the tenders completed in all respects. He placed reliance upon the Judgment of the Andhra Pradesh High Court in the case of R. Venkatram Reddy & anr V. Jetamoni Gouramma, reported in AIR 2011 Andhra Pradesh 94 & prayed for dismissal of the Writ Petition.

9. On, rival contentions of the parties, the question that arises for consideration of this Court is whether the order passed under Annexure-5 by Opp. Party No. 1 cancelling the tender in question & directing to go for fresh bidding to make the bid more competitive in public interest is just & legal in the facts & circumstances of the case.

10. The undisputed facts are that in response to the tender call notice, the Petitioner along with Opp. Party No. 4 & another M/s. Classic Super Construction submitted his tenders. The tender of Opp. Party No. 4 & M/s. Classic Super Construction become non-responsive to the technical qualification criteria & the Petitioner becomes single responsive tenderer.

11. Challenging the tender conditions, Opp. Party No. 4 approached this Court in W.P.(C) No. 7927 of 2011 which was disposed of on 25.7.2011 inter alia with the following observations & directions:-

Learned Counsel for the State submits that the entire tender process has been completed & so far as the award of contract to Opp. Party. No. 4 is concerned, the same has been referred to the Government in the Department of Water Resources, for consideration. According to him, the Government is yet to decide whether the work can be awarded to the successful tenderer. This being the position, in our considered opinion, the writ application is premature. If the Petitioner has any grievance, he may file a representation before Opp. Party No. 1 highlighting the grievance as have been made in this writ application. Let Opp. Party No. 1 decide the award of tender taking into consideration the objections raised by the Petitioner & pass necessary orders in this regard. The writ application is accordingly disposed of.

12. As it appears from the order of this Court dated 25.7.2011 the tender process was completed & the award of contract was referred to the Government in the Department of Water Resources for consideration. From the impugned order passed by Opp. Party No. 1 under Annexure-5, it reveals that the proposal was submitted by the CE & BM, LMB vide letter No. 6383 dated 17.8.2011 in connection with the technical bid & financial bid for the work in question & the same have been examined in detail at Government level taking into account the orders passed by this Court on 25.7.2011 in W.P.(C) No. 7927 of 2011 & representation of Opp. Party No. 4 was received on 10.8.2011. During pendency of the decision of Opp. Party No. 1, Opp. Party No. 2 called the Petitioner for negotiation on the bid value wherein the Petitioner reduced the bid value. After negotiation, a committee was constituted & as per minutes of the meeting the Engineer-in-Chief, after taking a decision referred the same to the Secretary/ Govt. for approval. Now the question arises whether the action of Opp. Party No. 2 calling the Petitioner for negotiation & the action of constituting the committee & sending the minutes of the meeting held by the Engineer-in-Chief to Opp. Party No. 1-Secretary for approval was correct & valid.

13. In our opinion when the matter was pending before the Government i.e. Opp. Party No. 1, who was considering the proposal submitted by the CE & BM, LMB vide letter No. 6383 dated 17.8.2011 with reference to the order of this Court & upon representation of Opp. Party No. 4, Opp. Party No. 2 should not have called the Petitioner for negotiation on the bid value & constituted a committee & referred the minutes of meeting held by the Engineer-in-Chief to the Secretary/ Govt. for approval. It may be noted here that even after modification of the bid value by the Petitioner on negotiation, there is still a difference of about Rs. 95,41,000 & thus the price offered by Narayan Pradhan is much lower than that of the price quoted by the Petitioner-Nigamananda Jena. In other words, the Government shall sustain loss to the tune of Rs. 95,41,000 if the work will be awarded in favour of Petitioner Nigamananda Jena.

14. As it appears, Opp. Party No. 2 is anxious to award the work in favour of the Petitioner by hook or crook. Moreover, the action of O.P. No. 2 is in defiance of the order of this Court. Therefore, the action of O.P. No. 2 is not above suspicion

in the circumstances indicated above. This action of Opp. Party No. 2 amounts to showing favouritism to the Petitioner which is not at all permissible under the law. Therefore, the relief claimed by the Petitioner on the basis of the negotiation reached between Opp. Party No. 2 & the Petitioner & the minutes of the meeting held by the Engineer-in-Chief, who after taking a decision, referred the same to the Secretary/Govt. for approval cannot be granted.

15. At this juncture, it is necessary to extract the order passed by the Secretary to Government, Department of Water Resources under Annexure-5 which has been challenged in this Writ Petition.

Government of Orissa Department of Water Resources

OFFICE ORDER

III-LMB-20/2011 No..../WR Bhubaneswar, dated

The proposal submitted by the CE & BM, LMB vide letter No. 6383 dated 17.8.2011 in connection with the technical bid & financial bid for the work "Construction of Spur at RD 3.55 KM on Devi Left Embankment of Alipada (Protection to Scoured bank on Devi Left Embankment from RD 3.260 KM to 4.257 KM by providing launching apron & stone revetment) under NABARD Assistance-RIDF-XV" have been examined in detail at Government level taking into account the orders passed by the Hon'ble High Court, Orissa, Cuttack dated 25.7.2011 in W.P.(C) No. 7927/2011 & representation of Sri Narayan Pradhan received on dated 10.8.2011 thereof.

Further the representation of Sri Narayan Pradhan & report of the Chief Engineer & E.I.C. WR, it is found that out of the (three) bidders, the bidder Sri Narayan Pradhan & M/s Classic Super Construction become non-responsive to the technical qualification criteria: & Sri. Nigamananda Jena becomes single responsive for the tender by which the financial bid becomes less competitive.

After careful consideration the undersigned did not feel it proper & pass order to cancel the tender invited vide e-procurement Notice No.CE/LMB/08/2010-11 having bid identification No.CELMBJSPD-01/2010-11 & go for fresh bidding to make the bid more competitive in public interest.

Sd/- Principal Secretary to Government

16. Perusal of the above order shows that the Principal Secretary to Government finding that the Petitioner becomes the single responsive for the tender by which the financial bid becomes less competitive passed the impugned order to cancel the tender in question & directed to go for fresh bidding to make the bid more competitive in public interest.

17. We do not find any illegality or infirmity in the order passed by the Principal Secretary to Government, Department of Water Resources under Annexure-5 keeping in view the value of the tender work in question & public interest. In the result, the Writ Petition is dismissed. No order as to costs.

V. Gopala Gowda, C.J.

I agree.