
(2019) 05 UK CK 0117

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 2451 Of 2018

Suresh Singh Panwar

APPELLANT

Vs

State Of Uttarakhand And Others

RESPONDENT

Date of Decision : 07-05-2019

Acts Referred:

Uttarakhand Mines & Mineral Amended Rules, 2017 — Rule 28(ka)(1), 28(ka)(2), 28(ka)(3), Rule 29(ka), 29(ka)(24)
Constitution Of India, 1950 — Article 14, 19(1)(g), 301

Citation : (2019) 05 UK CK 0117

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : Niranjan Bhatt, N.S. Pundir

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. The respondent no. 2 invited the e-tenders vide its notice and terms and conditions dated 18.12.2017, whereby they invited the applications from the probable contractors for participation in the e-tendering process for lifting of RBM from the areas as specified in the tender document itself. It was specifically provided that the tendering and ultimately execution of the contract would be governed by the provisions contained under the Uttarakhand Mines & Mineral Amended Rules 2017. Apart from various stages of tendering for the collection of the RBM in question the tender document itself provided that on culmination of the final tendering and on the determination of a successful bidder, they would be declared as H1, H2, H3, H4 categories and henceforth.

2. In accordance to the terms of the tendering document it further provided under its sub-clause (3) of clause 9, that on the declaration of the bidders as H1, H2, H3 & H4, first an offer would be extended to H1 and in an event of his failure to respond to the offer extended within the specified time then, the same would be granted to the next successful bidder, i.e. H2, and this process would be

carried out henceforth till ultimately the contract is finalized in favour of the bidder thus classified.

3. The argument of the learned counsel for the petitioner is that under the tendering process the petitioner happens to be one of the applicants in pursuance to the tender notice dated 08.12.2017 and had participated in the draw of lots for the work contained in serial no. 3, Uttarkashi, Village Badkot. On the culmination of the tendering process according to him he was determined as to be a successful bidder and he was placed at H4, as would be apparent from the office memorandum No. dated 17.04.2018.

4. The relevance would be to the appendix-2 to the said order, which contains the name of the petitioner. The offer to execute the contract was extended chronologically by respondent no. 2 to H1, H2 and H3 and henceforth and according to the petitioner all the three successful bidders, who were accordingly placed above the petitioners, they have declined to enter into the contract, and accordingly, the contention of the petitioner is that as per the conditions of sub-clause (3) of Clause 9 of the tender document the case of the petitioner is that the contract ought to have been offered to the petitioner, who happens to be the next in chronology. But, despite of the fact that the three bidders having not responded the respondents were bound to have followed the system of descending order offer, yet the petitioner was not extended with the contract and no work order was issued in his favour. Since there being a non-compliance of sub-clause (3) of Clause 9 of the tender notice, the contention of the petitioner is that he had submitted his claim before the respondents for the grant of the contract, but the same was not considered by the respondents, and consequently he has preferred the present writ petition, whereby, he has prayed for calling for a record and quashing the impugned office memorandum dated 27.07.2006, as passed by the respondent no. 2, whereby, while at other places the contract and work orders have been issued by the respondent, but so far as the place in question, where the petitioner was the aspirant and has been determined as to be an H4, i.e. at Uttarkashi, Tehsil Badkot, is concerned the claim of the petitioner was declined to be accepted by the respondent.

5. The contention of the petitioner is that the directives as contained in clause 9 (3) of the tender condition was mandatory in nature and on the refusal to accept the offer by H1, H2 & H3 or by them not coming forward to accept the tender the offer was bound to have been continued to be extended to the next lower bidder, i.e. the petitioner, for execution of the contract, but despite of the refusal by the three bidders above the petitioner, yet the petitioner's claim was not considered, and the same was rejected. Consequently, the petitioner has preferred the present writ petition for the reliefs claimed therein to the effect to quash the order dated 27.07.2018, as passed by respondent no. 2 relating to the cancellation of the tender process as initiated by the tender notice dated 18.12.2017 and with the prayer of mandamus directing the respondent to provide an opportunity to the petitioner being H4 to deposit the prescribed

amount as quoted by him and the contract may be executed in his favour. Clause 9(3) is quoted hereunder:

"9. सफल बोलीदाता की घोषणा अग्रेत्तर कार्यवाही-

(3) H1 के असफल होने की दशा में उसकी अर्नेस्ट मनी को जब्ज करते हुए कोटिक्रम में द्वितीय ई-नीलामी बोलीदाता को H2 उसकी बोली के मूल्य का दस प्रतिशत कार्य दिवसों के अन्तर्गत जमा कराये जाने का अवसर प्रदान कराया जायेगा, उसके भी असफल होने की दशा में उसकी अर्नेस्ट मनी जब्त करते हुए उत्तरोत्तर कोटिक्रम का अनुपालन करते हुए अन्तिम सफल बोलीदाता तक प्रक्रिया सम्पन्न कर सफल पाये गये ई-नीलामी बोलीदाता की घोषणा निर्देशक द्वारा की जायेगी। सभी ई-नीलामी बोलीदाताओं के असफल होने की दशा में उनके द्वारा जमा अर्नेस्ट मनी को जब्त करते हुए ई-नीलामी बोली की प्रक्रिया को समाप्त घोषित किया जायेगा तथा खनन पट्टे हेतु ई-निविदा सह ई-नीलामी की प्रक्रिया सात दिन की अल्पावधि की विज्ञप्ति के उपरान्त पुनः प्रारम्भ की जायेगी। "

6. The argument as extended by the learned counsel for the petitioner is that he supports his contention and claim from the rules, which has been framed by the State of Uttarakhand called as Uttarakhand Mines and Mineral Amended Rules, 2017, wherein, under clause 28 ka it contemplated extension of an offer to the next successful bidder in the descending order of the offer extended by them. Rule 28 (क)(1,2,3) is quoted hereunder:

1. द्वितीय चरण की बोली समाप्त होने के उपरान्त उच्चतम बोलीदाता द्वारा दी गयी वार्षिक ई-नीलामी बोली धनराशि का दस प्रतिशत (10प्रतिशत) "सफल बोलीदाता धनराशि" तीन दिन के अन्तर्गत विभागीय चूंलउमद हंजमूंल के माध्यम से ऑनलाईन जमा करने के उपरान्त सफल बोलीदाता घोषित किया जायेगा।

2. H1 के असफल होने की दशा में उसकी अर्नेस्ट मनी को जब्त करते हुए कोटिक्रम में द्वितीय ई-नीलामी बोलीदाता को H2 उसकी बोली के मूल्य को दस प्रतिशत कार्य दिवसों के अन्तर्गत जमा कराये जाने का अवसर प्रदान कराया जायेगा, उसके भी असफल होने की दशा में उसकी अर्नेस्ट मनी जब्त करते हुए उत्तरोत्तर कोटिक्रम का अनुपालन करते हुए अन्तिम सफल बोलीदाता तक प्रक्रिया सम्पन्न कर सफल पाये गये सफल ई-नीलामी बोलीदाता की घोषणा निर्देशक द्वारा की जायेगी। सभी ई-नीलामी बोलीदाताओं के असफल होने की दशा में उनके द्वारा जमा अर्नेस्ट मनी को जब्त करते हुए ई-नीलामी बोली की प्रक्रिया को समाप्त घोषित किया जायेगा तथा खनन पट्टे हेतु ई-निविदा सह ई-नीलामी की प्रक्रिया सात दिन की अल्पावधि की विज्ञप्ति के उपरान्त पुनः प्रारम्भ की जायेगी।

3. सफल ई-नीलामी बोलीदाता द्वारा अधिकतम वार्षिक नीलामी बोली का दस प्रतिशत (10प्रतिशत) "प्रोस्पेक्टिव पट्टाधारक धनराशि" (बिन्दु 2 के अतिरिक्त) सात कार्य दिवसों के अन्दर विभागीय पेमेन्ट गेटवे के माध्यम से ऑनलाईन जमा करने के उपरान्त प्रोस्पेक्टिव पट्टाधारक अर्थात् ऐसा सफल ई-नीलामी बोलीदाता, जो अधिकतम वार्षिक नीलामी बोली का 10 प्रतिशत धनराशि जमा कर दिया हो, घोषित किया जायेगा। "

7. He further from the excerpts of the said rules of 2017 has drawn the attention of this Court to the provisions as contained in sub-clause 24 of Rule 29 ka of the said regulations, as a matter of fact, the said clause (24) is nothing but a saving clause, which provides that on the culmination of the proceedings as per the rules prevalent if a successful bidder is not determined, the competent authority will exercises its exclusive power in consultation with the Director Mine and Mineral and the contract would be executed accordingly. Rule 29 (d)(24) is quoted hereunder:

"ई-निविदा सह ई-नीलामी प्रक्रिया के दौरान ऐसा प्रकरण जिसका उल्लेख इस शासनादेश में वर्णित किया जाना रह गया

हो अथवा पूर्णतः स्पष्ट न किया जा सका हो ऐसे प्रकरणों पर निदेशक भूतत्व एवं खनिकर्म इकाई, को अन्तिम निर्णय लेने हेतु प्राधिकृत किया जाता है। निदेशक, भूतत्व एवं खनिकर्म इकाई तत्सम्बन्धी अन्य शासनादेशों/अनुदेशों का अनुसरण कर व्याख्यापित करते हुए निर्णय दे सकेगा, निदेशक, भूतत्व एवं खनिकर्म इकाई का निर्णय अन्तिम होगा एवं सर्व पक्षों को मान्य होगा।"

8. The said stipulation contained under clause 24 provided that the decision thus taken by the Director Mining would be final inter se between the parties, the provisions in fact, this Court is of the view that its an enabling clause to meet a particular contingency where Director Mining has been given an extraordinary powers to act to overcome a contingent situation.

9. On the other hand, the argument as extended by the learned counsel for the State he submits that merely because of the fact that on the culmination of the tendering process the petitioner had been placed at S.No. H4 in accordance with the price quoted by him in his bid he does not acquire any exclusive right as such that the contract was required mandatorily to be executed in his favour. In support of his contention a reference is made to clause 14 of the tender notice (Annexure 1) to the writ petition, which is quoted hereunder:

"14- ई-निविदा सह ई-नीलामी प्रक्रिया के दौरान ऐसा प्रकरण जिसका उल्लेख इस ई-निविदा सह ई-नीलामी आमंत्रण प्रपत्र में वर्णित किया जाना रह गया हो अथवा पूर्णतः स्पष्ट न किया जा सका हो ऐसे प्रकरणों पर निदेशक, भूतत्व एवं खनिकर्म इकाई को अन्तिम निर्णय लेने का अधिकार होगा। इस प्रक्रिया को किसी भी समय वापस लिये जाने एवं निरस्त कर पूर्ण अधिकार निदेशक, भूतत्व एवं खनिकर्म इकाई में निहित है, निदेशक, भूतत्व एवं खनिकर्म इकाई का निर्णय अन्तिम होगा।"

10. In the entire tendering process and on its culmination upto the final stage of bidding and placement as H1, H2, H3 and henceforth, by clause 14 of the tender notice it has been provided that the entire tendering process can be cancelled by the Director without providing any opportunity or assigning any reason for its cancellation. This was an exclusively power which was exclusively reserved by the respondents, and the petitioner's participation in the bidding process would equally be covered by clause 14.

11. The petitioner has submitted that he could not have been rendered ousted to execute the contract when the earlier three bidders have not participated in the proceedings, and hence, the contract ought to have been executed in his favour. This Court is of the view that merely being placed at a particular level of bidding, does not create a right that contract must be executed in his favour. Its always the economic factor too, which has to be considered by the employer, because obviously price bid of H4 would be much lower bid as compared to highest bid of H1.

12. This Court is not in acceptance with the argument as extended by the learned counsel for the petitioner in view of the stipulations contained under clause 14 of the tender notice, which itself provides that the State may at any time withdraw the contract, cancel it after the prior approval from the Director Mining and go for fresh bidding so that State may not suffer monetary loss, and

this Court is of the view that its always states prerogative to make efforts for getting the highest price for the benefit of the State, which is the supreme factor to be considered for grant of RBM contract.

13. The argument as extended by the learned counsel for the petitioner from the view point that merely because since he has been placed at serial no. H4 and there has been a refusal from the other three higher bidders, who were just above the petitioner, an offer should have been extended to him for giving the work executed in terms of the contract. But the same has been denied by the respondent/State that merely because of the fact that as per sub-clause

(3) of Clause 9 of the tendering notice and merely because of the fact that the offer extended by the respondent has reached to the level to which the petitioner has been placed after the refusal by the others, that will not create any indefeasible right in favour of the petitioner for the mandatory execution of the contract. As the implication of clause 14 could be enforced at any time by respondent. The said contention of reserving the rights to cancel the contract at any point of time has been reserved by the Director under Clause 14, which provides that the Director without adopting any procedure or on occurrence of any untoward situation, he may on his own wisdom had at any point of time can cancel the entire tendering process. Thus, the cancellation, which has been done by the impugned order by respondent no. 2, cannot be faulted of that merely because of the placing of the petitioner as an H4, it will not give him an indefeasible right that the work order ought to have been issued in his favour for the contract as offered by the tender notice as issued by the respondent on 18.12.2017.

14. The said contention and the reasoning assigned is also not supported from the view point of the ratio of the judgment as reported in AIR 2017 Uttarakhand 103 'SPX Dry Cooling Technologies, Belgium vs. Bharat Heavy Electricals Limited & Another', whereby, the Division Bench of this Court while dealing with the matters that in the contractual matters though it is expected by the State Agency has to act fairly while dealing with the bidders in the tendering process but, simultaneously it has held that in the contractual matters where a contract after being placed at L1 or the highest bidder cannot stake his claim for the grant of the contract as a mandate provided under the contract laws because until and unless the tender committee founds the action to be violative of Article 14 no interference in rejecting of the offer of tender or its non-acceptance could be permissible. The said ratio has been propounded by the Division Bench of this Court in a judgment reported in AIR 2017 Uttarakhand 103 SPX Dry Cooling Technologies, Belgium vs. Bharat Heavy Electricals Limited & Another.

15. In the said judgment the ratio which has been propounded in paragraph 10 of the said judgment is based upon the principle that the criteria of awarding of a contract, its implications or its violation or the process, which has been adopted for the grant of the contract if factually and apparently it suffers from no mistakes then merely because of the placement as H1 no right would be created

in favour of the person applying for the grant of the contract.

16. The relevant part of the said judgment is quoted hereunder:

"10. Therefore, the principle enunciated is that unless public interest is affected or where process adopted or decision is malafide or intended to favour someone or where the process adopted or decision made is so arbitrary & irrational that no responsible authority, acting reasonably in accordance with law, could have reached the Court would not interfere in such a matter. The Court is concerned more with public interest than with the injury that a private party may suffer. Bearing in mind these principles if we appreciate the contention raised, we would think that no case at all has been made out for interference in the matter."

17. In view of the fact that there is no breach of any fundamental right of the petitioner, his case will not fall to be within the ambit of infringement of any right Article 14 & 19 (1) (g) and 301 of the Constitution of India, as it was only at the stage of offer of the contract when the dispute has arisen and no right of any of the parties to the contract was crystallized.

18. Thus, this Court finds no merit in the writ petition, and the same is, accordingly dismissed.