

IN THE HIGH COURT OF ORISSA AT CUTTACK

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WRIT PETITION (CIVIL) No. 2850 OF 2021

(An application under Articles 226 & 227 of the Constitution of India.)

M/s. Ashirbad Industries & others Petitioners

Versus

State of Odisha & Others Opposite Parties

Advocate(s) appeared in this case:-

For Petitioners : Mr. U.C. Mohanty, Advocate.

For Opposite Parties : Mr. S. Palit,
Additional Government Advocate.

**CORAM : THE CHIEF JUSTICE
JUSTICE B.P. ROUSTRAY**

JUDGMENT

18th February, 2021

B.P. Routray, J.

1. Three petitioners, viz., M/s.Ashirbad Industries, M/s.Poojarini Enterprisers and M/s.Bhagabati Industries have jointly filed the present writ petition challenging the cancellation of Tender Call Notice No.1W/2020-21 invited through e-Tender by the Executive Engineer, Mechanical Division, Bhubaneswar to execute the Hydro Mechanical Gate works under different Civil Divisions.

2. The Petitioners state that they all are registered small scale industrial units and in pursuance to Tender Call Notice No.1W/2020-21, they participated in the tender process for Fabrication, Supply, Transportation and Erection of hydro mechanical gate works under Opposite Party No.5, i.e. the Executive Engineer, Mechanical Division, Bhubaneswar. The tender was available from 21st May, 2020 to 30th May, 2020 through e-Tender with stipulation for opening of the technical bid on 1st June, 2020. The Petitioners are the successful L-1 bidders for 24 nos. of works as per the tender notice. On 10th June, 2020, Opposite Party No.5 recommended the case of the Petitioners for the work to the Superintending Engineer (Opposite Party No.4) and thereafter the Superintending Engineer further recommended the same to the Chief Engineer (Opposite Party No.3). As there was delay in finalizing the tender process, the Petitioners filed W.P.(C) No.17602/2020, W.P.(C) No.17593/2020 and W.P.(C) No.17594/2020 individually, which were disposed of by this Court with direction to Opposite Party No.5 to consider and dispose of the representation of the Petitioners by passing a reasoned and speaking order after affording reasonable opportunities of hearing to the Petitioners. Since the direction of this Court has not complied in time, CONTC No.3706/2020, CONTC No.3702/2020 and CONTC No.3707/2020 have been preferred by the Petitioners.

3. In the meantime, the Superintending Engineer and the Chief Engineer in their orders dated 10th September, 2020 (Annexure-7) and 15th September, 2020 (Annexure-6) intimated Opposite Party No.5 for rejection of the tender as the tender documents are found defective and the discrepancies regarding “Structure and

Organization”, “Plant and Equipment” and “Performance record” are noticed during re-scrutinization.

4. Getting information of such letters of the Superintending Engineer and the Chief Engineer, the Petitioners filed three writ petitions in W.P.(C) No.29174/2020, W.P.(C) No.29192/2020 and W.P.(C) No.29194/2020 individually challenging such instructions of the Superintending Engineer and the Chief Engineer as well as for a direction to Opposite Party No.5 to finalize the tender process in favour of the Petitioners. In W.P.(C) No.29174/2020, Opposite Party No.5 filed his counter stating that, submission of details about “Structure and Organization”, “List of Plant and Equipment” and “Performance record” are mandatory requirements as per Form-B, Form-E and Annexure-A of the Tender Call Notice and non-submission of the same were noticed after re-verification of the bids.

5. While the matter stood as thus, the order under Annexure-1 cancelling the tender was issued by the Opposite Party No.5- Executive Engineer.

6. Mr. U.C. Mohanty, learned counsel for the Petitioners contends that when the writ petitions filed by the Petitioners in W.P.(C) No.29174/2020, W.P.(C) No.29192/2020 and W.P.(C) No.29194/2020 praying for finalizing the tender are pending adjudication, the order of cancellation passed by the Executive Engineer under Annexure-1 is erroneous and hit by the principles of *lis pendens*. His further contention is that, when the Petitioners have been selected as successful bidders, the unilateral action of the Opposite Parties in cancelling the tender without giving any

opportunity of hearing to the Petitioners is illegal, arbitrary and not sustainable in the eye of law. To substantiate his contention, he cites two decisions of this Court in the case of *Homogenomics Private Ltd. vs. State of Odisha and others*, reported in *2017(I) ILR-CUT-31* and *Sampad Samal vs. State of Odisha and others*, reported in *2017 (I) ILR-CUT-262*.

7. On the contrary, Mr. Palit, learned Additional Government Advocate for the State-Opposite Parties submits that mere acceptance of the bid of the Petitioners by the Executive Engineer without approval of the higher authorities, i.e., the Superintending Engineer and Chief Engineer does not create any right in their favour for execution of the work. He further submits that as per the Tender Call Notice, the authority reserves the right to reject any order or all of the bids even without assigning any reason. Mr. Palit continues to submit that upon re-verification of the bids at the level of Superintending Engineer and Chief Engineer since error was noticed in evaluation of bids, the same needs to be rectified by taking a conscious decision in cancelling the tender process and thus no illegality is involved in the same. Further, since no agreement has been executed with the Petitioners, no right of the Petitioners can be said to have been violated by such cancellation.

8. Undoubtedly the selection of the Petitioners as L-1 bidders for 24 nos. of works as per the Tender Call Notice by the Executive Engineer has not been questioned by the Opposite Parties. But during re-verification of the bid documents by the Opposite Party Nos.3 and 4, some defects and discrepancies were noticed resulting cancellation of the tender process. It is not the case of the parties that the tender

was cancelled in order to grant the work in favour of any other person. It is also not the case of the parties that the tender was cancelled without any reason. What is to be seen is whether such cancellation of the tender violates any right accrued in favour of the Petitioners or such cancellation of the tender is so unreasonable or illegal that will not stand the test of law.

9. In the case of *Jagdish Mandal vs. State of Orissa and others*, reported in (2007) 14 SCC 517, the Hon'ble Supreme Court considering the scope of the Court to interfere in tender and contractual matters in exercise of powers of judicial review has held as follows:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some

technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

Or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

10. In the case of *Homogenomics Private Ltd.* (*supra*) relied on by the Petitioners, the facts are quite different as in the said case the technical bid of the Petitioner in that case was rejected being disqualified and during pendency of the case, Opposite Party No.3 was selected and issued with work order. This Court has observed that:

“xxx

xxx

xxx

On the basis of the admitted facts, when the Opposite Party No.3 had no valid DCGI certificate at the time of opening of technical bid and price bid, this Court is of the considered view that the contention raised that subsequent renewal made, cannot validate the invalid contract. Thereby, Opposite Party No.2 has acted in excess of its jurisdiction.”

11. Similarly in the case of *Sampad Samal (supra)* the cancellation of the tender granted in favour of the Petitioner therein was on a mere technical ground, i.e. for lapse of 90 days. However this Court held as follows:

“14. Applying the aforesaid well settled principles to the present context and taking into consideration the conditions stipulated in clause-17 of the tender document read with clause-10 of the terms and conditions of the tender paper and giving them their plain meaning, as the authority concerned has passed the impugned order of cancellation, without any proper and adequate ground, rather, as it is clear, in an arbitrary manner because of pendency of frivolous petition, the same cannot be sustained in the eye of law.”

12. Therefore, both the above cases, as cited by the Petitioners do not lend any help to the Petitioners being distinguishable on facts.

13. Coming to examine the other contention of the Petitioners, the doctrine of *lis pendens* as envisaged in Section 52 of the Transfer of Property Act, denotes the operation of common-law *maxim pendent lite nihil innovetur*. It is based on equity, good conscience and justice because it will be impossible to bring an action or suit to a successful termination if changes are permitted to prevail.

14. In the present case, the facts are clear that the tender process was not finalized and no agreement of execution of work has been issued. The bid documents offered by the Petitioners has been accepted at the level of Executive Engineer which is subject to further approval by the Superintending Engineer and Chief Engineer and while undergoing such stage of approval at the higher level due to revelation of defects and discrepancies, the tender was cancelled. Therefore, there was no creation of right accrued in favour of the Petitioners to execute the work for which the Tender Call Notice was issued. Since no such right can be construed which can be said to have accrued in favour of the Petitioners, the cancellation of the tender process in entirety in no way affects the Petitioners and thus, nothing can be said to have changed by such cancellation. Since by mere acceptance of the bid documents on the part of the Executive Engineer would not create any right in favour of the Petitioners, the cancellation of the tender also cannot be said to have attracted the doctrine of *lis pendens*.

15. The reasons as assigned by the Opposite Party Nos.3 and 4 in Annexures-6 and 7 regarding defects and discrepancies in the bid papers which is regarding non-submission of the mandatory requirements as per the Tender Call Notice cannot be said as illegal or arbitrary by any stretch. The higher authorities have rectified the errors noticed in the evaluation process resulting cancellation of the tender. Since no other intention or mala fide purpose is found from the action of the Opposite Parties in cancelling the tender, we do not find any merit in the submission of the Petitioners to interfere in the action of the Opposite Parties in cancelling the tender.

16. In view of the discussions made above, no merit is found to warrant interference in the action of the Opposite Parties in cancelling of the e-Tender under Annexure-1 and as such, we do not incline to interfere with the same.

17. Accordingly, the writ petition is dismissed. There shall be no order as to costs.

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B.P. Routray
Judge

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Dr. S. Muralidhar
Chief Justice

18th February, 2021.
//B.K. Barik, Secretary//