

GAHC010262062024



2024:GAU-AS:12937-DB

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

WRIT APPEAL No.426 OF 2024

Sipl Infracon, having its registered Office at Sri Krishna Nagar, Bela Road, PO: Ramna, District: Muzaffarpur, Bihar – 842002 and represented by one of its Partners Shri Prashant Saurabh, Son of Late Chandeshwar Prasad Sharma, a resident of Shri Krishna Nagar, PO & PS: Bela, District: Muzaffarpur, Bihar.

.....Appellant

-Versus-

1. The Union of India, represented by the Secretary to the Government of India, Ministry of Power, New Delhi – 110006.
2. The National Hydro Electric Power Corporation Private Limited (NHPC), represented by its Chairman-cum-Managing Director, Faridabad, Haryana, PIN – 121003.
3. The Executive Director, Subansiri Lower Hydro Electric Project, Gerukamukh, District: Dhemaji, Assam, PIN – 787035.
4. The Group Senior Manager (P&C), Subansiri Lower Hydro Electric Project, Gerukamukh, District: Dhemaji, Assam, PIN – 787035.
5. The General Manager (Contract), Subansiri Lower Hydro Electric Project, Gerukamukh, District: Dhemaji, Assam, PIN – 787035.

6. The Tender Evaluation Committee, represented by Group Senior Manager, i.e. respondent No.4, Subansiri Lower Hydro Electric Project, Gerukamukh, District: Dhemaji, Assam, PIN – 787035.

7. Brahmaputra Infrastructure Limited, Brahmaputra House, A-7 Mahipalpur (NH-8), Mahipalpur Crossing, New Delhi – 110037.

.....Respondents

– B E F O R E –
HON’BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON’BLE MR. JUSTICE KAUSHIK GOSWAMI

For the Appellant(s) : Mr. S.K. Ghosh, Advocate.
Mr. S. Nath, Advocate.

For the Respondent(s) : Mr. B.D. Deka, Advocate and Mr. N. Choudhury,
Advocate for respondent No.7.

Date of Hearing : 19.12.2024.

Date of judgment : **19.12.2024.**

JUDGMENT & ORDER (ORAL)

(Vijay Bishnoi, CJ)

This writ appeal is preferred by the appellant being aggrieved with the judgment & order dated 21.11.2024 passed by the learned Single Judge in WP(C) No.132/2023.

2. Looking to the fact that the matter is regarding the award of contract in relation to an infrastructure project, with the consent of the learned counsel appearing for the parties, we have heard the matter finally at the admission stage itself.

3. The appellant, which is a start-up Company, has approached the Writ Court being aggrieved with the action of the respondent NHPC Limited, whereby the technical bid submitted by the appellant/writ petitioner in response to the Notice Inviting Tender (NIT) dated 04.08.2022 for the work of "*River Bank protection/ erosion control measures on the Left Bank of River Subansiri Downstream of village Gerki 1 (RD 28 KM - 29 KM)*" has been rejected as non-responsive. The technical bid of the appellant/writ petitioner was declared as non-responsive on the ground that the bidder had not furnished any Certificate of Registration with any Government/Semi Government Department/NHPC certifying it as a Class-I or Class-A type Contractor.

4. The appellant/writ petitioner argued before the learned Single Judge that as per the exemption granted to a start-up Company vide Clause 3.2.E, the appellant/writ petitioner was not required to submit the certificate of registration of the Contractor as Class-I or Class-A. It was also contended before the learned Single Judge that prior to the registration of the appellant/writ petitioner as a Medium Size Entrepreneur (MSE) start-up Company, the appellant Company was a Proprietorship Firm, which was duly registered as a Class-I/Class-A Contractor Firm and for the purpose of meeting the qualification specified in Clause 3.2.A(c), the said Registration Certificate of the Proprietorship Firm was required to be taken into consideration. The appellant/writ petitioner has also questioned the decision of the NHPC Limited of treating the technical bid submitted by the respondent No.7 as responsive.

5. The learned Single Judge, after taking into consideration the submissions of the rival sides, has dismissed the writ petition. The relevant extract of the impugned judgment is reproduced hereunder:-

“18. I have heard the learned counsels appearing on behalf of the parties and given my anxious consideration to the respective submissions.

19. As noted in the previous segments of the instant judgment, Clause 3.2E had provided certain exemptions to all startups (whether MSEs or otherwise) falling within the definition as per Gazette notification dated 23.05.2017 from meeting the qualification criteria in respect of Prior Experience-Prior Turnover as per Clause 3.2A however subject to meeting their quality and technical specifications. In that view of the matter, SubClause (a) and Sub-Clause (b) of Clause 3.2A which pertain to the prior financial turnover as well as the prior experience were to be exempted.

20. It is also relevant to take note of that this exemption was not absolute inasmuch as the employer reserves the right to deny such exemptions to startups (whether MSEs or otherwise) in case of circumstances like procurement of items relating to public safety, health, critical security, operations and equipments, etc. However, Sub-Clause (c) of Clause 3.2A were not in relation to prior experience or prior turnover but was specifically as regards registration with any Government/Semi Government Department/ NHPC as a Class 1 or Class A contractor or as the case may be, thereby allowing such contractors for undertaking works equivalent to estimated value. The submission of the certificates as required under Sub-Clause (c) of Clause 3.2A was not exempted in terms with Clause 3.2E inasmuch as the Clause 3.2E only related to prior experience and prior turnover.

21. In the instant case, it would be seen that the Petitioner was issued an email on 13.10.2022 asking the petitioner to provide the certificate required under Clause 3.2A(c) of the Notice Inviting Tender. The Petitioner knew the requirement but submitted the certification as a Class 1 contractor of the proprietorship firm namely M/s SIPL INFRACON, proprietor Prashanth Saurabh and not M/s SIPL INFRACON (startup partnership firm). Under such circumstances, the technical evaluation which was carried out on 29.11.2022 whereby the Petitioner was held to be responsive, taking the said certificate so submitted by the Petitioner to satisfy the requirement of Clause 3.2A(c) was not as per the requirement of the Notice Inviting Tender. The said error which occurred in the technical evaluation carried out on 29.11.2022 was however rectified on 10.12.2022 that too after giving a further opportunity to the Petitioner to produce such certification. Under such circumstances, this Court is of the opinion that the exercise of the power so carried out by the Respondent Authorities in rejecting the technical bid of the Petitioner cannot said to be arbitrary, unreasonable or even contrary to the notice inviting tender.

22. It is a well settled principle of law that the jurisdiction to exercise the power of judicial review is only limited when such actions on the part of the Respondent Authorities is illegal, unreasonable, arbitrary and does not

satisfy the principles of Wednesbury. However, there being no case made out insofar as the rejection of the Petitioner's technical bid by the Petitioner in the facts of the instant case, this Court is of the opinion that no interference is required.

23. *Be that as it may, a further question though arises in the instant case as to whether the decision of the Technical Committee in its meeting dated 10.12.2022, insofar as the Respondent No.7 is required to be interfered with. It is seen that like the petitioner, the Respondent No.7 was also issued an email on 13.10.2022 asking the Respondent No.7 to submit a valid Registration Certificate. The Respondent No.7 thereupon submitted an EPF Challan on 14.10.2022 wherein the EPF Challan contained the Registration Number in the name of M/s Brahmaputra Infrastructure Ltd. It is further seen that this aspect was not taken into consideration during the technical committee meeting held on 29.11.2022 which was subsequently rectified in the technical committee meeting held on 10.12.2022 and accordingly, the technical bid of the Respondent No.7 was held to be Techno-commercially responsive. Under such circumstances, the question of interference with the decision of the technical committee held on 10.12.2022 does not arise.*

24. *In that view of the matter, the instant writ petition stands dismissed."*

6. The learned counsel for the appellant has submitted that the learned Single Judge has not taken into consideration the fact that the Registration Certificate of the appellant start-up MSE was not required to be furnished in view of Clause 3.2.E of the Bid Document. It is also submitted that even though it is assumed that the same is required to be submitted, then the Certificate of Class-A Registration of the Proprietorship Firm was required to be taken into consideration because the same relates to one of the Partners of the start-up appellant Company.

The learned counsel has submitted that the Hon'ble Supreme Court in the case of ***New Horizons Limited & Anr. -Vs- Union of India & Ors.***, reported in ***(1995) 1 SCC 478*** has laid down that while determining the experience of a Company, the experience of one of the Partners of the Company is required to be taken into consideration as the experience of the Company

itself. The learned counsel has further submitted that the Hon'ble Supreme Court in ***M/s Maa Nabadurga Construction -Vs- Saroj Kumar Jena & Ors.*** [Petition for Special leave to Appeal (C) No.26788/2012] has reiterated the said position of law. It is also contended by the learned counsel for the appellant/writ petitioner that, as a matter of fact, a newly registered start-up Company cannot obtain a Class-I or Class-A Registration Certificate on account of lack of experience and when the appellant/writ petitioner had raised this specific objection before the NHPC Limited, they removed the said condition in the subsequent NITs.

It is submitted that in view of the above fact it can be assumed that the said condition of submitting Registration Certificate by a start-up Company as Class-I or Class-A Contractor was not mandatory.

It is also contended that the learned Single Judge has not rightly appreciated the fact that the respondent NHPC has illegally declared the technical bid of the respondent No.7 as responsive though, admittedly, it had submitted the requisite documents after the last date of submission of the bid, in response to the NIT in question.

7. The learned counsel appearing for the respondent No.7, as caveator, has supported the impugned judgment and has argued that there is no illegality in the impugned judgment passed by the learned Single Judge.

8. Heard the learned counsel appearing for the parties and perused the material available on record.

9. It is not in dispute that the appellant/writ petitioner has failed to furnish the Registration Certificate of the appellant/writ petitioner start-up Company as a Class-I or Class-A Contractor.

10. Having carefully examined Clause 3.2.A(C) as well as Clause 3.2.E of the Bid Document, we are of the view that the learned Single Judge has rightly come to the conclusion that the exemptions granted to the start-up Companies are subject to the prior experience and prior turnover. The condition of submitting Registration Certificate of a start-up Company as a Class-I or Class-A Contractor was not exempted.

We are also of the view that the learned Single Judge has rightly observed that there is no illegality in the action of the respondents NHPC Limited to declare the bid submitted by the respondent No.7 as responsive because earlier NHPC authorities had failed to take into consideration the fact that the documents regarding the registration of the respondent No.7 were already available.

So far as the judgments of the Hon'ble Supreme Court, on which the learned counsel for the appellant/writ petitioner has placed reliance, are concerned, the same has been taken into consideration by the learned Single Judge and the same has rightly been distinguished from the facts and circumstances of the present case.

11. In view of the above discussions, we do not find any merit in this writ appeal. The same is, therefore, dismissed at the admission stage itself.

JUDGE

CHIEF JUSTICE