IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.93 of 2016
Arising out of
Civil Writ Jurisdiction Case No. 13806 of 2014
Along With
Interlocutory Application No.337 of 2016

==

M/s Hariom Construction a partnership firm through one of its Partner Shri Pankaj Kumar Singh, son of Vijay Kumar Singh, resident of village- Khaira, P.O.- Jaihind Tendua, P.S.- Mali (Nabinagar), Aurangabad.

.... Appellant/s

Versus

1. The State of Bihar, through Principal Secretary, Rural Work Department, Government of Bihar, Patna
2. The Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Rural Works Department, Bihar.
3. The Tendering Committee, PMGSY, Rural Works Department, Government of Bihar, Patna.

.... Respondent/s

==

Appearance :

For the Appellant/s : Mr. Y. V. Giri, Senior Advocate
Mr. Ashish Giri, Advocate

For the Respondent/s : Mr. Awanish Nandan Sinha, G. P.-11

==

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
And
HONOURABLE MR. JUSTICE VIKASH JAIN

C. A. V. JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 29-11-2016

Re.: Interlocutory Application No.337 of 2016

The application is for condonation of delay of 2 days in filing of the present Letters Patent Appeal.

2. For the reasons mentioned in the application, we find that sufficient cause is made out for condonation of delay. Consequently, we condone the delay in filing of the present Letters Patent Appeal.

3. Interlocutory Application stands allowed accordingly.

Re.: Letters Patent Appeal No.93 of 2016

The present Letters Patent Appeal under Clause X of the Letters Patent is directed against an order passed by a learned Single Judge of this Court on 12th October, 2015 whereby, the writ application filed by the appellant in respect of package no.02PMGSY-134 remained unsuccessful.

2. The brief of facts, arises out of the present appeal, is that the notice inviting tender in respect of the aforesaid package was issued on 26th February, 2014. The appellant M/s Hariom Construction along with M/s Ajay Engicon Pvt. Ltd. and M/s Anand Construction Pvt. Ltd. submitted tenders. After opening of the technical bid and financial bid on 27th May, 2014, M/s Ajay Engicon Pvt. Ltd. was declared L-1, the appellant as L-2 and M/s. Anand Construction Pvt. Ltd. was declared as L-3. Later, the tender of M/s Ajay Engicon Pvt. Ltd. was cancelled on 18th July, 2014. The Tender Committee took a decision to undertake a fresh exercise of issuance of fresh NIT for the aforesaid work in question.

3. The appellant invoked the jurisdiction of this Court challenging the decision of the State Government for issuance of fresh notice on the ground that it being the second lowest tenderer, the contract should be awarded to it.

4. Such stand of the appellant was resisted by the State

Government, *inter alia*, on the ground that in terms of Rules 163 and 164 of the Bihar Public Works Code, negotiation can be held only with the lowest tenderer. It has categorically been prescribed not to negotiate at the lowest rate after opening of the bid which is for once and in itself final for the said contract. In case, whereupon the enquiry of complaint against the successful lowest bidder, if the complaint got substantiated and thereafter, the successful bidder becomes out of fray, then the second lowest rate bidder should not be preferred for the award of the contract as the same would come within the purview of rate negotiation and barred by the provision under Rules 163 and 164 of the Code. Rules 163 and 164 of the code read as under**: -**

> "163. The lowest tender will be accepted. If rate quoted by more than one tenderer is same than the tenderer should be selected on the basis of draw of lots in the presence of such tenderers. In case of single tender, the approval of the next higher authority will be taken to ensure that due procedure and publicity was ensured. However where a tender is brought before the tender committee, its decision will be final.
>
> 164. Negotiation of rates should be done with the lowest tender only if his tender is considered to be too high."

5. Before the learned Single Judge, the appellant relied upon a Division Bench judgment of this Court in L.P.A. No.1337 of 2014 (M/s. Petroleum v. The State of Bihar & Ors.) decided on 14th November, 2014 to contend that the cancellation of the notice inviting tender is arbitrary, unjustified and without any cogent reasons,

therefore, the appellant being the next lowest tenderer is entitled for allotment of the works and that the process of inviting fresh tender is unjustified in law.

6. The learned Single Judge considered the said arguments and relied upon the Supreme Court judgments, such as Raunaq International Ltd. V. I.V.R. Construction Ltd., (1991) 1 SCC 492; Jagdish Mandal v. The State of Orissa & Ors., (2007) 14 SCC 517; Heinz India (P) Ltd. & Anr. V. State of U.P. & Ors. (2012) 5 SCC 443. The learned Single Judge found that the Division Bench judgment in M/s. Petroleum (supra) referred to by the learned counsel for the appellant was an appeal arising out of an interim order, therefore, the observation made is confined to the facts of the said case and that keeping in view the fact that the Division referred the matter back to the Writ Court. It was also found that the said case has no applicability to the facts of the present case where the rules of negotiation are contained in the P.W.D. Code, which was not the case under consideration.

7. It may be mentioned that after the order was passed by the Division Bench, the matter was referred to the learned Single Judge. The learned Single Judge dismissed the writ petition bearing CWJC No.14318 of 2014 (M/s. Petroleum Vs. The State of Bihar & Ors.) on 15.12.2014. The order passed by the learned Single Bench is as under:-

> "26. The cogent, convincing and plausible grounds for issuance of a fresh NIT on 13.9.2014 in the opinion of this Court could be none else except the interest of the revenue of the State, inasmuch as whatever had undergone in the period by way of rates of all the bidders known, and the fetching capacity of the sand mining of the area known could definitely have made an impression upon the authorities to go for a fresh bidding, especially when there were two writ petitions and two appeals involving the same issue in which considerable period has already been lost from the month of January to July, 2014. In that view of the matter, this Court cannot find any flaw in the fresh tender notice dated 13.9.2014."

8. Before this Court, the learned counsel for the appellant vehemently argued that keeping in view the findings recorded by the Division Bench in M/s. Petroleum's case (supra), such as paragraph 43, the decision of the State Government has to be a reasoned order and asserting that the cancellation of the tender is in public interest, is not sufficient.

9. Learned counsel for the appellant relied upon the judgments of the Hon'ble Supreme Court reported as Anil Kumar Singh v. Chairman, Dealer Selection Board, Patna & Ors., (2015) 11 SCC 481; Chairman-cum-Managing Director, Indian Oil Corporation Ltd. & Ors. v. Sunita Kumari & Anr., (2014) 16 SCC 790; Monika Gupta v. Union of India & Ors., (2010) 6 SCC 574; and a Division Bench judgment of this Court in L.P.A. No.807 of 2013 (Bihar State Power (Holding) Co. Ltd. V. M/s GKE-SSELJV & Ors.) decided on 9th September, 2013 to contend that the appellant being the next

lowest tenderer, is entitled to allotment of contract in the event of rejection of the bid of the lowest tenderer.

10. Before we consider the respective arguments raised by learned counsel for the parties, some of clauses from the tender documents (Annexure-8 to the writ application) read as under:-

> "**<u>Section-1</u>**
>
> List of Important Dates of Bids for Construction/Up gradation of Roads under Pradhan Mantri Gram Sadak Yojana and their maintenance for five years.
>
> xx xx xx
>
> 18. The undersigned has right to extend or cancel the tender without assigning any reason.
>
> **<u>Section 2</u>**
>
> Instructions to Bidders
>
> xx xx xx
>
> 30. Employer's Right to accept any Bid and to reject any or all Bids.
>
> 30.1. Notwithstanding Clause 29 above, the Employer reserves the right to accept or reject any Bid, and to cancel the bidding process and reject all bids, at any time prior to the award of Contract, without thereby incurring any liability to the affected Bidder or bidders or any obligation to inform the affected Bidder or bidders of the grounds for the Employer's action."

11. We have heard learned counsel for the parties and find no merit in the present Letters Patent Appeal. P.W.D. Code deals with the situation as to with which tenderer, the negotiation can be held. In terms of Rules as reproduced above, the negotiation can be held only with the lowest tenderer. Since the lowest tenderer was disqualified,

therefore, the State could not enter into the negotiation with the next lowest tenderer, i.e. the appellant. In the absence of negotiation, the State would be spending more public money than what was offered by the lowest tenderer; therefore, it is a prudent decision of the State Government to cancel the tender process and to invite the fresh bid to have a fair, transparent bid process.

12. The decision to cancel the notice has to be examined as to whether such decision is actuated by *mala fide* or in discharging of the obligation cast on the State. The question has been examined by the Hon'ble Supreme Court in a judgment reported as State of U.P. v. Al Faheem Meetex (P) Ltd. (2016) 4 SCC 716, wherein the decision was taken to cancel the bid process as there were only two valid bids. It was held that such decision cannot be said to be unfair and *mala fide* or based on irrelevant considerations.

13. In another judgment, reported as Maa Binda Express Carrier v. North-East Frontier Railway, (2014) 3 SCC 760, the Hon'ble Supreme Court examined the scope of judicial review in the matter relating to award of contracts. It was held that submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest tender. The Court held

to the following effect:-

> "8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

14. In another judgment reported as NTPC Ltd. V. Ashok Kumar Singh, (2015) 4 SCC 252, it was held that the revocation of the tender notice is the prerogative of the Corporation in the said case.

15. The three judgments of the Hon'ble Supreme Court referred to by the learned counsel for the appellant arise out of allotment of distributorship of the Public Sector Oil Companies

wherein it has been held that if the lowest tenderer is found ineligible, the letter of intent can be issued to the second lowest bidder. The said judgments have no applicability to the present case as such cases relate to a concession of grant of letter of intent. The State does not spend any money for issuing such letter of intent. The tender process is in public interest so that all eligible tenderer are dealt with fairly in a non-discriminatory manner.

16. In the judgment of the Division Bench of this Court in M/s. GKE-SSELJV's case (supra), the Court found that the Power Company has changed its decision from one to another in quick succession almost as if it was without due application of mind. It is the said fact which weighed with the Division Bench to interfere in the process when the second lowest bid was not accepted. It is a judgment keeping in view the facts of the case which has no applicability to the facts of the present case. But in the present case, the State has to spend public money to seek execution of the contract. No amount of public money can be overspent than what is warranted in law. If the lowest tenderer has been found to be ineligible for any reason, the next lowest tenderer cannot be given contract at the prices offered by him since his prices are going to be higher than the prices offered by the lowest tenderer. It is not in public interest to award contract at a higher price than the price offered by the lowest tenderer.

17. In view of the aforesaid judgments, we find that the

decision to scrap the earlier tender process and to re-issue notice inviting tender cannot be said to be unfair, unjust, arbitrary or irrational. If the bid of the lowest tenderer has been rejected, it was a prudent decision of the State Government to invite fresh tender rather than to award contract to the next highest tenderer and to pay more public money than what was offered at one stage by the lowest tenderer.

18. In view of the above, we do not find any merit in the present Letters Patent Appeal. The same is, thus, dismissed.

(Hemant Gupta, ACJ)

Vikash Jain, J. I agree.

(Vikash Jain, J)

Sunil

AFR/NAFR	A. F. R.
CAV DATE	19.11.2016
Uploading Date	29.11.2016
Transmission Date	