

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.2196 of 2015

IN

Civil Writ Jurisdiction Case No. 8342 of 2015

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1. The Union Of India through the General Manager, East Central Railway, Hajipur, District- Vishali, Bihar.
 2. The Chairman, Railway Board Room No. 256-A, Rail Bhawan, Raisina Road, New Delhi- 110001.
 3. Workshop Projects Organisation through the Chief Administrative Officer, Workshop Projects Indian Railways, 6th Floor, Chamber Bhawan, J.C. Road, Gandhi Maidan, Patna-800001.
 4. Chief Engineer-I, Workshop Projects, Indian Railways, Workshop Projects Organisation 6th Floor, Chamber Bhawan, J.C. Road, Gandhi Maidan, Patna-800001.

.... Appellant/s

Versus

1. Waterfront Constructions Private Limited having its registered office at C-3, Lake View Apartment, 1127, Model, Colony, Shivaji Nagar, Pune represented through Vivek Vithalrao Gawai, son of Vithalrao D. Gawai, Resident of Flat No. 2, Varun Apartment, Peer Bazar, P.S. Usmanpura, District- Aurangabad, Maharashtra.

.... Respondent/s

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Appearance :

For the Appellants : Mr. S. D. Sanjay, Senior Advocate
Mr. Anil Kumar Sinha, Advocate
Mr. Abhimanyu Deo, Advocate
Mr. Ankit Katriar, Advocate

For the Respondent : Mr. Kumar Kaushik, Advocate

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 01-04-2016

This is an appeal, under Clause 10 of the Letters Patent of Patna High Court, questioning the legality of the judgment and order, dated 07.09.2015, passed by a learned single Judge of this Court on an application, registered as CWJC No. 8342 of 2015, filed

by the sole respondent under Article 226 of the Constitution of India. By the judgment and order under appeal, learned single Judge has allowed the said writ application holding that the respondent is qualified to participate in the *financial bid* and has set aside the order disqualifying the respondent from participating in the tender process after rejecting its *technical bid*.

2. Briefly narrated, the facts of the case are that the appellants, who were the respondents in the writ proceeding before the learned single Judge, had issued a notice inviting tender (NIT), on 13.11.2014, for earth filling work, construction of road, boundary wall as well as minor bridges within the workshop area, connecting traffic yard, road, diversion road, etc in connection with setting up of Wagon POH at Badnera, District Amravati (Maharashtra). From the pleadings and documents on records, it transpires that the aforesaid N.I.T. was issued by the Office of the Chief Administrative Officer, Work Shop Projects, Chamber Bhawan, Patna. The tender documents stipulated “*two packet system*” of tendering for completing the process of tender. Under the said process, the tenderers were required to submit their quotations/offers in two sealed envelopes; i.e., one cover containing “*technical and commercial condition*” and the other cover containing “*the financial bids*”. The first packet was required to be submitted with the



objective of scrutinizing the capability, possession of appropriate machinery and equipments, financial strength, experience, etc., of the tenderers. The Indian Railways have laid down the standard general conditions of contract and Clause 7A thereof deals with two packet system of tendering. It requires that technical details and commercial conditions (packet-I) shall be read out before the tenderers or their representatives at the time of opening of tenders and they shall be evaluated by the Tender Committee. If the applications are found acceptable by the competent authority, the second packet is required to be opened and the tenders to be processed for finalization in the normal manner. It further contemplates that if, on the basis of the information contained in the first packet, the Tender Committee needs clarification regarding design, specification, etc., discussion shall be held with each individual party/tenderers after obtaining approval of the competent authority.

3. Clause 4 of Chapter III of the N.I.T., in question, lays down *minimum eligibility criteria* for the tenderers, relevant portion whereof is being extracted hereinbelow:-

“4.1 Contractor should have completed in the last three financial years (i.e. current year and three previous financial years), at least one “similar work for minimum value of 35% of Advertised tender

value, clarified as under:-

4.1.1 Similar nature of work physically completed within the qualifying period, i.e., the last 3 financial years and current financial year (even though the work might have commenced before the qualifying period) should only be considered in evaluating the eligibility criteria.

4.1.2 The total value of similar nature of work completed during the qualifying period and not the payments received within qualifying period alone, should be considered.”

x	x	x	x
x	x	x	x

4. It is evident from the minimum *eligibility criteria*, reproduced above, that the contractors should have completed, in the last three financial years (i.e., current financial year and three previous financial years), at least, one single work for minimum value of 35% of the advertised tender value. It is not in dispute that initially, estimated cost of the project was Rs. 24.43 crores, which was subsequently changed to Rs. 22.60 crores by issuing a corrigendum.

5. Upon considering the amended estimated cost of the Project and the requirement under Clause 4 of the special conditions of tenders, laying down the eligibility criteria, it can be easily culled out that to become eligible, a Contractor should have

completed, at least, one single work for minimum value of 7.91 crores (35% of the advertised tender value at Rs. 22.60 crores) between 01.04.2011 and 16.01.2015. There is no dispute between the parties in this regard.

6. The respondent, which is a Company registered under the Indian Companies Act, 1956, in the year 2009, is said to be engaged in providing construction services. In response to the N.I.T., the respondent applied and submitted its technical and *financial bids* before the concerned authority, on 15.01.2015, along with all relevant documents including the documents in support of its claim that it had the experience of completion of work of similar nature as contemplated under Clause 4 of Chapter III aforesaid. The details in support of the claim that the respondent Company had completed the tender work and the supporting documents are there, which have been brought on record by way of Annexure-R/3 to the supplementary counter affidavit, filed in the writ proceedings on behalf of the appellants.

7. As required, the *technical bid*, i.e., Packet I, was opened by the Tender Committee on 19.01.2015. The Tender Committee found the respondent Company lacking in eligibility as none of the works shown by it satisfied the criteria as prescribed in Clause 4 of the tender conditions.



8. The respondent-Company, aggrieved by the rejection of *technical bid* by the appellants, approached this Court by filing an application, under Article 226 of the Constitution of India, which gave rise to CWJC No. 8342 of 2015, seeking a direction to the Workshop Projects Organization (Respondent No.3) to reconsider the tender papers submitted on behalf of the Company and permit its participation in the *financial bid*. Setting aside of the decision taken by the respondent rejecting the *technical bid* of the respondent Company was also sought for.

9. From the pleadings in the writ application, we find that the respondent took a plea that the representative of the respondent was never informed that its *technical bid* had been rejected. It is pleaded in the writ application that the Company was never informed either about the date of opening of *financial bid* or about rejection of its *technical bid* despite the fact that the representative of the Company was in regular touch with the office of the appellant. Only when the *financial bid* of the Company was not opened by the respondent authority on 25.05.2015 that the representative of the Company filed a representation on 28.08.2015 raising a grievance of non-communication of grounds for rejection of the *technical bid*. It is pleaded in the writ application that total contractual amount received by the respondent Company during last

three financial years and current financial year (2014) is much more than 150% of the advertised tender value inasmuch as the Company had received Rs. 36,82,59,141 during the financial year 2011-12, Rs. 60,19,39,592 during the financial year 2012-13 and Rs. 75,03,01,822 during the financial year 2013-14 from Civil Engineering contracts, which is much more than 150% of the advertised tender value of Rs. 22.60 crores.

10. Opposing the reliefs sought for in the writ proceedings, the appellants filed a counter affidavit asserting therein that the respondent Company had submitted a list of 7 works. Out of the works, so enlisted, one work at serial No.3, the date of completion was shown as 19.10.2014, which was within the required period, i.e., 01.04.2011 to 16.01.2015. The name of the work was given as “construction of M.I. Tank @ Kumbhavadi Tal, Vaibhavwadi District- Sindhavurg”. In support of the said work, the respondent Company had relied on a certificate issued by the Executive Engineer, Small Scale Irrigation, (W.C) Division, Kuwarbao, Ratnagiri. From the said certificate, it appeared that the work, which, according to the respondent, had been completed was, in fact, in progress. The appellants, in their counter affidavit, in the writ proceedings, thus, took the stand that statement of the tenderer, submitted in Serial No. 3 of the requisite annexure regarding date of

completion of work, was found to be false.

11. The respondent Company, thereafter, filed a rejoinder to the counter affidavit in the writ proceedings asserting that with respect to Item No.7 of the details of work of similar nature of prescribed value, which had been completed in last three years, it was out of an inadvertent clerical error that the date “15.03.2015” was typed as the date of completion of work, though the respondent Company had completed the work on 25.03.2012 itself. According to the respondent Company, the authorities, while considering the *technical bid* and rejecting the claim of completion of work of similar nature within the stipulated period, ought to have looked into the documents/certificate attached in support of such claim. According to the respondent Company, had the Company been given an opportunity at the time of opening the *technical bid* and before rejecting the *technical bid*, it could have clarified the position. The certificate, in support of work No.7 given in the list, was brought on record by way of Annexure 5 to the rejoinder in the writ proceedings.

12. The learned single Judge, after having considered the rival pleadings and submissions advanced on behalf of the contesting parties, framed following issues for the purpose of final adjudication of the case:-

“(i) Whether it was an inadvertent typographical/clerical error committed by the petitioner while submitting the details of the works undertaken in the last three financial years, in so far as it related to item Nos. 3 and 7?

(ii) Whether the error so committed by the petitioner was bonafide and capable of rectification or was sufficient to call for his disqualification in the *technical bid*?

(iii) Whether the Tender Committee even after noticing that the petitioner had enclosed a certificate confirming one such work which stood completed within the prescribed period, of the value so desired in the tender notice, yet could proceed to disqualify the petitioner?

(iv) Whether the decision of the Tender Committee simply rests on the incorrect information supplied by the petitioner in relation to the work mentioned at item no.3 of the list of works?”

13. The learned single Judge arrived at the conclusion that there were errors in the list of works No. 3 and 7 submitted by the respondent Company in its *technical bid* reflecting incorrect dates of completion of work. The date of completion of work, at Item No. 3, was shown to be on 19.10.2014, whereas the said work was still in progress as was evident from the certificate attached in support of the claim of the Company to have completed the work.

Scheduled date of the completion of the said work was 06.02.2017.

As regards work No.7, the date of completion of work was given as 15.03.2015 by the Company itself, whereas, according to the certificate brought on record by way of Annexure-R/3 in the counter affidavit filed by the appellants, the work was shown to have been completed on 25.03.2012 itself.

14. The learned single Judge, therefore, held that even if the work, enlisted in Item No.3, was to be ignored, while assessing the claim of the Company as regards completion of work of desired value within stipulated period, the Tender Committee ought to have noticed the completion certificate available in relation to the work at item No.7. The learned single Judge also held that the Tender Committee ought to have considered the eligibility criteria of the respondent Company taking into account the certificate attached with respect to the work No.7. The learned single Judge further held that the act of the appellants, in disqualifying the Company on the basis of the certificate available in relation to work at Item No.3 but not giving him the benefit in relation to the work at item No.7 on the same account, though the required certificate was available in the tender papers, was arbitrary and, therefore, not capable of being upheld. Accordingly, by the order under appeal, the learned single Judge set aside the order passed by the Tender Committee

disqualifying the respondent from participating in the tender process.

The learned single Judge, on the basis of the information available on record, held that the Company was qualified to participate in the *financial bid* and, accordingly, directed the Tender Committee of the appellants, Union of India, through the Ministry of Railways, to re-evaluate the *financial bid* afresh and take a final decision in accordance with law.

15. The appellants are aggrieved by the order of the learned single Judge and have presented this appeal under Clause 10 of the Letters Patent of this Court.

16. Mr. S.D. Sanjay, learned Senior Counsel, appearing on behalf of the appellants, has submitted that the judgment and order, under appeal, suffer from factual and legal infirmities. He has submitted that from the details of work submitted by the Company itself, it was found that the Company claimed to have completed only one work of tender value within stipulated period. He has submitted that the Company itself has admitted that there was an error in the *technical bid* to the extent that date of completion of work No.7 was wrongly mentioned as 15.03.2015 in place of 25.03.2012. He has further submitted that the certificate, in support of completion of work No.7 issued by the Executive Engineer, Small Scale Irrigation (W.C.) Division, Ratnagiri, is of no help to the



tenderer inasmuch as Clause 4 of the said certificate shows that balance amount of work of Rs. 130.04 lacs was still pending. It has been submitted, referring to the said certificate, that one Mr. R. S. Miragane Barshi, District Solapur, has been shown to be the contractor and the work is shown to have been sublet to respondent Company vide an agreement, dated 07.11.2006. He contends that no agreement, dated 07.11.2006, has been brought on record by the respondent Company. He has further submitted, referring to the rejoinder filed on behalf of the Company in writ proceedings, that the said work is said to have been assigned by the said R.S. Mikragane Barshi to Sri Ram Associates on 01.03.2003, which was, later on, taken over by the present Company, i.e., Waterfront Constructions Private Limited on 01.04.2009. He has accordingly argued that the work, which the respondent Company is said to have completed after the same having been assigned to it on 01.04.2009 by Sri Ram Associates, was for the original allottee of the work, i.e., R.S. Miragane Barshi. Mr. S. D. Sanjay contends that the manner in which the respondent Company claims to have executed the work of Item No.7 is, in fact, a work done by the Company for the private agency, i.e., R. S. Miragane Barshi. He has also submitted that the said certificate cannot be treated to have been issued in favour of the respondent Company. The certificate merely shows that the work

had been sublet to respondent Company.

17. Mr. Kumar Kaushik, learned counsel appearing on behalf of the respondent Company, defending the order, under appeal, has submitted that it was mandatory for the Tender Committee to have informed the respondent Company about the discrepancies in the *technical bid* to the extent it related to work No.7 and ought to have got it clarified. According to him, the Work Project Organization has issued a letter, dated 23.09.2013, in compliance of an order passed by the Delhi High Court that whenever a tender was rejected or tender document was not issued and if a party required reasons, it was necessary that reasons be communicated to such parties to avoid unnecessary litigations. He has also submitted that the ground for rejection of the *technical bid* of the respondent Company was that incorrect date of completion of work No.3 was mentioned, though the work was still in progress and was about to be completed in the year 2017. He submits that, admittedly, the respondents failed to take into account the documents pertaining to work No.7, which the Company had, in fact, completed. According to Mr. Kumar Kaushik, learned counsel for the respondent, the appellants took undue advantage of an inadvertent typographical error in the list of works submitted by the Company showing 15.03.2015 instead of 25.3.2012 as the date of



completion of work. He has submitted that the appellants are estopped from taking a new plea for the first time, in the present appeal, with regard to work No.7. He contends that the Tender Committee ought to have considered the certificate submitted by the Company at the time of processing the *technical bid*, which they did not do and the learned single Judge has rightly set aside order disqualifying the respondent Company from participating in opening of the *financial bid*.

18. Mr. Kumar Kaushik, learned Counsel for the respondent, has placed reliance on a Supreme Court's decision in case of ***Rashmi Metaliks Limited Vs. Kolkata Metropolitan Development Authority***, reported in (2013) 10 SCC 95, to contend that mistake/typographical error, in the list of work submitted by the Company, was capable of being rectified and, on such hyper technical ground, the *technical bid* of the respondent was wrongly rejected and, therefore, learned single Judge has rightly allowed the writ application.

19. What has emerged from the pleadings on record and submissions advanced on behalf of the parties that the respondent Company had given details of work of similar in nature in order to claim his eligibility in terms of Clause 4 of the conditions of contract as noted above. We have noticed from materials on



record, over which no dispute has been raised, that in order to be eligible, the tenderer ought to have completed the work of prescribed value or more between 01.04.2011 and 16.01.2015. The Company had attached certificate issued by the different authorities. A bare perusal of the details so given shows that the respondent Company relied on work Nos. 1, 2, 4, 5 and 6, which were, admittedly, not completed and were still in progress or had been completed much before the stipulated period. As against work No.3, the date of completion was incorrectly given as 19.10.2014.

20. The dispute, thus, is confined to work No.7 and the questions, which we are required to address as to whether on the basis of the information available on record, learned single Judge could have held the respondent Company/writ petitioner to be having the eligibility criteria, leading to setting aside of the Tender Committee's decision rejecting the *technical bid* with a direction to the appellant to evaluate the *financial bid* of the respondent Company.

21. Apparently, the contract of work, at Item No.7 of the list containing the details of work submitted by the respondent Company, was awarded to one R. S. Miragane Barshi. The date of work order, issued in favour of R. S. Miragane Barshi, was 07.10.2002. The said certificate refers to an agreement, dated



07.11.2006, through which the work had been sublet to respondent Company. It is not even the case of the respondent Company that the work was sublet to it in the year 2006. On the other hand, it transpires from the rejoinder filed on behalf of the Company to the counter affidavit that the contract, pertaining to work No.7, was awarded, in favour of R.S. Miragane Barshi, in the year 2002. He assigned the said work in favour of one Sri Ram Associates, who was said to be instrumental in obtaining the work order. Clause 5 of the assignment of contract in favour of Sri Ram Associates reads thus:-

“5. The cheques, demand drafts received from the said department towards bill payments will be deposited in the bank account of assignor with Ichalkaranji Janta Sahakari Bank Ltd. bank and the assignor shall always bound and further undertakes to issue the cheque immediately to the assignee towards the bill payment as mentioned hereinabove.”

22. Upon perusal of the said assignment of contract by Sri R. S. Miragane Barshi, in favour of Sri Ram Associates, it can be easily deciphered that Sri Ram Associates was made to work for Sri R. S. Miragane Barshi for completion of the work. It is the case of the respondent Company that said Sri Ram Associates had assigned the work in his favour in the year 2009 and accordingly, the

certificate, in question, in support of work No.7, should be treated to have been issued in favour of the respondent-Company.

23. We are unable to accept the contention that the certificate, in relation to work No.7, can be treated to be a certificate in favour of the respondent Company for more than one reason. It is mentioned in the certificate that the work was sublet to respondent Company through an agreement, dated 07.11.2006. There is nothing on record to substantiate this fact. Secondly, the work order was issued in the year 2002. The respondent Company claims to have taken over the work in the year 2009. In any event, even on the basis of the said certificate in respect of work No.7, the respondent Company cannot be said to have completed the desired value of work. We notice from page 2 of the said certificate that a substantial amount for the said work was already done before the work was assigned to the respondent Company.

24. Having considered the above factual aspects, we are clearly of the view that the Supreme Court's decision, in case of ***Rashmi Metaliks Limited*** (supra), has no application to the present facts and circumstances of the case as the respondent Company has not been able to establish that it fulfilled the basic requirement of Clause 4 of the special condition of contract as noted above. The certificate, as contained in Annexure-R/3 of the counter affidavit,

which was filed by the respondent Company along with *technical bid* in support of its claim of eligibility, is of no help as the said certificate cannot be said to have been issued in favour of the Company.

25. The finding, recorded by the learned single Judge that in view of the said certificate, the respondent Company satisfied the eligibility criteria cannot be upheld.

26. The judgment and order, dated 07.09.2015, passed by the learned single Judge, in the facts and circumstances as noted above, requires interference. The said order, dated 07.09.2015 passed by the learned single Judge is, accordingly, set aside. Consequently, C.W.J.C. No.8342 of 2015 stands dismissed.

27. This appeal is, accordingly, allowed.

28. There shall, however, be no order as to costs.

(Chakradhari Sharan Singh, J)

I.A.Ansari, ACJ:- I agree.

(I.A. Ansari, ACJ))

ArunKumar/-

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