

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 2614 of 2016**

Ashish Kedia S/o Shri Ashok Kedia, Aged About 33 Years Proprietor M/s Ashish Kedia Railway Constructor And Order Supplier, Having Its Office At Near Shastri Chowk Akaltara, District Janjgir Champa, Civil & Revenue District Janjgir Champa Chhattisgarh

---- Petitioner**Versus**

1. State of Chhattisgarh Through The Secretary, Public Works Department, Mahandi Bhawan, Mantralaya, Naya Raipur Chhattisgarh
2. The Municipal Council, Through Its Chief Municipal Officer, Akaltara District Janjgir Champa Chhattisgarh

---- Respondents

For Petitioner : Shri Vivek Chopda, Advocate.
 For Respondent/State : Shri Arun Sao, Deputy Advocate General
 For Respondent No. 2 : Shri Vinay Pandey, Advocate.

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Sanjay Agrawal, J.

Judgment on Board**Per Deepak Gupta, Chief Justice****31/01/2017**

1. By means of this petition, the Petitioner has prayed for a writ restraining the Respondent-Municipal Council, Akaltara from proceeding further with the tender process pursuant to tender notice dated 24.09.2016 and has also prayed that he being the sole successful qualifying tenderer in the earlier tender dated 22.07.2016, the tender for the work of beautification of Gopiya pond, be awarded to the Petitioner.
2. There is no dispute about the facts of the case. On 11.04.2016, the Municipal Council-Akaltara issued an e-procurement tender notice inviting tenders

for beautification of Gopiya Talab at Akaltara with total probable amount of contract was assessed at Rs. 27.16 lacs. Alongwith the tender, the tenderers were also required to submit documents in terms of condition No. 12 which reads as follows:

“12. “All the contractors are required to submit Envelope A & B physically & online document mandatory containing the following:”

I. Attested copy of Registration certificates.

II. Scan copy of original EMD instrument.

III. Experience Certificate.

IV. Attested copy of Income Tax Return Clearance (Saral copy) Certificate.

V. Attested copy of valid Commercial Tax Registration certificate in state of Chhattisgarh/valid Commercial Tax clearance certificate.

V. Attested copy of valid Solvency certificate or registration amendment certificate in respect of submission of interest bearing instrument as security.”

3. The Petitioner took part in this tender process, however, this tender process was cancelled. Thereafter, a fresh tender was invited on 22.07.2016 for the same project with the same estimated cost and with the same terms and conditions. The Petitioner participated in this tender process. There were 9 tenderers and out of them, the tender of 8 tenderers were technically rejected and therefore, the Petitioner was the sole technically qualified tenderer. However, instead of awarding the tender to the Petitioner, a fresh tender notice was issued on 24.09.2016. Though, the project remains the same, the cost remains the same, but the essential conditions with regard to qualification criteria i.e. experience as quoted hereinabove, was deleted and even in the documents to be filed now, the experience certificate, solvency certificate and affidavit of Engineer concerned

were not required to be filed. The Petitioner did not take part in the last tender process but when the last tender process was just started, he approached this Court challenging the action of the Municipal Council-Akaltara, for floating this tender.

4. Return has been filed by the Respondents and with respect to cancellation of the first tender floated by them, the Municipal Council relies on a letter dated 03.05.2016 issued by the Director, Urban Administration and Development Department wherein it has been directed that in all tenders floated after 12.04.2016, the tenders should be floated through M/s. Mjunction Services Limited whereas, earlier they were being floated through the Next Tender. Since the Petitioner has participated in the second tender, we are not going into the validity of the second tender but we are constrained to observe that the manner in which the first tender has been cancelled is not at all proper. The letter of 03.05.2016 only states that the tender which are floated after 12.04.2016 should be floated through Next Tender. The first tender in this case had already been floated on 11.04.2016 i.e. prior to 12.04.2016. Therefore, there was no justifiable reason to cancel the tender. This has been cancelled arbitrarily and totally interpreting the letter dated 03.05.2016.

5. In the State of Chhattisgarh, we have been observing that the tenders are issued and cancelled at the whims and fancies of the officials. No doubt the authority inviting the tender has a right to cancel the tender but this must be cancelled for justifiable reasons. The process of floating tenders, inviting tenders and evaluating the tenders is time consuming and costs money to the public exchequer. These tenders should not be cancelled merely because 'suitable' tenderers are not available.

6. Tenders cannot be cancelled without giving reasons why they are being cancelled. Those reasons must be on the file and they must stand scrutiny of law. As far as this case is concerned, cancellation of the first tender, in our opinion, is without any justification. However, since the Petitioner has taken part in the second tender process, he has acquiesced and therefore, we are not going into the other aspects but are pointing out this fact to the officers of the State that the tenders cannot be cancelled merely because they want it to be cancelled. There must be reasons available for cancellation of the tender.

7. The second tender was floated on 22.07.2016. As pointed out above, there were 9 tenderers and only the Petitioner was found to be technically qualified. Instead of awarding tender to him, it was decided to float a fresh tender on the ground that since there was only one tenderer, it would not be advisable to award the tender to him. This may be a justifiable reason to float fresh tender that there was only one technically qualified tenderer and there may not be adequate competition. But the practice all over the country is that this is normally done only when the tender is floated for the first time. If in the second tender also, there is no competition, then the single tenderer will have to be awarded the contract. We are saying so because if the tenders get delayed, not only the project gets delayed but due to inflation, cost of the project also escalates. We may also refer to the order dated 28.01.2014 issued by the State Government wherein it is clearly mentioned that when the first tender is floated and there is only one qualified tenderer, then normally the contract should not be awarded to him. However, in the second call, if there is a single qualified tenderer, then he should be awarded the contract.

8. As far as this case is concerned, when the tender was floated for the second time on 22.07.2016, at the top of the notice, the Municipal Council itself

has written 'second call' which means it was treating it to as second tender. However, if evaluation of the tender received in response to the first tender had not been done, then we may permit the Respondents to go for a a fresh tender.

9. Be that as it may, the Respondents issued a fresh tender and interestingly as pointed out above, the condition with regard to experience was deleted. We are dealing here with a project relating to beautification of pond. This is not a work that everybody can do. This is a specialized type of work and when earlier there was a condition prescribing experience of similar works, we see no reason why this condition should have been deleted on the third occasion. When on earlier two occasions, this condition was there, why should it not be on the third occasion. The only justification given is that because of lack of competition, the said condition was decided to be deleted. We are not at all satisfied with this argument.

10. The law is well settled that whenever the State or public authority are dealing with contracts, they cannot violate Article 14 of the Constitution. In this behalf reference may be made to the judgment delivered by the Apex Court in *E.P.Royappa v. State of Tamil Nadu & Another* {1974 AIR 555}.

11. It is more than apparent to us that the condition with regard to experience was removed only to ensure that the contract is given to somebody else who may not even have any experience in the work of beautification of the work of pond. This would amount to wastage of public funds. The condition in a tender cannot be tailor-made to suit the official or their favourite contractors. When there was already a condition of experience which is a salutary condition, why should such a condition be removed? We could have understood if no technically qualified person had bid in the tender. Here, the Petitioner who is technically qualified had bid in the first as well as in the second tender and if in the first tender also, his bid

has been evaluated, then we see no reason, why in the second bid if he was the sole tenderer, the tender should not have been awarded to him.

12. We therefore dispose of the writ petition with the following directions:

(i) The third notice inviting tenders is quashed and all action pursuant thereto are set aside.

(ii) In case, technical bid of the Petitioner has been evaluated in the first tender and he was the sole technically qualified person in the first tender also, then he shall be awarded the contract in terms of the second tender.

(iii) In case, the Petitioner was not the sole qualified bidder in the first tender or the technical bids were not evaluated, then the Respondents shall be at liberty to float a fresh tender for beautification of this project but they shall include the condition with regard to experience as was there in the first tender.

13. The Respondent No. 2 is directed to file his affidavit within a period of two weeks and shall also produce the entire records of the first tender to show whether the technical bid of the Petitioner was evaluated or not.

14. List on 14.02.2017 only for the purpose of filing of the affidavit.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(Sanjay Agrawal)
Judge