AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 3621 of 2019

M/s Surana And Company A Proprietorship Concern, Through Its Proprietor Rajendra Surana, S/o Shri Hukumchand Surana, Aged About 58 Years, Having Its Office At SM-39, Padmanabhpur, Durg, District Durg Chhattisgarh

---- Petitioner

Versus

1. State of Chhattisgarh Through Secretary, Department of Public Works, Mantralaya, Mahanadi Bhawan, Nawa Raipur, Atal Nagar, District Raipur Chhattisgarh
2. Engineer In Chief Public Works Department, First Floor, Nirman Bhawan, North Block, Sector-19, Nawa Raipur, Atal Nagar, District Raipur Chhattisgarh
3. Chief Engineer Tender Cell In-Charge, Office Of Engineer In Chief, Public Works Department, First Floor, Nirman Bhawan, North Block, Sector-19, Nawa Raipur, Atal Nagar, District Raipur Chhattisgarh

---- Respondents

For Petitioner : Shri Anand Dadariya, Advocate.
For Respondent/State : Shri Gagan Tiwari, Deputy Govt. Advocate.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

Order on Board

P. R. Ramachandra Menon, Chief Justice

04.10.2019

1. Whether the attestation stated as made by the Notary to the affidavit sworn to by the Petitioner on the relevant date, despite the fact that the authorization to act as 'Notary' had expired long ago, could be accepted as

a valid document submitted along with the tender (so as to permit the Petitioner to participate in the bid) and whether a subsequent affidavit duly notarized and produced by the Petitioner could be considered and acted upon to declare the eligibility are the questions to be answered by this Court.

2. The grievance projected is with regard to rejection of the technical bid of the Petitioner as per Annexure P/1 order. The sequence of events reveals that Annexure P/3 Notice Inviting Tender ('NIT', in short), was issued by the 3rd Respondent on 06.08.2019 in connection with three different works/packages involving construction of roads in different sectors. The Petitioner sought to participate in respect of Sl.No.3 of the packages i.e. “Construction and Maintenance of road from Masulpani to Jamgaon Road (Batch-II Fourth Call)” and submitted the bids i.e. 'technical bid' and 'price bid' separately, as insisted in the NIT.

3. On 17.09.2019, an explanation was sought for as per Anneuxre P/4, on the basis of a complaint received, that as on the date of attestation, the authority of the Notary had already expired. This was replied by the Petitioner as per Annxure P/5 dated 18.09.2019 pointing out that an application for renewal had already been submitted and it was pending. Thereafter, a fresh affidavit, duly notarized was also produced, seeking to have his bids considered. This however did not yield any positive result and the technical bid was rejected vide Annexure P/1, which made the Petitioner to approach this Court by filing the writ petition with the following prayers :-

> “10.1 That, this Hon'ble Court may kindly be pleased to issue appropriate writ/writs quashing the impugned communication/email dated 28.09.2019(ANNEXURE-P/1) issued on behalf of the respondents rejecting and holding petitioner disqualified for the bid submitted by the petitioner for Tender No. 54151 of NIT No. 079/TC/EinC/PWD/2019-20 for construction and maintenance of RCP LWE Road Masulpani to Jamgaon;
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> 10.2 That, the Hon'ble Court may kindly be pleased to issue appropriate writ/writs, order/orders direction/directions to the respondents to consider and open the price-bid submitted by the petitioner for Tender No. 54151 of NIT no. 079/TC/EinC/PWD/2019-20 for construction and maintenance of RCP LWE Road Masulpani to jamgaon;
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> 10.3 That, the Hon'ble Court may kindly be pleased to grant any other relief, including the cost of this petition, as it appears to be fit and appropriate to this Hon'ble Court.”

4. Shri Anand Dadariya, learned counsel appearing for the Petitioner submits that the course pursued by the Respondents is *per se* wrong and illegal in all respects; that the reason shown to reject the technical bid of the Petitioner is not a ground to disqualify the Petitioner from participating in the tender proceeding as given in 'Clause 4.7' of Annexure P/3 NIT; that the affidavit to be given is only formal to the effect that all the particulars given by the bidder are correct and there is no case that any of the

information furnished by the Petitioner was wrong or that he had suppressed any material fact. The Petitioner contends that he satisfied all the conditions/requirements as envisaged under 'Clause 25.1' and that submission of affidavit is not a mandatory condition, but just a collateral norm, which could not have been a reason to reject the technical bid. It is pointed out that the last date for submission of the bid was on 19.08.2019, which came to be extended to 28.06.2019 and the Petitioner, having submitted his bid on 21.06.2019, 'online', with all the relevant documents, it ought to have been considered by the Respondents. Learned counsel submits that the price quoted by the Petitioner is so attractive, that it is much lower than the rate quoted by the lowest among the other bidders, by virtue of which, much amount can be saved by the State Government as well.

5. In connection with the attestation of documents by Notary, the learned counsel submits that the authorization certificate was issued to the Notary for a period of 5 years from 10.05.1999, which was renewed for a further period of 5 years, as per certificate dated 24.07.2010, with effect from the date of expiry i.e. 10.05.1999. The right to practice was renewed for a further period of 5 years on 31.07.2014, with effect from 10.05.2014, by virtue of which, it was valid till 10.05.2019. In fact, the Notary who has attested the affidavit of the Petitioner, had submitted his application for renewal on 31.10.2018, i.e. much before expiry of the term and the requisite fee was satisfied. These factual aspects are sought to be substantiated by producing copies of the relevant documents. However, the renewal certificate came to be issued by the competent authority on

23.08.2019, only prospectively, under some misconceived notion, as if the application for renewal was submitted by the Notary after expiry of the tenure (as reflected from the data discussed in the certificate, that the certificate had expired on “10.05.2018”, whereas it ought to have mentioned as “10.05.2019”). Since the application for renewal was preferred on 31.10.2018, well before expiry of the tenure, the renewal ought to have been given with effect from the date of expiry i.e. 09.05.2019.

6. Learned counsel points out that the Notary has already moved the competent authority (by way of 'Document No.7') to rectify the mistake and to give renewal with effect from date of expiry, which is stated as still pending. The crux of the submission of learned counsel for the Petitioner is that, no 'mistake' or 'misrepresentation' was done by the Petitioner in any manner; nor is there any lapse or suppression on his side. The expiry of tenure of the certificate of authorization of the Notary was not a piece of information which was available with the Petitioner and that the 'affidavit' itself is not a mandatory document, as it is only in assertion of the correctness of the contents of the tender and the documents produced. The said defect is 'curable' and in fact, it has been cured by the Petitioner, by producing a 'fresh affidavit', duly notarized. Reliance is sought to be placed on the verdict passed by the Apex Court in the matter of **Rashmi Metaliks Limited and another v. Kolkata Metorpolitan Development Authority and Others**[1]**.**

7. Shri Gagan Tiwari, learned counsel representing the State submits that the

[1] **(2013) 10 SCC 95**

scope of interference by this Court in such matters is very limited, which cannot be in respect of the decision taken, but the 'decision making process'. This being the position, the scrutiny is only to ascertain whether there is any defect in the 'decision making process' pursued by the authorities concerned. The admitted facts put-forth by the Petitioner reveal that the affidavit submitted by the Petitioner <u>was not duly notarized</u> on the relevant date, as the authority of the Notary to certify the document had already expired and the Notary was not holding a valid certificate on the relevant date. Effect of notarization is highlighted with reference to Section 5 and Section 9 of the Notaries Act, 1952, which are extracted below for convenience of reference :-

> **“5. Entry of names in the Register and issue or renewal of certificates of practice.**-(1) Every notary who intends to practice as such[may], on payment to the Government appointing him of the prescribed fee, if any, be entitled-
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> (a) to have his name entered in the Register maintained by that Government under section 4; and
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> (b) to a certificate authorizing him to practice for a period of [five year] from the date on which the certificate is issued to him.
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> [(2) The Government appointing the notary, may, on receipt of an application and the prescribed fee, renew the certificate of practice of any notary for a period of five years at a time.]

> ***9.* Bar of practice without certificate.-** (1) Subject to the provisions of this section, no person shall practice as a notary or do any notarial act under the official seal of a notary unless he holds a certificate of practice in force issued to him under section 5:
>
> Provided that nothing in this sub-section shall apply to the presentation of any promissory note, *hundi* or bill of exchange for acceptance or payment by the clerk of a notary acting on behalf of such notary.
>
> (2) Nothing contained in sub-section (1) shall, until the expiry of two years from the commencement of this Act, apply to any such person as is referred to in the proviso to clause (d) section 2:[Provided that in relation to the State of Jammu and Kashmir the said period of two years shall be computed from the date on which this Act comes into force in that State.]"

8. The learned counsel for the State submits that, so as to certify any document by a Notary, by way of attestation, he should hold the certificate authorizing him to do such act and in the instant case, the Notary was admittedly not holding a valid certificate on the date of attestation. This being the position, there was no valid attestation of the affidavit on the relevant date and as such, the affidavit submitted by the Petitioner could not have been considered and hence rejected by the authorities. It is also pointed out that the decision rendered by the Apex Court and sought to be relied on by the Petitioner stands on different footing, as it is in relation to production of a document, which was not a mandatory requirement, unlike

the instant case, where it is 'mandatory', as revealed from the tender proceedings. Specific reference is made to the proceedings bearing NIT No.079/TC/EinC/PWD/2019-20 dated 05.08.2019 issued by the Chief Engineer (In-charge Tender Cell), O/o Engineer-in-Chief, PWD, (forming part in the Annexure P/3 NIT). The penultimate paragraph of the said document clearly stipulates that the bidders are required to submit (a) Original bid security in approved form and (b) Original affidavit duly verified and notarized as per Clause 4.4B(a)(ii) and 4.4B(c) to the Chief Engineer, Tender Cell, Nirman Bhawan, PWD, North Block, Sector-19, Nava Raipur, Atal Nagar (CG) 492002, as per provisions of bid document, through Speed/Registered Post, failing which the bids shall be declared non-responsive. Clause 4.4B(a) is reproduced below :-

> "4.4 B (a) Each bidder must produce:
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> (i) Copy of PAN Card issued by Income Tax Authorities;
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> (ii) An affidavit that the information furnished with the bid documents is correct in all respects; and
>
> (iii) Such other certificates as defined in the Appendix to ITB. Failure to produce the certificates shall make the bid non-responsive."

9. The format of the affidavit to be submitted along with the tender as aforesaid bears the specific Clause 4.4B(a)(ii). It also contains a '<u>Note</u>' at the top, to the effect that "<u>the affidavit should be on a non-judicial stamp paper of Rs.10/- attested by Magistrate/Sub-Judge/Notary Public</u>". By usage of the specific terminology '**<u>shall</u>**', it is again mandated that the

affidavit to be submitted by the tenderer in the particular form had to be attested in the particular manner, which cannot be watered down at all. On the date of attestation, since the Notary was not holding certificate of authority at all, in terms of the relevant provisions of the statute, it is not a valid attestation and there is no provision either in the Act or the Rules to have the certificate of practice to be renewed automatically, on submitting the application by the Notary, satisfying the prescribed fees.

10. In the instant case, admittedly, the renewal has been given only with effect from '09.05.2018'. Even if the application preferred by the Notary to correct the mistake is accepted and acted upon favourably, it cannot tilt the balance in any manner, with regard to the course of action pursued by the Respondents in rejecting the technical bid, submits the learned counsel for the State. It is also pointed out that, if at all the Petitioner has sustained any loss due to the lapse or mischief committed by the Notary, the remedy can only be by way of appropriate action to be taken against the Notary and not against the State Government.

11. Learned counsel for the Petitioner, however, points out that the technical defect with regard to execution of the affidavit cannot be a ground to 'disqualify' the Petitioner from participating in the proceedings, as the circumstances under which, the Petitioner could be disqualified have been clearly mentioned in Clause 4.7 of Annexure P/3 NIT, which does not take in such a situation. This is sought to be answered by the learned counsel for the State pointing out that the said Clause is not applicable to the case in hand, as it deals only with 'disqualification' of the persons who stand

already qualified. In the instant case, the Petitioner did not cross the first hurdle to get qualified, for not having valid/proper attestation by the Notary, prescribed as a mandatory requirement under Clause 4.7, which reads as under :-

> "4.7 Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have:
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> (i) made misleading or false representations in the forms, statements, affidavits and attachments submitted in proof of the qualification requirements; and/or
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> (ii) record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc; and/or
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> (iii) participated in the previous bidding for the same work and had quoted unreasonably high or low bid prices and could not furnish rational justification for it to the Employer; and/or
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> (iv) On acceptance of bid the bidder or its any of the partner has not signed the contract for what so ever the reason may be, bidder shall not be allowed to bid for that particular work or bid submitted by him will be treated as non responsive."

12. On going through the above Clause, it is clear that all the four different instances are with reference to the case of bidders who meet the qualifying criteria, whereby they could be disqualified, if they come under

any of the sub-clauses i.e. (i) to (iv) mentioned therein. After hearing both the sides and after going through the materials on record, we are of the view that the 'disqualification' of bidder is something different from 'rejection' of the bid. In the instant case, it is not a disqualification, but a matter of simple rejection, for not meeting the requirements as stipulated in the tender. This being the position, Clause 4.7 of Annexure P/3 NIT is not attracted to the case in hand.

13. Coming to the reliance sought to be placed on the verdict passed by the Apex Court, it is relevant to go through paragraphs-17 and 18 of the decision in **Rashmi Metaliks Limited** (supra), which are to the following effect :-

> “17. So far as clause (j) of the detailed notice inviting E-tender No.01/KMDA/MAT/CE/2013-2014 dated 10.5.2013 emanating from the office of the Chief Engineer is concerned, it seems to us that contrary to the conclusion in the impugned judgement, the clause is not an essential element or ingredient or concomitant of the subject NIT. In the course of hearing, the Income Tax Return has been filed by the Appellant-company and scrutinized by us. For the Assessment Year 2011-2012, the gross income of the Appellant- company was Rs.15,34,05,627, although, for the succeeding Assessment Year 2012-2013, the income tax was NIL, but substantial tax had been deposited.
>
> 18. We think that the Income Tax Return would have assumed the character of an essential term

> if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest Income Tax Return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the Appellant-company and if even thereafter no rectification had been carried out, the position may have been appreciably different. It has been asserted on behalf of the Appellant-company, and not denied by the learned counsel for the Respondent-Authority, that the financial bid of the Appellant-company is substantially lower than that of the others, and, therefore, pecuniarily preferable."

It was a case where one of the bidders did not produce the ITR along with the bid, the scope of which was considered and interference was declined by the High Court, ultimately, leading the matter to be taken up before the Supreme Court. After perusing the relevant records/proceedings, particularly, the NIT dated 10.05.2013, the Apex Court made an observation to the effect that the stipulation mentioned was not an essential requirement or ingredient of the NIT and it was only a collateral term. It was in the said circumstances, that the material produced by the bidder before the Apex Court, in support of the contention, was acted upon, giving advantage.

14. Coming back to the instant case, as noted already, Annexure P/3 NIT clearly insists filing of an affidavit "duly verified and notarized" as per Clause 4.4B(a)(ii) and 4.4B(c); further stating under Clause 4.4B(a)(ii) to the effect that each bidder must produce an affidavit that the information furnished with the bid documents is correct in all respects. The format of the affidavit also gives a clear idea that it should be on a non-judicial stamp paper of Rs.10/- attested by Magistrate/Sub-Judge/Notary Public. Insofar as the requirement of attestation is shown as a mandatory requirement, it should have been satisfied, as stipulated. The only question is whether the subsequent renewal of the certificate of practice given to the Notary will meet the requirement, so as to treat the affidavit attested earlier and already submitted by the Petitioner as a valid one.

15. Going by the provisions contained in the Notaries Act, 1952, particularly, Section 9 read with Section 5, the Notary should be holding a certificate of practice on the date of attestation. Admittedly, the certificate issued to the Notary had already expired on 09.05.2018. Though an application for renewal was preferred by the Notary much before the expiry of the tenure, it came to be renewed only much later and on the date of attestation, he was not holding a valid certificate in terms of Section 9, read with Section 5 of the Notaries Act, 1952. As it stands so, even if the mistake in issuing the certificate of renewal (giving only prospective effect) is rectified by the competent authorities and it is given effect from the date of expiry, it still cannot come to the rescue of the Petitioner, so far as there is no fault, mistake or lapse on the part of the Respondents in considering the credentials of the bidder and rejecting the technical bid of the Petitioner for

want of proper affidavit attested by the Notary on the date of consideration. This makes the decision making process unassailable.

16. In the said circumstance, we are of the view that the rejection of the technical bid of the Petitioner is in conformity with the relevant provisions of the Notification Inviting Tender. We do not find any irregularity, much less any illegality in the 'decision making process' done by the Respondent authorities. Interference is declined and the writ petition stands dismissed.

17. Our observation as above is only with regard to the rights and liberties of the Petitioner to participate in the bid and is not with respect to the rights and liberties of the Notary, who has made an application for renewal with effect from the date of expiry of the authorization in accordance with law.

Sd/-

(P.R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge

Anu