

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.267 of 2020

In

Civil Writ Jurisdiction Case No.5710 of 2020

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Kumar Manash Construction Pvt. Ltd. having its registered office at Mohalla-Sareya, Ward No. 13, P.O. and P.S.- Gopalganj, Near Kali Mandir, District-Gopalganj, Pin- 841428 through its Managing Director namely Vijay Kumar Rai, (male) aged about 43 years, son of Sri Baccha Prasad Rai, resident of Mohalla- Sareya, Ward No. 13, P.O. and P.S.- Gopalganj, Near Kali Mandir, District- Gopalganj, Pin- 841428.

... .. Appellant/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Rural Works Department, Government of Bihar.
3. The Engineer-in- Chief, Rural Works Department, Government of Bihar, Patna.
4. The Superintending Engineer, Rural Works Department, Siwan Division, Siwan.
5. The Executive Engineer, Rural Works Department, Hathua Division, Siwan.
6. Chanda Singh, Wife of Vijay Kumar Singh, resident of B- 144, Ekta Satya Shanti Apartment, Setor- 13, Rohini Sector- 7, North West Delhi at present Resident of B- 98, Police Colony, P.S. Anisabad, District- Patna.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Ashish Giri, Advocate
For the Respondent/s	:	Mr. P.K. Shahi, Sr. Advocate
		Mr. Ravindra Kumar, Advocate
For the State	:	Mr. P.N. Shahi, AAG-6.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 16-10-2020

Heard Shri Ashish Giri, learned counsel for the appellant, Shri P.N. Shahi, learned Additional Advocate General No. 6 for the State, Shri P.K. Shahi, learned senior counsel and Shri Ravindra Kumar, learned counsel for the respondents.



2. The current Letters Patent Appeal No. 267 of 2020 challenges the judgement dated 19.06.2020 passed by a learned Single Judge of this Court in CWJC No. 5710 of 2020 titled as Chanda Singh vs. State of Bihar and others.

3. The issue before this Court pertains to the interpretation of the qualifying terms of a technical bid for a tender (package No. BR 13 PTR-04/MRLOI-Rampur North to Dularpur under PMGSY Rural Roads Project) issued by the respondent State.

4. The brief facts of the case are that the respondent State rejected the technical bid of the original petitioner for want of fulfilling the qualifying terms of the bid namely Clause 4.4A (a) of the Instructions to Bidders (ITB) which requires the financial turnover of the bidder to be equivalent to the bid amount. The original petitioner however, contended before the learned Single Judge that Clause 4.4A (b) read along with the other clauses, would ensure that he qualified for the tender.

5. The learned Single Judge after going through the scheme of the bid, held that the rejection of the technical bid of the original petitioner was arbitrary exercise of power and quashed this decision of the respondent State dated 15.02.2020. As per the learned Single Judge, Clause 4.4A (a) was directory and not



mandatory in nature, thus on a reading of Clauses 4.4A (a) and (b) it was found that the original petitioner was eligible for the tender.

6. Aggrieved by this judgement, the appellant, who was allowed to file the present appeal, contend that the judgment is contrary to settled legal principles and since it allows the original petitioner to compete with qualified tenderers, it violates Article 14 of the Constitution of India. The appellant is the successful bidder in the tender issued subsequent to the subject matter of the writ petition, though in relation to the same very work, necessity whereof arose, as none including the writ petitioner was found to be eligible. Noticeably in the subsequent tender, the writ petitioner did not participate, leaving the field open for other parties to furnish their bids in relation to which the present appellant qualified, to whom, work stands allotted.

7. The State has come out in support of the present appeal.

8. No other submission(s) has been made on behalf of either of the parties.

9. We must now understand the qualifying conditions laid out in the ITB and the manner in which it ought to be interpreted. The clauses regarding the qualifying conditions for the bid are reproduced as follows:



“4.4 A. To qualify for award of the Contract, each bidder should have in the last five years (5 years immediately preceding the year, in which the bids are invited, year means financial year):

(a) Achieved in any one year a minimum financial turnover as mentioned in the Bid Data Sheet (as certified by Chartered Accountant and at least 50% of which is from Civil Engineering construction works). The estimated cost of the work would not include maintenance cost for 5 years and the turnover will be indexed at the rate of 8% per year.

(b) satisfactorily completed, as prime contractor or sub-contractor, at least one similar work equal in value half of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited.”

10. On a reading of the above conditions, it is apparent that there are three conditions that are set out in Clause 4.4 A (a) which requires each bidder in the last five years to, firstly achieve a minimum financial turnover as mentioned in the Bid data sheet, secondly that at least 50% of this turnover should be from Civil Engineering construction works and thirdly, that the turnover should be indexed at the rate of 8% per year. Clause 4.4 A (b) further lays out that each bidder in the last five years must have either as a prime contractor or a sub-contractor completed at least



one work that is similar to the tendered work the value of which should be equal to half of the estimated cost of work for which the bid is invited.

11. While interpreting the above clauses, the manner in which they were drafted and the punctuations used provide insight into the intention of the drafter. A “full stop” (.) is used as a punctuation between the two Clauses 4.4 A (a) and (b) as opposed to a “slash” (/) or even terms such as “or”. This signifies that the conditions set out in 4.4 A (a) and (b) are not to be construed in the alternative, rather they are distinct conditions that are to be read cumulatively as the qualifying conditions that need to be fulfilled by the bidder.

12. The Hon’ble Apex Court in the case of **Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Ltd and Anr., (2016) 16 SCC 818**, at paragraph 15 held that “the words used in the tender documents cannot be ignored or treated as redundant or superfluous they must be given meaning and their necessary significance”. Thus, the interpretation of the Clause 4.4 A (a) as redundant and inoperative is contrary to the plain meaning of the terms of the tender.

13. Further, it must be kept in mind that in matters of technical bids for a tender the Court ought to exercise judicial



restraint and must not impose its own judicial interpretation over that of the employers. This principle was discussed by the Hon'ble Apex Court in the case of **Montecarlo Limited v. National thermal Power Corporation Limited, (2016) 15 SCC 272**, it observed that:

“26.In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to



the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills.” (emphasis supplied)

14. The well-established principles of interpretation of terms of a tender and the scope of judicial review for technical bids were further reiterated by the Hon’ble Apex Court most recently in the case of **Central Coalfields Ltd v. SLL -SML (2016) 8 SCC 622**. The court states that:

“47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the



terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber. 48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot." (emphasis supplied)



15. Based on the above law it is apparent that the learned Single Judge has erred in interpreting the financial conditions set out in Clause 4.4A (a) as a non-essential term that could be deviated from and in allowing the original petitioner to qualify for the bid.

16. It is therefore held that the relevant Clauses of the ITB are to be interpreted as essential and mandatory.

17. The current appeal is allowed and the judgment of the learned Single Judge dated 19.06.2020 is set aside.

18. Interlocutory Application(s), if any, shall stand disposed of.

(Sanjay Karol, CJ)

(S. Kumar, J)

K.C.Jha/-

AFR/NAFR	AFR
CAV DATE	
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