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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 05/03/2020****Judgment Delivered on : 23/03/2020****Writ Petition (C) No. 194 of 2020**

M/s. Shanti Enggicon Private Limited, Registered Address Clubpara Bolangir Orissa, Corporate Office Shanti Niwas in front of Agrasen Bhawan Korba, Chhattisgarh, 495677, through its Director Shri Rohit Agrawal, aged About 32, R/o Shanti Niwas in front of Agrasen Bhawan Korba, Chhattisgarh, 495677.

---- Petitioner**Versus**

1. NTPC Limited, through its General Manager, having Registered Office at NTPC Bhawan, Scope Complex 7, Institutional Area, Lodhi Road, New Delhi- 110003
2. Additional General Manager (C&M)/ Sr. Manager (C&M) Shared Service Centre Coal Mining HQ, NTPC Limited, Coal Mining HQ Ranchi, Opposite Chutia Police Station, District Ranchi - 834001 Jharkhand.
3. General Manager, NTPC Limited, Talaipalli Coal Mining Project Lailunga Road, Gharghoda, District Raigarh- 49611

---- Respondents

For Petitioner : Shri Vikram Sharma, Advocate.

For Respondents / : Shri B.D.Guru, Advocate.
Company

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

C.A.V. Judgment**Per P.R. Ramachandra Menon, Chief Justice**

1. The arbitrary action on the part of the Respondents threatening and forcing the Petitioner vide Annexure P/8 dated 09.01.2020 to withdraw the bid, despite rating the Petitioner as L-1, with an attempt to forfeit the Earnest Money Deposit (*for short 'the*

EMD’) and to blacklist the Petitioner from participating in future Tenders for not having separately mentioned the GST rate in the tender, however taking a differential treatment in the case of the remaining three bidders and to have it awarded to the party of their choice, is put to challenge in this writ petition.

2. Annexure P/2 Notice Inviting Tender (for short 'the NIT') was issued by the 2nd Respondent on 09.09.2019 for Talaipalli Coal Mining Project situated in the Raigarh District of the State of Chhattisgarh, which is under the control of the 3rd Respondent. The tender was floated for construction of the road for Coal Evacuation (**Section B**) and road for Township approach for Talaipalli Coal Mining Project (**Section C**). The purpose of construction of the above two roads was quite different insofar as **Section B** road was to be used for coal evacuation which will be located outside the Township area and can be used by the general public as well, whereas **Section C** road was to be constructed inside the township area, which was strictly to be a private road. As a matter of fact, when the Goods and Service Tax Act, 2017 was introduced from July, 2017, the rate of taxes payable, it being a work contract, was fixed as 18% (9% CGST + 9% SGST). Subsequently, as per Annexure P/4 dated 22.08.2017, pursuant to the meeting of the GST Council, the rate was modified, segregating the rate of tax with reference to the purpose of the road by virtue of which construction of **Section B** road; was to attract a tax liability of only **12%** (6% CGST + 6% SGST), whereas **Section C** road which was for

internal/township purpose, it was to carry a higher rate of **18%** (9% CGST + 9% SGST).

3. As mentioned above, when Annexure P/2 NIT was issued on 09.09.2019, Annexure P/4 modified rate of GST had already been brought into force from 22.08.2017, but in the relevant column of the form contained in the web portal, there was only one column for mentioning the GST rate. The tender conditions specifically stipulated that the Probable Amount of Contract (*for short 'the PAC'*) was Rs.24,32,45,371.37 and that the rate had to be quoted by the bidder by "percentage" - higher or lower, including all taxes/duties.

4. Clause 11.1.3.2 of the Instructions to Bidders (*for short 'the ITB'*) provided that the bidder shall quote (i) the basis price (including all taxes and duties etc. but excluding GST) and (ii) applicable GST% as asked for in the Bill of Quantities. Clause 11.3 of the ITB provided that if the bid was defective in any manner, it was to be rejected which will not entail any forfeiture of any EMD as warranted in the case of withdrawal of a bid. As per clause 12.3 of the ITB, it was clearly stipulated that the rate to be quoted was excluding the GST, as the GST had to be quoted separately. Under Clause 12.4 of the ITB, it was clearly provided that payment of the GST was to be the employer's liability (awarder's liability).

5. Clause 26 of the General Conditions of Contract (*for short 'the GCC'*) dealing with the taxes, duties, levies etc. specifically insists (under clause 26.2) that it shall be the employer's duty to pay the GST.

This virtually is an exception to the stipulation under clause 26.1 which casts the liability upon the contractor to satisfy all the taxes, duties, levies etc.

6. Clause 14.5 of the ITB is to the following effect:

“14.5 The Bid Security shall be forfeited in any of the following circumstances without any notice or proof of damage to the Employer:

(a) If the Bidder withdraws or varies his bid during the period of Bid validity.

(b) If the successful Bidder does not accept the correction of its Bid Price pursuant to ITB sub-clauses 23.2.

(c) If the successful Bidder refuses to withdraw, without any cost to the Employer, any deviation to bidding documents found anywhere in the bid.

(d) If the successful Bidder fails within the time limit specified to accept the award of Contract or fails to furnish the required Contract Performance Security in accordance with ITB clause 27.

(e) If the bidder/his representative commits any frauds while competing for this Contract pursuant to the Fraud Prevention Policy of NTPC.

(f) In case the bidder is disqualified from the bidding process in terms of section 3 & 4 of the Integrity Pact.”

7. Under clause 23.2.3 of the ITB, if the rate quoted was defective, it was open for the employer to add the left over amount and not to have the quote reduced in any manner. Clause 23.3 of the ITB makes it further clear that if the amount quoted is defective, it was to be properly evaluated to fix the bid price and the evaluated bid price had to be declared to identify the L-1 bidder. This was to avoid any chance for a bidder to quote lesser amount to project himself and claim to be the L-1 bidder. Similarly, if any bidder quotes a higher rate of GST, since the rate of GST is statutory, only the notified rate can be claimed or be paid by the awardee by virtue of the obligation under clause 12.4

of the ITB (that the liability to satisfy the GST shall always be for the awarder/employer). That apart, Section 9 of the GST Act, read with clause 12.4 of the ITB clearly makes it obligatory for the awarder/employer of the “works contract” read with Section 2(119) of the CGST Act, 2017 (which includes construction) to satisfy the GST upon the awarder of the contractor, whatever be the rate. This is virtually to the effect that, whether the rate of GST is quoted in the tender or if any wrong rate is mentioned, it cannot have any bearing with regard to the evaluation of the bid, more so when power is vested upon the awarder of the contract to evaluate the bid in terms of clause 23.3, read with clause 23.2.3 of the ITB. The case projected by the Petitioner has to be analysed in the above background.

8. As mentioned already, by virtue of the different rates stipulated as per Annexure P/4 dated. 22.08.2017 (amended rate) providing for a lower rate of tax at 12% for construction of roads having public purpose (Section-B) of Annexure P/2 NIT and higher rate of tax of 18% in respect of construction of roads for internal/private purpose (Section-C) of Annexure P/2 NIT, and further since the terms of the tender clearly stipulated that quoting of the bid amount was to be by excluding the GST and further that satisfaction of the GST was always to be the liability of the awarder/employer, the petitioner quoted the bid at Rs.18,24,58,353.06 and the column for mentioning the rate of GST was left blank. On submitting the tender as above, the Petitioner was served with Annexure P/5 dated 27.12.2019 pointing out that the petitioner, having not mentioned the rate of GST, the quote of

Rs.18,24,58,353.06 was treated as inclusive of GST and hence, deducting the GST, the quote was brought down to 15,46,25,723/-; which was noted as below 36.43% of the estimated rate of Rs.24,32,45,371.32 and hence was branded as 'Abnormally Low Rate'. By virtue of the specific instructions given to the bidders (ITB), the Petitioner was asked to furnish additional performance security undertaking for providing additional performance security to the tune of Rs.2,21,54,912/- if the work was awarded to the Petitioner. On receipt of the said communication, the Petitioner submitted Annexure P/7 reply dated 08.01.2020 pointing out that the bid quoted by the Petitioner excluding GST was Rs.18,24,58,353.06 besides such other vital particulars. However, without any regard to the said reply, the Petitioner was served with Annexure P/8 dated 09.01.2020 virtually threatening the Petitioner of coercive action and forcing to withdraw the bid with an intent to forfeit the EMD and to blacklist the Petitioner from participating in the future transactions. This made the Petitioner to approach this Court challenging Annexure P/8 and the course of action sought to be pursued by the Respondents.

9. When the matter came up for consideration before this Court on 15.01.2020, urgent notice was issued to the Respondents, also granting interim order of *status quo* with regard to the forfeiture of the EMD till the next date of hearing, which came to be extended further. On receipt of notice, the Respondents have entered appearance and filed reply, seeking to sustain their action in issuing Annexure P/8, for the reason that the Petitioner had failed to quote the rate of GST

despite the clear stipulation in this regard. In the said circumstance, the GST had to be carved out from the rate quoted, thus reducing the quote from Rs. 18,24,58,353.06 to Rs. 15,46,25,723/- which was far below the estimated price (abnormally lower rate), leading to such other consequences as mentioned therein. It is also contended that the writ petition is not maintainable by virtue of lack of territorial jurisdiction, as the tender has been issued from Ranchi in the State of Jharkhand. The Respondents further contend that the stipulations in the tender have been correctly understood by the other participants who have submitted their tenders quoting the GST separately and that the writ petition is only liable to be dismissed as devoid of any merit at all.

10. The Petitioner has filed a rejoinder virtually reiterating the contentions raised in the writ petition and seeking to controvert the contents of the return filed by the Respondents.

11. We heard Shri Vikram Sharma, the learned counsel for the Petitioner and Shri B.D.Guru, the learned counsel representing the Respondent-Company.

12. The learned counsel for the Petitioner points out with reference to Annexure P/6, which is the screen shot of the bid submitted by the Petitioner online, clearly showing the estimated price of Rs. 24,32,45,371.37 in column No. 6, the entry given by the Petitioner as he was quoting less *i.e.* minus in column No. 9 and the quote offered in column No. 13 as 24.99% of the estimated cost, which

is without GST. Column No. 18 (as to the rate of GST) was left blank, which fact is admitted in Annexure P/5 letter as well. Column No. 54 shows the amount quoted by the Petitioner as Rs.18,24,58,353.06, though the heading in the said column as given by the Respondents in the web portal is described as an amount with premium/discount and GST. Even according to the Respondents and as notified in the tender conditions, the quote was never to include GST and the rate of GST was to be separately given under column No. 18. This being the position, it was never open for the Respondents to have reduced the GST from the quote of Rs.18,24,58,353.06, to work out the bid amount of the Petitioner and by virtue of the specific clauses under 23.3 of the ITB, read with clause 23.2.3 of the ITB, if the amount quoted was defective in any manner, it was to be added on and the evaluated bid price had to be worked out by the Respondents to identify the L-1 bidder. The tender conditions do not provide to reduce the bid amount, and hence, the action pursued by the Respondents was *per se* wrong and illegal in all respects. The learned counsel submits that, if the bid was wrong, not acceptable or defective in any manner, at best they could have rejected it by virtue of clause 11.3 of the ITB; under which circumstance, no adverse consequence was to be resulted by way of forfeiture of the EMD or blacklisting of the Petitioner. It is with reference to the 'unauthorised reduction' of the bid amount, that the Respondents were insisting the Petitioner vide Annexure P/5 to withdraw the bid, so as to enable them to forfeit the EMD and to blacklist the Petitioner, which is *per se* wrong and illegal.

13. The learned counsel for the Petitioner further submits that the objection raised as to the maintainability of the writ petition with reference to the territorial jurisdiction has absolutely no basis as power of this Court is wide enough by virtue of the specific provision under Article 226(2) of the Constitution of India which stipulates that the power of the Court under clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by this Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part arises for the exercise of such power notwithstanding that the seat of such Government/authority or the residence of such person is not within those territories. The learned counsel submits that Annexure P/2 NIT was issued for construction of roads for the Talaipalli Coal Mining Project which is situated in Raigarh District of the State of Chhattisgarh. The construction of the roads as above was for the benefit of general public in the State and particularly at Raigarh and further the Respondents had a project office at Raigarh in Chhattisgarh as well. This being the position, the cause of action mainly or at least in part, had arisen at Raigarh in Chhattisgarh and this Court is having the jurisdiction to deal with the matter. It is further pointed out that, though there is a clause in the NIT stating that all disputes shall be subject to jurisdiction of the Courts at Ranchi, it can have operation only when an agreement is executed confining the jurisdiction to that place (when cause of action/dispute is arising in different places conferring jurisdiction upon different Courts). Reference is made to Section 20(c) of the Code of Civil Procedure, 1980 in this regard. The learned counsel submits that insofar as no agreement has

been executed and that stage is still to be reached, the jurisdiction of this Court cannot be ousted in any manner. Reliance is sought to be placed on the verdicts passed by the Apex Court in ***A.B.C. Laminart Pvt. Ltd. & Another v. A.P. Agencies, Salem***; {(1989) 2 SCC 163, paragraphs 13 to 17}.

14. It will be worthwhile to extract paragraph 15 of the judgment reported in ***A.B.C Laminart Pvt. Ltd.*** (*supra*) for easy reference:

“15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of, its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In case of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of action disappears. The above are some of the connecting factors.”

Similarly, reliance is also placed on the verdict passed by the Apex Court in ***Election Commission of India v. Saka Venkata Rao*** {AIR 1953 SC 210, paragraphs 6 and 7}, besides citing (with permission) the verdict passed by a learned Single Judge of the Karnataka High Court reported in ***Millipore India Private Ltd. v. Govt. of India & Others*** {AIR 2002 Karnataka 280, paragraphs 9, 11, 13, 14 and 15} referring to various judgments rendered by the Apex Court.

15. With regard to the merits involved, the learned counsel for the Petitioner submits that the existence of two different rates of GST by virtue of Annexure P/4 amendment brought about and notified on 22.08.2017 in respect of the construction of roads for public purpose (**Section B – 12%**) and internal/private purpose (**Section C – 18%**) is not denied by the Respondents. Since Annexure P/4 governed the field on the date of issuance of the tender *i.e.* on 09.09.2019, it was for the Respondents to have taken note of the situation and to have provided appropriate columns for making entries in the web portal with different rates, which admittedly is not satisfied. Confusion was there in the minds of the other participants as well, as revealed from Annexure R/1 price bids quoted by the participants. The rate of GST quoted by a bidder by name Sunil Kumar Agrawal, in column No. 18 is only '12%', whereas another bidder by name R.K. Transport & Constructions Ltd. has quoted the rate as '18%'. The bid quoted by Sunil Kumar Agrawal in a different capacity as 'Sunil Kumar Agrawal LLP' (Limited Liability Partnership) mentions the rate of GST as '18%'. This means, no other bidder had given the rate correctly or separately in respect of

Section-B and **Section-C** construction of roads and it was by virtue of this confusion that the Petitioner left the column No. 18 (provided to mention the rate of GST) as blank. It was more so, since satisfaction of the GST was to be the employer's liability by virtue of clause 12.4 of the ITB, read with Section 9 of the GST Act; by virtue of which mentioning of the rate by the bidder was immaterial. Whatever be the rate, it was to be satisfied by the awarder and as such, mentioning of a particular rate by the bidder would never tilt the balance in any manner insofar as his quote (stipulated to be given excluding the GST) is concerned. Reliance is placed on a ruling rendered by the Division Bench High Court of Kerala as reported in **C.A. George v. State of Kerala** {AIR Online 2019 Ker 713, paragraphs 12, 13 and 14} holding that, if the tax rate is not mentioned in the column and if the bid amount is quoted accordingly, it cannot be presumed that the bid amount is inclusive of the tax/GST.

16. After hearing both the sides, we find that there is considerable force in the submissions made by the learned counsel for the Petitioner with reference to the materials brought on record. Insofar as there is no dispute that the GST rate originally notified as per Annexure P/3 came to be modified and segregated into two, vide Annexure P/4 dated 22.08.2017 (stipulating a lesser rate of **12%** for construction of roads for public purpose (**Section-B**) and a higher rate of **18%** for construction of roads for internal/private purpose (**Section-C**), it was obligatory for the Respondents to have provided separate columns in the Annexure P/2 tender issued on 09.09.2019 when Annexure P/4

notification was governing the field. That apart, by virtue of the clear stipulations under clause 12.4 of the ITB, read with Section 9 of the GST Act, payment of GST was to be the liability of the awarder and hence, mentioning or non-mentioning of the rate of GST was to be of no consequence as it is a 'constant figure' with regard to which no alteration can be thought about either by the bidder or by the awarder. Above all, if at all, there was any mistake or the bid was defective for not quoting the proper amount with reference to the duties/taxes payable, it was quite open for the Respondents to have 're-evaluated the bid' in terms of clause 23.3, read with clause 23.2.3 of the ITB to work out the actual quote and to identify the L-1 bidder. Obviously, it is without any regard to these vital aspects, that the proceedings were sought to be pursued hastily, by issuing Annexure P/8; virtually without considering the objection/ explanation raised by the Petitioner vide Annexure P/7 in response to Annexure P/5. We are of the view that Annexure P/8 order/proceedings dated 09.01.2020 impugned in the writ petition is not liable to be sustained and hence, it is set aside.

17. In view of the enabling clauses contained in Annexure P/2 NIT as discussed above, it is still open for the Respondents to re-evaluate the bid submitted by all the participants including the Petitioner and to work out the actual bid amount, if the GST was also to be considered as part of the bid and thus, adding it on, instead of deducting the GST from the bid quoted by the Petitioner or such other bidder. After conducting the re-evaluation as above, the bid proceedings could be finalized, identifying the successful bidder and to have the work

awarded accordingly; subject to satisfaction of the other requirements in accordance with law. Since there cannot be any dispute with regard to the 'rate of tax' payable and as to the liability of the employer/awarder to satisfy the same, it is open for the Respondents to consider the quotes made by the bidders including the Petitioner (treating the same as excluding the GST) as nobody has claimed it to be inclusive of the GST and further when the tender conditions stipulate that it has to be excluding the GST. It is also open for the Respondent-Company, if they so desire, to go for re-tender, giving proper clarification in this regard and providing necessary column for making the entries in the web portal showing the different works (Section-B and Section-C separately) with reference to the rate of tax payable.

18. The writ petition stands allowed. No costs.

Sd/-
(P.R. Ramachandra Menon)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE