

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 08/06/2020****Judgment Delivered on : 12/06/2020****Writ Petition (C) No. 1126 of 2020**

M/s Ritesh Kumar Agrawal S/o Shri Natwar Lal Agrawal aged about 35 years, through Partner Mr. Devnarayan Yadav, Resident Ward No.5 Near Durga Mandir, Village Baradwar, District Janjgir-Champa, Chhattisgarh.

---- Petitioner**Versus**

1. State of Chhattisgarh, through the Secretary, Public Works Department Mahanadi Bhawan, New Mantralay, Atal Nagar District Raipur, Chhattisgarh.
2. The Engineer-In-Chief, Water Resource Department, District Raipur, Chhattisgarh.
3. The Chief Engineer Water Resource Department, Hasdeo Ganga Kacchar, Ambikapur District Sarguja, Chhattisgarh.
4. The Superintending Engineer Water Resource Circle, Shyam Barnai Project Circle, Ambikapur District Sarguja, Chhattisgarh.
5. The Executive Engineer Water Resource Department Division No.1, Ambikapur District Sarguja, Chhattisgarh.

---- Respondents

For Petitioner : Shri Apoorva Tripathi, Advocate.

For Respondents/State : Shri Gagan Tiwari, Deputy Government Advocate

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. Cancellation of the tender floated for some civil construction works after identifying the technically qualified bidders including the Petitioner, is subjected to challenge, contending that it is highly arbitrary and without any

reason as discernible from Annexure P/1 impugned in the writ petition. It is also contended that the 5th Respondent, who has issued Annexure P/1 is not having the power or competence to have cancelled the tender, it being beyond the financial capacity of the Executive Engineer as per the relevant norms/guidelines issued in this regard.

2. Heard Shri Apoorva Tripathi, the learned counsel appearing for the Petitioner as well as Shri Gagan Tiwari, the learned Deputy Government Advocate for the State/Respondents.

3. Coming to the sequence of events, an online tender notification was issued on 24.01.2020 for the lining and construction work of Shyam Ghunghutta Project with an estimated probable amount of contract stipulated as Rs. 23.55 Crores (approximate). The Petitioner being qualified in all respects as per the norms, submitted the bids in the prescribed manner *i.e.* Envelope 'A' (containing the details of registration under the Unified Registration System applicable to the State, EMD and the affidavit), Envelope 'B' (consisting of the Technical Bid with supported documents) and Envelope 'C' (consisting of the Price Bid). According to the Petitioner, the Respondents had issued two corrigendum and the last date for submitting the bid was extended to be in conformity with the modifications. On opening the Envelopes 'A' and 'B', it was found that necessary requirements were satisfied by the Petitioner and accordingly, he was declared as technically qualified. The price bid was to be opened on 18.03.2020, which came to be adjourned to the next date. However, to the utter shock and surprise of the

Petitioner, he was informed that the entire tender proceedings were cancelled as per Annexure P/1 dated 19.03.2020 issued by the 5th Respondent, absolutely stating no reasons but for mentioning that it was under "some unavoidable circumstances". This, according to the Petitioner is highly arbitrary and illegal in all respects and is only with intent to extend undue favours to somebody behind the curtain, who could not participate in the tender which made the Petitioner to have it challenged by filing the writ petition.

4. The Respondents No. 1 to 5 have filed a reply pointing out that the idea and understanding of the Petitioner is thoroughly wrong and misconceived. The said Respondents have asserted that the tender was cancelled, not by the 5th Respondent but by the Chief Engineer i.e. the 3rd Respondent. A copy of the relevant order has been produced as Annexure R/1 alongwith the reply, adding that Annexure P/1 issued by the 5th Respondent is only a 'notice', that too, issued "for the Chief Engineer", who happens to be the competent authority. The financial power and competency of the Chief Engineer to have issued Annexure R/1 and the competence of the Executive Engineer/5th Respondent who has issued Annexure P/1 notice have been explained in the reply, with reference to the relevant provisions norms, including those contained in the general instructions issued by the Chief Engineer and also the relevant clauses in the Works Department Manual. The circumstance under which the tender had to be cancelled has been explained therein, followed by a 'Covering memo' dated 08.06.2020

producing a copy of the 'Schedule of the quantities' about the 'structure default' in specification, in item No. 12 and 14 of the old NIT dated 24.01.2020. The Respondents have pointed out that a fresh tender has been notified incorporating the structural changes and this is never detrimental to the rights and interest of the Petitioner or the other three participants, all of whom have been declared as technically qualified.

5. Shri Apoorva Tripathi, the learned counsel for the Petitioner submits that Annexure P/1 under challenge does not contain any reason and that the present attempt of the Respondents is only to provide/supplement the reasons by filing a reply. It is stated that the correctness of the administrative decision has to be evaluated with reference to the contents of the order and it cannot be supplemented by the reasons stated in the subsequent affidavits or other proceedings, in view of the law declared by the Apex Court in ***State of Punjab v. Bandeep Singh & Others***; (2016) 1 SCC 724. Reliance is also sought to be placed on the verdict passed by the Apex Court in ***Raman Dayaram Shetty v. International Airport Authority of India & Others***; {(1979) 3 SCC 489 : AIR 1979 SC 1628} to contend that the original tender floated by the Respondents contained all the relevant specifications and that the same cannot be changed later, that too, after declaring the Petitioner as technically qualified. This, according to the Petitioner amounts to violation of Article 14, 19(1)(g) and Article 299 of the Constitution of India. The learned counsel also submits that, Annexure R/1 produced alongwith the reply showing the reasons, is not liable to be

accepted as it is only an afterthought. It is pointed out that the opening portion of the said note is a 'typed one'; whereas the subsequent endorsements stated as effected therein by the higher authorities and the order/decision stated as taken by the Chief Engineer on 18.03.2020 to have the tender cancelled, are written manually. The learned counsel also points out that everything came as a 'bolt from the blue' on 18.03.2020 itself when the alleged recommendation was made by the Sub Divisional Engineer as the necessity to effect some structural changes; which is stated as accepted by the higher authorities on the same day and the file virtually flew to the Chief Engineer on that date itself; who has passed the order cancelling the tender without wasting any time on 18.03.2020. The sequence of events in this regard casts serious doubts and hence, it is not liable to be accepted, submits the learned counsel. Insofar as the Petitioner had already been declared as qualified, after opening the Envelopes 'A' and 'B', the remaining course of action was only to open the price bid i.e. Envelope 'C' and to have the successful bidder identified - based on the rates quoted. According to the Petitioner, he has quoted the rock bottom rate and as such, cancellation of the above tender is nothing but arbitrary, which is liable to be interdicted by this Court. The learned counsel further submits that, by virtue of the probable amount of contract, the authority to accept the contract was only the State Government and as such, cancellation of the tender by any lower authority is contrary to the relevant norms and is to be interdicted.

6. Shri Gagan Tiwari, the learned Deputy Government Advocate submits with reference to the contents of the return dated 06.06.2020 and the covering memo dated 08.06.2020 producing the schedule of quantities, that pursuant to the tender floated on 24.01.2020 and the two subsequent corrigendum dated 08.02.2020 and 19.02.2020, the last date for submitting tender was stipulated as 06.03.2020 and opening of the Envelopes 'A' and 'B' was scheduled to be held on the next date i.e. on 07.03.2020. In fact, four bidders including the Petitioner submitted their bids, which were opened and on evaluation of the credentials of the said four bidders, all of them were found technically qualified and were declared accordingly. However, before opening of the price bid i.e. Envelope 'C', scheduled on 18.03.2020, the Sub Divisional Officer, Shyam Canal Sub Division No. 1, Ambikapur, vide letter dated 18.03.2020 addressed to the Executive Engineer/5th Respondent informed that there was a structural default in specification of item No. 12 and 14, as the same was contrary to the 'General Instructions' issued by the Chief Engineer vide letter dated 22.05.2019 directing the use of M-15 and M-20 quality of cement in RCC and BCC. In the instant case, the specification for construction of structure was stipulated as CC 1:3:6 and CC 1:2:4. Since the tender specification of the structure was obviously contrary to the General Instructions issued by the Chief Engineer, a recommendation was made to the Executive Engineer for amendment in the tender; which came to be forwarded to the next higher authorities, ultimately taking the matter to the Chief Engineer on the same day, particularly since the price bid was to be opened immediately, as scheduled.

7. On examining the matter, the Chief Engineer observed that, by the time the serious mistake with regard to the structural fault of the RCC and BCC grade was noted, Envelope 'A' and 'B' had already been opened, declaring all the bidders as qualified and as such, no correction in the structural default was possible. It was accordingly, that a decision was taken for issuance of a fresh tender as any amendment, otherwise, would change the technical specification provided by the tenderer and would also increase the cost of construction. This is specifically mentioned in Annexure R/1 order issued by the Chief Engineer; the outcome of which came to be communicated by the Executive Engineer, vide Annexure P/1 notice. Since proper reasons have been given for cancellation of the tender, and since no additional burden or hurdle is caused or placed on any of the qualified tenderers including the Petitioner and further since the cost factor has also gone higher because of the change in the structural grade, in turn leading to the fresh tender notification, no interference is warranted in the writ petition.

8. With regard to the financial acceptance/approval of the bid, the learned counsel for the State points out that the Petitioner has only tried to wrongly interpret Annexure P/5 order dated 24.05.2019 issued by the competent authority, whereby the jurisdiction of the authorities has been prescribed for taking decision with respect to any dispute in connection with the tender. The said proceeding is only with regard to the financial acceptance/approval of the bid after opening of the Envelope 'C' and declaration of L-1 bidder. With reference to clause 4.1.1 of the General Rules

& Directions/Guidelines for Guidance of Contractors (Extracted in Paragraph 10 of reply), the learned counsel submits that for issuance of specifications, design and drawing of any other documents required in connection with the work, the Superintending Engineer/Executive Engineer stands authorised. It was accordingly, that the NIT was floated under the seal and signature of the Executive Engineer/Superintending Engineer, after getting the approval from the Chief Engineer. It is also pointed out that, as Annexure P/1 itself shows that the said notice regarding cancellation of the tender has been issued by the 5th Respondent/Executive Engineer, after the decision taken by the Chief Engineer vide Annexure R/1, and hence quite in order.

9. With regard to cancellation of the tender as per Annexure R/1 proceedings of the Chief Engineer dated 18.03.2020, it is asserted by the learned counsel that the power is vested with the Chief Engineer, by virtue of clause 2.0.86 (3) of the Works Department Manual; a copy of which has been produced as Annexure R/3. This reads as follows:

"(3) Powers of rejection of tenders: - If none of the tenders received for a work is suitable, all the tenders may be rejected only by the same authority which is competent to accept the tender, but in the case of tenders in the competency of government for acceptance, the C.E. will be competent to reject the tenders. "

Details of the fresh tender notified on 22.05.2020 in the above circumstance have been given in paragraph 12 of the reply, which also shows that, by virtue of the rectification of the structural default, the cost has also been increased as shown in the modified specification in column No. 12

and 14. The particulars in this regard under the 'Old NIT' dated 24.01.2020

and the 'New NIT' dated 22.05.2020 are given in a tabulated form, which is

extracted below convenience of reference:

"As per Old NIT dated 24/01/2020

No.	Item of work	Clubbed quantity	Clubbed Rate	Unit	Amount in Rs.
12.	Providing and placing cement concrete 1:3:6 with 40 mm graded metal in foundation of structures etc. i/c formwork, shuttering, tamping, vibrating and mixing by mixer. Finishing, curing, cleaning, dewatering and pumping of working area if required etc. complete i/c all lead and lifts of all materials and as per drawing, specification and as directed by Engineer-in-charge	1899.55	2717.16	Cum	5161387.00
14.	Providing and placing cement concrete 1:2:4 with 20 mm graded metal in coping as per specification, structures etc. i/c formwork, shuttering, tamping, vibrating and mixing by mixer. Finishing, curing, cleaning, dewatering and pumping of working area if required etc. complete i/c all lead and lifts of all materials and as per drawing, specification and as directed by the Engineer-in-charge	1836.24	4445.65	Cum	8163272.00

As per New NIT dated 22/05/2020

No.	Item of work	Clubbed quantity	Clubbed Rate	Unit	Amount in Rs.
12.	Providing and placing plain mix cement concrete M-20 with 20 mm graded metal in coping and construction of structures etc. i/c formwork, shuttering, tamping, vibrating and mixing by mixer. Finishing, curing, cleaning, dewatering and pumping of working area if required etc. complete i/c all lead and lifts of	3735.79	3929.96	Cum	146481505.2

	all materials and as per drawing, specification and as directed by the Engineer-cum-charge				
14.	Providing and placing R.C.C. M 15 Mix with 20 mm graded metal for RCC work excluding cost of reinforcement as per specification, structures etc. i/c formwork, shuttering, tamping, vibrating and mixing by mixer. Finishing, curing, cleaning, dewatering and pumping of working area if required etc. complete i/c all lead and lifts of all materials and as per drawing, specification and as directed by the Engineer-in-charge	204.36	3467.13	Cum	708542.69

10. It is pointed out that, since there was a major change in the 'specification of the structure', it could not have been done during middle of the proceedings. As Envelopes 'A' and 'B' had already been opened, it became quite necessary to have the tender itself cancelled, for setting a level playing field for the participants. It is further contended that opening of the Envelope 'A' and 'B' and declaring the Petitioner and the other bidders as technically qualified, by itself, cannot confer any vested right to proceed with the defective structures and to have the tender finalised by opening the priced bid.

11. After hearing both the sides, we find considerable force in the submissions made from the part of the Respondents. Though Annexure P/1 issued by the 5th Respondent/Executive Engineer has been styled as an order in the writ petition, the said proceeding itself shows that it has been issued "for the Chief Engineer". The original order of cancellation has been passed by the Chief Engineer himself as borne by Annexure R/1 and the circumstance under which it has been cancelled is discernible from the said

order Annexure R/1; which in turn has been pointed in the reply filed by the Respondents. This being the position, it cannot be said that the decision to cancel the tender has been taken without assigning any reason or that reason is sought to be supplemented to the order cancelling the tender. Despite the position as above, Annexure R/1 passed by the Chief Engineer has not been chosen to be challenged by the Petitioner, but for confining his challenge only to Annexure P/1 issued by the Executive Engineer which is only a notice, based on Annexure R/1.

12. With regard to the case law cited from the part of the Petitioner, there is no dispute that the correctness/validity of an order/decision should be judged by the reasons stated in the said order/decision itself and there cannot be any subsequent explanations or reasons to have it accepted. This is the dictum in ***State of Punjab*** (*supra*) cited from the part of the Petitioner, which of course has been held applying the law declared by the Apex Court in ***Mohinder Singh Gill v. Chief Election Commissioner***; (1978) 1 SCC 405. Since Annexure R/1 clearly demonstrates the circumstances under which the decision was taken to have the tender cancelled, the above decision does not come to the rescue of the Petitioner in any manner. Similarly, the decision rendered by the Apex Court in ***Raman Dayaram Shetty*** (*supra*), is also not applicable to the case in hand. The point sought to be asserted by the Petitioner in the said decision is that the stipulations in the tender will have to be strictly applied, which otherwise will amount to denial of equality of opportunity. As mentioned already, the bids were submitted by all

the qualified bidders including the Petitioner, based on the stipulations in the tender as notified. It was only after declaration of the qualified bidders, that a serious structural default with regard to the RCC/PCC came to the notice of the Sub Divisional Engineer,, Shyam Canal Sub Division No. 1, Ambikapur, who brought it to the notice of the higher authorities, pointing out that it was contrary to the general instructions issued by the Chief Engineer insisting to maintain a higher structural level. This was immediately considered by the higher authorities taking up the matter to the Chief Engineer, who after proper application of mind, decided to have the tender cancelled, as it was a basic/fundamental error which would involve higher cost factor as well. It was accordingly, that necessary corrections were made also with escalated cost as given in clauses 12 and 14 of the Schedule, leading to issuance of a re-tender on 22.05.2020. This being the position, the 'decision making process' pursued by the Respondents cannot be stated as arbitrary or malafide in any manner. The plea of arbitrariness and malafides raised by the Petitioner is not substantiated in any manner and is totally vague and absolutely without any basis.

13. The issue can be viewed from another angle as well. There were only four bidders including the Petitioner and all the four bidders were declared as technically qualified. Admittedly, the price bid Envelope 'C' was never opened and the rates quoted by the qualified bidders including the Petitioner was not known to anybody else. There is no case for the Petitioner that the Envelope 'C' has been mutilated or that the rates have been leaked

out and that the Petitioner was standing at L-1. The structural changes which were found necessary have been effected in the re-tender notification; which obviously has increased the cost factor as well. No additional burden or hurdle is placed in the re-tender notification so as to prevent any of the qualified bidders including the Petitioner from participating in the bid and as such, no prejudice has been caused to the Petitioner in any manner. It is not open for the Petitioner to contend that once a person is technically qualified, it is obligatory for the tenderer to have accepted his price bid. Similarly, there is no basis for the Petitioner to contend that there is no power with the Respondents to cancel the tender, according to this Court, the said power is very much discernible from clause 4.1.5 of the NIT to reject all or any bid. Since all the bids have been rejected by virtue of the cancellation of the tender and since fresh tender with the same qualification; however with higher structural requirements has been floated, it is quite open for the Petitioner as well to participate, if so desired. Considering the nature of construction, there cannot be any compromise with the requisite quality of the structure. The decision of the Chief Engineer in this regard shall prevail upon any other individual consideration of the bidder. Even otherwise, if there is a conflict involving a public right and a private right, the latter shall yield to the former.

14. In the above circumstance, we do not have any hesitation to hold that the course pursued by the Respondents in cancelling the tender and to go for re-tender is perfectly within the four walls of law and it does not cause

any prejudice to the Petitioner, who is free to participate in the fresh tender, based on the terms notified.

15. The writ petition fails. It is dismissed accordingly.

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

Sd/-
(Parth Prateem Sahu)
JUDGE