

NAFR

HIGH COURT OF CHHATTISGARH BILASPUR**Order Reserved on 02.02.2021****Oder Delivered on 26.02.2021****Writ Petition (C) No.1599 of 2020**

Nitya Nand Singh (Contractor), S/o Late Banwari Singh, aged about 59 years, Water Resource, PWD, RES, A-5 Class Contractor, Mayapur, Ambikapur 497001, District Surguja, Chhattisgarh.

---- Petitioner**Versus**

1. State of Chhattisgarh Through the Secretary, Department of Water Resource, Mahanadi Mantralaya, Naya Raipur, Atal Nagnar, Post Office & Police Station Naya Raipur, District Raipur, Chhattisgarh.
2. Engineer-in-Chief, Water Resource Department, Shivnath Bhawan, Sector-19, Naya Raipur, Atal Nagnar, Post Office & Police Station Naya Raipur, District Raipur, Chhattisgarh.
3. Chief Engineer, Hasdeo Ganga Basin, Water Resource Department, Ambikapur, Chhattisgarh.
4. Executive Engineer, Water Resources Division, Water Resource Department, Jashpur, Chhattisgarh.
5. Superintendent Engineer, Shyam Barnai Project Circle, Water Resource Department, Ambikapur (Surguja), Chhattisgarh
6. Ashok Kumar Mittal 5162(2) Main Road Korba, Ward No.04, Korba Town, Korba, District Korba, Chhattisgarh.
7. Barbrik Project Limited through its Director Dhruv Kumar Agrawal, P.R.A. House, Nehru Park Road, Surajpur, Chhattisgarh 497229.
8. M/s Khalatkar Construction, through its Director Jayant Madhavarao Khalatkar, Plot No.R-127, Umred Road, Behind Gillurkar Hospital, Reshimbag, Hanuman Nagar Nagpur, Maharashtra 440009.
9. M/s Radheshyam Agrawal Infrastructures Pvt. Ltd. through its Director Radheshyam Agrawal, Shri Shyam Tower, Kavita Nagar, Main Road Avanti Vihar, Raipur, Chhattisgarh.

---- Respondents

For Petitioner : Shri Rakesh Kumar Jha, Advocate
 For Respondent/State : Shri Chandresh Shrivastava, Dy. Advocate General
 For Respondent No.8 : Shri Praveen Das and Shri Vivek Verma, Advocates

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

C A V Order

Per Parth Prateem Sahu, Judge

1. Cancellation of Notice Inviting Tender ('NIT') bearing System Tender No.47015 dated 03.01.2019 after opening of price bid and identifying the petitioner to be 'L-1' and issuance of second tender notification bearing System Tender No.64548 dated 08.06.2020 made the petitioner to approach this Court by filing instant writ petition with following reliefs :-

“a) That, this Hon'ble Court may kindly be pleased to quash/set aside the order dated 27/5/2020 (Annexure-P/1) passed by the respondent No.4 bearing No.463/Ba.Le.Li.

b) That, this Hon'ble Court may kindly be pleased to direct the respondent authorities not to proceed further pursuant to fresh NIT dated 8/6/2020 bearing No.64548.

c) That, this Hon'ble Court may also kindly be pleased to direct the respondent authorities to issue the work order in favour of the petitioner pursuant to the NIT No.47015 dated 3/1/2019 and to allow the petitioner to start the construction activities without any interruption.

d) Cost of the petition may also be granted to the petitioner.

e) Any other relief, which this Hon'ble

Court deems fit and proper, may also kindly be granted to the petitioner, in the interest of justice.”

2. During the pendency of this writ petition, successful bidder was identified, hence, petitioner by way of amending the writ petition, has sought for relief No.10(f), which is as follows :

f) That, this Hon'ble Court may also kindly be pleased to direct the respondent authorities not to issue the work order pursuant to opening of bid on dated 22/7/2020 (Annexure-P/1-A).”

3. Facts of the case in nutshell are that, respondents have issued tender notification bearing System Tender No.47015 dated 03.01.2019 under project 'Susdega Diversion Scheme' for the work of construction of main diversion weir (barrage type) with all appurtenant work of Susdega Diversion Scheme. The probable amount of work was Rs.1437.20 Lakhs and completion period of work was fixed as 18 months (including rainy season). Petitioner along with interested contractors submitted bid for aforementioned work which is a civil work. Total 10 contractors participated in the proceedings and upon opening of price bid, petitioner's financial bid has been found to be lowest, hence, he has been shown in comparative chart as 'L-1'. After opening of price bid, 'Letter of Intent' and 'Work Order' were not issued to the petitioner, for which, he made several representations to the authorities, but he could not get any fruitful result. Upon becoming L-1 in subject tender proceedings, bid submitted by petitioner in other tender proceedings were not

opened on the ground of bid capacity. Work under the subject tender is also included for computing the bid capacity of petitioner, he has made all necessary arrangements of manpower and machinery due to which, he suffered heavy loss. Respondent No.3 recommended for issuance of work order in favour of the petitioner pointing out that bid submitted by the petitioner is less than 22.65% of 'Schedule Of Rates' dated 01.08.2010 and 29.03.2011, as such, respondent authorities will save public exchequer. Ignoring the recommendation made by respondent No.3, suddenly respondent No.4 has issued an order/letter dated 27.05.2020 (Annexure P/1) for cancelling the System Tender No.47015 dated 03.01.2019. Subsequently, a fresh tender notification was issued on 08.06.2020 vide System Tender No.64548. During pendency of this writ petition, respondent authorities have completed the proceedings of new tender notification, in which, respondent No.8 became successful being 'L-1'. The petitioner accordingly amended the writ petition and brought the necessary facts on record.

4. Respondents No.1 to 5/State submitted reply to writ petition pleading therein that work of the Department is to supply water to the residents for drinking, other public uses and irrigation purpose. The respondent-State has decided to construct main diversion weir (barrage type) at village Susdega to supply water for irrigation to agriculturists of seven villages. Residents of those seven villages are tribal people engaged in farming. In furtherance of aforesaid decision, respondents have floated two separate tender notifications bearing System Tender No.47015 for construction of main diversion

weir (barrage type) with all appurtenant work of Susdega Diversion Scheme of value of Rs.1437.20 Lakhs and System Tender No.47016 for erection and fixing of 4 nos. under sluice gates, 8 nos. spillary gates and 2 nos. canal gates of value of Rs.1173.22 Lakhs. The first work of System Tender No.47015 is related to civil work and second work of System Tender No.47016 is related to electrical and mechanical engineering work. According to previous practice, civil work and mechanical engineering work, of the project are to be included in one tender. After opening of price bid, proceedings of tender notification bearing System Tender No.47015 (civil work) proceedings were sent to the Chief Engineer for its submission before Tender Evaluation Committee for its consideration and approval. Tender Evaluation Committee forwarded its opinion to the Secretary, Water Resources Department. Considering the recommendation of Tender Evaluation Committee that two different works of same project i.e. civil construction and electrical mechanical engineering notified separately will not get the desired result, Secretary accepted the recommendation, directed for cancellation of System Tender No.47015, and issuance of fresh NIT. Consequently, Annexure P/1 order was issued on 27.05.2020 whereby System Tender No.47015 was cancelled. Fresh NIT bearing System Tender No.64548 was issued on 08.06.2020 for the work of 'Construction of head work of **“Susdega Diversion Scheme (Barrage type) with design, drawing, fabrication, supply and erection of 4 Nos under sluice gate size (8m x 6m), 8 Nos spill way gate (8m x 4.5m), stop log gate and 2 Nos canal sluice gate**

size 1.5m x 1.5m including remote control system & all appurtenant work for construction of Susdega Diversion Scheme in Patthalgaon Block of Jashpur District". The consolidated tender of both the works which were subject matter of earlier tender notification have been issued to achieve larger public interest. After issuance of second tender notification bearing System Tender No.64548 dated 08.06.2020, many of the contractors have participated and submitted their bids. Petitioner did not participate. The petitioner was never restrained for participating in any other tender proceedings as submitted by learned counsel for the petitioner.

5. Respondent No.8 submitted reply to writ petition pleading therein that in second tender notification bearing System Tender No.64548 dated 08.06.2020, he was identified to be successful bidder being 'L-1' in overall ranking. The petitioner chose not to participate in second tender notification, hence, he is not entitled for any relief. Respondent No.8 is having vast experience in the nature of work, his price bid was 21.25% below SOR, work order was issued to him on 11.11.2020. The petitioner being not a participant of second tender notification bearing System Tender No.64548 dated 08.06.2020, cannot challenge the said proceedings and award of work to respondent No.8.

6. Shri Rakesh Kumar Jha, learned counsel for the petitioner submits that upon issuance of System Tender No.47015 dated 03.01.2019, petitioner submitted his bid along with other contractors.

Upon completion of technical and financial evaluation, petitioner became 'L-1' and he was waiting for issuance of 'Letter of Intent' and 'Work Order' in his favour, but respondent authorities in very arbitrary manner have not proceeded further, and not issued any work order after opening of price bid. Petitioner made several representations upon which, he has been assured that work order will be issued to him, upon which, petitioner has mobilized all the plants and machineries near the work site, in which, he has incurred huge expenditure. Upon becoming 'L-1' in subject tender notification proceedings, bid submitted by the petitioner in other tender proceedings have not been opened upon assessing his bid capacity including the value of subject work. In about more than 10 tender proceedings, his bids were not opened and he was deprived from participating in subsequent tender proceedings. After lapse of long time, respondent authorities have suddenly issued letter on 27.05.2020 (Annexure P/1) cancelling the tender notification, in which, petitioner stood as 'L-1'. No reason has been assigned in tender cancellation letter (Annexure P/1), but it is only mentioned as 'due to unavoidable reasons'. The action on the part of respondent authorities in issuing second tender notification on 08.06.2020 for the same work is arbitrary and with malafide intention. It is contended that second tender notification has not been published, as such, petitioner could not get notice of issuance of second tender notification and was deprived from participating in it. The action of respondent authorities in issuance of tender notification without publication is only to extend the benefit to persons of their choice

and oust the petitioner. He submits that Annexure P/1 cancellation order dated 27.05.2020 bearing System Tender No.47015 dated 03.01.2019 as well as issuance of second tender notification vide System Tender No.64548 dated 08.06.2020 be quashed and Respondent authorities be directed to permit the petitioner to start the work of tender notification bearing System Tender No.47015.

7. Per contra, Shri Chandresh Shrivastava, Deputy Advocate General representing the State submits that idea and understanding of the petitioner is not correct. Prior to issuance of subject tender notification bearing System Tender No.47015, practice adopted by respondent's Department is for floating consolidated tender of civil and mechanical work of project. In the subject tender notification, only civil work was notified and for mechanical and electrical work, separate tender notification was issued bearing System Tender No.47016. After opening of price bids, when all tender proceedings have been forwarded to the higher authorities and Tender Evaluation Committee, they opined that two works of same project i.e. civil as well as mechanical and electrical to be notified consolidatedly to yield better result and recommended for cancellation of tender notification bearing System Tender Nos.47015. Recommendation made by the Committee to the Secretary was approved and thereafter, cancellation order dated 27.05.2020 (Annexure P/1) was issued. The action taken by respondent authorities cannot be said to be arbitrary, unreasonable and with malafide intention. Even the petitioner has not pleaded in very specific term projecting malafide against any of responsible officer. Second tender notification bearing

System Tender No.64548 is a consolidated tender for two works of same project as per recommendation. Second tender notification was published as per the Rules and it is also online tender. The submission of learned counsel for the petitioner that second tender notification has not been given wide publication is not correct being online tender proceeding. In second tender notification, 5 contractors qualified in techno-commercial evaluation and their price bids were opened, out of which, respondent No.8 became successful being L-1. After completion of other formalities, work order was issued to respondent No.8. It is pointed out that petitioner cannot claim that on assurance, he has mobilized his machineries and manpower near the work site, because no such stage has come for acting and proceeding further unless and until 'Letter of Intent', 'Work Order' is issued in his favour and agreement is signed between awarder and tenderer. Petitioner cannot claim any benefit on the internal correspondence between officers of Department as stated. The submission of the petitioner that his price bid was not opened computing the bid capacity including the value of subject tender, even if that being so, petitioner could have approached the Court for redressal of his grievance, if any. The petitioner has not participated in System Tender No.64548 dated 08.06.2020, hence, he should not be permitted to challenge the same when it has already been finalized, respondent No.8 has been identified as successful bidder and work order is also issued.

8. Shri Praveen Das, learned counsel representing the 8th Respondent submits that upon issuance of System Tender

No.64548 dated 08.06.2020, respondent No.8 along with other contractors submitted their bid. Price bid of 5 tenderers have been opened, upon which, price bid of respondent No.8 was found to be lowest. The submission made by the petitioner that second tender notification has not published is not correct. Respondent No.8 has not participated in earlier tender proceedings bearing System Tender No.47015 dated 03.01.2019, hence, there is no clash of interest of petitioner and respondent No.8. After completion of proceedings of second tender notification, work order has been issued in his favour on 11.11.2020 and he has already commenced the work. Relief as sought for by the petitioner cannot be granted to him because he is stranger to second tender proceeding bearing System Tender No.64548 dated 08.06.2020. He did not participate for the reasons best known to him. It is contended that writ petition is not sustainable and to be dismissed.

9. We have heard learned counsel for the respective parties and also perused the pleadings and documents placed on record by them.

10. The first submission raised by learned counsel for the petitioner that action of respondent authorities in issuing Annexure P/1 order dated 27.05.2020 cancelling tender proceedings bearing System Tender No.47015 dated 03.01.2019 to be arbitrary, perusal of document (Annexure R/1) would show that for Susdega Diversion Project, two separate tender notifications were issued i.e. (i) System Tender No.47015 (**subject tender notification**), which is for

construction of main diversion weir (barrage type) with all appurtenant work of Susdega Diversion Scheme having work value of Rs.1437.20 Lakhs and (ii) System Tender No.47016 for erection and fixing of 4 nos. under sluice gates, 8 nos. spillary gates and 2 nos. canal gates having work value of Rs.1173.22 Lakhs. System Tender No.47016 has been cancelled on 07.02.2019 itself vide Annexure R/2. The online tender submitted by the petitioner along with 9 others were opened on 05.03.2019, in which, petitioner became L-1. The proceeding of same tender notification was forwarded to Chief Engineer. Chief Engineer has approved the rate of petitioner, thereafter, proceeding has been further forwarded to Tender Evaluation Committee. As per pleadings and submissions made by learned counsel for the State, Tender Evaluation Committee considering that two separate tender of same project may not yield better result, recommended for cancellation of subject tender proceedings and forwarded the same to Secretary of the Department. Considering the recommendation of Tender Evaluation Committee, Secretary vide letter dated 17.01.2020 had directed respondent No.3 to cancel the subject tender notification and for issuance of fresh consolidated tender notification for both the works under 'Susdega Diversion Scheme'. The decision taken by Tender Evaluation Committee is a decision taken by Expert Committee considering the requirement and technical specification of the work. The submission made by learned counsel for the petitioner that issuance of order dated 27.05.2020 (Annexure P/1) is without any rhyme or reason, in view of above, is not correct. It is for the

awarder of the work to consider as to how the work under them is to be awarded executed in their best interest including value of the work. Courts cannot interfere with the decision of getting work under them to be executed in a particular manner and they are having exclusive authority and jurisdiction to consider the same. Courts are having very limited jurisdiction while exercising the power of judicial review, that is, only to consider whether the decision making process of the respondents is arbitrary, unreasonable or with malafide.

11. The law with regard to interference in the tender proceedings is well settled by Hon'ble Suprme Court in case of **Tata Cellular v. Union of India** reported in **(1994) 6 SCC 651**, in which, Hon'ble Supreme Court has held thus :

“77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment

of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind* reported in (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

12. With regard to fixing of terms and conditions of tender document for eligibility criteria, Hon'ble Supreme Court in case of **Michigan Rubber (India) Limited v. State of Karnataka and others** reported in (2012) 8 SCC 216 has held thus :

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be

malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

13. Further, Hon'ble Supreme Court while considering the other judgments in case of **Consortium of Titagarh Firema Alder S.P.A.- Titagarh Wagons Ltd., through Authorised Signatory v. Nagpur Metro Rail Corporation Limited (NMRCL) through its General Manager (Procurement) and Another** reported in (2017) 7 SCC 486, has held thus :-

“30.....The Court quoted a passage from *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818, wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional Courts

should not interfere. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.....”

14. The ground raised by learned counsel for the petitioner that respondent authorities acted with malafide is without any specific pleading and proof. To succeed on the ground of malafide, petitioner has to bring on record specific pleading and evidence to prove the same; merely making a one line pleading that respondent authorities acted with malafide, will not suffice to succeed on that ground.

15. The Hon'ble Supreme Court in case of **Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and Others** reported in **(2005) 7 SCC 764**, has considered the issue of allegation of malafide and held thus :

“56. It is well-settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". [*vide E.P. Royappa v. State of T. N.*, (1974) 4 SCC 3]. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very

seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa v. State of Maharashtra*, (1976) 1 SCC 800 (SCC p.802, para 2); “It (*mala fide*) is the last refuge of a losing litigant”.

16. The submission made by learned counsel for the petitioner that respondent authorities have not published second tender notification is also not correct because petitioner himself has placed on record second tender notification bearing System Tender No.64548 dated 08.06.2020 as Annexure P/10. The writ petition was filed on 29.06.2020. The petitioner in writ petition has not made any specific pleading with regard to getting knowledge of issuance of second tender notification dated 08.06.2020 and its source, hence, it will be presumed that petitioner got knowledge of second tender notification as soon as it was floated online.

17. The ground taken by the petitioner with regard to suffering of heavy loss on account of mobilizing all the machinery and manpower near the work site cannot be attributed to the respondent authorities because respondent authorities have not issued any work order or they entered into agreement with the petitioner. The petitioner cannot blame the respondent authorities even if he acted on assurance given by any of the employee in individual capacity. One of the important aspects of the case is that even after getting knowledge of second tender notification dated 08.06.2020, petitioner has chosen not to participate, hence, he cannot challenge the tender

proceedings. No relief can be granted to the petitioner in these proceedings when second tender is already finalized, work order is issued to respondent No.8 and as per submission made by learned counsel for the 8th respondent, the work is already commenced.

18. In view of aforementioned law laid down by Hon'ble Supreme Court and also considering the facts of the case projected by learned counsel for the petitioner and the respondents as well, we do not find that decision making process for cancellation of tender proceedings bearing System Tender No.47015 dated 03.01.2019 to be in any manner arbitrary, unreasonable or acted with malafide.

19. For the foregoing reasons, writ petition being sans merit, is liable to be and is hereby dismissed.

Sd/-
(P. R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge