

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Order reserved on 24/2/2021
Order delivered on 04/03/2021

WPC No. 2376 of 2020

- M/s. Raj Industries, through its Proprietor Rajesh Gupta, S/o Shri R.I. Gupta, aged about 52 years, New Sarkanda, Bilaspur (CG)

---- Petitioner**Versus**

1. South East Central Railway General Manager, South East Central Railway, Bilaspur (CG).
2. Senior Divisional Electrical Engineer (G), South East Central Railway, Bilaspur (CG)
3. Principal Chief Electrical Engineer, South East Central Railway, Bilaspur (CG)

---- Respondents

For Petitioner : Mr. Anup Mazumdar, Advocate

For Respondents : Mr. R.S. Patel, Mr. MalayJain & Mr. Palash Agrawal, Advocates.

Hon'ble Shri PR Ramachandra Menon,CJ**Hon'ble Shri Parth Prateem Sahu, J****CAV Order****Per Parth Prateem Sahu, J**

1. Petitioner has filed this petition challenging cancellation of Tender No.O.T.P.-19-20-23 by respondents with following reliefs:-

“10.1. That the Records pertaining to the tender invitation and submitted documents by petitioners may be called for kind per usual of this honourable court.

10.2. That the respondent authorities may be

directed to quash decision/order regarding the cancellation of tender and direct the respondents to allot the tender no. tender no.O.T.P.-19-20-23 to the petitioner firm.

10.3. That any other relief which this Hon'ble court may deem fit and just in the facts and circumstances of the case.”

2. Facts necessary for disposal of this petition are that on 17.5.2020 the respondents floated Tender Notification No.OTP 19-20-23 for the work of “Provision of Extension /Modification of control building at Bilaspur/SECR for new East Rail orridor project of CERL & Chhattisgarh East West Rail corridor project of CEWRL”. The petitioner participated in the tender proceedings along with six other bidders. Along with tender document, the petitioner deposited earnest money on 16-17/05/2020. Upon opening of bids submitted by the tenderers, bid of one SNB Electrical, Janjgir Champa has been found to be lowest one, whereas bid of the petitioner was found to be second lowest. Upon examination of the documents submitted by the lowest bidder, it was found that lowest bidder did not fulfil requisite eligibility criteria laid down in the tender document, as such bid of lowest bidder has been rejected. As a result, petitioner, who is second lowest bidder and qualifies all the requisite eligibility criteria as prescribed in the tender document, became entitled for award of contract. However, for the reasons best known to the respondent authorities, instead of awarding contract to the petitioner, the entire tender proceedings have been cancelled.

This made the petitioner to approach this Court by preferring this petition pleading therein that as per tender conditions and the Indian Railways Standard General Conditions of Contract, 2019 (for short 'Conditions of 2019'), if for any reason, the L1 is found ineligible to enter into agreement, then work is to be awarded to L2 contractor/bidder. Respondent authorities cancelled the entire tender proceedings and this fact came to the knowledge of petitioner only when earnest money and security deposit were remitted in petitioner's bank account on 10.7.2020. Petitioner submitted an application for not cancelling the tender proceedings, which was not replied by respondent authorities. The sole Proprietor of petitioner firm has obtained 'A-Class' Electrical License as per requirement and both the sole proprietors of the petitioner firm fulfil the requisites. In the earlier contract work awarded by the respondent Railways, the entire amount of bills has not been paid even after completion of work on the ground that there is a dispute pending before the High Court with regard to the status and constitution of the petitioner firm as to whether it is a partnership firm or a proprietorship firm. There is no difference between 'proprietorship firm' & 'unregistered partnership firm' and a case bearing Arbitration Application No.4/2020 is pending before the High Court on the similar ground. Petitioner has obtained 'A-Class' license in his own name as a sole proprietorship firm which also matches with his Sales Tax and Income Tax accounts. The petitioner firm

has solidified its entity as proprietorship firm. License was obtained on 19.3.2010, even then the bid of petitioner has not been accepted and the entire tender proceedings have been cancelled.

3. Respondent Railways submitted its reply resisting claim and pleadings made in the petition. It has been pleaded that respondent authorities have all the rights not to accept lowest bidder or other bidders and they shall neither demand any explanation for the cause of rejection nor the Railways to assign any reason for the same, as mentioned in Clause-7 of the tender form under the Conditions of 2019. The petitioner participated in present tender proceedings claiming it to be a proprietorship firm and the dispute with regard to nature and status of petitioner firm is still sub judice before the High Court in WPC No.1009/2020, parties being M/s Raj Industries vs. SECR, wherein the petitioner claimed it to be a partnership firm. The petitioner has cleverly used the words 'solidified their entry as a proprietorship firm' and such other terminology, thereby not clarifying whether Shri Rakesh Gupta is still part of the said proprietorship firm or not. Partnership deed is submitted by the petitioner in support of its claim of partnership firm, but after taking a stand, if any with regard to dissolution of partnership firm, the document in this regard could have been filed. Misleading affidavits with regard to nature of the firm have been filed by the petitioner with the respondent Railways, therefore, action is proposed against

the petitioner firm, but due to pendency of writ petition, the proceedings could not be commenced. Petitioner somehow wanted to avoid serious consequences of the act of misconduct and fraud on its part. Tender proceedings have not been cancelled, but since none of the bidders met with eligibility criteria as prescribed under the tender document, **“the tender was discharged”**. The offer of the petitioner was evaluated by the authorities and petitioner firm has not been found to be qualified.

4. Petitioner submitted rejoinder to reply submitted by respondent Railways and pleaded that the tender was intentionally discharged by respondents. They have not supplied the information sought under the Right to Information Act, 2005 till date. Partnership deed submitted by the petitioner has already been wetted earlier and thereafter contract was awarded. A letter has been written to the petitioner to submit 'A-Class' Electrical Contractor License in the name of Rajesh Gupta. On 25.4.2018 said Rajesh Gupta was having 'A-Class' license and the reference made with regard to Rakesh Gupta in this case shows biased attitude of the respondent Railways. Earlier the petitioner was awarded contract of work under tender dated 27.10.2016 and thereafter forged letter was inserted in it. Overall experience of the tenderer firm during past seven years is to be considered for experience and even one of the partners' experience can be considered for the purpose of participating

in the tender proceedings.

5. Mr. Anup Mazumdar, learned counsel for petitioner submits that action on the part of the respondent authorities in discharging the tender is highly arbitrary and unsustainable. As per tender conditions and the Conditions of 2019, when for one or other reasons, L1 is not found eligible to enter into agreement or for award of contract, then L2 is to be considered for award of contract. The tenders are issued under the motive of public welfare and up-liftment. No reason has been assigned for cancelling the entire tender proceedings. Cancellation / discharge of the tender must be supported by cogent reasons. Petitioner fulfils all pre-requisites as prescribed under the tender document for becoming eligible for execution of work and amongst seven bidders, the petitioner is only qualified, but in a very arbitrary and unreasonable manner, the bid of petitioner has been rejected declaring the petitioner to be disqualified. There is no transparency in the action of the respondent authorities as the Minutes of Meeting for discharging the tender proceedings have not been supplied even after making application. Ground taken by the respondent Railways to disqualify the petitioner that petitioner does not have requisite experience to fulfil eligibility criteria is not correct. Petitioner is engaged in the work of contract with the respondent Railways since long and executed contracts as a partnership firm wherein 'A-Class' license was with one of the partners of the firm in which

the petitioner was also one of the partners. Hence, the work experience under the license of Rakesh Gupta (one of the partners of the partnership firm) is to be considered for the purpose of calculating / assessing experience of the petitioner also. In support of this contention, he places his reliance on the judgment passed by Hon'ble Supreme Court in case of **New Horizons Ltd. Vs. Union of India** reported in (1995) 1 SCC 478 and the order passed by the Madras High Court in **WP No.5915/2008**, parties being **Jay Engineering Work Vs. Chairman, Tamil Nadu Electricity Board & ors.**

6. Mr. R.S. Patel, learned counsel appearing on behalf of respondent Railways submits that the respondent authorities have acted in accordance with the terms and conditions of the tender document and the Conditions of 2019. There is no challenge to the clauses of the Conditions of 2019 by the petitioner wherein the respondents have been given authority to cancel / discharge the tender proceedings. Petitioner in this tender proceedings submitted bid showing itself to be a proprietorship firm and along with bid also filed 'A-Class' electrical contractor license which has been issued only on 13.3.2020, as such the petitioner did not fulfil the eligibility criteria as prescribed under Clause 10.1 of the tender document. Petitioner has projected itself in different capacities at different points of time with the respondent Railways, which is apparent from two different affidavits filed by the petitioner with the Railways i.e. affidavit dated 28.1.2017 & 16.4.2018.

In the affidavit dated 20.1.2017 the petitioner firm has been shown to be a proprietorship firm, whereas in affidavit sworn on 16.4.2018 it is shown as partnership firm having two partners namely Rajesh Gupta and Rakesh Gupta. These affidavits are sufficient to show that the petitioner has tried to mislead the authorities as well as this Court. Respondent authorities have made internal correspondence on the subject of forfeiture / withholding of earnest money deposit/ performance guarantee / security deposit available with the respondent under contract of M/s Raj Industries, Bilaspur. Dispute with regard to status of petitioner firm is pending consideration before the High Court in WPC No.1009/2020 filed by the petitioner. Under the tender document and the Conditions of 2019, the respondents are having authority to discharge tender without assigning any reason to anyone. There is no arbitrariness in the action taken by the respondent authorities. Writ petition being devoid of any substance is liable to be dismissed.

7. We have heard learned counsel for the parties and also perused the pleadings and documents placed on record by respective parties in support of their claim.
8. To appreciate the rival submission made by learned counsel for the parties, we have gone through the documents annexed along with writ petition as well as reply.
9. So far as the submission made by learned counsel for petitioner with regard to partnership firm and the work

experience to be counted in favour of one of the partners is concerned, the partnership deed brought on record as Annexure P-2 is an unregistered partnership deed. The petitioner has not filed any document to show that clauses/ conditions mentioned in the partnership deed have been complied with in its entirety. In view of two different affidavits placed on record by respondent Railways along with its reply, stated to be executed by petitioner, and further taking into consideration that writ petition as well as arbitration proceedings are pending consideration in which also similar grounds, as raised in this petition, have been raised by the petitioner, we do not find it appropriate to consider and decide that issue in this writ petition. More so, when in this writ petition the challenge is with regard to the discharge of tender by respondent authorities invoking the clauses mentioned in the tender document as also the Conditions of 2019.

10. The petitioner has denied the execution of two affidavits filed by the respondents and further argued that those affidavits are concocted documents. This dispute, as raised by the petitioner, cannot be decided in a petition under Article 226 of the Constitution of India.

11. In view of the fact that a litigation with regard to status and constitution of petitioner firm is pending consideration between the parties and further the internal correspondence of the respondents under the head of 'forfeiture/withholding of earnest money deposit, performance guarantee, security

deposit, available with respondent Railways and other dues of the department, if any, under the contract of M/s Raj Industries, Bilaspur, we are refraining ourselves to decide the issue raised by the petitioner that experience of partnership firm be taken into consideration as experience of the petitioner.

12. In the given facts and circumstances of case, we have called the minutes of meeting of Tender Committee and the same was produced before this Court in a sealed envelope, which was opened in the Court and perused. Upon perusal of the Minutes of Meeting of the Tender Committee, we do not find any arbitrariness, unreasonableness or malafide in the decision making process of the respondent authorities in discharging the tender proceedings.
13. For the foregoing reasons, writ petition *sans merit* and the same is hereby dismissed as such.
14. Sealed envelope submitted by the respondents be returned to the learned counsel for respondents.

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

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-