

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 1780 OF 2019

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

Pravas Behera Petitioner

-Versus-

State of Odisha and others Opp. Parties

For Petitioner : Mr. Anup Kumar Pattnaik,
Advocate

For Opp. Parties : Mr. J.P. Patnaik,
Government Advocate

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HON'BLE MR. JUSTICE SANJAY KUMAR MISHRA**

DECIDED ON :: 05.07.2022

DR. B.R. SARANGI, J. The Petitioner, who is a Scheduled Caste 'A' Class Contractor, has filed this Writ Petition seeking to quash the Office Order dated 28.12.2018 at Annexure-4, whereby the Superintending Engineer, Cuttack (R&B) Circle, Cuttack-Opposite Party No.2 has cancelled the Tender Call Notice No.S.E. Ctc. (R&B) 3/2018-19 at

Annexure-1, pursuant to which the Petitioner was selected as L1 Bidder.

2. The factual matrix of the case, in a nutshell, is that the Petitioner is a Scheduled Caste 'A' Class Contractor duly registered under the P.W.D. having Registration No. 458/2016-17. The Superintending Engineer, Cuttack (R&B) Circle, Cuttack-Opposite Party No.2 invited tenders for "*Construction of E Type Quarters (One Block-6 Nos) for Police Department at OSAP 6th Bn. Cuttack (Civil, El, PH)*" vide Bid Identification No. S.E. Ctc.(R&B) 3/2018-19. Pursuant to the Detailed Tender Call Notice, the Petitioner submitted his bid. The bid was of two parts, namely, Technical Bid and Financial Bid. The Technical Bid is used to disqualify the Bidders, who are not eligible as per the Clauses entered under the Detailed Tender Call Notice. Then the Financial Bid is opened in order to ascertain the lowest Bidder, i.e. L1 Bidder, so as to award the tender.

2.1 As per the schedule of tender documents, the Petitioner submitted his bid and participated in the process of tender. He having been qualified in the Technical Bid, which was opened on 06.10.2018, his Financial Bid was taken into consideration and he was declared as L1 in furtherance of his quote percentage of -8.01. But, instead of awarding the work order to the Petitioner to perform the work, Opposite Party No.2 cancelled the tender, vide Office Order dated 28.12.2018. Hence, this Writ Petition.

3. Mr. Anup Kumar Pattnaik, learned Counsel appearing for the Petitioner vehemently contended that the Petitioner, being a Scheduled Caste 'A' Class Contractor, having been participated in the tender process and declared as L1, after the Financial Bid was opened, all of a sudden and without assigning any reason, the Opposite Party No.2 should not have cancelled the Tender Notice, particularly when the Petitioner had a legitimate expectation that after being declared as L1 he would be given the rightful opportunity

to discharge his part of obligation, as per the Tender Call Notice, to perform the work in question. Therefore, cancellation of tender, vide impugned order dated 28.12.2018 at Annexure-4, cannot be sustained in the eye of law.

3.1 It is further contended that Opposite Party No.2, being a State, every administrative decision taken by it is to be supported by reasonable nexus to the object that it is trying to achieve and in absence of such reasonable nexus, every administrative decision must be deemed to be arbitrary, illegal and untenable in the eye of law and violates Article 14 of the Constitution of India.

3.2 To substantiate his contention, learned Counsel for the Petitioner has relied upon the decisions of this Court in the case of **Tarun Mohanty v. State of Odisha and Ors**, 2018 (I) OLR 1025 : 2018 (II) ILR-CUT 12 and in the case of **Rutuparna Construction v. State of Odisha and Ors**, 2018 (II) OLR 496 : 2018 (II) ILR-CUT 197.

4. Mr. J.P. Patnaik, learned Government Advocate appearing for the State-Opposite Parties contended that pursuant to the Tender Call Notice, five (5) numbers of bidders were technically qualified, out of which, four (4) were SC Contractors. To extend the benefit to all the SC Contractors and to ensure a more competitive price, all the technically qualified SC Contractors were requested to submit their willingness to avail price preference applicable to SC/ST Contractors and after receipt of their willingness, they were asked to submit negotiation in sealed cover. When other three bidders submitted their negotiation, the Petitioner-Contractor, who was L1 in Financial Bid, as his bid price was 8.01% less than the tender price, declined in writing to submit negotiation. Therefore, tender has been cancelled by the Authority. As a consequence thereof, no illegality or irregularity has been committed by the Authority by cancelling such tender, therefore contended for dismissal of the Writ Petition.

5. This Court heard Mr. A.K. Pattnaik, learned Counsel appearing for the Petitioner and Mr. J.P. Pattnaik, learned Government Advocate appearing for State-Opposite Parties by hybrid mode, and perused the records. Pleadings having been exchanged between the parties, with the consent of learned Counsel for the parties this Writ Petition is being disposed of finally at the stage of admission.

6. Undisputedly, the Petitioner-Contractor, who belonged to SC Category, being a successful bidder having been declared as L1, pursuant to the tender invited by Opposite Party No.2, namely, Superintending Engineer, Cuttack (R&B) Circle, Cuttack, the work ought to have been awarded in his favour. But, instead of doing so, the Opposite Party No.2 has cancelled the Tender Call Notice, without assigning any reason, vide Annexure-4 dated 28.12.2018. As a matter of prudence, the Office Order under Annexure-4 ought to have contained the reasons for such cancellation. In absence of any reasons

for cancellation of tender, the impugned Office Order at Annexure-4 cannot sustain.

7. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the Authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

8. Reasons being a necessary concomitant to passing an order, the Appellate Authority can thus

discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

Similar view has also been taken in ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & another***, 2017 (I) OLR 5 and ***Banambar Parida v. Orissa Forest Development Corporation Limited and others***, 2017 (I) OLR 625.

9. This Court, while entertaining the Writ Petition, considering the prima facie case in favour of the Petitioner, passed the following order on 28.01.2019, in I.A. No. 1520 of 2019:-

“W.P.(C) No. 1780 of 2019
&
I.A. No.1520 of 2019

02. 28.01.2019. *Learned counsel for the petitioner states that in view of Annexure-3, the petitioner was found to be the lowest bidder. In spite of that, after two and half months the tender has been cancelled by order dated 20.12.2018.*

Learned Additional Government Advocate has accepted notice on behalf of the State-opposite parties. Let extra copies of the writ petition be served on him in order to enable him to obtain instruction in the matter or file counter affidavit by the next date.

The matter to come up on 11.02.2019.

As an interim measure, it is directed that no fresh tender will be invited till the next date. Even if the tender is issued, the same shall not be finalized without leave of this Court.

Urgent certified copy of this order be granted on proper application.”

10. Pursuant to the notice issued by this Court, the Opposite Parties entered appearance and filed their Counter Affidavit explaining the reasons for cancellation. In Paragra-5 of the Counter Affidavit, it has been specifically mentioned that pursuant to the Tender, five (5) numbers of bidders were technically qualified, out of which four (4) numbers are SC Contractors. To extend the benefit to all the SC Contractors and to ensure a more competitive price, all the technically qualified SC Contractors were requested to submit their willingness to avail price preference applicable to SC/ST Contractors after receipt of their willingness and they were subsequently asked to submit negotiation in sealed cover. When other three bidders submitted their negotiation, the Petitioner-Contractor, who was L1 in Financial Bid, as his bid price was 8.01 % less than tender price, declined in

writing to submit negotiation. The explanation so submitted in the Counter Affidavit cannot be acceptable, as because the Order, basing upon which the cancellation has been made, does not contain any reason, as has been explained subsequently in the Counter Affidavit, which is not legally permissible.

11. It is well settled principle of law laid down by the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi***, AIR 1978 SC 851 that :

“When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.”

12. In ***Commissioner of Police, Bombay v. Gordhandas Bhanji***, AIR 1952 SC 16, the apex Court held as follows:

“Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of

what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older.”

Similar view has also been taken in ***Bhikhubhai Vithlabhai Patel v. State of Gujarat***, (2008)4 SCC 144.

13. It is candidly admitted by the learned Government Advocate appearing for the Opposite Parties that the Petitioner is L1 Bidder. Therefore, the question of calling upon him to have negotiation, even if he belonged to SC category, does not arise. A communication was made on 28.11.2018 to the Petitioner, which was placed on record in the Rejoinder Affidavit as Annexure-5 calling upon him to offer his further negotiated rate, against his offered rate, i.e. 8.01% less, which should be in percentage basis up to two digit decimal only and it should be submitted in sealed cover on or before 28.11.2018. In the said letter, the Petitioner was also

directed to submit his willingness towards extension of validity period of the tender, failing which tender would be decided on its own merit. There is no justifiable reason to call upon the Petitioner to have a negotiation with him, as he was the L1 Bidder in the tender process conducted by Opposite Party No.2. The Petitioner submitted his reply on 22.11.2018, which has been placed on record as Annexure-6, declining to go for any further negotiation, rather requested Opposite Party No.2 for drawal of Agreement for undertaking the work by him.

14. It is of relevance to note that the Central Vigilance Commissioner had issued a Circular on 18.11.1998 on the subject “Improving vigilance administration” and in Clause-2.4 thereof, it has been prescribed as follows:-

“2.4 Tenders.

Tenders are generally a major source of corruption. In order to avoid corruption, a more transparent and effective system must be introduced. As post tender negotiations are the main source of corruption, post tender negotiations are banned with immediate effect except in the case of negotiations with L1 (i.e. Lowest tenderer).”

Therefore, the post tender negotiations are generally avoided, as it is considered as anti thesis to open tender.

15. Even under the OPWD Code, the post tender negotiation is only permissible under two circumstances. First, as provided in Para-3.5.14 of the OPWD Code Volume-1, if L1 bidder does not turn up for agreement after finalization of the tender then he shall be debarred from participation in bidding for three years and action will be taken to blacklist the Contractor. In that case L2 Bidder, if fulfils the other required criteria would be called for drawing agreement for execution of work subject to the condition that L2 Bidder negotiates at par with the rate quoted by the L1 Bidder otherwise the tender will be cancelled in case a Contractor is blacklisted it will be widely published and intimated to all departments of the Government and also Government of India agencies working in the State. Secondly, the post tender negotiation is also allowed in case of price preference/ grant of concession to Scheduled Tribe and Scheduled Caste Contractors. As per the Circular No.16/37-27748,

dated 11.10.1977, if the Tender of the following type of Scheduled Caste and Scheduled Tribe Contractors is within 10% of the rate quoted by the lowest tender for any work, the work may be considered for award to him/them at the lowest tenders rate in the relaxation of rule 18 of the D.G.F.R. Vol.1 and Para 3.5.14 of the OPWD Code.

- (a) Individual registered contractors belong to the S.C and S.T.
- (b) Private limited companies in which at least 5% of the share are held by members of Scheduled Caste and/or Scheduled Tribe.
- (c) Partnership firms in which at least 51% of the share are held by members of Scheduled Caste and/or Scheduled Tribes.

In view of the aforesaid provision, the present case is not coming within the ambit of calling for post tender negotiation. The reason being, when the Petitioner is an L1 Bidder and a qualified SC Contractor, the question of price preference does not arise at all.

16. In **Tarun Mohanty** (supra), at Paragraph-11 of the judgment, this Court relying upon the judgment of the apex Court held as follows:-

*“11. In **Shiv Sagar Tiwari Vs. Union of India and Ors.**, AIR 1997 SC 1483, the Apex Court held that whatever procedure the Government proposes to follow in accordance with the tender must be clearly stated in the tender notice. The consideration of the tender received and procedure followed in the matter of acceptance of tender should be transparent, fair and open. Similar view has also been taken in **Common Cause Vs. Union of India**, 1996 (6) SCC 593. The powers of judicial review in the arena of contractual jurisdiction has been widened, as has been held by the Supreme Court in **Mahabir Auto Stores Vs. Indian Oil Corporation**, AIR 1990 SC 1031, as well as **Food Corporation of India Vs. M/s Kamdhenu Cattle Feed Industries**, AIR 1993 SC 1601.”*

In the said judgment, the Circular/Notification of the Government dated 11.10.1977 with regard to Guidelines to Works Department, Government Instructions, has been considered.

17. In **Rutuparna Construction** (supra), at Paragraphs-9 and 10 of the judgment, this Court held as follows:-

“9.From the record, it is clear that the notification dated 11.10.1977 was not specifically made

applicable to the present Tender Call Notice. In the absence of the notification dated 11.10.1977 having been made applicable, which grants benefit of 10% price preference in favour of Scheduled Caste and Scheduled Tribe contractors, the benefit of the said notification cannot be given to the Schedule Caste candidates for awarding contract in pursuance of such Tender Call Notice, which did not specifically make the notification applicable.

10. A Division Bench of this Court has, by judgment and order dated 18.12.2017 passed in W.P.(C) No. 20802 of 2017 (Tarun Mohanty Vrs. State of Odisha and others), specifically held that in the absence of the Tender Call Notice specifying the applicability of the 9 notification dated 11.10.1977 granting benefit of 10% price preference to the Scheduled Caste and Scheduled Tribe contractors, the said benefit cannot be given.”

18. In the present case, even though the Petitioner belonged to SC Category, he did not want to invoke the benefit of the Government Circular dated 11.10.1977, as he had already been declared as L1 by following the tender procedure. Therefore, the cancellation which has been made and the reasons which have been assigned in the Counter Affidavit, having no leg to stand, this Court is of the considered view that the impugned Office Order dated 28.12.2018 passed by Opposite Party No.2 under

Annexure-4 cannot be sustained in the eye of law and the same is liable to be quashed and is hereby quashed. The Opposite Parties are directed to proceed with the matter without causing any further delay.

19. In the result, the Writ Petition is allowed. However, there shall be no order as to costs.

S.K. MISHRA, J. I agree.

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DR. B.R. SARANGI,
JUDGE

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S.K. MISHRA,
JUDGE

Orissa High Court, Cuttack
The 05th July, 2022, Arun/GDS