

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P (C) No. 12955 of 2022

*M/s BECO Elevator Engineering,
Visakhapatnam*

.....

Petitioner

Mr. S.S. Padhy, Adv.

Vs.

*National Aluminium Company Ltd.
BBSR and another*

.....

Opposite Parties

Ms. P. Rath, Adv.

CORAM:

DR. JUSTICE B.R. SARANGI

MR. JUSTICE G. SATAPATHY

ORDER

02.11.2022

Order No.

07.

This matter is taken up through hybrid mode.

2. Heard Mr. S.S. Padhy, learned counsel appearing for the petitioner and Ms. P. Rath, learned counsel appearing for the opposite parties.

3. The petitioner has filed this writ petition seeking to quash the tender call notice dated 21.04.2022 under Annexure-5 for the work “Comprehensive Maintenance contract for 37 nos. of Lifts at Alumina Refinery, NALCO, Damanjodi”, and to issue direction to the opposite parties to treat its bid as responsive.

4. Mr. S.S. Padhy, learned counsel appearing for the petitioner contended that the opposite parties issued a tender call notice on 27.10.2021 in respect of the very same work, wherein under Annexure-1C the pre-qualification criteria (PQC) was prescribed indicating the definition of ‘similar works’. Pursuant to said tender call notice, the petitioner and one Sri Sai Elevators and Power Solutions participated in the process of tender. The petitioner became L2 bidder, while the other one became L1. The selection of Sri Sai Elevators and Power Solutions was objected to by the petitioner on technical ground, which was considered and

accordingly the bid was cancelled vide order dated 04.04.2022 under Annexure-4 and fresh tender was issued on 21.04.2022 under Annexure-5, where also Annexure-1C contained the pre-qualification criteria (PQC) for the very same works and the definition of 'similar works' was provided, which is not similar as has been indicated in the earlier tender call notice dated 27.10.2021. It is further contended that the opposite parties have time and again changed the definition of 'similar works' in respect of the tenders dated 13.09.2017, 28.08.2019, 27.10.2021 and 21.04.2022, which has been placed at paragraph-10 of the writ petition. It is further contended that the conditions stipulated in the present tender is causing immense difficulty to the petitioner, which has been explained at paragraph-14 of the writ petition. To substantiate his contention, he has relied upon the judgment of the apex Court in the case of ***Silpi Constructions Contractors v. Union of India***, (2020) 16 SCC 489.

5. Ms. P. Rath, learned counsel appearing for the opposite parties-NALCO raised preliminary objection with regard to fact that the contention raised about Sri Sai Elevators and Power Solutions, which participated in the earlier bid and also participated in the present bid and was selected, has not been impleaded as party to the writ petition. Due to non-joinder of proper party, the writ petition should be dismissed. It is further contended that due to suppression of material facts, the writ petition can also be dismissed. It is further contended that the petitioner, while challenging the conditions of the tender call notice dated 21.04.2022, has suppressed the material fact, as it had applied in pursuance of the said tender. As the petitioner challenges the tender condition, if it had made the disclosure, it

could have been evident at the admission stage itself that the tender conditions do not debar the petitioner and it could not have been able to make out a ground of discrimination. As such, there is no such pleadings available in the writ petition debarring the petitioner to participate in the tender process itself and admittedly the petitioner has taken part in the tender process after the notice was issued by this Court on 19.05.2022. Therefore, having participated in the process of tender, now the petitioner cannot challenge the conditions stipulated in the tender itself, which amounts to suppression of facts and, as such, on that basis, the writ petition is liable to be dismissed. It is further contended that M/s Sri Sai Elevators and Power Solutions had quoted Rs.45,39,855.65, whereas the petitioner had quoted Rs.57,19,932.12 with difference of 11,80,076/-. It is contended that non-disclosure was with an aim to take chance in the financial bid, if the petitioner would have succeeded in the same, then there would have been no requirement to press the writ petition. Consequentially, it is contended that the writ petition should be dismissed due to non-joinder of proper party as well as suppression of material facts. Otherwise also, having participated in the process of tender, the petitioner cannot be permitted to challenge the condition stipulated in the tender itself.

6. Having heard learned counsel for the parties and after going through the records, this Court finds that the conditions stipulated in the aforesaid tender call notice are under challenge and, as such, while entertaining the writ petition, this Court, vide order dated 19.05.2022, issued notice to the opposite parties and passed interim order that the tender process pursuant to Annexure-5 may continue but the same shall be subject to the result of the writ

petition, till 21.06.2022. But fact remains, while of the conditions are prejudicial to the interest of the petitioner has not been indicated in the pleadings to the writ petition. More so, the petitioner, having satisfied all the conditions stipulated in the DTCN, participated in the bid on 23.05.2022 and, as such, having participated in the process of bid, without taking leave of this Court, now the petitioner cannot turn around and challenge the conditions stipulated in the tender, which amounts to suppression of facts. As such, the said fact has been brought to the notice of the Court by filing rejoinder affidavit, but by the time the rejoinder affidavit was filed, the petitioner had already participated in the bid itself. More so, though allegations have been made against Sri Sai Elevators and Power Solutions, but it has not been made as party to the writ petition.

7. With regard to non-joinder of parties, reliance has been placed on the judgment of the apex Court in the case of ***Afcons Infrastructure Ltv. v. Nagpur Metro Rail Corporation Ltd.***, (2016) 16 SCC 818, wherein the apex Court held that the petitioner has to make all the tenderers as parties to the writ petition and due to non-joinder of parties, the Court should not go into the root of the matter and as such, the claim of the petitioner cannot sustain in the eye of law. Though contrary to the said judgment, the petitioner has relied upon the judgment of the apex Court in the case of ***Silpi Constructions Contractors*** (supra), wherein, while dealing with the judgment of the High Court that in all the cases challenging the decision of the tendering authority all the eligible tenderers should be made as parties, the apex Court held that such a broad proposition could not be laid down as an inflexible rule of law. Supposing the tender documents are not

sold/delivered to a party wanting to submit a tender, in such a case the other tenderers would not be necessary parties. As such, the apex Court also held that who are the necessary parties will depend upon the facts of each case. But that is not the case here. In the present case, since the petitioner has already made allegation against Sri Sai Elevators and Power Solutions and, as such, it being a necessary party, its non-impletion, cannot sustain in the eye of law and the writ petition is not maintainable. Mr. S.S. Padhy, learned counsel for the petitioner contended that he has already filed I.A. No. 10953 of 2022 on 10.08.2022 seeking Sri Sai Elevators and Power Solutions as party to the writ petition. But that itself cannot cure the defect because the petitioner has already participated in the bid without impleading Sri Sai Elevators and Power Solutions. Therefore, the objection raised by learned counsel for the opposite parties that the writ petition should be dismissed on the ground of non-joinder of proper parties as well as suppression of material facts, has got ample force.

8. In view of the foregoing reasons, as delineated above, this Court is not inclined to entertain this writ petition, which is accordingly dismissed.

9. Interim order passed on 19.05.2022 stands vacated.

(DR. B.R. SARANGI)
JUDGE

(G. SATAPATHY)
JUDGE