ORISSA HIGH COURT: CUTTACK

W.P.(C) No. 33851 of 2020

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

AFR

M/s. JIBANDHARA ..... Petitioner

-Versus-

Union of India and others ..... Opp. Parties

For Petitioner	:	Mr. Sukanta Kumar Dalai, Advocate.
For Opp. Parties	:	Mr. Chandra Kanta Pradhan, Senior Panel Counsel. (O.Ps. No. 1 to 4)
		Mr. Surendra Nath Kar, Advocate. (O.P. No.5)

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HON'BLE MISS JUSTICE SAVITRI RATHO

Date of hearing and judgment: 09.03.2022

DR. B.R. SARANGI, J. The petitioner has filed this writ petition seeking to quash the Tender Call Notice dated 26/27.11.2020 under Annexure-9 series; and to direct the opposite parties to approve the extension of the appointment of the petitioner for a further period of two years, i.e. from 03.01.2021 to 02.01.2023 as per the terms of contract, in view of the recommendation made by opposite party no.3 on 27.10.2020 under Annexure-6; and to direct opposite party no.3 to release the arrear dues of Rs.1,40,00,000/- along with subsequent pending dues of the petitioner forthwith.

2. The factual matrix of the case, in brief, is that opposite party no.3 floated an e-tender call notice on 08.08.2016 for empanelment of Chemists for CGHS for three years, i.e. 2016-2019 with the terms and conditions specified therein. The petitioner participated in the tender process and became successful. Accordingly, the petitioner executed the agreement for a period of one year on 03.11.2016. But subsequently the said agreement was renewed on 02.11.2017 and 02.11.2018 for one year extension in each spell. Another advertisement was issued by the opposite party no.3 on 26.04.2019 for empanelment of Chemists for CGHS for a period of three years on expiry of earlier tender with same terms and conditions of 2016. Since the tender process was

continuing, the appointment of the petitioner was extended from 03.11.2019 to 02.12.2019 with the same terms and conditions, as per the appointment order dated 03.11.2016. Again, the agreement was extended from 03.12.2019 to 02.01.2020 because of the delay in finalization of the tender. In the meantime, the petitioner participated in the process of tender, pursuant to the e-tender call notice dated 26.04.2019. Though the advertisement was issued for three years, the petitioner, being the successful bidder, entered into an agreement with opposite party no.3 on 03.01.2020 for a period of one year. While the contract was subsisting, opposite party No. 3 wrote a letter on 27.10.2020 to opposite party no.2 for approval of extension of appointment of the petitioner for two years, i.e. from 03.01.2021 to 02.01.2023. The petitioner also wrote a letter on 13.11.2020 to opposite party no.3 to release the arrear dues. But, instead of extending the period, as had been recommended, opposite party no.2 wrote to opposite party no.3 for initiation of fresh tender call notice, vide letter dated 16.11.2020. Pursuant thereto, opposite party no.3 floated the tender call notice on 26.11.2020 for a period of three years by enhancing the EMD amount from Rs.30,000/- to around Rs.14.00 lakhs. Therefore, the petitioner has approached this Court by filing the present writ petition.

3. Mr. S.K. Dalai, learned counsel for the petitioner contended that though the tender floated on 26.04.2019 was for a period of three years, the agreement was executed with the petitioner on 30.12.2019 for a period of one year. Therefore, before expiry of such period of one year, as per the normal practice, extension was to be given in favour of the petitioner for a period of another two years and, as such, opposite party no.3 had also written a letter to opposite party no.2 for extension of such period. However, opposite party no.2, without acceding to the request made by opposite party no.3, wrote a letter to opposite party no.3 to initiate fresh tender, pursuant to which, the tender call notice was issued on 26.11.2020. Thereby, the authorities have acted arbitrarily and unreasonably, for which the

petitioner has approached this Court in the present writ petition.

4. Mr. C.K. Pradhan, learned Senior Panel Counsel for the Union of India, contended that admittedly the notice inviting tender was for a period of three years, but while executing the agreement, the petitioner entered into the agreement for a period of one year and, more so, that period has not been extended by the authority. Apart from the same, while executing the agreement for a period of one year, the petitioner had not raised any objection or protest for execution of such agreement for a period of one year, though the advertisement was for a period of three years. As the price quoted by the petitioner was not accessible to the opposite parties, they wanted to go for a fresh tender. As a consequence thereof, the request made by opposite party no.3 for approval of extension of appointment of the petitioner for two years from 03.01.2021 to 02.01.2023 was not acceded to and, thereby, direction was given by opposite party no.2 to opposite party no.3 to initiate fresh tender. Accordingly,

fresh tender was floated on 26.11.2020 and the petitioner did not participate in the said fresh tender. Pursuant to such tender, though opposite party no.5 got selected, but due to interim order passed by this Court, the same could not be settled in his favour. As such, the petitioner is continuing by virtue of the interim order passed by this Court.

5. Mr. S.N. Kar, learned counsel appearing for opposite party no.5 contended that pursuant to the fresh tender issued on 26.11.2020, opposite party no.5 participated in the process of tender and got selected, but no work order was issued in his favour because of the pendency of this writ petition and, as such, the petitioner is enjoying the interim order. As a consequence thereof, rights of opposite party no.5 have been affected and it has not been able to perform its part of contract due to non-execution of agreement by the authority concerned.

6. This Court heard Mr. Sukanta Kumar Dalai, learned counsel for the petitioner; Mr. Chandra Kant Pradhan, learned Senior Panel Counsel for Union of India

and Mr. Surendra Nath Kar, learned counsel for opposite party no.5 by hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with their consent this writ petition is being disposed of finally at the stage of admission.

7. There is no dispute with regard to the factual matrix that the petitioner was selected, pursuant to the tender call notice dated 08.08.2016, and entered into an agreement for a period of one year. The same was renewed from time to time i.e. on 02.11.2017 and 02.11.2018, and by this process the three years period, pursuant to such tender call notice, expired. Thereafter, a fresh tender call notice was issued on 26.04.2019, in which the period of contract was mentioned to be for three years, but the petitioner, on being participated and selected, entered into an agreement on 30.12.2019 for a period of one year. Thereby, the period of one year, as per the agreement, was to expire on 29.12.2020. But, during the subsistence of the agreement, a request was made by opposite party No.3 to opposite party no.2 vide letter

dated 27.10.2020, for extension of tender period for another two years, i.e. from 03.01.2021 to 02.01.2023. As the said request was made without supported by reasons, this Court, vide order dated 28.02.2022, called upon the Additional Director, in the office of the Joint Director, Central Government Health Scheme-opposite party no.3, to appear in person and explain under what circumstances he had written the said letter for extension of time for a period of two years. He appeared before this Court and stated that he has no experience, so as far as the administrative matter is concerned, and that since the petitioner was supplying medicines and drugs pursuant to the agreement for a period of one year, on a bonafide belief he had requested for extension of contract for a period of two years and, as such, he admitted that no reason has been assigned in the letter itself.

8. In the above scenario, the only question remains to be considered is that if a contract is for one year, after expiry of the period of contract, has the petitioner got any right to claim that the same should be

extended. When this query was made by this Court, Mr. Dalai, learned counsel for the petitioner cited some decisions of this Court as well as the apex Court in the cases of ***M/s. Monarch Infrastructure (P) Ltd. v. commissioner, Ulhasnagar Municipal Corporation and others***, AIR, 2000 SC 2272; ***West Bengal Electricity Board v. Patel Engineering Co. Ltd and others***, AIR 2001 SC 682; ***Central Coalfields Ltd and another v. SLL-SML (Joint Venture Consortium) and others***, AIR 2016 SC 3814; ***Ramana Dayaram Shetty v. The International Airport Authority of India and others***, AIR 1979 SC 1628; ***Radhamohan Patra v. State of Orissa and others***, IR 1992 Orissa 221; ***Roots Industries India Ltd. v. Airports Authority of India and others***, (2016) 3 SCC 569; and ***United Contractors Association v. State of Orissa and others***, 2018 (I) OLR 331, in which one of us (Dr. Justice B.R. Sarangi) was a member.

9. On perusal of those decisions, this court finds as follows:-

In ***M/s. Monarch Infrastructure (P) Ltd.*** (supra) the apex Court held that if the term of a tender is deleted after the players entered into the arena, it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions, fresh process of tender was the only alternative permissible.

In ***West Bengal Electricity Board*** (supra), the apex Court held that tenders were invited only from the bidders who have satisfied in pre-qualification and the instructions to the bidders issued by the employer required the bidder to fill in rates and prices for all items of the works described in the bill of quantities both in figures and words and as such errors been confined to a case of either recording in U.S Dollar equivalent to the unit rates already noted in Indian Rupee or vice versa, the mistakes could have been corrected. More so, if a mistake has been committed may, be unilateral or mutual, but it is always unintentional. If it is intentional, it ceases to be a mistake.

In ***Central Coalfields*** (supra), the apex Court held that rejection of bid not accompanied by bank guarantee in format prescribed in bid documents treating it as non-responsive in view of the General Terms and Conditions governing bidding process, is not arbitrary, unreasonable or perverse. Therefore, it is not open to judicial review.

In ***Ramana Dayaram Shetty*** (supra), the apex Court, while considering the terms of contract, the interpretation, deed and construction, held that on a proper construction what the notice required was that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years' experience of running a IInd hotel or restaurant. The test of eligibility laid down was an objective test and not a subjective one. Therefore, the tender cannot be accepted of a person, who does not fulfill the requisite qualification.

In ***Radhamohan Patra*** (supra), this Court came to a conclusion that tender received ten minutes beyond the prescribed time cannot be considered, even if the amount tendered is lowest one.

In ***Roots Industries*** supra, the apex Court held that interference in contractual matters, when the tender/bid process had been finalized and contract awarded to another while the writ petitioner was in process of challenging rejection of its bid is not a ground on which the writ petition can be dismissed. The writ petition be restored to file of High Court for disposal on merits on the ground of judicial review

In ***United Contractors Association*** (supra) this Court held that invitation for tenders issued for various packages by the designated officer under PMGSY and during the process of online bidding by way of 4th corrigendum, tender for the work from Sl. No. 1 to 168 was cancelled. For such cancellation in a selective manner, it is stated to be 'due to unavoidable circumstances' the meaning of which is not available to be inferred from the contents of 4th corrigendum. Therefore, cancellation of tenders so made without assigning any reason cannot sustain.

10. All these cases, which have been referred to by Mr. Dalai, learned counsel for the petitioner, factually are not the same and similar to the present case. So far as the principle is concerned, the principle is applicable to the facts of respective cases. But here the fact is absolutely different from that of the cases cited before this Court. Here, the fact is that the petitioner having entered into an agreement for a period of one year, when such period was going to expire, even though the recommendation was made for extension of another two years, if the authorities decided to issue fresh notice inviting tender, in that case, whether the Court can interfere with the same in exercise of power under judicial review. The answer is obviously not. The Court cannot

interfere with that at this stage, when the period of contract was already over, as the agreement was for a period of one year. No doubt, the notice inviting tender was issued for a period of three years, but the petitioner knowing fully well and without any objection executed the agreement for the period of one year.

11. In the above view of the matter, this Court does not find any merit in this writ petition, which is accordingly dismissed. No order as to costs.

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DR. B.R. SARANGI,
JUDGE

SAVITRI RATHO, J. I agree

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SAVITRI RATHO,
JUDGE

Orissa High Court, Cuttack
The 9th March, 2022, Arun/GDS