D/L. 15.
January 10, 2024.
MNS.

WPA No. 27658 of 2023

M/s Asha Construction
Vs.
The State of West Bengal and others

Mr. Soumya Majumder,
Mr. Subhabrata Das,
Mr. Amartya pal,
Mr. Kartick Kumar Goyal

… for the petitioner.

Mr. Amal Kumar Sen,
Ms. Ashima Das (Sil)

…for the respondent-authorities.

1. Affidavit-of-service filed in Court today be kept on record.
2. The petitioner has thrown the present challenge against the decision of the respondent authorities to refuse to grant work order to the petitioner, although the petitioner was the L1 bidder in the tender process, and to forfeit the Earnest Money Deposit (EMD) made by the petitioner.
3. Learned counsel appearing for the petitioner contends that initially the petitioner had participated in the tender and had turned out successful. Thereafter an acceptance order

was issued on January 16, 2023 indicating that the GST payable was @ 12%. Subsequently, however, by a notification of the Government dated July 13, 2022, the rate was enhanced from 12% to 18%.

4. As a consequence, the petitioner wrote to the respondent authorities seeking to incorporate the said enhanced 6% in the rates which were quoted by the petitioner.

5. In such context, the petitioner also rely on a Memorandum, bearing No. 4691-F(Y) dated November 22, 2022 issued by the Finance Department, Government of West Bengal, which contemplates that in all cases where work order is given inclusive of all taxes and there is clear indication on rate of GST @12% in the tender document, the tendered value of unbilled works may be enhanced up to 6% subject to adjustment of cost of inversion if any. The said Memorandum further provides that in all cases where tender is under process and there is clear indication of GST @ 12%, the tender amount may be enhanced by 6% subject to adjustment of cost of inversion, if any.

6. By placing reliance on the same, it is argued that the respondent authorities acted *de hors* their own Memorandum in insisting upon the petitioner entering into an agreement in terms of the original acceptance order, thereby incurring a loss of 6% on account of GST, which was palpably illegal. As such, the subsequent forfeiture of the EMD amount and refusal to grant work order to the petitioner were palpably bad in law.
7. Learned counsel for the State, at the outset, contends that the writ petition is not maintainable since the dispute pertains to a commercial contract.
8. In such context, it is also argued that the prayer of the petitioner, if allowed, would tantamount to a modification of the tender terms. It is submitted that since there was an acceptance on the part of the parties with regard to the tender conditions, the same has to be treated on the same footing as a contract.
9. Learned counsel for the State places reliance on the judgement of *Rajasthan State Industrial Development and Investment Corporation Vs. Diamond and Gem Development Corporation*

Limited reported at *(2000) 6 SCC 293*. In the said judgement, the Supreme Court *inter alia* observed that a party cannot claim anything more than what is covered by the terms of the contract for the reason that contract is a transaction between two parties and has been entered into with open eyes and understanding the nature of contract.

10. Learned counsel also places reliance on the judgement reported at *(2019) 4 SCC 401* where the Supreme Court reiterated the principle that tender terms fall in the realm of contract and cannot be altered by judicial review unless palpable arbitrariness, discrimination, unreasonableness or malice are established. The Wednesbury Principle was relied on by the Supreme Court in such context.

11. Learned counsel for the State next contends that under Clauses 19 and 21 of the tender document, the respondent authorities had sufficient leeway to terminate the contract.

12. Furthermore, learned counsel places reliance on a communication dated May 10, 2023 made by the petitioner where the petitioner itself stated that it requested “honorary

termination" of the petitioner's bid. Thus, in view of the petitioner's own request to have the tender terminated, the respondent authorities were justified in refusing to issue work order and forfeiting the EMD in terms of the contract.

13. A perusal of Clauses 19 and 21 of the tender document shows that those are subject to certain riders. Whereas Clause 19 stipulates that the contractor whose tender will be accepted shall make the formal agreement within seven days and if he fails to do so, the tender would be liable to be cancelled and earnest money forfeited, even in terms of the language employed therein something else remains to be done even if the contractor fails to execute the formal agreement within seven days. The expression "will liable" to be cancelled indicates that the termination is not automatic on the failure of the part of the contractor to execute a formal agreement within seven days.

14. That apart, in the present case, there were subsequent correspondences between the petitioner and the respondent authorities even after the expiry of seven days, which come

within the purview of the principle incorporated Section 18 of the Limitation Act, 1963, amounting to acknowledgement on the part of the authorities regarding the delay on the part of the petitioner on such score. By such conduct, the respondents waived their rights of cancellation under the clause.

15. Since the respondents insisted upon performance of the terms of the contract even after the expiry of seven days, it cannot be said that termination would be an automatic fallout of non-execution of the agreement within seven days.

16. Insofar as Clause 21 is concerned, the same provides for disqualification of a contractor in cases if the bidder withdraws his tender before its acceptance or refuses to work within a reasonable time without assigning any satisfactory explanation for such act.

17. Neither of the said conditions are applicable here.

18. The bidder in the present case did not withdraw its tender before acceptance, since acceptance order was already issued by the respondent authorities before the relevant dispute.

19. Also, the question of the petitioner refusing to work within a reasonable time has not yet arisen, since no work order was ever issued to the petitioner in terms of the contract.
20. That apart, the scope of providing satisfactory explanation has to be looked into prior to disqualification of a contractor under Clause 21. Thus, in neither Clause 19 nor Clause 21, the cancellation or termination is automatic.
21. In the facts of the present case, although the State takes a stand that the prayer of the petitioner would tantamount to rewriting the contract between the parities, it is not so in view of the Memorandum issued by the State itself on November 22, 2022. The said Memorandum, in no uncertain terms, provides for enhancement of GST by 6% from 12% to 18%, even in cases where work order has been issued. In cases where the tender is under process and there is clear indication of rate of GST @ 12%, the Memorandum provides for enhancement by 6% on account of GST. The acceptance order dated January 16, 2023 was issued subsequent to the November 22, 2022 Memorandum and, as such, was subject to the operation of the said

Memorandum. Since the petitioner had participated in the tender before the enhancement of GST from 12% to 18%, the provisions of the Memorandum dated November 22, 2022 were squarely applicable in the present case. Thus, the respondent authorities ought to have honoured the commitment of the State issued by way of a Memorandum dated November 22, 2022 by enhancing the GST from 12% to 18% and/or permit the petitioner to refurnish the quotations by incorporating such 6% enhancement, which was the precise request of the petitioner vide its communication dated April 17, 2023 (Annexure P4 at page 70 of the writ petition).

22. It is well-settled that State actions have to be scrutinized on a higher standard of fairness than the action of private employers.

23. Even in the judgement cited by the respondents reported at *(2019) 4 SCC 401*, the Supreme Court categorically applied the Wednesbury test and opened up a window for judicial review even regarding the tender terms where there is arbitrariness, discrimination, unreasonableness and malice.

The present instance is one where there is palpable arbitrariness and discrimination against the petitioner insofar as the respondents refused to apply the provision of the Memorandum dated November 22, 2022 to the petitioner, despite the petitioner coming under the purview of the same.

24. Hence, on the score of such arbitrariness and discrimination, the respondent authorities fail the Wednesbury test and, as such, their action is palpably unreasonable and discriminatory against the petitioner.

25. Insofar as the purported expression of the petitioner's will for the tender to be terminated, the same, as evidenced in the communication dated May 10, 2023, was an obvious fallout of the blatant refusal of the respondents to honour their own Memorandum by permitting the petitioner to enhance GST from 12% to 18%.

26. Since the expression of the petitioner's interest to terminate the tender was obviously under State coercion and duress, the same cannot said to be an unqualified intention on the part of the petitioner or any admission on the part of the petitioner regarding termination

of the tender or the work order envisaged thereunder.

27. Hence, the said action of the petitioner cannot be held to be on such a high footing that the same would preclude the petitioner's very challenge to the respondents' action in not giving effect to the Memorandum dated November 22, 2022 in respect of the petitioner.
28. In such view of the matter, the respondents were duty-bound to permit the petitioner to enhance the GST rates by 6 per cent in terms of their own Memorandum dated November 22, 2022 read in conjunction with Notification No. 03/22-Central Tax (Rate) dated July 13, 2022 whereby the enhancement of GST rates took effect, coupled with WBGST Rate Notification No. 1393-FT dated August 23, 2022 whereby the State of West Bengal adopted the GST enhancement.
29. Thus, the impugned action of the respondents in refusing such request of the petitioner and consequential refusal to issue work order and forfeiture of the EMD cannot be sustained.
30. In such view of the matter, WPA No. 27658 of 2023 is allowed on contest, thereby setting

aside the refusal of the respondent authorities to issue work order to the petitioner in terms of the tender in which the petitioner participated successfully and the forfeiture of the EMD amount deposited by the petitioner.

31. Insofar as the subsequent tender issued on December 18, 2023 is concerned, the same would obviously be subject to the outcome of the present writ petition, since the present writ petition was preferred on December 6, 2023, that is, prior to the issuance of the fresh tender.

32. In such view of the matter, as a consequence of the setting aside of the refusal by the respondents to give the work order to the petitioner, all subsequent action taken by the State, including subsequent tender, if any issued, are hereby set aside.

33. The respondents shall issue work order to the petitioner by permitting the petitioner to incorporate the enhancement of 6% to the GST rates in its freshly quoted rates. Such fresh quotation shall be given by the petitioner to the respondent authorities within a week from date. Upon such rates being served on the respondent authorities, the respondent

authorities shall issue the work order in terms thereof in favour of the petitioner pursuant to the tender-in-question.

34. Alternatively, the respondent will be at liberty to refund the entire earnest money paid by the petitioner with interest @ of 10% till the date of such payment to the petitioner, in which case subsequent action taken by the State in issuing fresh tender shall be sustained.

35. There will be no order as to costs.

36. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)