

**HON'BLE THE CHIEF JUSTICE MR. MOHAMMAD RAFIQ
HON'BLE MR. JUSTICE BISWANATH RATH**

02. 27.11.2020 Mr. U.C. Mohanty, Advocate : For the Petitioner
 Mrs. Suman Pattanayak, : For the Opp. Parties-State
 Addl. Govt. Advocate

ORDER

Heard learned counsel for the parties by Video Conferencing mode.

2. Learned counsel for the petitioner submits that the present writ petition being identical to W.P.(C) No.27225 of 2020, the same may be disposed of in the light of the order dated 06.11.2020 passed therein.

3. Mrs. S. Pattanayak, learned Additional Government Advocate for the State-opposite parties does not dispute the said position.

4. This writ petition has been filed by the petitioner-M/s. Suman Enterprisers being aggrieved by the action of the opposite parties in cancelling the process of tender initiated pursuant to tender call notice under Annexure-3 series.

5. Mr. U.C. Mohanty, learned counsel for the petitioner submits that the opposite parties had found, not only the tender of the petitioner, but other tenders also, technically qualified which is evident from annexure-3 series where the name of proprietor of the petitioner is mentioned at different serial numbers. It is submitted that the Executive Engineer, Mechanical Division, Berhampur vide communication dated 17.06.2020 recorded that after computation of the

comparative statement it was revealed that all bidders had quoted 14.99% less than the amount of estimated cost put to tender. He therefore requested all of them to attend the Office on 22.06.2020 at 10 AM to participate in the transparent lottery system for finalization of the tender as per OM No.10224 dated 01.09.2015 of Government of Odisha, Works Department. However, the opposite parties sat over the matter for a long time and finally the Executive Engineer, Mechanical Division, Berhampur by letter dated 28.09.2020 (annexure-4) informed that the tender for all work vide e-Procurement Notice-Bid Identification No. EE(M)/MDB:02/2020-21 had been cancelled due to unavoidable circumstances on instruction by Superintending Engineer (M) Mechanical Circle, Bhubaneswar vide letter No.479/WE. Dated 04.09.2020.

Learned counsel for the petitioner relies on para-26 of the OPWD Code Volume-II to argue that the reasons for accepting a tender, which is not the lowest or for rejecting all tenders, should be recorded on a separate sheet of paper and it should be attached to the comparative statement and removed before the case goes back to the office. It is submitted that by order under Annexure-4, the Executive Engineer, Mechanical Division, Berhampur has directed cancellation of the tender call notice merely stating that the tender has been cancelled due to an unavoidable circumstances and on instruction from the Superintending Engineer(M), Mechanical Circle, Bhubaneswar, but does not record any reason whatsoever.

Learned counsel for the petitioner in support of his argument relies on the judgment of this Court in the case of **Sampad Samal vs. State of Odisha & Ors, 2017 (I) ILR-CUT-262** and submits that this Court in the said judgment held that while dealing with the matter the opposite parties sat over the matter and allowed 90 days to expire without there being any fault of the tenderer and then cancel the tender call notice only on the reason that 90 days period has expired. In that case, this Court did not accept the reasons given by the opposite parties and quashed the order of cancelling the tender and directed the opposite parties to award the work in question to the petitioner.

6. Mrs. Suman Pattanayak, learned Additional Government Advocate for the State-opposite parties submits that the case of the petitioner is quite distinguishable from that of **Sampad Samal** (supra), relied on by the learned counsel for the petitioner. She submits that in that case the petitioner was the lowest bidder whereas in the present case the petitioner and other thirteen bidders have all quoted the same rate i.e. 14.99% less than the amount of estimated cost put to tender. The fact situation obtaining in the present case is therefore totally different as none of them could be considered as lowest bidder. In the present case the matter was referred to the higher authority by the Executive Engineer with the proposal to draw the lottery, but eventually the decision was taken to issue fresh tender call notice so as to obtain the competitive bids.

7. Having heard learned counsel for the parties and perused the impugned order, we find that the case of the petitioner is indeed distinguishable from that of **Sampad Samal** (supra) relied on by learned counsel for the petitioner. In that case even after the petitioner was found the lowest bidder, the matter remained pending before opposite parties for more than 90 days. In view of that reason, this Court held that opposite parties had allowed a long period of 90 days to elapse for reason of their inaction and that cannot be used to the detriment of the petitioner. Admittedly, in the present case, the petitioner had not quoted the lowest rate. On the contrary, all fourteen bidders including the petitioner quoted 14.99% less than the amount of estimated cost put to tender. In such situation, if the proposal of the Executive Engineer to select the bidder by drawing lottery has not been accepted by the higher authority, no fault can be found in such decision. And eventually, if the fresh tender call notice is issued, the petitioner and all others would be able to participate in the same afresh.

8. Accordingly, the writ petition being devoid of merit stands dismissed.

However, at this stage, learned counsel for the petitioner submits that since the decision has been taken by the opposite parties to cancel the bidding process, EMD deposited by the petitioner should be refunded.

Accordingly, we direct the opposite parties to refund the EMD deposited by the petitioner in respect of tender call notice under Annexure-3 series forthwith.

As restrictions are continuing for COVID-19, learned counsel may utilize the soft copy of this order available in the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020.

MP

(Biswanath Rath)
Judge

(Mohammad Rafiq)
Chief Justice