

CASE NO.:
Appeal (civil) 1348 of 2005

PETITIONER:
Laxmi Sales Corporation

RESPONDENT:
M/s Bolangir Trading Co. & Ors.

DATE OF JUDGMENT: 22/02/2005

BENCH:
N. Santosh Hegde, B.P. Singh & S. B. Sinha

JUDGMENT:
J U D G M E N T
(arising out of SLP (c) No. 3723 of 2004)
WITH
C.A. NO. 1349 OF 2005
(arising out of SLP (C) No. 4775 of 2004)

SANTOSH HEGDE, J.
Delay condoned.
Leave granted.

These two appeals arise out of the civil Writ Petition No. 3592 of 2003 filed before the High Court of Orissa at Cuttack. One appeal arises out of an order dated 22.8.2003 made by the High Court in the main writ petition (c) No. 3592/03. The connected appeal arises out of an order made on 22.12.2003 by the High Court in Review Petition No. 127 of 2003.

Writ Petition (c) No. 3592 of 2003 was filed by the contesting respondent herein viz. respondent No.3. In the said writ petition the said respondent sought for an order quashing the tender process held for Bolangir \026 Bhawanipatna territory whereby the second respondent herein had rejected the tender of the said respondent herein for providing pre-paid telephone services in the district of Bolangir \026 Bhawanipatna. It was the contention of the said respondent before the High Court that though it was fully qualified to be considered and awarded the above said contract, the same was rejected on erroneous grounds by the second respondent herein and the contract was awarded in favour of the appellant.

The High Court while entertaining the said writ petition allowed the same and held that the rejection of the offer made by the second respondent herein was arbitrary and unfair hence, cancelled the contract awarded in favour of the appellant herein and directed a fresh tender in accordance with law.

Being aggrieved by the said order setting aside the contract in favour of the appellant herein preferred Special Leave Petition (c) No. 17828/03 primarily urging that the certificate of the Chartered Accountant produced by the said respondent was not a genuine one and the High Court had relied upon the said forged certificate of the Chartered Accountant and allowed the writ petition. The said Special Leave Petition came to be withdrawn with a view to approach the High Court by way of a review petition to bring to its notice that the certificate of the Chartered Accountant produced by the said respondent on which the High Court had relied upon, was not a genuine certificate.

After the withdrawal of the above said Special Leave Petition the appellant approached the High Court by way of a review petition alleging that the Chartered Accountant's certificate

purportedly issued by M/s. Romesh Kumar & Co. was not a genuine one hence, the court was misled to pass the original order allowing the writ petition. The High Court, however, dismissed the review petition observing:

"\005Thus, the basis of the judgment under review is not only that the writ petitioner had furnished the report/certificate of the Chartered Accountant the genuineness of which is under challenge in this review application but also that the entire tender process stood vitiated on account of absence of clear stipulation in the advertisement or the notice inviting tenders."

Having been unsuccessful in the review petition the appellant is now before us in these two appeals challenging both the orders made in the main writ petition as well as in the review petition by the High Court.

Mr. P.N. Misra, senior counsel appearing for the appellant submitted that the respondent department rightly rejected the tender of the respondent for want of mandatory information as required in the tender form as well as in the instructions issued therein. According to the learned counsel, following are the mandatory requirements which the respondent failed to produce which compelled the respondent department to reject its offer:

- a) All supporting documents wherever applicable in Annexures I & J should be furnished;
- b) Turnover of the firm/organisation over the last two years (with supporting documents);
- c) Work experience of the last 2 years with full details (the supporting documents to be submitted)
- d) Proof of Turn Over (Latest P&L A/c duly certified by a Chartered Accountant)
- e) The checklist, annexures-I & J along with all desired documents and EMD should be furnished.

Learned counsel for the appellant also submitted that the department in its counter has clearly stated that the tender of the respondent was rejected for lack of information in the tender form which was the mandatory requirement for accepting the tender amongst which latest profit and loss account duly certified by a Chartered Accountant evidencing the annual turnover of Rs. 25 lakhs was necessary. The department in the said counter had also stated that the respondent along with the tender document had filed only the purported certificate of the Chartered Accountant and its sales tax turnover whereas the profit and loss account was never produced as certified along with the tender form and was filed for the first time before the High Court in the writ petition, therefore, when the tender of the said respondent was considered there was no material to find out what exactly was the profit and loss account for the year 2001-02 evidencing sale turnover as required in Appendix-C, Annexure-J and Checklist Clause 6 (c) of the tender documents. It is the contention of the learned counsel for the appellant as also of the learned counsel for the department that because of the non-supply of this material information the offer made by the respondent had to be rejected. The learned counsel then pointed out from the judgment of the High Court that the High Court came to the conclusion in the writ petition that none of the above documents was required to be mandatorily furnished, and specially the audited profit and loss account for the relevant year. The rules and conditions subject to which the bids were invited did not anywhere stipulate that a tender would be rejected if audited profit and loss account in support of the eligible turnover of Rs. 25 lakhs was not furnished by the tenderer.

The argument of the learned counsel for the respondent was in tune with the finding of the High Court inasmuch as that the absence of the documents which was made the basis for rejection of the tender were really not called for in the advertisement and as a matter of fact the turnover of the said respondent for the relevant year was more than the minimum stipulated in the tender form hence, the same was produced before the High Court to establish its claim for acceptance of tender.

We have heard the argument of the learned counsel for the parties and perused the record. In our opinion, the High Court was not justified in coming to the conclusion that production of the documents mentioned herein above along with the tender form was not mandatory and the High Court was also not justified in coming to the conclusion that neither the rules and conditions governing the tender nor the advertisement calling for tender made it mandatory for an intending tenderer to produce those documents and specially proof of turnover for the relevant year 2001-02. We have already noticed from the various conditions in the tender form and annexures annexed thereto that production of supporting documents wherever applicable in Annexure I & J was one of the requirements of the tender and Annexure J specifically required at Sl. No. 7 the proof of turnover of the firm over the last two relevant years with supporting documents. The same annexure also required the tenderer to produce proof of work experience for the last two years with full details and supporting documents and the checklist had specifically mentioned that the production of proof of turnover with latest profit and loss account duly certified by a Chartered Accountant was a mandatory requirement.

In this background we are unable to accept the finding of the High Court that there was no mandatory requirement of the production of the above documents. As a matter of fact the High Court erred in coming to the conclusion in para 6 of its judgment in the writ petition that "the advertisement in Annexure-1 to the writ petition only states that for Bolangir-Bhawanipatna, a tenderer must have a turnover of Rs. 25 lakhs, but it does not anywhere state that audited profit and loss account has to be submitted by a tenderer showing a turnover of Rs. 25 lakhs". This finding of fact as noticed by us herein above is contrary to records and is an error apparent on face of the record.

Learned counsel for the respondent submitted that he along with the writ petition produced sufficient material to establish his turnover, which the High Court correctly accepted, but the learned counsel for the appellant, in our opinion rightly, contended that these turnovers really did not reflect the turnover of the relevant year. It is also relevant to note the fact that the allegation, that certification by a Chartered Accountant is not genuine, has not been rebutted by the concerned respondent.

In this factual background, we think the High Court was not justified in allowing the writ petition of respondent No.1 Bolangir Trading Company in regard to the grant of contract pertaining to the district of Bolangir & Bhawanipatna.

Since we have come to the conclusion that the High Court has misread the material on record and has committed factual error based on which the relief is granted, we do not think it necessary to go into the various judgments relied upon by the High Court.

For the reasons stated above these appeals succeed. The impugned orders of the court below are set aside and the writ petition (c) No. 3592 of 2003 is dismissed.

In view of our above order, there is no need to make any separate order in the appeal arising out of the review order of the High Court.

JUDIS