

## **Ram Chandra Jaiswal Vs M.S.T.C. Ltd. A Government of India Enterprise and Others**

**Court:** Jharkhand High Court

**Date of Decision:** Sept. 24, 2008

**Acts Referred:** Constitution of India, 1950 " Article 12

**Citation:** (2008) 4 JCR 489

**Hon'ble Judges:** Dabbiru Ganeshrao Patnaik, J

**Bench:** Single Bench

### **Judgement**

@JUDGMENTTAG-ORDER

D.G.R. Patnaik, J.

Prayer in this writ application is for a writ in the nature of mandamus commanding upon the respondents to forthwith

confirm the grant of Tender No. MSTC/ERO/JSEB/07/T-144, dated 28.3.2007 in favour of the petitioner and to permit the petitioner to lift 4650

M.T. of Iron Scrap lying at the site of P.T.P.S. in accordance with the terms and conditions of the aforesaid Tender.

A further prayer, introduced by way of amendment of the original writ application vide an interlocutory application No. 2412 of 2008, on the basis

of certain developments subsequent to the filing of the writ application, is for issuance of a writ of certiorari for quashing the letter No. 683 (S & P)

dated 2.8.2008 written by the Chief Engineer (Store and Purchase) (Respondent No. 7) to the Sr. Law Adviser-cum-Additional Secretary by

which the aforesaid Tender regarding disposal of 4650 M.T. of iron scrap lying at the site of P.T.P.S. has been decided to be cancelled and re-

auctioned and also for quashing the letter dated 5.8.2008, written by the Deputy Manager (ERO), M.S.T.C. (Respondent No. 4) to the Sr. Law

Advisor, Jharkhand State Electricity Board, intimating that in view of letter dated 2.8.2008, issued by the Respondent No. 7, the M.S.T.C. intends

to refund the Earnest Money Deposit of Rs. 25 lakhs to the Petitioner-Company and would re-auction the iron scrap materials at the earliest.

2. Earlier, the writ petition contained two more prayers, namely, (i) For an order directing the Respondent Nos. 1 to 7 to recall the letter dated

15.12.2007, written by the M.S.T.C. Ltd. to the Respondent No. 8 and (ii) for quashing the aforesaid letter. These two prayers have since been

omitted in view of the fact that the private Respondent No. 8 have withdrawn himself from the fray of the bidders.

3. The facts of the petitioner's case in brief are as follows:

The M.S.T.C. Ltd. which is a Government of India Enterprise and an authority within the meaning of Article 12 of the Constitution of India, issued

a Tender (Annexure-1) in the month of March, 2007 vide Tender No. MSTC/ERO/JSEB/6-7/T-144 dated 28.3.2007 on behalf of the J.S.E.B.

(Respondent No. 5) for sale of 4650 M.T. of Iron Scrap materials lying at the site of the P.T.P.S. This was done in terms of the order passed by

the High Court of Jharkhand. The tender was to be opened in the presence of the Sr. Law Officer of the Jharkhand State Electricity Board, since

the materials belonged to the Jharkhand State Electricity Board.

The tender was opened on 28th March, 2007 in which the petitioner alongwith three other bidders, including the Private Respondent No. 8,

participated and submitted their respective offers.

The petitioner was the highest bidder for the purchase of the materials, since he had offered to purchase the materials at Rs. 14,115/- per M.T.

The petitioner had also made an earnest money deposit of Rs. 25 lakhs together with his offer in compliance with the terms and conditions of the

tender documents.

4. Although the petitioner was declared to be the highest bidder at the time of the opening of the said Tender on 28th March, 2007, he later learnt

that the respondents had intended to award the tender in question, to the respondent No. 8 who was the third highest bidder.

5. The petitioner objected by addressing a letter to the Financial Secretary of the J.S.E.B. (Respondent No. 5). A reply communication was

received by the petitioner, issued by the Respondent No. 1, vide, its letter dated 11.11.2007 informing that it had duly communicated by

Respondent No. 1 to the Respondent No. 5 that the petitioner was the highest bidder and that the petitioner had withdrawn all conditions forming

part of the petitioner's offer.

In terms of the Tender, the offer of the bidders was to be valid for a period of 90 days. However, by letter dated 14th August, 2007, the petitioner

was called upon by the Respondent No. 1 and directed to keep its offer renewed and accordingly, the period continued to be renewed from time

to time till 15th April, 2008.

The petitioner's case is that while on the one hand, the respondents continued to delay in awarding the Tender to the petitioner, in spite of it being

declared as the highest bidder, the Respondent No. 1 started negotiating with the Private Respondent No. 8 to match the offer of the petitioner at

Rs. 14,115/- per M.T. Pursuant to such negotiations, the Respondent No. 1 had even written to the Chief Engineer (Stock and Purchase)

(Respondent No. 7) that the Respondent No. 1 had agreed to match with the price of the petitioner and has offered unconditionally to purchase

the materials at the same price as quoted by the petitioner.

6. The petitioner being aggrieved by such conduct of the respondent No. 1, was prompted to file the present writ application for an order to

prohibit the Respondent No. 1 to enter into any Post-Tender Agreement with the Private Respondent No. 8.

7. Subsequent to the filing of the present writ application, the private Respondent No. 8 withdrew itself from the contest and filed an interlocutory

application vide I.A. No. 4187 of 2008 in this writ application for deleting its name from the cause title of the writ application and upon such

prayer being allowed, vide order dated 12.5.2008 and the name of the Private Respondent No. 8 having been deleted, the petitioner was

expecting that it being the highest bidder, the work order would be awarded to it. Such expectations, became more genuine when the petitioner got

information through a copy of the proceedings of the meetings of the Officers of the Respondent No. 1 dated 17.6.2008 (Annexure-12), wherein

by a majority decision, it was decided to recommend for allotment of work to the petitioner @ 14, 115/- per MT.

8. Even though, this Court had directed the respondents to file their counter affidavit, but instead of filing the same, representatives of the

Respondent No. 1 had written a letter dated 5.8.2003 to the Sr. Law Advisor, J.S.E.B. that the Respondents-M.S.T.C would refund the earnest

money of Rs. 25 lakhs to the petitioner-Company and would re-auction the iron scrap materials lying at the site of P.T.P.S. at the earliest. This

letter, according to the petitioner's information was written by the M.S.T.C. Ltd. on the basis of a letter dated 2.8.2008, written by the Chief

Engineer (Store and Purchase), J.S.E.B. to the Sr. Law Advisor-cum-Additional Secretary, Department of Legal Affairs, Ranchi.

9. After repeated directions by this Court and an order directing the Respondent No. 5 to remain present in Court, counter affidavit on behalf of

the respondents was filed on 25.8.2008.

10. Denying and disputing the entire claim of the petitioner, the stand taken by the respondents is that the petitioner was a conditional bidder and

out of the several bidders, the private Respondent No. 8. (referred to as H3 bidder), remained as the only unconditional bidder. As such,

negotiations was held with the aforesaid H3 bidder who accepted to match the higher price quoted by the petitioner.

The further stand taken by the respondents is that since the petitioner had put forward its, conditions alongwith its offer at the time when the tender

was opened, the petitioner's subsequent communication of withdrawal of the conditions, cannot be allowed when such withdrawal was made after

opening of the bid. It is further stated that considering the above aspects, the M.S.T.C. Ltd., J.S.E.B. and the Sr. Law Advisor collectively and

rightly decided at the meeting dated 14.12.2007 that the petitioner is a conditional H1 bidder and, therefore, cannot be entertained.

The final stand taken by the respondents is that the J.S.E.B. has decided to cancel the Tender No. MSTC/ERO/JSEB/06-07/T-144 Dated

28.3.2007 regarding disposal of 4650 M.T. of Iron Scrap lying at the site of the P.T.P.S. and to re-auction the same,

11. Criticising the stand taken by the respondents, Mr. M.S. Mittal, learned Counsel for the petitioner submits that the contention of the

respondents that the petitioner was the conditional bidder is. totally incorrect and misleading. Learned Counsel would explain that as a matter of

fact, while submitting its offer in response to the Tender notice, the petitioner by an accompanying letter had merely sought certain clarifications

regarding the terms and conditions of the Tender documents. However, when the clarifications sought for, was wrongly interpreted as conditions,

the petitioner promptly withdrew the letters and had declared that it is prepared to comply with and to abide by the terms and conditions as written

in the Tender documents. The withdrawal letter was addressed to the respondents and served upon them on 7th July, 2007 i.e. during the period

of validity of the offer of bidders. Learned Counsel submits further that thus, the petitioner's offer after having shed all its purported conditions,

remained a valid unconditional offer and the petitioner being the highest bidder, there could be no other compelling grounds for the respondents to

refuse the petitioner's offer and to negotiate with the private Respondent No. 8 in violation of the instructions of the Central Vigilance Commission,

Government of India issued vide its Notice dated 3rd August. 2001.

Learned Counsel adds further, that after delaying the matter for more than one year, the respondents cannot be allowed to cancel the Tender and

re-auction the materials. The petitioner, in the light of the legitimate expectations created by the respondents' declaration that the petitioner was the

highest bidder and by the subsequent recommendations of the concerned officers of the respondents at the joint meeting to award the contract to

the petitioner, it had not only invested the security deposit of Rs. 25 lakhs but had also invested further amounts for making the arrangements to lift

the scrap materials from the site of the P.T.P.S. Learned Counsel submits further, that the respondents being a Government enterprise, cannot be

allowed to retract from their commitments. The decision to cancel the Tender, at this juncture after a delay of over more than one and half years,

according to learned Counsel, smacks of ill motives and with intent to gain higher margin of profits on account of anticipated inflation in market

price of the materials.

12. The undisputed facts, which surface from the rival pleadings of the parties, are:

(i) Certain quantity of scrap materials belonging to the J.S.E.B. (Respondent No. 5) was lying at the site of P.T.P.S., was to be sold.

(ii) Pursuant to the directions of the High Court, the M.S.T.C. Ltd., acting on behalf of the J.S.E.B., took up charge for conducting the sale of the

scrap materials and issued a Tender notice in the month of March, 2007.

(iii) In response to the Tender Notice, the petitioner and the private Respondent No. 8 alongwith two other parties had participated in the Tender

bid and submitted their respective offers.

(iv) The price quoted by the petitioner was the highest in the lot.

(v) While submitting its offer, the petitioner vide its letter sought for modification in the terms and conditions of the Tender documents.

(vi) The modifications sought for by the petitioner in the terms and conditions of the Tender documents, which were interpreted by the respondents

as conditions imposed by the petitioner, was withdrawn by the petitioner, even during the period when the petitioner's offer was valid and such

withdrawal was acknowledged by the Respondent No. 1 through his letter dated 11th October, 2007 (Annexure-6) and an assurance was

conveyed to the petitioner by the aforesaid letter that the petitioner was the highest bidder.

(vii) Even though, in terms of the Tender, the offer of the bidders was valid for a period of 90 days from the date of their respective offers but the

period was extended by the Respondent No. 1, by repeated renewals till 15th April, 2008.

(viii) During this extended period, the respondents started negotiating and persuading the private Respondent No. 8 to match the price offered by

them with the price of the petitioner.

(ix) Even though, this writ application was filed on 11.3.2008, but the respondents avoided filing their counter affidavit in spite repeated directions

by this Court and ultimately filed their counter affidavit on 25.8.2008, declaring that they had decided to cancel the Tender and would proceed to

re-auction the materials.

13. The petitioner has seriously questioned the bona fides of the conduct of the Respondent No. 1, who, according to the learned Counsel for the

petitioner, despite the orders of this Court and being invested with the authority to conduct the proceedings for sale of the iron scrap materials

belonging to the J.S.E.B., have acted in a most arbitrary and partial manner.

The facts disclose that even though the Tender Notice declared that the offer made by the bidders would be valid for 90 days from the date of

offer, the Respondent No. 1 continued to extend the period of its own accounts without any valid and genuine reasons. The plea taken by the

Respondent No. 1 that the offer of the petitioner was a conditional offer, cannot be accepted in view of the fact that even during the period of the

validity of the offer and before the Respondent No. 1 could finally sit down to consider the offers for acceptance, the purported conditions were

withdrawn by the petitioner. Such withdrawal was effectively communicated and acknowledged by the representatives of the Respondent No. 1

and duly communicated to the J.S.E.B. and a communication was also sent by the representatives of the Respondent No. 1 to the petitioner that

the petitioner No. 1 was declared to be the highest bidder. Annexure 12, which is a copy of the proceedings of the minutes of the meetings of the

Central Disposal Committee of the J.S.E.B., also confirms that the petitioner was acknowledged as the highest bidder and the Committee had

recommended for awarding of the work to the petitioner.

14. From the counter affidavit of the respondents, there does not appear any genuine and reasonable excuse for the respondents to cancel the

tender and to refuse to award the work to the petitioner. The decision taken by the respondents at this belated stage after over one and half years

of the offer made by the petitioner, to cancel the Tender, does give ample room to speculate that the conduct of the respondents is not above-

board and could have been prompted by oblique and mala fide motives. Had the respondents taken the decision regarding acceptance of the offer

made by the bidders, the petitioner having been declared as the highest bidder, would have been benefited by the contract (had it) been awarded

to it. The petitioner did have reasonable expectations of the contract being awarded to it and of gaining some profits in business which, by the acts

and conducts of the respondents has been frustrated.

15. It appears however that though the respondents have not denied the petitioner's contention that it was pursuant to an earlier order of this Court

that the Respondent No. 1 had initiated steps for the sale of the scrap materials of the J.S.E.B., but neither party has filed a copy of the purported

order to enable this Court to understand as to what were the circumstances under which such order was passed by the Court.

16. However, in spite of the above facts and circumstances, the ultimate fact which remains is that in absence of the acceptance of the petitioner's

offer from the side of the respondents-J.S.E.B., there is no concluded contract between the parties, on the basis of which any right could have

been deemed to have accrued to the petitioner. The petitioner, therefore, cannot insist upon the respondents-J.S.E.B. that they should give the

contract to the petitioner under the original tender, which now stands cancelled, nor can the petitioner question the reasons for cancellation of the

Tender.

17. Nevertheless, in the light of the facts and circumstances of the case, the petitioner would certainly be entitled not only to the refund of the

earnest money deposited by it, but also adequate compensation for the loss caused to it. In my opinion, such loss to the petitioner can be

compensated by awarding penal interest to be paid by the respondents to the petitioner on the amount of security deposit.

18. Accordingly, the respondents are directed to forthwith refund the earnest money of Rs. 25 lakhs deposited by the petitioner alongwith penal

interest @ 12 per cent per annum on the principal amount calculated from the date of deposit till the date of final payment.

19. With these observations, this writ application is disposed of.