

(2007) 10 CAL CK 0035

Calcutta High Court

Case No: M.A.T. No. 2550 of 2007 with C.A.N. No. 7170 of 2007

NICCO Corporation Ltd.

APPELLANT

Vs

Cable Corporation of India
Limited and Others

RESPONDENT

Date of Decision: Oct. 15, 2007

Acts Referred:

- Constitution of India, 1950 - Article 12

Citation: (2008) 1 CHN 567 : (2008) 2 CTLJ 321 : 112 CWN 341

Hon'ble Judges: Bhaskar Bhattacharya, Acting C.J.; Rudrendra Nath Banerjee, J

Bench: Division Bench

Advocate: Anindya Kumar Mitra, Abhrajit Mitra, S.N. Pyne and Jishnu Chowdhury, for the Appellant; Dipak Kumar Basu and Aparna Banerjee, Saktinath Mukherjee, Bhaskar Ghosh, Pallab Kumar Chakraborty and Sandipan Mitra, for the Respondent

Judgement

Bhaskar Bhattacharya, ACJ.

1. These two mandamus appeals were heard together as these are preferred against the self-same order dated 6th August, 2007 passed by a learned Single Judge of this Court by which His Lordship allowed a writ application filed by the Universal Cable Ltd. the private respondent in these appeals, by setting aside the decision of the Metro Railway Authority to award contract in favour of NICCO Corporation Limited ("NICCO"), the appellant, in one of these appeals with the observation that whatever amount of work had already been executed by NICCO should not be undone and it would be entitled to the payment as per its entitlement for the work done till the date of delivery of judgment. His Lordship, however, directed the Metro Railway Authority to proceed to award the contract for the balance work to the next eligible tenderer or to initiate fresh process for execution of the balance work with further direction that in such a case, NICCO would not be entitled to participate in the process of fresh tender.

2. Being dissatisfied, both the NICCO and the Metro Railway Authority have preferred these two separate appeals.

3. The Universal Cable Limited, the private respondent before us in these two appeals, filed a writ application before the learned Single Judge thereby praying for the following relief:

(a) A writ in the nature of Mandamus commanding the respondent Nos. 1 and 2 to complete the tendering process in term of the notice of tender No. ELECTVC/GARIA/2/R for supply erection/laying and commissioning of 33KV and 11 KV Feeder Cables from Shayam Bazar RSS to New Garia TSS for power supply arrangement in Tollygunge-Garia section and the price bids submitted by successfully awarding the work contract in favour of the consortium of the petitioners being the only eligible bidder;

(b) A writ in the nature of Mandamus commanding the respondent Nos. 1 to 2 to strictly act in terms of the terms and conditions of the tender advertisement published in April, 2006 and in terms of the General Condition of tender and conditions of contract of the Electrical Engineering Department, Metro Railway, Calcutta;

(c) A writ in the nature of Certiorari commanding the respondent authorities to transmit all records in respect of the said tendering process and upon failure to show cause and/or reasonable cause to quash the same;

(d) Rule NISI in terms of prayers (a), (b) and (c) above;

(e) Interim order restraining the respondent authorities from awarding the work contract and/or cancelling the tendering process without leave of this Hon'ble Court and/or until disposal of the writ petition;

(f) Ad interim prayers in terms of prayer (e) above;

(g) Any other or further order or orders as to Your Lordships may deem fit and proper.

3a. The case made out by the writ petitioner may be summed up thus:

(1) The writ petitioner entered into a consortium agreement for the purpose of making consortium bid and entering into a contract for supplying, laying, erection, testing and commissioning of 11KV and 33KV power cables in Tollygunge and Garia Section against the tender issued by the Metro Railway Authority.

(2) In the month of October, 2005, the respondent No. 2, on behalf of the President of India* issued a notice of tender inviting open tender in sealed cover from the reputed licensed contractors for the work of supply of erection/laying and commissioning of 33KV and 11KV feeder cables from Shyam Bazar RSS to New Garia TSS for power supply arrangement in Tollygunge-Garia section with a period of

completion of 24 months from the date of issue of letter of agreement. The total estimated value of the work was Rs. 23,15,80,178/-.

(3) In response to the above tender notice, the writ petitioners submitted their Techno Commercial Bid and the Price Bid along with other contractors. Although, the Techno Commercial Bids of the bidders were opened, the Metro Railway Authority, for the reason best known to them, cancelled the tender notice and the tender evaluation process. The Deputy Chief Electrical Engineer, on behalf of the respondent No. 2, intimated the writ petitioner No. 1 that the subject tender had been discharged by the competent authority; however, no reason was assigned, in the said letter.

(4) After a gap of six months, the respondent authorities issued a fresh notice of tender in the month of April, 2006 for the self-same work, which was the subject-matter of the former tender issued in the month of October, 2005.

(5) The estimated value, eligibility criteria and other terms and conditions of the subsequent tender were the same as that of the earlier tender.

(6) The writ petitioners in response to the above notice of tender issued in the month of April, 2006 again submitted its price bid within the due date on August 4, 2006.

(7) There were six bidders for the subsequent tender and after evaluation of the Techno Commercial Bids, which were opened on August 4, 2006, three bidders namely, Yamuna Gases and Chemicals Limited, NICCO Corporation Limited and the writ petitioners were shortlisted for evaluation of price bids, which were opened on 10th October, 2006. The Yamuna Gases and Chemicals Ltd. submitted only variable price bid and therefore, became ineligible in view of the withdrawal of the variable price by the respondent authorities and, thus, effectively the other two bidders submitted firm price bid and were within the zone of consideration.

(8) NICCO Corporation Ltd. quoted for 81.215% increase on the estimated tender value of Rs. 23,15,80,178/- whereas the writ petitioners quoted for 120.824% increase on the estimated tender value.

(9) On cancellation of the first tender, on 18th April, 2006, it was intimated by the Metro Railway Authorities that the job should be retendered. After about five months, the subsequent tender was floated. In the meantime, there was unprecedented rise in the price of copper all over the world, which is the main raw material for manufacturing the cables involved in the tender and it constituted approximately 75% of the raw material cost. Surprisingly enough, the Metro Railway Authorities while re tendering the work in April, 2006 did not at all take into consideration the increased copper-price and did not re-estimate the value of the revised tender and thereby, diluting the eligibility criteria of the subsequent tender.

(10) NICCO Corporation Ltd. was ineligible for participation in the tendering process vide notice of tender published in the month of October, 2005 in view of the fact that it was one of the essential eligibility criteria that the intending tenderer should have completed in the last three financial years from 2002-03, 2003-04, 2004-05 and 2005-06 till the date of opening of the tender at least one similar single work involving supply, erection, testing and commissioning work of power cables/traction sub-station/power supply sub-station/power supply transmission including its protection scheme for system voltage of 11KV/33KV and/or above for a minimum value of 35% of the advertised tender value of work.

(11) The respondent authorities cancelled the previous notice of tender published in the month of October, 2005 and a fresh tender in the month of May, 2006 on the self-same terms and conditions was issued only to give work order in favour of NICCO Corporation Ltd., which in the meantime, managed to gather the experience in terms of Clause (b) of the eligibility criteria for the purported completion of work contract in January, 2006.

(12) The memo dated 22nd May, 2006 issued by the Karnataka Power Transmission Corporation Ltd. in favour of NICCO Corporation Ltd., which was commissioned only in January, 2006, was invalid and on the basis of such certificate no work order could be given.

(13) The said Karnataka Power Transmission Corporation Ltd. had de-listed NICCO Corporation Ltd. from its approved list of companies involving 66KV underground cables but in spite of such fact, Metro Railway Authorities selected the NICCO Corporation Ltd. being the lowest bidder. Hence, the writ application.

4. The NICCO Corporation Ltd. contested the application thereby opposing the prayer of the writ petitioner and contending that it had the requisite eligibility criteria for the tender in question and being the lowest bidder, the Metro Railway Authorities rightly issued the work order in its favour.

5. The Karnataka Power Transmission Corporation Ltd. by filing affidavit more or less supported the claim of the NICCO Corporation Ltd. that it had completed its work under the said corporation, but it was made clear that the certificate relied upon by the NICCO was not the performance certificate.

6. The Metro Railway Authorities also justified their action and opposed the writ application.

7. The learned Single Judge by the order impugned herein although did not accept the allegation of the writ petitioner that the previous notice of tender was cancelled to accommodate the NICCO Corporation Ltd., found substance in the plea of the writ petitioner that the NICCO Corporation Ltd. had no requisite eligibility as the certificate issued by the Karnataka Power Transmission Corporation Ltd. merely indicated completion of the project and that the same was not the certificate of

performance and according to the learned Single Judge, existence of the performance certificate in favour of the bidder was essential in order to be eligible for the said contract.

8. As in the meantime, about 80% of the work had already been completed. His Lordship directed the Metro Railway Authorities not to give further work order with added direction that either the balance work should be done through the next eligible bidder or the Metro Railway Authorities would be free to issue fresh process of tender. His Lordship, however, made it clear that in case of fresh tender, NICCO would not be entitled to participate. His Lordship further directed the Metro Railway Authority to pay costs of Rs. 50,000/- to the writ petitioners with liberty to realise such amount from the persons who were responsible for selecting NICCO.

9. As indicated earlier, being dissatisfied, these two appeals have been preferred, one by the NICCO Corporation Ltd. and other, by the Metro Railway Authorities.

10. Mr. Mitra, the learned Senior Advocate appearing on behalf of the NICCO Corporation Ltd, has strenuously contended before us that the learned Single Judge having turned down the principal allegation of the writ petitioner i.e. mala fide against the Metro Railway Authority and arrived at the conclusion that the rejection of the previous notice of tender was made on just ground, the case of the writ petitioner fails as his client had the required eligibility criteria. According to Mr. Mitra, the finding of the learned Single Judge that filing of performance certificate was an essential condition for the tender was unreasonable and even the writ petitioner could not file such performance certificate along with its tender papers. Mr. Mitra contends that the techno commercial bids of the parties were opened on August 4, 2006 and as such, the writ petitioner was quite aware of the qualification of the parties to the bid but filed the writ application on January 19, 2007, after the work order was issued in favour of his client. Such fact, Mr. Mitra continues, indicates that all the parties proceeded as if performance certificates were not required to be given. Mr. Mitra points out that the writ petitioner even could not raise such objection because in such a situation, its own bid would have also been rejected. Mr. Mitra further contends that the writ application should have been rejected on the ground of delay alone as the work order had already been issued in favour of his client. Mr. Mitra further contends that having regard to the fact that at the time of disposal of the writ application, 80% of the work having been completed by his client. His Lordship should not have interfered at that stage when admittedly the parties proceeded as if both the bidders were eligible and the writ petitioner, itself, could not file any performance certificate. Moreover, the writ petitioner having participated at the process of selection and having failed on merit, its bid being higher by several crores of rupees, it had no right to maintain the writ application when it had also not filed the performance certificate in support of its qualifications. Mr. Mitra further contends that there was even no justification of restraining his client from participating in the fresh tender when His Lordship did not restrain the

writ petitioner, similarly placed with the appellant, from participating in the fresh process of tender. Mr. Mitra, therefore, prays for setting aside the order passed by the learned Single Judge and allowing the appeal.

11. Mr. Basu, the learned Advocate appearing on behalf of the Metro Railway Authority, the appellant in the other appeal, has adopted the submissions of Mr. Mitra and in addition to those, has contended that in view of the order passed by the learned Single Judge the railway project has suffered a serious set back as 80% of the work had already been completed. Mr. Basu submits that satisfactory completion of a work does not necessarily mean that the production of performance certificate was necessary at the stage of considering the bids. Mr. Basu further points out that the bid of the writ petitioner being Rs. 9 crore more than that of the appellant, his client accepted the bid of the NICCO as both were technically competent to get the work order. Mr. Basu, therefore, prays for setting aside the order passed by the learned Single Judge.

12. Mr. Mukherjee, the learned Senior Advocate appearing on behalf of the writ petitioner has supported the conclusion arrived at by the learned Single Judge and in addition, has submitted that the issue of mala fide raised by his client ought to have been decided against the railway authority. According to Mr. Mukherjee, the client of Mr. Mitra having failed to acquire the essential eligibility criterion of successful completion of a similar work the learned Single Judge rightly allowed the writ application. Mr. Mukherjee further contends that in view of the admitted fact that the price of copper, the main ingredient of the work material, having been increased during the relevant period, the railway authority at the time of issuing the fresh tender in the month of April, 2006 ought to have increased the value of the project but with mala fide intention, did not enhance such valuation lest Mr. Mitra's client would lose the opportunity to participate for want of eligibility criteria. Mr. Mukherjee, therefore, prays for dismissal of these appeals on further ground that there was unholy connection between the two appellants before us.

13. Therefore, the first point that arises for consideration in this appeal is whether filing of performance certificate for doing the similar job within the period mentioned in the notice of tender was a necessary qualification of the bidders.

14. The notice of tender lays down the following eligibility criteria for the bidders:

a) Total contract amount received during the last three financial years and in the current financial year should be minimum of 150% of advertised tender value.

b) The intending tenderer should have completed in the last three years (i.e. current year and three previous financial years i.e. 2003-04, 2004-05, 2005-06 and in 2006-07 till the date of opening of the tender) and at least one similar work involving "supply, erection, testing and commissioning work of power cables/transaction sub-station/power supply sub-station/power supply transmission, including its protection scheme of system voltage of 11KV/33KV and/or above" for a minimum

value of 33% of the advertised value of work.

c) The intending tenderer shall have to produce revenue/banker's solvency certificate of 40% of the advertised tender value.

Notes appended to the tender notice gave following indication as regards criterion (b):

The word completed means having satisfactorily executed the work of requisite value in the qualifying period specified in criterion (b) above, as regard similar work the tenderer should have satisfactorily executed one work for supply, erection, testing and commissioning work of power cables/traction sub-station/power supply transmission, including its protection scheme for voltage of HKV/33KV and/or above of at least 35% of the advertised tender value of work in the prescribed period.

14a. The certificate produced by the NICCO shows that the Karnataka Power Transmission Corporation has given the following certificate issued by the Executive Engineer of the Corporation:

This is to certify that M/s. NICCO CORPORATION LTD, Cable Division, Kolkata have executed Design, Manufacture, Testing, Supply of 66KV station at MRS to Telecom Layout in Vijaynagar, Bangalore.

This job was carried out against DWA No. 208-210 dated 18.6.2003. These cables were tested and commissioned on 4.1.2006 and the performance is satisfactory.

15. According to the writ petitioner, the said certificate is not a certificate of performance but a mere completion certificate and according to the terms of agreement between the NICCO and the Karnataka Corporation, the performance certificate can only be issued by the Chief Engineer and not by the Executive Engineer.

16. At this stage, it would be profitable to refer to the certificate dated 3.11.05 relied upon by the writ petitioner in support of its bid, which is quoted below:

To whom it may concern.

Sub: Payment Certificate

Ref: Supply and installation package of 132KV Cable from Gaighat Sub-Station along Mahatma Gandhi Setu up to Hazipur end of the bridge.

M/s. CCI Limited was awarded the Work, of 132KV XLPE Cable Lying across Mahatma Gandhi Setu over river Ganga from BSEB, Grighat Sub-Station, Patna to Cable termination yard at Terasia Maidan (6.774KM) vide LOA No. C-45708-1399-3/LOA-1/1213 date 08.01.04 (supply portion) and LOA No. C-45708-1399-3/LOA-11/1214 dated 08.01.04 (erection portion). Total value of work was Rs. 28.8 cr. The work has been completed successfully on 26.04.05 and the entire payment has been made to M/s. CCI Limited.

17. After going through the two certificates relied upon by the parties, we find that those certify "successful completion" of the work but none of those certificates can be said to be "performance certificate". The fact that entire payment has been made does not imply that the guarantee period of performance was over and to that effect, no certificate was issued to the writ petitioner.

18. The parties, however, including the Metro Railway Authority, all along proceeded as if production of successful completion certificate by the bidders was sufficient to be eligible in the process of tender and as such, no objection was raised by the writ petitioners at the time of opening of the techno commercial bid on August 4, 2006 and only in its letter dated December 6, 2006, after the price bids had been opened and it has been disclosed that the writ petitioner was not the lowest bidder, the writ petitioner for the first time complained that the words "satisfactorily executed" would mean "performance of a contract till the guarantee/warranty period was over". It does not appear from the record that any other bidder's bid was rejected for non-submission of performance certificate. As it appears from the record that there were six bidders who initially participated but three out of them were disqualified at the opening of the techno commercial bid and the other three including the writ petitioner and the NICCO were in the process of contest. At that point of time, the writ petitioner did not raise any objection as regards the eligibility of the NICCO for non-submission of the performance certificate as the parties proceeded that filing of such certificate was not necessary.

19. In our view, the plain reading of the conditions of tender do not indicate that the parties were called upon to produce "performance certificate" of their past work, which can only be obtained after the expiry of the period of guarantee of performance fixed by the agreement was over. If the object of the railway was to get the performance certificate from the bidders at the time of submission of the bids, it would not have asked them to produce even the performance certificate for the work done in the current year viz. 2006-07 till the date of opening of the tender when the advertisement was given in the month of April, 2006, the last date of submission of tender was June 1, 2006, and the self-same day was the date for opening the tender except the price bid (as appearing from the notice printed at page 69 of the paper-book) knowing fully well that it was impossible for any bidder to get such performance certificate for the work done during the year 2006-07 till the date of opening of the tender. Therefore, in our opinion, it was rightly contended on behalf of the railway authority that it intended that the completion certificate was sufficient to meet the eligibility criteria and the parties proceeded on that basis without raising any objection. It is now settled law that when two interpretations of a clause of a notice of tender are possible and the tendering authority has adopted one of those, which is not an absurd view, a Writ Court should not interfere with the decision of the authority. The learned Single Judge, as it appears from the order impugned, was impressed by the fact that in Form V of the tender papers there was an item for production of the performance certificate and

according to His Lordship, such clause in the tender paper justified the contention of the writ petitioner that the performance certificate should have been filed. With great respect, we are unable to subscribe to the view taken by His Lordship. In our opinion, the terms of a tender should be interpreted, on the basis of the requirement indicated in the advertisement of the tender particularly when such advertisement has explicitly, disclosed the eligibility criteria including their explanation. If some new clause is added in the tender paper which is inconsistent with the conditions mentioned in the advertisement, such inconsistent clause in the tender papers should be ignored unless fresh corrigendum is issued regarding the eligibility criteria. In our view, it is rightly contended by Mr. Mitra, the learned Counsel for the NICCO that the said Form V was merely a checklist for the purpose of verification of the papers submitted by the bidders and the expression "performance certificate" has been loosely used but never with the intention of meaning "the document certifying that the previous project completed by the bidder had performed satisfactorily during the guarantee period agreed to by the parties" and consequently, the said expression in the tender paper cannot have overriding effect on the terms mentioned in the advertisement.

20. Over and above, in the case before us, the writ petitioner itself having the same deficiency, even if we assume for the sake of argument that production of performance certificate was compulsory, none of the rights of the writ petitioner has been infringed by the alleged wrong decision of the tendering authority as its bid has not been cancelled on that ground but his bid was rejected as it was higher one by huge amount of Rs. 9 crore and odd. The position would have been different if the railway authority had rejected the bid of the writ petitioner on the ground of non-submission of performance of certificate but ignored the same defect of the NICCO and in such a situation, the writ petitioner could have reasonably argued that he had been discriminated.

21. We, therefore, hold by relying upon the decision of the three-Judges Bench of the Apex Court in the case of [Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others](#), , that if a party has taken a chance of selection without protest but remained unsuccessful on merit, he cannot be permitted to challenge the process of selection on the ground of some illegality even if we assume for the sake of argument that filing of performance certificate was an essential condition. The learned Single Judge, in this connection, has relied upon the following observations of a three-Judges Bench in the case of [Raj Kumar and Others Vs. Shakti Raj and Others](#), , which is also reported in [Raj Kumar and Others Vs. Shakti Raj and Others](#), :

Yet another circumstance is that the Government had not taken out the posts from the purview of the Board, but after the examinations were conducted under the 1955 Rules and after the results were announced, it exercised the power under the proviso to para 6 of 1970 notification and the posts were taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the

candidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in [Madan Lal and Others Vs. State of Jammu and Kashmir and Others](#), and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection as being illegal; he is estopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the and also conduct of the selection in accordance with the rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case. Thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the committee as well as the action taken by the Government are not correct in law.

22. It is apparent that the said Bench did not dispute the proposition of law enunciated in the case of Om Prakash Shukla (supra) reiterated in the case of Madan Lai (supra), but having regard to the fact that in the said case, the Government made "glaring" illegalities in the procedure of selection and the State decided to withdraw the appeals at the hearing stage and at the same time, the Apex Court permitted other various interveners to participate, the litigations really took the shape of a Public Interest Litigation as several appeals were heard and disposed of by the, said order and consequently, the Bench did not reject the writ application on the ground of estoppel. Therefore, the said decision cannot be cited as precedent for the purpose of nullifying the effect of the well-settled proposition of law laid down by a Bench of equal strength. We find that for doing complete justice between the parties, the Supreme Court, in that case, did not apply the doctrine of estoppel in the facts of the said case.

23. The learned Single Judge also relied upon the decision of the Supreme Court in the case of [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), in holding that when a "state" entertains the tender of a party even though it does not have the requisite experience, it denies equality of opportunity to others similarly situated in the matter of tendering for the contract and there may have been many others who were precluded from participating in the tender as a result of conditions of eligibility mentioned in the advertisement of contract. In our opinion, the said decision is not applicable to the fact of the present case for two reasons. First, we have already held that the terms of the tender did not require the filing of performance certificate and secondly, even if we hold otherwise for the sake of argument, in the case of Ramanna (supra), the appellant did not participate in the process of tender under the impression that he having no qualification as mentioned in the notice of tender, his bid would be rejected but filed the writ application, challenging the selection on the ground that if he knew that the eligibility criteria mentioned in the notice of tender would not be strictly applicable

he would have applied and in such circumstances, objection was raised that at his instance the writ application was not maintainable as he did not participate in the process of tender. The Supreme Court rejected such plea by making the following observations:

That takes us to the next question whether the acceptance of the tender of the 4th respondent was invalid and liable to be set aside at the instance of the appellant. It was contended on behalf of the 1st and the 4th respondents that the appellant had no locus standi to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant did not enter the field of competition by submitting a tender, what did it matter to him whose tender was accepted; what grievance could he have if the tender of the 4th respondents was wrongly accepted. A person whose tender was rejected might very well complain that the tender of someone else was wrongly accepted, but, it was submitted, how could a person who never tendered and who was at no time in the field, put forward such a complaint? This argument, in our opinion, is misconceived and cannot be sustained for a moment. The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondent, but that he was differentially treated and denied equality of opportunity with the 4th respondent in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4th respondent was concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was Constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in law and the acceptance of the tender of the 4th respondent was vitiated by any legal infirmity.
(Emphasis supplied)

24. Here the position is otherwise. The writ petitioner understood the terms of the contract and participated without raising any protest as regards the production of performance certificate because he knew that if such objections were raised, he would be out of the process. After opening of the techno commercial bid, three out of six bidders were eliminated for want of eligibility but the writ petitioner did not dispute the qualification of the NICCO. After opening of the price-bid, when his bid was found to be higher by Rs. 9 crore and odd than that of NICCO, the selected bid, he raised objection regarding the necessity of filing of performance certificate. As the bid of the writ petitioner was not cancelled on the ground of non-submission of

performance certificate but was not accepted because of higher amount of bid, he cannot be prejudiced in any way by the decision of the tendering authority and the principles, laid down in the case of *Om Prakash (supra)*, is clearly applicable.

25. Similarly, we do not find any substance in the contention of Mr. Mukherjee, the learned Advocate appearing on behalf of the writ petitioner that the Metro Railway Authority ought to have enhanced the value of the tender for the increase of price of copper within the period of six months and that it did not increase the value because in such a case, the NICCO would not get the qualification for bidding. It is rightly contended by Mr. Basu and Mr. Mitra, the learned Counsel appearing on behalf of the appellants that railway would try to minimise the costs of construction and that there was no reason of unnecessarily enhancing the value of the work at the cost of public exchequer. The writ petitioner, as it appears from record, after the opening of the price bid, for the first time in writing complained of such objection of valuation alleging that such point was agitated during pre-bid discussion on May 22, 2006. We fail to appreciate why such point was not raised in writing earlier and accordingly, we turn down such absurd contention. We have already pointed out that the railway authority rightly refused to increase the value of the tender work from the one, which was fixed just six months earlier. It is true that in the letter dated June 28, 2006, the writ petitioner complained of price-hike of copper but its complaint was against the withdrawal of price variation clause; in the said letter, it never complained of mala fide motive of Railway Authority in protecting the NICCO from disqualification by not enhancing the valuation of the work order.

26. The next question is whether the writ application was liable to be dismissed also on the ground of delay.

27. In this case, the work order was issued on January 5, 2007 and the writ application was filed on January 17, 2007. However, the application was listed for the first time on February 16, 2007 and was moved on February 22, 2007 when a learned Single Judge passed direction for filing affidavits but the prayer for interim order was refused.

28. The learned Single Judge by the order impugned held that the writ application having been affirmed 12 days after the issue of the work order, there was no delay. In arriving at the conclusion. His Lordship held that the writ petitioner prior to issue of the work order in favour of the NICCO had raised objection regarding the ineligibility of the NICCO to participate in the process of tender and could have approached the Writ Court being aggrieved by the inaction by the Metro Railway Authority to consider such objection and to pass an order thereon in one way or the other; however, according to His Lordship, the contract in favour of the NICCO not having been awarded, and the petitioners having been assured of consideration of their objection, any writ application prior to issue of the work order in favour of the NICCO would run the risk of being rejected as premature and only after the work order was issued that a right had accrued in favour of the writ petitioner.

29. We have already pointed out that prior to opening of the price-bid, the writ petitioner never complained of ineligibility of the NICCO in writing although the eligibility bid was opened earlier and we have not found any written document issued by the Metro Railway Authority assuring the writ petitioner of considering any objection of ineligibility of the NICCO for not filing the performance certificate or the enhancement of valuation of the work order. It is preposterous to suggest that after a notice of tender had been issued, the last date of submission of bids expired, bids submitted, the techno commercial bids opened and even the price bids had been considered, there was any lawful scope of giving any assurance at the instance of a "State" within the meaning of Article 12 of the Constitution of India to any of the bidders of enhancing the valuation of the work order for the purpose of eliminating the lowest bidder from the process of tender on the ground of want of eligibility criteria. Therefore, the plea taken by Mr. Mukherjee is an absurd one. After the techno commercial bid was opened and some of the bidders were eliminated, there was no scope of giving any assurance to the writ petitioners of further excluding any of the remaining bidders on the ground of ineligibility.

30. We find from the work order that the successful bidder was required to take steps immediately for giving bank guarantee and to contact the railway authority by 10 days after receiving the letter for further action and direction for execution of the work. The work order was valued about Rs. 37 crore and therefore, for supply of material, the successful bidder is required to take immediate step not only for procuring money but also for preparation of the work.

31. In our view, merely because a writ application was affirmed within 12 days from the issue of the work order, such conduct on the part of the writ petitioner is not sufficient to get rid of any allegation of laches and delay. So long the writ application was not moved before the Court and the Court after being prima facie satisfied calls for affidavit from the respondents, the successful bidder is not required to give importance of any such writ application and even can allege mala fide against the writ petitioner for deliberately not moving the same. We have already pointed out that when the writ application was moved on 22nd February, 2007, by that time the successful bidder has started functioning pursuant to that order as would appear from the letter dated February 15, 2007 written by the Metro Railway Authority that it had informed the NICCO the place for storing of the materials and asked to pre-pone the date of inspection before 15th March, 2007.

32. It appears from the earlier letter dated 12th February, 2007 written by the NICCO to the Metro Railway Authority that they had planned to supply 23 Kms. of 33KV. 1C x 185 sq. mm. cable by 20th March, 2007 and further 22 Kms. by 31st March 2007.

33. From those documents, it is clear that prior to the actual moving of the writ application, the NICCO had already taken step in accordance with the work order and invested money for the purpose of complying with the terms of the huge job.

34. In our view, the learned Single Judge was not justified in only taking into consideration the fact that the writ petitioner affirmed the writ application within 12 days from the date of passing of the work order. His Lordship ought to have taken note of the fact that mere filing of the writ application without making any endeavour to move the same in the facts of the present case cannot absolve it of the charge of inaction and in such a case, the delay in moving the application is vital, inasmuch as, it can be reasonably concluded that the writ petitioner had with evil motive deliberately allowed the successful bidder to spend money for performance of the job without actually moving the matter before the Court.

35. Moreover, during the pendency of the writ application, no interim order was granted in favour of the writ petitioner and when the matter came up for final hearing, as it appears from the order impugned, 80% of the work had already been completed. Such fact should also be taken into consideration at the time of disposal of the writ application. Since the work order was issued for public utility service and 80% work had already been completed, in our view, the learned Single Judge should have also taken into consideration such fact even if we assume for the sake of argument that production of performance certificate was a necessary condition of acceptance of the bid inasmuch as the cancellation of the work order at that stage would cause huge delay in completion of a public project. The learned Single Judge ought to have considered the fact that for the balance 20% of the work the completion of the project will be stalled and fresh advertisement is to be given for re-tender and in the process the cost of the project will also be increased.

36. Apart from the question of delay, we find that the bid of the writ petitioner was more than nine crore of rupees higher than that of NICCO. Cost of a construction is also a vital factor, which weighs with the public utility service authority in the matter of grant of work order. It appears from the record that NICCO in the past had done this type of job and, therefore, this is not a case where the work has been done by a person having no experience of this type of job. We have already found that successful completion of a project of a similar nature as mentioned in the advertisement was the essential qualification and not the production of performance certificate and, therefore, in the facts and circumstances of the present case the learned Single Judge should not have set aside the work order.

37. We also do not approve the further direction of the learned Single Judge that in future tender the NICCO should not be permitted to participate whereas no such restriction was imposed upon the writ petitioner. If according to the learned Single Judge, the NICCO was not eligible to apply for tender without having any performance certificate, the writ petitioner is equally ineligible and in such a case, the writ petitioner should also be restrained from participating in the future process.

38. Be that as it may, in view of our specific finding that the filing of performance certificate, which can only be obtained after completion of the agreed and the

guaranteed period of successful performance of a project, was not the essential condition, the writ application is rejected with the finding that there was no illegality in the process of selection of NICCO and that the approach of the writ petitioner was a mala fide one in the facts of the present case as discussed above. The appeals are, therefore, allowed with costs, which we assess at Rs. 50,000/- each, separately to be paid by the writ petitioners to the two appellants. The order impugned is set aside.

Rudrendra Nath Banerjee, J.

I agree.