

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.13806 of 2014

=====

M/s Hariom Construction a partnership firm through one of its Partner Shri Pankaj Kumar Singh, son of Vijay Kumar Singh, resident of village- Khaira, P.O.- Jaihind Tendua, P.S.- Mali (Nabinagar), Aurangabad

.... Petitioner

Versus

1. The State of Bihar, through Principal Secretary, Rural Work Department, Government of Bihar, Patna
2. The Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Rural Works Department, Bihar
3. The Tendering Committee, PMGSY, Rural Works Department, Government of Bihar, Patna

.... Respondents

with

=====

Civil Writ Jurisdiction Case No. 14419 of 2014

=====

M/s Maa Bharti Construction, a partnership firm through one of its partner Shri Manoj Kumar Singh S/o Vijay Singh Resident of New Area, Aurangabad, presently residing at Plot No. 105, Saket Nagar, Near Sankat Mochan, Lanka Varanasi (U.P.).

.... Petitioner

Versus

1. The State of Bihar through Principal Secretary, Rural Work Department, Government of Bihar, Patna.
2. The Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Rural Works Department, Bihar.
3. The Tendering Committee, PMGSY, Rural Work Department, Government of Bihar, Patna.

.... Respondents

=====

Appearance :

(In CWJC No. 13806 of 2014)

For the Petitioner/s : Mr. Y.V.Giri, Sr.Adv.
Mr. Ashish Giri, Adv.

For the Respondent/s : Mr. Avnish Nandan Sinha, GPXI

(In CWJC No. 14419 of 2014)

For the Petitioner/s : Mr. Y.V.Giri, Sr.Adv.
Mr. Ashish Giri, Adv.

For the Respondent/s : Mr. Sunil Kumar Mandal, SC24

=====

CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

CAV JUDGMENT

Date: 12-10-2015

Heard learned counsel for the parties.

2. Both the writ applications involve the same question and thus, having been heard together are being disposed of by this common judgment.

3. The prayer of the petitioner in C.W.J.C.No. 13806/2014 reads as follows:

“i) For issuance of a writ/ order/ direction in the nature of certiorari for quashing the decision taken by the respondent Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Rural Work Department, Bihar taken on 28.7.2014 to the limited extent of having cancelled the notice inviting tender so far as relates to construction of road and CD work with maintenance for tender group no. 02PMGSY 134 in Aurangabad and having taken a decision to re-advertise the same (Annexure 6).

ii) For issuance of necessary writ/ order/ direction in the nature of mandamus commanding the respondent to award the contract for group no. 02PMGSY 134 in Aurangabad district as he is the lowest tenderer after cancellation of the tender of Ajay Engicon Pvt. Ltd. by the technical committee under the chairmanship of respondent no.2 in the meeting dated 28.7.2014.

iii) For issuance of interim order preventing the respondent authority from re-tendering the work in question.”

4. In C.W.J.C.No. 14419/2014 the prayer of the petitioner reads as follows:

“i) For issuance of a writ/ order/ direction in the nature of certiorari for quashing the decision taken by the respondent



Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Rural Work Department, Bihar taken on 28.7.2014 to the limited extent of having cancelled the notice inviting tender so far as relates to construction of road and CD work with maintenance for tender group no. 02PMGSY 128 in Aurangabad and having taken a decision to re-advertise the same (Annexure 6).

ii) For issuance of necessary writ/ order/ direction in the nature of mandamus commanding the respondent to award the contract for group no. 02PMGSY 128 in Aurangabad district as he is the lowest tenderer after cancellation of the tender of Ajay Engicon Pvt. Ltd. by the technical committee under the chairmanship of respondent no.2 in the meeting dated 28.7.2014.

iii) For issuance of interim order preventing the respondent authority from re-tendering the work in question.”

5. As would be apparent from the aforesaid prayer made in both the writ applications the petitioners in both the cases want that the award of contract should be made in their favour for the work in question, namely, Construction of Road and CD Works with maintenance for two Tender Groups being 02PMGSY-134 and 02PMGSY-128.

6. Mr. Y.V.Giri, learned Senior counsel for the petitioners appearing in both the cases, has raised a very short question. According to him, once the petitioners also were participant in the tender process in which one M/s Ajay Engicon Pvt. Ltd. had been



declared to be lowest bidder and consequently chosen for being awarded the contract, upon its being held to be disqualified by the Tender Committee, for both the aforesaid group of work but subsequently the petitioners being the second lowest bidder would automatically entitled for being granted the contract and therefore, the department was not supposed to undertake a fresh exercise of awarding contract by issuance of fresh notice inviting tender as has been sought to be done by the impugned order. In this regard strong reliance has been placed by Mr. Giri on a Division Bench judgment dated 14.11.2014 in LPA No. 1337/2014 (M/s Petroleum v. the State of Bihar & ors.).

7. On the other hand, learned counsel for the respondents have taken a plea that after the tender notice had culminated into a decision for awarding of contract in favour of M/s Ajay Engicon Pvt. Ltd. on account of its being declared to be the lowest bidder, there was no question for negotiation for the award of contract with the petitioners only on account of its being second lowest bidder. Strong reliance in this regard has been placed to Rule 164 of the Bihar Public Works Code.

8. The facts giving rise to these two writ petition being not at all in dispute all that needs to be recorded is that on 26.2.2014 a Notice Inviting Tender (NIT) was issued by the Rural Works



Department for award of contract in which for the work of package No.02PMGSY-128 the petitioner M/s Maa Bharti Construction alongwith M/s Ajay Engicon Pvt. Ltd. and Ms Shanti Construction had participated and upon opening of the technical bid and financial bid M/s Ajay Engicon Pvt. Ltd. was declared to be L-1, whereas the petitioner M/s Mas Bharti Construction was declared to be L-2 and M/s Shanti Construction was declared to be L-3 on 26.5.2014/ 27.5.2014. However, before award of contract could be given to M/s Ajay Engicon Pvt. Ltd. the tender committee took a decision to cancel the tender document of M/s Ajay Engicon Pvt. Ltd. and also undertake a fresh exercise of issuance of fresh NIT for the aforesaid work in question.

9. Likewise for the package No.02PMGSY -134 a NIT was issued on 26.2.2014 in which the petitioner M/s Hariom Construction alongwith M/s Ajay Engicon Pvt. Ltd. and M/s Anand Construction Pvt. Ltd. had participated and in course of opening of the technical bid and financial bid on 27.5.2014 while M/s Ajay Engicon Pvt. Ltd. was declared as L-1, the petitioner M/s Hariom Construction was declared as L-2 whereas M/s Anand Construction was declared as L-3 but here also on account of cancellation of tender document of M/s Ajay Engicon Pvt. Ltd. on 18.7.2014 a similar decision was taken for issuance of fresh NIT.



10. The only question, therefore, which would emerge for consideration is as to whether the petitioners in both the cases on account of being found L-2 had acquired any right of being automatically granted the contract upon its disqualification of L-1, namely, M/s Ajay Engicon Pvt. Ltd. There is no rule or decision or even the condition of NIT brought to the notice of this Court that after opening of the tender and declaration of L-1 if at a subsequent stage L-1 is declared unsuitable or gets disqualified for any reason whatsoever, the contract has to be awarded in favour of L-2 or for that purpose in absence of L-1 and L-2 also being not granted such work has to be awarded by entering into contract with L-3. It is here that the respondents have correctly placed their reliance on Rule 164 of the PWD Code which prohibits negotiation of rates with anyone except the lowest tender.

11. To that extent PWD Code under Rule 158 lays down that the tender must be obtained for all works which are to be given on contract for a sum of Rs.20,000/- or more. Rule 159 lays down invitation of tender by way of advertisement for wide circulation and Rule 160 prescribes that the tender should be opened in presence of the intending contractors. Rule 161 prescribes that no tender should be received unless accompanied by the earnest money, whereas Rule 162 only provides for the amount of earnest money. It is Rule 163 and 164

which are relevant for the purposes of these two writ applications which lay down that the lowest tender will be accepted and the negotiation of rate should be done with the lowest tender. Rule 163 and 164 thus are reproduced hereinbelow:

“163. The lowest tender will be accepted. If rate quoted by more than one tenderer is same then the tenderer should be selected on the basis of draw of lots in the presence of such tenderers. In case of single tender, the approval of the next higher authority will be taken to ensure that due procedure and publicity was ensured. However where a tender is brought before the tender committee, its decision will be final.

164. Negotiation of rates should be done with the lowest tender only if his tender is considered to be too high.”

12. From reading of Rule 163 and 164 it would become clear that at least PWD Code does not recognize anyone else except lowest tender (L-1) and in fact after opening of the tender papers and declaration of L-1 there is no provision made in the Rules to award work to L-2 or L-3 even by way of negotiation in view of clear prohibition of any negotiation of rates with anyone else except L-1. Thus, from reading of the provisions of Rule 163 and 164 this much can be safely said that after the tender is opened and upon perusal of the financial bid L-1 is declared, rest all of them having quoted higher rate than L-1 get out of way, inasmuch as no negotiation of rate can be

done with them in view of prohibition under Rule 164, which, as noted above, provides for negotiation of rate only with L-1 if the rate offered by it is found to be too high.

13. In the considered opinion of this Court such Rule 163 and 164 has also a sanguine purpose because in absence of Rule 163 and 164 if the concept of lowest tender (L-1) is eliminated, it would lead to a chaos or arbitrary exercise of power by the Tender Committee which after opening of the rates may start negotiation with all the tenderers whose technical bid have been found to be valid and their financial bid has been opened. It is here that predictability of lowest tender (L-1) of being awarded work or negotiation with L-1 for lowering the rates in case its tender is found to be too high seeks to achieve the object of fairness and avoidance of abuse of discretionary power in the award of contract.

14. The submission of Mr. Giri that after L-1 was out of race the petitioners being L-2 automatically became the lowest bidder (L-1) has to be also noted for its being rejected. Once the tender was opened and M/s Ajay Engicon Pvt. Ltd. was declared the lowest tender (L-1) the exercise had come to an end and if for any reason whatsoever L-1 could not have been awarded the contract, the petitioners being L-2 could not have been declared now L-1 to give the benefit of Rule 163 and 164 of the PWD Code.



15. That would bring this Court to consider the ambit of the writ jurisdiction in the matter of award of contract vis-à-vis the scope of judicial review under Article 226 of the Constitution of India. By now it is well settled that the principles of judicial review would apply to the exercise of contractual powers by the Government in order to prevent arbitrariness or favouritism. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. Judicial review is concerned not with the decision but with the decision making process and unless that restriction on the power of the Court is observed, the Court under the guise of preventing the abuse of power would be itself guilty of usurping power.

16. The Apex Court, thus, considering the scope of judicial review under Article 226 of the Constitution of India in the contractual matter in the case of *Tata Cellular v. Union of India*, reported in (1994)6 SCC 651, had noted the inherent limitations in the exercise of such power and declared that the State was free to protect its interest as the guardian of the finances. The Apex Court had also held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless

the power is exercised for any collateral purpose. The scope of judicial review, thus, was confined to the following three distinct aspects:-

- (i) Whether there was any illegality?
- (ii) Whether there was any irrationality?
- (iii) Whether there was any procedural impropriety?

17. The Apex Court in the aforesaid judgment of Tata Cellular (supra) had also gone to formulate the principles governing judicial review in the contractual matter in the following words:

- (i) The modern trend points to judicial restraint in administrative action.
- (ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made,
- (iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such

decisions are made qualitatively by experts.

(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

18. Having laid down the aforesaid six principles governing the judicial review in the contractual matter the Apex Court had also prescribed test for determining arbitrariness and the duty of the Court was confined to the question of legality of the Government decision where the concern of Court could be to find out, whether a decision-making authority:-

- (i) exceeded its power.
- (ii) committed an error of law.
- (iii) committed a breach of the rules of natural justice.
- (iv) reached a decision which no reasonable tribunal would

have reached or.

(v) abused its powers.

19. The aforesaid judgment of the Apex Court in the case of Tata Cellular (supra) has been followed without exception in the subsequent cases including in the case of M.P.Oil Extraction v. State of M.P. & ors., reported in (1997)7 SCC 592, wherein while named down with the exercise of governmental decision by undertaking whether or not a better fixation of rate was possible had struck a note of caution that in economic and policy matters the scope of judicial review was limited.

20. Thus, in the backdrop of the law laid down by the Apex Court in the case of Tata Cellular (supra) this Court would find that when the lowest tender (L-1) after opening of the bid and its declaration have gone out of race on account of certain subsequent ineligibility, the decision of the Government to go for a fresh tender cannot be said to be either in excess of power or an error of law or any breach of the rules of natural justice or abusing its power.

21. As a matter of fact when in the present two cases there was a huge difference between the lowest rate (L-1) of M/s Ajay Engicon Pvt. Ltd. and that of the two petitioners going in lacs of rupees the decision of the State Government to go for a fresh tender can also be said to be in public interest, inasmuch as the element of

public interest as laid down in the case of Raunaq International Ltd. Vs. I.V.R. Construction Ltd. reported in (1991) 1 SCC 492 would include:-

- (i) Public money to be spent for the purpose of contract,
- (ii) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities.
- (iii) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously.
- (iv) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer.

22. This aspect of the matter was in fact again gone into by the Apex Court in the case of Jagdish Mandal v. the State of Orissa & ors., reported in (2007)14 SCC 517, wherein while considering the scope of judicial review in matters relating to tenders and award of contracts had identified the special features which should be borne in mind while judicially reviewing award of contracts in the following words:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or



decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.”

23. Even recently the scope of judicial review was gone into by the Apex Court in the case of *Heinz India (P) Ltd. & Anr. V. State of U.P. & ors.*, reported in (2012)5 SCC 443, wherein it had approved the following passage of an English Law in the case of *Reid v. Secy. of State for Scotland*, reported in (1999) 1 All ER 481, which succinctly summed up the law:

“Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the Tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may



have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence.”

24. In a more recent decision of Apex Court in the case of *M/s Siemens Aktiengesellschaft & S. Ltd. v. DMRC Ltd. & ors.*, reported in (2014)11 SCC 288, the whole aspect in relation to challenge to any decision to the award of contract had held as follows:

“22. There is no gainsaying that in any challenge to the award of contract before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint

where the decision is bonafide with no perceptible injury to public interest.”

25. Thus, judged on the parameters of the limited scope of judicial review of this Court under Article 226 of the Constitution of India in the contractual matter, it cannot be said that if the Government did not decide to award contract to the petitioners, its such decision could be interfered by this Court, inasmuch as such a decision is patently bonafide and no perceptible injury has been caused to the public interest. By-now it is also well settled that no person has a fundamental right to insist that the State Government must enter into the contract after opening of the tender bids. In a case like the present one in hand where after opening of the tender bid was to be ratified by the State Government which did not do so and therefore, no contract was executed, no bidder have got any right in the contract and cannot assail such decision in a writ petition or even otherwise as has been held by Orissa High Court in the case of Abdul Yakub v. State of Orissa & ors., reported in AIR 1975 Orissa 202, and again in the case of Adi Narayan Naik & ors. vs. State of Orissa & ors., reported in AIR 1987 Orissa 115.

26. As a matter of fact the reliance placed by Mr. Giri on the judgment of the Division bench in the case of M/s Petroleum (supra) is also wholly misplaced, firstly because that was not a case



governed by the PWD Code and in fact related to settlement of mining rights governed by statutory provisions. Secondly, the appeal in that case was carried against an interim order and therefore, whatever observations were made had to be necessarily confined to the facts of that case, inasmuch as no law was laid down therein that after declaration of L-1 as unsuitable for award of contract, L-2 necessarily has to be awarded the contract. In fact all that was said in paragraphs no. 56 and 57 in the judgment of the Division Bench in the case of M/s Petroleum (supra) will itself leave nothing for speculation that neither any law was laid down with regard to award of contract to L-2 nor issuance of fresh NIT upon cancellation of the earlier NIT was held to be bad, inasmuch as in paragraphs no. 56 and 57 the Division Bench had held as follows:

“56. Obviously, therefore, the appellant herein becomes the first qualified bidder and, consequently, the work order/ settlement order ought to have been given in favour of the present appellant and denial thereof cannot be sustained except on cogent, convincing and plausible grounds. Whether such a good ground existed for cancelling the NIT, dated 5.12.2013, is a question, which has not yet been decided in the writ petition and cannot, as a sequel thereto, be decided in this appeal.

57. The question, therefore, whether good ground exists or existed for cancelling the NIT, dated 5.12.2013, needs to be obviously decided in the writ petition and, that too, at the

earliest so that the dispute, surrounding the entire selection process, can be brought to an end.”

(underlining for emphasis)

27. Coupled with the aforesaid observations, the Division Bench in paragraph no.79 had only remitted the matter back to the Writ Court. Therefore, this Court would not find anything from the aforementioned judgment which can be made applicable to the facts of the present cases, especially when they were also not governed by the provisions of the Bihar PWD Code. For completion of the record this much, however, must be recorded here that upon remand the case of M/s Petroleum in C.W.J.C.No. 14318/2014 was disposed of afresh by a judgment dated 15.12.2014, wherein it was held that the petitioner on account of being L-2 could not have been awarded contract and on the basis of open bid held in the Court as it related to mining rights for a limited period M/s Mahadeo Enclav was awarded the contract. Such judgment dated 15.12.2014 in C.W.J.C.No. 14318/2014 having been allowed to be confined to the facts of that case, this Court would not find anything from the observations made in the Division Bench judgment in the case of M/s Petroleum (supra) on the basis of which these cases can be decided.

28. As a matter of fact from the official records produced by the respondents it would appear that for the work in question being

one related to Pradhan Mantri Gram Sadak Yojana (PMGSY), Ministry of Rural Development had issued its circular dated 7.5.2013 in which guidelines were issued to process dealing with the bids/tenders and Paragraph 5.10 of the said circular had specifically prohibited negotiation in the following words:-

“5.10 Negotiations not permitted:

As per provisions under SBD or Model Bidding Document of PMGSY, negotiations with the bidders at any stage of bidding are not permitted. As such, the Employer shall not be authorized to carry out any negotiations at any stage and in any form.”

29. In view of above, after M/s Ajay Engicon Pvt. Ltd. was declared the lowest tender on the basis of its rate (-) 10% of the estimated rate for Group No 02PMGSY-128 for a sum of Rs.446.40361 lacs and similarly for Group No.-2PMGSY-134 (-) 6.0% of the estimated rate being 579.54325 lacs, the respondents could not have awarded contract to the petitioners being L-2 whose rate was much higher than Ajay Engicon Pvt. Ltd. Had the award been given in favour of the petitioners despite their being not the lowest bidder after opening of the financial bid in which M/s Ajay Engicon Pvt. Ltd. was found to be the lowest bidder on the aforementioned rates that by itself could have been in violation of Rule 163 of the PWD Code. After elimination of M/s Ajay Engicon

Pvt. Ltd. at a subsequent stage after opening of the tender and declaration of its L-1, there was also no possibility of making the some sort of negotiation with the petitioners being L-2 for brining down their rates, inasmuch as Rule 164 of the PWD Code prohibits the same.

30. Thus, when the law is also well settled that in the matter of award of contract the Government has to look to its own financial interest and has to also award contract in a transparent manner, this Court would find no error in cancelling the earlier NIT and going for a fresh NIT to enable wider participation and a healthy competition to secure the avowed object of selecting the best contractor on the basis of lowest competitive rate.

31. In the result, for the reasons indicated above, this Court would not find any merit in either of the two writ applications, which are accordingly dismissed.

(Mihir Kumar Jha, J)

Patna High Court
Dated the 12th October, 2015
A.F.R./Surendra/-

U			
---	--	--	--