

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.20072 of 2014**

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M/s Dhanpat Prasad through its one of the partner Mr. Sanjay Kumar, Son of Late Binda Prasad, Resident of Mohalla - Line Par, P.S. Nawada, P.O.- Nawada, District - Nawada, Pin-805110, State - Bihar.

.... .... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Road Construction Department, "Vishweshwaraiya Bhawan" Bailey Road, Patna-15.
2. The Engineer-in-Chief, Road Construction Department "Vishweshwaraiya Bhawan" Bailey Road, Patna-15.
3. The Chief Engineer (Communication) (South Bihar Wing), Road Construction Department, "Vishweshwaraiya Bhawan" Bailey Road, Patna-15.
4. The Secretary (Technical), (South Bihar Wing), Road Construction Department, "Vishweshwaraiya Bhawan, "Bailey Road-15.
5. The Superintending Engineer, Road Construction Department, Magadh Road Circle, Gaya.
6. The Executive Engineer, Road Construction Department, Road Division -1, Jehanabad.
7. The Executive Engineer, Road Construction Department, Road Division, Sheikhpura.

.... .... Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. Chitranjan Sinha, Sr. Adv.  
Mr. Manish Sahay, Adv.  
Mr. Amish K. Jha, Adv.

For the Respondent/s : Mr. Manikant Mishra, Adv.

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**CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA**  
**ORAL JUDGMENT**

3      12-01-2015      Heard learned counsel for the parties as with regard to the following prayer made in this writ application:-

*"1(i) For, after quashing of decision dated 15-11-2014 of Technical Bid Evaluation Committee with regard to the petitioner only, as contained in Annexure-4, commanding and directing the concerned respondent to consider the tender of the petitioner alongwith others after opening of his financial bid and decide the same in accordance with law, because the technical bid of the*

*petitioner has been rejected in most arbitrary manner and on baseless ground."*

2. During the pendency of this writ application the petitioner has filed I.A. No. 9345 of 2014 seeking amendment in prayer to the following effect:-

"For quashing of decision dated 04.12.2014 of departmental Tender Committee with relates to decision regarding inviting fresh tender after cancelling the same only, issued vide memo no. 5670(E) dated 09.12.2014 under signature of Engineer-in-Chief (i.e. Respondent no. 2) as contained in Annexure-12, whereby and whereunder during pendency of this writ application the said Committee has taken decision for inviting fresh tender after cancelling the same with regard to work in question. The petitioner is not aggrieved about rejection of tender of Rambarat Sharma Electric Works Pvt. Ltd."

3. The petitioner again on account of subsequent event has filed another I.A. No. 9624/2014 for the amendment in the prayer which reads as follows:-

"(iv) For quashing of Notice for inviting Re-Tender in short NIT) No. RCD/Jehanabad/07/2014-15, issued under signature of Executive Engineer (Respondent no. 6) as contained in Annexure-13, because the said authority has knowingly invited said re-tender after having knowledge about order passed on 03.12.2014 by this Hon'ble Court in present case,

under which this Hon'ble Court has pleased to say that "While this court is not inclined to pass any interim order for the present but, then, it is made clear that any action which shall be taken by the respondents shall remain subject to the result of this writ application."

4. Mr. Chitranjan Sinha, learned senior counsel for the petitioner, in support of the aforesaid relief, has straightway proceeded to assail that the reasons, which has been weighed upon the respondents in rejecting the technical bid of the petitioner, by describing it to be factually incorrect and legally impermissible. He explains that the petitioner's technical bid has been rejected only on the ground that its earlier working experience with regard to construction of road measuring 0.6 KM was found to be unsatisfactory in the sense that the petitioner had not completed the construction of the road as per the NIT but according to him when the land required for road itself was not free from dispute and half of the portion of the proposed road was incapable of being completed on account of dispute of land, the petitioner, in no view of the matter, could have been held to be responsible for not completing the work. He further explains that the petitioner had also completed the work over the available land by constructing the road and the reasons weighing upon the Respondents that the petitioner had failed to do the bituminous

work is also incorrect. In this regard, having filed reply to the counter affidavit, the petitioner has sought to explain that the bitumen was to be supplied by the department and when such supply was made, even that portion of work was completed by the petitioner.

5. Learned counsel for the State, on the other hand, has sought to justify the reason weighing upon the respondents in rejecting the technical bid and, according to him, the time weighted percentage of the petitioner was only 9.29%. In this regard, he has relied on paragraph no.7(C) to the counter affidavit, which reads as follows:-

*"7(C) The petitioner was declared disqualified in terms of Clause 4.7 of the CMBD-ITB or because petitioner was lacking behind in the progress of Puraina Ghat (missing Link) 0.6 K.M. As it is evident from the report sent by the Superintending Engineer Monitoring vide his Letter No. 4934(E) dated 20.10.2014 communicated to the Chief Engineer, South Bihar (communication), Sub-Division, Road Construction Department, Patna and as per the report the time weighted percentage of his work was only 9.29% which is clearly unsatisfactory.*

*In this regard further clarification was sought from the concerned Executive Engineer, Road Division, Sheikhpura who also vide his Letter No. 651 dated 05.11.2014 reported that the petitioner was responsible for keeping the work pending in which there was no obstruction otherwise.*

*The contractor has already executed the work up*

*to wet mix macadam, i.e., WMM (Non Bituminous Work) in the length of 300 M. This indicates that this section of road was encumbrance free. Hence, the petitioner should have completed the above work in this stretch. The petitioner did not execute the above work and on account of this, he has been disqualified in the technical bid in question."*

6. Mr. Sinha of-course placing reliance in reply to the counter affidavit reading as follows:-

"That statements made in para 7(c) to (f), 8, 14 & 15 of the counter affidavit are totally baseless and incorrect, hence the same are denied herewith. It is further submitted here that in para-20 of the writ application the petitioner has pointed out that the law is well settled that no tender can be invited without sanction of estimates, accord administrative approval, having sufficient funds as well as having defect free working site, but in present case the respondent no. 7 had invited tender for the said alleged work without having working site, not only that they had also issued work order in favour of the petitioner fixing the completion date i.e. till 12.06.2013 having knowledge that this would not be possible to the petitioner without handing over the working site."

has reiterated that there cannot be a disqualification for part of the uncompleted work because if experience has to be taken into account, either the whole work will qualify or the work will have to be ignored. He submits that if the land itself was not made

available to the petitioner for construction of road, how could it has been held responsible for non completion of the work.

7. He has also explained that during pendency of the writ application, the respondents have taken a final decision by cancelling the tender itself and taking a decision to issue a fresh N.I.T. because the sole remaining tenderer namely M/s Rambarat Sharma Electric Works Pvt. Ltd. also ultimately had been found to be disqualified.

8. There are two possible ways to dispose of this writ application. Firstly, to hold that the reason given for rejecting the technical bid was wholly illegal, inasmuch as, if a disqualification is being sought to be taken into account due to the petitioner not completing the work, the first and foremost requirement for that would be as to whether it was possible for the petitioner to complete the work. In the present case, the petitioner was required to complete the construction of 0.6 KM of road work. The petitioner however could not have completed the work because out of 0.6 KM, the Respondents itself had no title and possession for the 0.3 KM. The petitioner, therefore, had undertaken work for only remaining 0.3 KM. Now the allegation against the petitioner is that though he had done the stone chips work and earth work for construction of 0.3 KM. road but he had not even finished and

completed that part of the work by providing bitumen over the same and, to that extent, it would be relevant to quote the reasons given by the Tender Committee, which reads as follows:-

“कार्यपालक अभियंता, पथ प्रमंडल, शेखपुरा द्वारा सूचित किया गया है कि पुरैना-घाटकुसुम्भा पथ (मिसिंग लिंक पथ) 0.6 कि०मी० के संवेदक मेसर्स धनपत प्रसाद है। इस पथ के 300 मीटर भाग में भू-अर्जन की कार्रवाई लंबित रहने के कारण कार्य संभव नहीं हो सका है। शेष 300 मीटर पथांश में संवेदक द्वारा E/W, GSB, एवं WMM का कार्य किया गया है, परन्तु अभी तक Bituminous कार्य नहीं किया गया है। पथ के इस भाग में जिसमें कोई व्यवधान नहीं है, में शेष कार्य लंबित रखने के लिए संवेदक दोषी है। अतः मेसर्स धनपत को CMBD की कंडिका ITB-4.7 के आलोक में तकनीकी बीड में असफल पाया गया।”

(underlining for emphasis)

9. Though, Mr. Sinha has in reply to the counter affidavit produced material to show that when the Bitumen which was to be supplied by the department and when it was made available, even that part of the work was completed by the petitioner. This Court, however, will not take into account the subsequent completion of bituminous work over 0.3 KM. of road by the petitioner because whether such completion was made after the Tender Committee had taken a decision or otherwise can not be the basis for examining the reason of disqualification of petitioner. This Court will therefore proceed on the basis that the petitioner had not done the Bituminous work over 0.3 KM of road

but the question still would be, as to whether the petitioner could be disqualified even if it had not done the Bituminous work.

10. In the opinion of this Court a contractor who had been asked to complete the work for 0.6 KM of road and, therefore it also undertakes the work over 0.3 KM by doing the basic earth work and stone chips work and finds that the remaining portion of 0.3 KM. the road work cannot be done on account of dispute of land or non-availability of land is under no obligation to complete the work for the only remaining portion. The respondents in fact were duty bound to first ascertain the availability of the land before giving work order and, therefore, whatever be the work done by the petitioner that cannot be said to be incomplete on account of any laches on the part of the petitioner. Consequently the same could not have weighed upon the authorities in rejecting the technical bid of the petitioner. The concept of time weighted percentage may be very well applied to only such work where there was no handicap in completing the work either by way of non availability of land or bitumen to be supplied by the department to the petitioner but, here in the present case, all those explanations in the counter affidavit will have no meaning when it is an admitted fact that half of the land was not available for the petitioner to complete the work allotted

to it.

11. That being so, this Court will have no difficulty in holding that the rejection of the technical bid of the petitioner was factually incorrect and legally impermissible and thus the decision dated 4.12.2014 (Annexure-12) so far it relates to rejection of offer of the petitioner is quashed.

12. Secondly the question, however, will still be that when the three contractors had submitted their bid and out of them two including the petitioner were technically disqualified but, ultimately government has rejected even the offer of the third tenderer and has taken a decision for re-tendering, can this Court now direct the respondents to consider the offer of the petitioner for awarding the contract? As a matter of fact, now when the two other tenderers have gone out of race, the petitioner's offer will become single tender and, therefore, there would be no competition so as to ensure the protection of the public interest. In that view of the matter, while this Court must allow the writ application by holding the rejection of the technical bid of the petitioner to be correct but, then, it can not issue any direction to the respondents to award contract to the petitioner on the basis of old NIT because it finds the decision of re-tendering by way fresh NIT to be correct.

13. At this stage, Mr. Sinha informs this Court that re-



tender has already been done and the last date under the fresh NIT issued is also over and since the petitioner was waiting the result of this writ application and was also having the protection of the interim order dated 3.12.2014, it could not have participated in the fresh consideration. He has therefore sought to assail the fresh NIT dated 18.12.2014.

14. This Court has been informed that the fresh NIT was invited on 18.12.2014 and the last date of submission of the offer was 3.1.2015 whereafter the technical bids were opened on 6.1.2015 but, thereafter, the financial bid are likely to be opened on 15.1.2015.

15. Let it be noted that this Court by its order dated 3.12.2014 had made it clear that any action taken by the respondents shall remain subject to the result of this writ application. Today, when the writ application has been allowed to the extent of its being held that the rejection of the technical bid of the petitioner pursuant to the earlier NIT was incorrect, it has to be essentially held that the petitioner cannot be disqualified for fresh consideration and, therefore, keeping in view the interim order that was passed by this Court on 3.12.2014, this Court would quash the tender notice dated 15.12.2014 (Annexure-13) and would direct the authorities to re-advertise the work by way of fresh NIT in

which the petitioner's case shall also be considered in accordance with law without disqualification on which its earlier offer was rejected.

16. With the aforesaid observations and directions this writ application is allowed.

**(Mihir Kumar Jha, J)**

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