

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8869 of 2016

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1. M/s R. R. Company, a partnership firm, having its registered office at Village & P.O.- Jit Jhingo, Police Station- Khairia, District- Jamui through its one of the partners namely Mrs. Ranju Devi, daughter of Sri Bharat Singh, aged about 48 years, resident of village & P.O- Jit Jhingo, Police Station- Kharia, District- Jamui.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Secretary , Rural Works Department, Government of Bihar, Patna.
3. The Engineer-in-Chief, Rural Works Department, Government of Bihar, Patna.
4. The Deputy Secretary cum Internal Financial Advisor, Rural Works Department, Government of Bihar, Patna.
5. The Chief Engineer-2 Rural Works Department, Government of Bihar, Patna.
6. The Executive Engineer, Rural Works Department, Works Division Jamui District- Jamui.

.... Respondent/s

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with

Civil Writ Jurisdiction Case No.4907 of 2016

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1. M/s Sona Engicon Pvt. Ltd., Sona Commercial Complex, Thana Road, Gopalganj, Bihar - 841428 through its Managing Director Sri Chandra Vansh Giri son of Late Deodhari Giri.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Road Construction Department, Bihar, Patna.
2. The Chief Engineer, Road Construction Department, North Bihar Wing, Government of Bihar.
3. The Executive Engineer, Road Construction Department Road Division, Gopalganj.
4. The Superintending Engineer, Road Construction Department, Road Division, Gopalganj.

.... Respondent/s

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with

Civil Writ Jurisdiction Case No.11747 of 2015

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1. Subhash Kumar Shahi Son of Sri Shardanand Shahi, Resident of Village and P.O. - Deopura, P>S. - Rasoolpur, District - Saran at Chapra.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Rural Works Department, Government of Bihar, Patna.
3. The Engineer-in-Chief-cum-Additional Secretary, Cum- Special Secretary, Rural Works Department, Government of Bihar, Patna.
4. The Chief Engineer-3, Rural Works Department, Patna.
5. The Superintending Engineer, Rural Works Department, Work Circle, Chapra.
6. The Project Manager (M.R. Cell), Rural Works Department, Patna.

.... Respondent/s

Appearance :

(In CWJC No.8869 of 2016)

For the Petitioner : Mr. Sanjeev Kumar
Mr. Alok Kumar

For the Respondent/s : Mr. Amresh Kumar- S.C.11
(In CWJC No.4907 of 2016)

For the Petitioners : Mr. Y.V. Giri, Senior Advocate
Mr. Ashish Giri

For the Respondents : Mr. A. Ujjwal, S.C.25
Ms. Bandana Singh, A.C. to S.C.25

(In CWJC No.11747 of 2015)

For the Petitioner : Mr. S.B.K. Manglana
Mrs. Anita Kumari

For the Respondent/s : Mr. Vivek Prasad- G.P.18

CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
ORAL ORDER

4 21-07-2016 Heard learned counsels for the petitioners and learned counsels for the State in all the three writ petitions.

All the three writ petitions relate to the case of contractors, who were successful tenderers, but re-tender has been ordered by the Department on the ground that they were respectively the single tenderers after the technical bid.

For the said reason alone, the three writ petitions were heard together and with the consent of the parties, they are being

disposed of by this common order.

In C.W.J.C. No. 8869 of 2016 the petitioner, M/s. R.R. Company, being a registered contractor, filed its tender pursuant to a short notice inviting tenders advertised in daily newspaper on 06.08.2015. However, due to defect in the bid documents all the three bidders including the petitioner were declared ineligible and re-tender was directed to be made, for which advertisement was made on 01.01.2016 in the newspaper. The petitioner was concerned only with respect to the first item and accordingly, submitted its tender. The same related to construction of Amin Khaira Road to Dumarkala under Khaira Block, which was tendered vide tender I.D. No.39299, in which six bidders participated including the petitioner. The Technical Bid Evaluation Committee on 26.02. 2016 rejected the bid documents of all the other bidders, except the petitioner finding him eligible.

However, by letter dated 05.05.2016 the Department relying upon the Finance Department's notification dated 01.03.2016 amending Rule 131 (J) of the Bihar Financial Rules by inserting sub-rule (c) therein cancelled the tender and directed for re-tender of the work.

With regard to C.W.J.C. No.4907 of 2016, the petitioner M/s. Sona Engicon Pvt. Ltd. participated pursuant to



NIT No.RCD/GOP/2015-16 dated 16.07.2015 for construction-cum-maintenance work of Mishrauli Bhengari Road in K.M. 9 to 29 (length 20 K.M.) issued by the Road construction Department, Government of Bihar of which estimated cost was Rs.35.50 lacs. The last date for submission of bid was 06.08.2015, the date of opening of technical bid was 06.08.2015 and the date of opening of financial bid was 10.08.2015. The bid validity period was 120 days. The Technical Bid committee ultimately found the technical bid of as many as five out of 9 bidders as responsive. Finally upon the bid evaluation, three tenderers including the petitioner were found to be qualified in the technical bid. Out of them against Baibhav Construction Pvt. Ltd. a complaint was received and the Technical Bid Committee found the allegation to be true and therefore it was declared to be disqualified. By letter dated 04.12.2015, the petitioner was requested to extend the bid validity period for 60 days which the petitioner extended. Again by letter dated 05.02.2016, the petitioner was requested to extend the bid validity period till 31.3.2016, failing which it would be deemed that the petitioner was not interested to participate in the tender. However, the other technically qualified tenderer refused to extend the bid validity period and the petitioner thus remained the only valid tenderer. Thereafter, the petitioner was informed by letter



dated 05.03.2016 that the Departmental Tender Committee in its meeting held on 04.03.2016 has cancelled the tender since there was a single bidder qualified in technical bid and therefore the single financial bid could not be opened in the light of the Finance Department letter dated 01.03.2016.

In C.W.J.C. No.11747 of 2015, the petitioner, Subhash Kumar Shahi, had participated pursuant to a notice inviting tender, in which 25.03.2015 was fixed as the last date for submission of tender document and 27.03.2015 was the date for opening of the technical bid. As many as six contractors including the petitioner filed their tender documents but the Technical Bid Committee in its meeting held on 14.07.2015 found that except the petitioner none other qualified. However, by the impugned letter dated 22.07.2015 issued by the respondent No. 3, the Engineer-in-Chief-cum-Additional Secretary-cum-Special Secretary, Rural Works Department, Government of Bihar directed the respondent No.4 to go for re-tender for repairing work of Ekma Mashrakh Road on the ground that there was only a single tenderer, who qualified in technical bid.

Thus, all the three writ petitioners are aggrieved by the action of the respondents in rejecting the tenders solely on the ground that there was a single tenderer after the technical bid.



In the counter affidavit filed by the Department, reliance has been placed on the amendment to Rule 131 (J) of the Bihar Finance Rules in support of the stand that if only one tenderer remains for evaluation of the financial bid then there should be a re-tender.

Learned counsels for the petitioners submit that apart from the amendment made in the Bihar Financial Rules on 01.03.2016 in Rule 131 (J) nothing has been brought on the record to show that any such rule was prevailing in the Department that there should be re-tender if a single tenderer qualifies in the technical bid. On the contrary, as many as 6-7 cases have been brought on the record by the petitioners to show that even in the case of single tenderer, the Department has been repeatedly opening the financial bid document and granting the tender.

It is, thus, submitted that the action of the respondents for re-tendering in the case of these petitioners only is arbitrary, discriminatory and in violation of Article 14 of the Constitution. It is further submitted by learned counsel for petitioner M/s. Sona Engicon that so far as his case is concerned, it is not the case of a single tenderer having qualified after the technical bid; rather in the said case ultimately there were at least two qualified bidders after the technical bid and as such it was the laches and delay on



the part of the respondents that created a situation that the other tenderer refused to extend the bid validity period which led to the petitioner becoming a single tenderer. It is further submitted that it is not a case which can be said to be governed by the alleged amendment in the Bihar Financial Rule on 01.03.2016, apart from the fact that according to the petitioners, the said Rules are not applicable to their cases.

Two lines of submissions have been made by learned counsels for the petitioners with regard to the applicability of the said amended provisions of the Bihar Financial Rules on the ground that on its face this is not applicable to retendering by the Department which fact is mentioned in the amendment itself.

It is first of all submitted by learned counsel that Rule 131 (J) provides for a two bid system for purchasing high value plant, machinery, etc. of a complex and technical nature. Thus, the same rules cannot be applied to tenders which are issued under the Bihar P.W.D. Code, which alone governs such type of tenders as are involved in the present matters. It is further submitted that even the amendment made on 01.03.2016 clearly points out in the said direction through rule (d) therein which states that similar amendment shall be made by the concerned Administrative Department under the Bihar PWD Code. It is contended that

considering the same, amendment in the Bihar P.W.D. Code has been brought on the same lines on 09.05.2016.

It is further argued that the tenders are to be evaluated on the basis of rules prevailing on the date the NIT was issued and not on the basis of any subsequent amendment in the Rules and procedure to be followed, which is a well established principle, and thus for the said reason neither Rule 131J (c) nor the amendment in the Bihar P.W.D. Code would apply to the tenders involved in the present matters.

Rule 131J of the Bihar Financial Rules, 1950 along with sub-rules (c) and (d) added therein by a notification dated 01.03.2016 are quoted below:-

“131J. Two bid system: For purchasing high value plant, machinery etc. of a complex and technical nature, bids may be obtained in two parts as under:-

- (a) Technical bid consisting of all technical details along with commercial terms and conditions;
- (b) Financial bid indicating item-wise price for the items mentioned in the technical bid.
- (c) After evaluating the technical bids received by the purchaser department by the competent committee or authority, if only one tender remains for evaluation of financial bid then re-tender shall be invited for it immediately. If after inviting re-tender also, only one tender remains for evaluation of financial bid after

technical evaluation, then the matter will be disposed off by the authority of one level above of the competent authority.

(d) Similar amendment shall be required to be made by concerned administrative department in the Bihar Public Works Code.

The technical bid and the financial bid should be sealed by the bidder in separate covers duly superscribed and both these sealed covers are to be put in a bigger cover which should also be sealed and duly superscribed. The technical bids are to be opened by the purchasing Department at the first instance and evaluated by a competent committee or authority. At the second stage financial bids of only the technically acceptable offers should be opened for further evaluation and ranking before awarding the contract.”

So far as the petitioners of C.W.J.C. No.8869 of 2016 and C.W.J.C. No.11747 of 2015 are concerned they have made additional plea that in terms with the circular issued by the Rural Works Department which is applicable to all these tenders, a tender below 10 % of the specified rate is not to be accepted and such financial bids are to be declared invalid. It is submitted by learned counsel for the petitioner of CWJC No.8869 of 2016 that the financial bid of the petitioner is at 90% of the scheduled rate,



which is the least possible bid and thus re-tendering would not lead to any benefit in public interest; rather since the passage of approximately a year from the tender process the rate itself would be higher than what has been fixed in the earlier tenders and even the least possible valid bid would be higher than the petitioner's bid.

Learned counsel for the petitioner of CWJC No.11747 of 2015 also submits that as per his instruction, the financial bid of the petitioner is also approximately at the rate of 92.5% of the scheduled rates and he has been instructed to say that the petitioner is willing to accept the work at 90% of the said rate and the same argument would apply to this case also, apart from other submissions that the respondents are acting in a arbitrary and discriminatory manner by rejecting the bid of the petitioner on the said ground.

In support of their stand, learned counsels for the parties rely upon a decision of the Supreme Court in the case of Karnataka State Forest Industries Corporation vs. State of Karnataka and others: (2009) 1 SCC 150, in paragraphs Nos. 38 and 39 of which it has been held as follows:-

“38. Although ordinarily a superior court in exercise



of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable. (See ABL International Ltd.v. Export Credit Guarantee Corpn. Of India Ltd.).

39. There cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are not powerless. Reliance placed by Mr. Divan on G.J. Fernandez v. State of Mysore is not apposite. In that case itself it was held: (AIR p. 1757, para 12)

“12. Thus under Article 162, the State Government can take executive action in all matters in which the legislature of the State can pass laws. But Article 162 itself does not confer any rule-making power on the State Government in that behalf.”

G.J. Fernandez was considered in ABL International Ltd.”

They further rely on the decision of the Apex Court in the case of Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd.: (2005) 6 SCC 138 wherein paragraph Nos. 11 and 14 it has been held as follows:-

“11. The principles which have to be applied in



judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in *Tata Cellular v. Union of India*. It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. 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. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. (See para 85 of the

Report, SCC para 70).

14. In Raunaq International Ltd.v. I.V.R. Construction Ltd. it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.”

They further rely upon the decision of the Supreme Court in the case of Reliance Airport Developers (P) Ltd. v. Airports Authority of India: 2006 (10) SCC 1, in paragraph Nos. 56, 57 and 77 it has been held as follows:-

“56. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of



governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary (see *State of U.P.) v. Renusagar Power Co.*). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor de Smith in his classic work *Judicial Review of Administrative Action*, 4th Edn. At pp. 285-87 states the legal position in his own terse language that the relevant principles formulated by the courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant



considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

57. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the courts to assert their power to scrutinise the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is “illegality”, the second “irrationality” and the third “procedural impropriety”. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* (commonly known as CCSU case). If the power has been exercised on a non-consideration or non-



application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (Whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See CIT v. Mahindra and Mahindra Ltd.) The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book Applications for Judicial Review, Law and Practice thus:

“There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government’s claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial



review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."

(Also see *Padfield v. Minister of Agriculture, Fisher and Food.*)

77. Expression of different views and discussions in different meetings really lead to a transparent process and transparency in the decision-making process. In the realms of contract, various choices were available. Comparison of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review."

Learned counsel also relies upon the decision of the Apex Court in the case of *Reliance Energy Ltd. and another vs. Maharashtra State Road Development Corpn. Ltd. and others*: 2007 (8) SCC 1, in paragraph Nos. 36 and 39 of which it has been held as follows:-

"36. We find merit in this civil appeal. Standards



applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of “non-discrimination”. However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to “right to life”. It includes “opportunity”. In our view, as held in the latest judgment of the Constitution Bench of nine Judges in *I.R. Coelho v. State of T.N.*, Article 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. “Level playing field” is an important concept while construing Article 19 (1) (g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19 (1) (g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of “level playing field”. We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of “level playing field” is an important doctrine which is embodied in Article 19 (1) (g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. “Globalisation”, in essence, is liberalization of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in



the concept of “globalization”. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19 (1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of “equality” should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of “level playing field”. According to Lord Goldsmith, commitment to the “rule of law” is the heart of parliamentary democracy. One of the important elements of the “rule of law” is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of “reasonableness”, then such an act or decision would be unconstitutional.

39. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of “judicial review” cannot be denied even in contractual matters or matters in which the Government exercises its contractual



powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and there by breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above “certainty” is an important aspect of the rule of law. In Reliance Airport Developers the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided.”

Learned counsel also relies upon the decision of a learned single Judge of this court in the case of National Project

Construction Corporation Limited and Anr. vs. The State of Bihar and others : 2007 (2) PLJR 40. In paragraph Nos. 14 and 15 therein, it has been held as follows:

“14. Lastly, to the contention of the learned Advocate General that there being no agreement executed as yet and, therefore, no writ will lie, the answer is two fold. Firstly, the failure to execute the agreement is on the State Government because the petitioner has been repeatedly requesting for executing the agreement. It is common principle of law that no one can take advantage of his own default. In this respect, I am refer to what Chief Justice Chagla had to say in the case of All India Groundnut Syndicate Limited vs. Commissioner of Income Tax, AIR 1954 Bombay 232:

But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under sub-section (2) of Section 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person- we take it that the Income-tax Department is included in that definition- can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because “I have committed a default and the right is

lost because of that default”.

15. Secondly, even in pre-contractual stage, a person has a right to move the Court for appropriate writ. Without dilating, by way of illustration, I may refer to cases dealing with promissory estoppel and/or legitimate expectation which are all cases of pre-contractual stage because once a contract is entered into then parties are to be governed by the contract. Here, the grievance is that the petitioners having been duly selected, the agreement was of a matter of formality to follow and depended upon the State itself. The selection could not be set at naught except for justifiable reasons. In the present case, there is no justifiable reason and, as such, in absence of any justifiable reason, the action of the State would be per se arbitrary. Action being arbitrary per se would be violative of Article 14 of the Constitution of India. It is too late in the day to urge that in contractual matters, the State action is not governed by Article 14 of the Constitution of India. To my mind, the proposition that all governmental actions including that in contractual field, are governed by Article 14 of the Constitution of India is now so well established principle. It needs no precedence to support.”

Learned counsel for the State, on the other hand, submits that the rule of re-tendering in the case of single tenderer after technical bid is a salutary rule and the respondents have rightly relied upon it for re-tendering. However, he is at a loss to

explain as to how in such a large number of cases a single technically qualified bidder has been granted the contract by the State Government.

It is submitted by learned counsel that the amendment in Rule 131J of the Bihar Finance Rules, 1950 and the similar amendment in the PWD Code brought on 09.05.2016 supports the stand of the respondents that re-tendering should be ordered in case a single tenderer would remain after the evaluation of the technical bid.

I have considered the rival submissions of learned counsels for the parties. Whether the rule of re-tendering of a single bidder qualified after a technical bid is a salutary principle or not is not an issue arising in the matter in hand, as it ultimately lies in the realm of policy decision of the State Government. However, such policy decision must be incorporated in proper rules or executive instructions and followed in a consistent manner in all the cases. It is not open to the State Government to invoke the rule in cases where the Department may not like that the contract be awarded to a particular tenderer, rather it has to be done in a fair and reasonable manner in all cases. Specific cases have been cited by the petitioners to show that single tenderers have been consistently awarded contract by the Department



probably because they were blue-eyed boys of the Department, whereas the rule of re-tendering in the case of single tenderer is being followed in the case of the present petitioners. In view of a large number of cases brought to the notice of this Court, it cannot be said that such rule of re-tendering in the case of a single tenderer qualified after the technical bid was being followed consistently by the State. Thus the charge of discrimination will squarely apply in the present matters.

Learned counsel for the State is unable to show as to how the subsequent notification in the Bihar Financial Rules by amending Rule 131J of the Bihar Financial Rules and even later the Bihar PWD Code, which would actually govern the present cases, would affect the case of the petitioners in relation to tender notices issued much prior to coming into force of these rules. It is a trite principle that a tender process shall be governed by the rules in existence on the date the notice inviting tenders has been issued. No changes thereafter are possible barring exceptional circumstances and that too with the consent of all the tenderers.

So far as the case of the petitioner M/s. Sona Engicon of CWJC No.4907 of 2016 is concerned, there is the additional fact in his favour that brings its case out of the purview of Rule 131J (c) of the Bihar Financial Rules 1950 or even the Bihar



P.W.D. Code amended on similar lines. The said Rule clearly provides that after evaluating the technical bids received by the purchaser Department by the competent committee or authority, if only one tender remains for evaluation of the financial bid then re-tender shall be invited for it immediately. Apart from the fact that the Bihar Financial Rules would only apply to a tenderer for purchasing high value plant, machinery, etc. of a complex, and not to a public works contract, the fact remains in the case of this petitioner that two tenderers remained after evaluation of the technical bid. It is purely on account of the laches of the Department that the situation arose that the other tenderer refused to extend the bid validity period leaving the present petitioner as the sole tenderer. Thus, it cannot be said to be a case of a single tenderer covered by the said rules, apart from the fact that the said rules came much later and were not in existence when the tender was floated. In the said circumstances, the respondents were obliged to consider the case of the petitioner by opening the financial bid.

With regard to the petitioner M/s. R.R. Company of CWJC No.8869/2016, apart from the aforesaid reasons, further fact is that there is a clear statement at the bar that the financial bid of this petitioner is at 90%, i.e, the lowest valid bid that can be in



terms of the Circular dated 01.03.2016 applicable to all these contractors. I find that if the said fact is correct, then no public interest can be served by going for re-tendering as the fact will have to be taken into consideration that during the period of one year that the matter has remained in limbo the rates would have increased.

Apart from other grounds, similar consideration would apply to the case of the petitioner of C.W.J.C.11747/2015 as he also claims to have put his financial bid at 92.5% of the scheduled rate and further undertaking has been given by his counsel on the basis of instruction received that the petitioner would be willing to take the contract at 90% of the scheduled rate.

So far as the petitioner M/s. Sona Engicon is concerned, it is stated by learned counsel that the petitioner had filed the tender at the scheduled rate and may be prepared for negotiation to some extent in the matter.

Thus on a consideration of the entire facts and circumstances, this Court is of the view that in all the three matters, the respondents have acted in arbitrary and discriminatory manner by not opening the financial bids of the petitioners on the sole ground that they remained single bidders after the tender, when no circular has been brought to the notice of this Court that

such was the practice of the Department and half a dozen cases have been cited by the petitioners, in which single tenderers have been awarded contracts, apart from other reasons stated above.

The writ applications are, accordingly, allowed and the respondents are directed to open the financial bids of the petitioners within a period of two weeks from the date of receipt/production of a copy of this order and thereafter proceed to award the contract subject to the statements made by the petitioners through their counsels with regard to their financial bids.

In CWJC No.8869 of 2016 interlocutory application has been filed being I.A.No.5386/2016 in which challenge has been made to the re-tender notice inviting tenders published on 01.07.2016 in the daily newspaper Hindustan in which the concerned tender is item No.1.

It is, therefore, directed that the tender notice dated 01.7.2016 with regard to item No.1 in the case of CWJC No.8869/2016 shall not be given effect to and in view of the order, the same is held to be invalid.

(Ramesh Kumar Datta, J)

V.P.Sinha/-

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