

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14970 of 2016

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The Imperishable Security Services Pvt. Ltd. through its Director namely Kaustubh Ranjan having its Head Office- F-3/78-79 Ground floor, sector-16 Rohini, Delhi-110089 and Corporate office: Sharmkanta Chowk, N.H. 57 Mahesh Bhagat Banwari Lal Intermediate College Road, Bairiya, P.S.- Ahiyapur, District- Muzaffarpur, Bihar and Branch Office: Karmalichak, Near Kriti Petrol pump, N.H 30, Fatuha Road, Patna City- 800009.

.... Petitioner

Versus

1. The State of Bihar through its Principal Secretary Department of Health, Govt. of Bihar, Patna.
2. The Director (Health Service), Government of Bihar, Patna.
3. The Regional Director, Tirhut Division Health Services Muzaffarpur.
4. The District Officer, Sitamarhi.
5. The Civil Surgeon cum Chief Medical Officer, Sadar Hospital Sitamarhi.
6. The Superintendent, Sadar Hospital, Sitamarhi.
7. The Deputy Superintendent of Sadar Hospital, Sitamarhi.
8. The Spider Protection services Pvt. Ltd. through its Director Corporate Office at 126/11 R-Block, Top Floor, Govind Nagar, Kanpur-208006 (U.P.)

.... Respondents

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Appearance:

For the Petitioner	:	Mr. J.S. Arora, Senior Advocate Mr. Karandeep Kumar, Advocate Mr. Manoj Kumar, Advocate Mr. Gaurav Pratap, Advocate
For the State	:	Mr. Ranjan Kumar Singh, A.C. to P.A.A.G.-2
For Respondent No.8	:	Mr. Dhrub Mukharjee, Senior Advocate Mr. Arup Kumar Chongdar, Advocate Mr. Gajendra Kumar Singh, Advocate.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 20-12-2017

Heard learned counsel appearing for the respective



parties.

2. In the present case, the petitioner is challenging the work order containing memo no.219 dated 02.07.2016, whereby and where-under the Spider Protection Services Private Limited-respondent no.8 has been issued the work order for placing the security guards at Sadar Hospital, Sitamarhi and other centres of the district. Further prayer has been made to quash the memo no.686 dated 12.08.2016, whereby the agreement with the petitioner for placing the security guards at Sadar Hospital and other health centres of Sitamarhi district has wrongly been terminated, made the prayer of restoration of contract work assigned to the petitioner.

3. The present matter relates to grant of work order with respect to placing the security guards at Sadar Hospital and other health centres situated in the district of Sitamarhi. For that, an advertisement was published in the Hindi daily news paper, namely, Prabhat Khabar, on 11.05.2016, wherein the invitations were invited from interested persons in two closed envelopes; one for the technical bid and another for the financial bid, attaching supporting records. Altogether, five persons joined the fray by dropping sealed cover tenders. As per the petitioner, in the advertisement schedule dates of process of finalization of bid were not mentioned for opening the



technical bid as well as the financial bid, in order to ascertain the dates and time of opening of tender, time to time the representatives of the petitioner approached the respondents and it was communicated, necessary information with respect to the opening of the technical bid as well as the financial bid will be given to all the tenderers. A letter dated 27.05.2016 (Annexure-R/2) was sent to all contesting parties including the present petitioner, wherein date and time was mentioned for opening of technical bid i.e. on 31.05.2016 at 10:00 am. The notice was served upon the guard of the petitioner, namely, Vikash Kumar on 27.05.2016. All other tenderers except the petitioner were present, which is clear from the proceeding dated 31.05.2016. It appears from the proceeding of the Tender Committee, envelopes of technical bid of all tenderers were opened, in which the petitioner along with others as well as private respondent no.8 were declared successful. The tender Committee fixed the date on 04.06.2016 for opening of financial bid, communicated the proposed date vide letter no.1858 dated 02.06.2016 (Annexure-D to the Counter affidavit of respondent nos. 5, 6 and 7), but financial bid was not opened on the date fixed, was deferred and in the said letter it was mentioned that necessary information will be given to all the parties. It appears, as per the entry made in the letter, was sent to all concerned through e-mail.



Again notices were sent to all concerned persons vide letter no.2048 dated 21.06.2016 (Annexure-R/5) fixed the date for opening the financial bid on 22.06.2016 at 1:30 pm., as per the proceeding of Tender Committee, on that date the technical bid of qualified persons was accepted including the petitioner but the financial bid was not opened, fixed next date i.e. on 02.07.2016. The notices were sent to all the parties vide memo no.2170 dated 30.06.2016 (Annexure-R/7), intimating them the next date for opening the financial bid, accordingly, all parties were directed to remain present and participate in the financial bid. The financial bid was opened and it was found that the respondent no.8 has quoted the lowest rate comparative to all the contesting tenderers, which will be apparently clear from Annexure-R/8 and formally the work order was issued on the same date vide memo no.219 dated 02.07.2016, which is under challenge in this case.

4. Learned counsel for the petitioner submits that the petitioner was not served any notice about the opening of technical bid or the financial bid and the notice has purportedly been claimed to have been served upon Mr. Vikash Kumar, the security guard of the petitioner, but was not authorized to receive the notice but thereafter at no any point of time he was giving any information



about conducting of tender proceedings though it was adjourned from time to time, finally, the last notice dated 30.06.2016 fixing the date of opening the financial bid on 02.07.2016 was not served upon the petitioner. He further submits that all the actions are *mala fide* smacks under hand dealing, the entire process of selection is not transparent but completely opaque only was a fixed match in order to deprive the petitioner from the award of work, by adopting the modus ensure that the petitioner should not participate in the opening of the tender.

5. Learned counsel for the petitioner has brought to the notice of this Court to the minutes of proceeding dated 31.05.2016 (Annexure-R/3 and R/3/1 of the counter affidavit of respondent no.8), where the document discloses that one of the members of the Tender Committee, namely, District Sales Tax Officer, Sitamarhi, was absent as his signature on the proceeding dated 31.05.2016 is silent and in the bottom of the minutes the signatures of participants are in following seriatim (i) Abhishek (ii) Amit (iii) AKS and (iv) G. Shartta, whereas Annexure-A of the counter affidavit of the State, reflects the signature of the District Sales Tax Officer, Sitamarhi is very much available but the signatures of participants have been arrayed in different seriatim in following manner (i) G. Shartta (ii)



Amit (iii) A.K.S. and (iv) Abhishekh. He further pointed out that there is interpolation in the date as is apparently clear from Annexure-A from naked eyes indicates that signature of certain authority was obtained later on.

6. On comparison of the two documents, the contention of the petitioner appears to be correct; there is a difference in the arrangement of signatures and also the signature of the District Sales Tax Officer, Sitmarhi is absent in Annexure-3/1 i.e. proceeding dated 31.05.2016. This Court had directed the State to produce the original record. On perusal of the original record, it appears that the document which has been filed by the State is the photo copy of the original records, which is at Annexure-A of the counter affidavit of the State. This Court does not know from where the respondent no.8 has obtained this document (Annexure-R/3/1) attached with the counter affidavit, of course there is variance in both the documents.

7. Learned counsel for the respondent no.8 has submitted that the attendance-sheet of the proceeding dated 31.05.2016 reflects that the District Sales Tax Officer, Sitamarhi, who is the member of the Tender Committee was present on 31.05.2016 and had put his signature on the same date, so it was a mistake committed by the District Sales Tax Officer while putting the date below his signature,



later on, he corrected the date, so it cannot be said that he was absent, whereas the other corroborating documents reflect his presence on 31.05.2016.

8. Another objection has been raised by the petitioner, the notice of the subsequent dates were not served upon him as he has submitted that as per the proceeding dated 31.05.2016 the next date was fixed on 04.06.2016, but the said date was cancelled which was communicated through e-mail dated 02.06.2016. However, the said letter does not disclose the next date fixed for the proceeding of Tender Committee. The letter no.2048 dated 21.06.2016 (Annexure-R/5) indicates that the next date of meeting of Tender Committee was fixed on 22.06.2016 at 1:30 pm. and at the bottom it has been mentioned that the notices were sent in following manner; special messenger/registered post/e-mail/SMS/FAX/Phone call. The dispatch register has been produced before this Court for perusal. On perusal of the same, it appears that the entry of the service of notice with respect to memo no.2048 dated 21.06.2016 does not reflect in what manner the notices were served upon the parties, but the fact remains that except the petitioner all were present. The proceeding of Tender Committee dated 22.06.2016 reflects that the financial bid was not opened on that date, next date was fixed on 02.07.2016, for



that notice was issued vide memo no.2170 dated 30.06.2016, entry shows that letter was sent to all the concerned persons, but the mode of service of notice has not been mentioned and this Court has also examined the dispatch register with respect to memo no.2170 dated 30.06.2016, which is also silent in what manner the notices were effected upon the concerned persons. The proceeding of 02.07.2016 discloses that respondent no.8 quoted the lowest rate, accordingly, he was declared successful, the petitioner failed to succeed.

9. Whereas, learned counsel for the private respondent no.8 and the State have taken same plea that notice for opening the technical bid which was fixed on 31.05.2016, was properly served upon the agent of the petitioner, and nowhere in the writ application it has been stated who were the persons authorized to receive the notice on behalf of the petitioner-company. Merely, the denial that Vikash Kumar, was not the proper person to receive the notice will not *ipso facto* come in the aid of the petitioner. It is expected that when a notice has been served upon the agent, the same will be treated that it has been served upon the master, after having knowledge about the opening of the technical bid on 31.05.2016 petitioner had chosen to keep away from the technical bid proceeding, now petitioner cannot make complain about the opening



of the bid behind its back.

10. In the present case, it is apparently clear that the petitioner has been declared successful in technical bid but he could not succeed in the financial bid, in such circumstance, when it does not reflect that in what manner the notices were communicated to the parties concerned, especially to the present petitioner it is very difficult to decipher the manner of service of notice upon the petitioner was effected. In such circumstance, it has to be tested, whether the absence of the petitioner in participation of technical bid and financial bid will make the entire process of selection to be suffering from illegality and vitiates or the Court should refrain to interfere with the outcome of the proceeding, in which the respondent no.8 has been declared to be successful and work order has been issued on the ground it does not effect the public interest, no allegation of *mala fide* has been pleaded and proved.

11. Learned counsel for the respondent no.8 has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Michigan Rubber (India) Ltd. v. State of Karnataka and Others*, reported in (2012) 8 SCC 216. It will be relevant to quote paragraph no.24 of the said judgment, which is as under:-

“ 24. Therefore, a Court before interfering in tender or



contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and

(ii) Whether the public interest is affected.

If the answers to the above questions are in negative, then there should be no interference under Article 226.”

12. In the aforesaid judgment, the Court has considered the previous judgment passed in Tejas Constructions & Infrastructure Pvt. Ltd. vs. Municipal Council, Sendhwa, reported in (2012) 6 SCC 464, Raunaq International Ltd. vs. I.V.R. Construction Ltd. & Ors. (1999) 1 SCC 492, which is in the same line in what situation the Court should exercise the judicial review. The Court has also considered the decision passed in Tata Cellular vs. Union of India, (1994) 6 SCC 651, where the Court has said that the modern trend is to maintain judicial restraint in administrative action. The Government must have freedom of contract; a fair play in the joints is a necessary concomitant for an administrative body functioning in



an administrative sphere or quasi-administrative sphere. The principle of *Wednesbury* has to be applied while adjudicating contractual and tender disputes.

13. He also placed reliance on the decision of the Hon'ble Supreme Court in the case of *Jal Mahal Resorts Private Limited vs. K.P. Sharma and Others*, reported in (2014) 8 S.C.C. 804.

14. In *Tata Cellular* case (supra) it has been stipulated that the power of judicial review is a great weapon in hand of higher Court in the contractual matter to prevent the arbitrariness or favouritism in action and correct the maladies in decision making process, but there is an inherent limitations in exercise of that power of judicial review. The Government is the guardian of finances of the State. It is expected to protect financial interest of the State. Right to refuse the lowest or any other tender is always available to the Government, but the principles enunciated in Article-14 of the Constitution has to be kept in mind while accepting or refusing tender. There can be no questing 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, but if the power is exercised for any collateral purposes exercise of that power will be struck down. Judicial journey in the administrative



matter is to find out the right balance between administrative discretion to decide matters whether contractual or political in nature or issues of social policy, thus they are not essential justiciable and the need to remedy any unfairness, such an unfairness is set right by judicial review. But how far this Court interfere in judicial review has been deliberated by the Supreme Court and held that in administrative matter while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive and the principle has been culled out in paragraph no.94, which reads as under:-

“94. The principles deducible from the above are :

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) 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.

(4) 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.

(5) 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 or quasi-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.

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

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.”

15. The Court has specifically held that in the modern days the Court should maintain the judicial restraint in administrative action and while exercising the judicial review the Court does not sit in appeal but merely review the manner in which the decision was made. The decision only be tested by applying the principle of wednesbury of reasonableness and must be free from arbitrariness not effected by bias or actuated by mala fides. The scope for judicial scrutiny in the judicial review is limited to review the decision



making process and not review on merit; interference is only permissible as mentioned above.

16. In Jal Mahal case (supra) the decision of M.P. Oil Extraction vs. State of M.P. reported in (1997) 7 SCC 592 has been adopted and affirmed the extent of judicial review in the executive and legislative matter and held that the power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be occasion to give signal of misgivings about the role of judiciary of overstepping its limit by unwarranted judicial activism. It will be relevant to quote paragraph nos.137 and 138 of the said judgment, which read as under:-

“137. From this, it is clear that although the Courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State Authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the Court chooses to overrule the correctness of such



administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P., SCC at p.611 has unequivocally observed that: (SCC para 41)

“41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective field.

138. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision



which is writ large on a particular activity at the instance of the State or any other authority connected with it, the Court should remain a passive, inactive and a silent spectator. What is sought to be emphasised is that there has to be a boundary line or the proverbial "laxman rekha" while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation and diligence which do not reflect arbitrariness or illegality in its decision and execution. If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalisation wherein global players are also involved as per policy decision".

17. Taking into account the parameters and scope of judicial review and applying the principle that has been held out in the aforesaid judgments of Hon'ble Supreme Court it has to be tested whether this Court is required to interfere with the award which has been conferred to the private respondent no.8. Two things are very important in this matter, the petitioner and respondent no.8 were declared successful in technical bid in the meeting dated 31.05.2016, in that meeting except the present petitioner all tenderers were participated in the proceeding. The plea of the petitioner that he was not given the notice cannot be accepted in the background that notice was served upon Vikash Kumar, who



happens to be the security guard of the petitioner and never notified to whom the notice can be served, in such circumstance, the service of notice on agent will be treated to be the service on master. So the plea that he was not given the notice of the proceeding of 31.05.2016 cannot be accepted. But, here the matter does not end, the next date for financial bid was fixed on 04.06.2016, which was adjourned, next date was fixed on 22.06.2016 on that date the Tender Committee accepted the outcome of the previous proceeding of technical bid, but from the record it does not appear that notice was served upon the petitioner for the meeting to be held on 22.06.2016 and finally the financial bid was opened, the petitioner failed to appear, to know, notice was served in what manner this Court has called the original record, examined the dispatch register, which does not disclose the method and mode of service of notice upon the contestants especially to petitioner. Though there is entry in dispatch register the notice was communicated, but which manner was applied or all manners were applied, is silent as well as there is no record to show that the notice was served upon the petitioner.

18. In Tata cellular case (supra) the Hon'ble Supreme Court has held that in the judicial review the Court should examine the decision making process not the decision. The transparency is the



part of Article-14 of the Constitution to be applied by the Government or Government agencies in all matters including the contractual matters and must reflect fairness in action, as arbitrariness is the antithesis of rule of law which strikes at the root. In Tejas Constructions & Infrastructure Pvt. Ltd. (supra), it has emphatically held by the Hon'ble Supreme Court that the basic requirement of Article-14 is fairness in action by the State and non-arbitrariness in essence and substance is the heart-beat of fair play, are amenable to judicial review only to the extent that action must be valid for a discernible reason and not whimsically for any ulterior purposes. If the State acts within the bounds and reasonableness, the Court would maintain restraint. So the thrust has been given, reasonableness and fairness in action.

19. In the present case, the record does not explain in what manner the notice was served upon the petitioner of two meetings dated 22.06.2016 and the proceeding dated 02.07.2016. In such view of the matter, this Court holds that the action of the respondents in awarding the contract to the private respondent no.8 suffers from illegality, hence work order containing memo no.219 dated 02.07.2016 is quashed. This Court directs the respondents to go for fresh exercise for selection of contractor for providing security



guards at Sadar Hospital and other health centres of Sitamarhi district. The process should be started without any delay. The present arrangement with the security guard would remain in operation till the appointment of new contractor.

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

(Shivaji Pandey, J)

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AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
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