

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.20035 of 2018

M/s Ganesh Ram Dokania a partnership form having it's place of business at Aliganj, Banka through it's authorized signatory namely Tapan Kumar Singh, son of Jatin Chandra Singh, Resident of House No. 13, C/o Rekha Devi, Road No. 7, Indrapuri, Patna-Keshri Nagar, Patna- 800024.

... .. Petitioner

Versus

1. The State Of Bihar through the Principal Secretary, Department of Building Construction, Govt. of Bihar, Patna.
2. The Principal Secretary, Department of Building Construction, Govt. of Bihar, Patna.
3. The Engineer in Chief cum Additional Commissioner cum Special Secretary, Department of Building Construction, Govt. of Bihar, Patna.
4. The Additional Secretary cum Commissioner Financial Advisor, Department of Building Construction, Govt. of Bihar, Patna.
5. The Chief Engineer (South) Department of Building Construction, Vishveshwariya Bhawan, Bailey Road, Patna.
6. The Executive Engineer, Department of Building Construction, Building Division, Banka.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Gautam Kumar Kejriwal, Advocate Mr. Atal Bihari Pandey, Advocate Mr. Alok Kumar Jha, Advocate
For the Respondent/s	:	Mr. Mahendra Pd. Verma, AC to SC-20

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 06-03-2019

This writ application has been preferred for issuance of a writ of *certiorari* to quash the office order communicated vide letter bearing Memo No. 9932(*bha*) Patna dated 19.09.2018 issued by the respondent Engineer-in-Chief-cum-



Additional Commissioner-cum-Special Secretary, Building Construction Department, Government of Bihar, Patna on the ground inter alia that it has been passed without considering the vital issues raised by the petitioner in its reply dated 05.03.2018 and the supplementary reply dated 17.09.2018.

2. Mr. Gautam Kumar Kejriwal, learned counsel representing the petitioner submits that the impugned order has got a civil consequence inasmuch because of the impugned order the petitioner cannot participate in any of the Tender invited by any government department in the State of Bihar and in any of the government company or corporation.

3. It is submitted that the suspension of the whole business activity of the petitioner for a period of one year without considering its reply is violative of fundamental right of the petitioner for freedom of trade and profession in terms of Article 19(1)(g) of the Constitution of India.

4. It appears from narration of facts that petitioner's firm had participated in a Tender invited by the respondents for construction of a Engineering College at Banka. The petitioner submitted its technical and financial bids in accordance with Clause 4.3 of the Standards Bidding Document. It is the case of



the petitioner that in terms of Clause 4.3, the petitioner submitted an affidavit of one M/s Prince Construction, Jamui containing the statement on oath of the said Firm of performing the work of subcontractor if the work is awarded to the petitioner Firm. The participation of a subcontractor in the main contract to be awarded to the Principal Contractor is only to the extent of 10% of the total cost of contract. The problem arose when the said M/s Prince Construction, in addition to the affidavit to work as subcontractor submitted its own bid for the purpose of award of contract.

5. Contention of the petitioner is that it was never within the knowledge of the petitioner at the submission of bid. The petitioner had no occasion to feel aggrieved by the said efforts made by M/s Prince Construction as nowhere in the standard bidding document there was any condition which bars participation of a contractor in individual capacity as well as a subcontractor attached with another contracting party.

6. It further appears from the pleadings that on 03.01.2018, the Departmental Tender Committee declared petitioner and other three contractors as responsive but on a reanalysis of the bid submitted by all the bidders by a Three



Men Committee nominated for this purpose. The bid of the petitioner's firm has been held non-responsive for two reasons which are as follows:

(a) The bid of the petitioner consisted of an affidavit by a co-bidder Prince Construction regarding assurance to execute the work in question as a subcontractor on the terms and conditions as contained in the Standard Bidding Document.

(b) Blacklisting order by the Rural Works Department, Ranchi as against the petitioner which though supported by an order of Hon'ble Jharkhand High Court setting aside such order of blacklisting but no confirmation letter of the concerned department of the State of Jharkhand was produced.

7. So far as this part of the decision of the Departmental Tender Committee is concerned, the same is not under challenge in the present writ application. The grievance of the petitioner is that all of a sudden the petitioner was served with show cause notice bearing reference No. 1562(bha) dated 19.02.2018 whereby an explanation was sought from the petitioner in connection with the alleged



submission of Tender bid in cartel which violated the confidentiality of the tender process. A copy of the show cause notice has been brought on record as Annexure-3 & 3/1 to the writ application. Petitioner submitted a reply dated 05.03.2018 vide Annexure-4 to the writ application, thereafter a fresh show cause notice vide letter no. 2659(bha) dated 21.03.2018 was issued calling upon the petitioner to submit an explanation in terms of the decision dated 05.03.2018 of the Departmental Tender Committee.

8. The petitioner claimed that he again forwarded the detailed reply, submitted earlier on 05.03.2018, through a forwarding letter dated 26.03.2018. Thereafter, the respondent no. 3 passed an order dated 29.05.2018 as contained in Annexure-5 to the writ application whereby and whereunder the registration of the petitioner's firm was suspended for a period of one year. Petitioner challenged the order dated 29.05.2018 by filing CWJC No. 10768/2018 before this court and a learned coordinate Bench of this court after hearing the parties passed order dated 22.06.2018 by which the writ application was allowed. The impugned order was set aside and the matter was remanded to the respondent no. 3,



Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Department of Building Construction, Govt. of Bihar, Patna for passing a speaking order after grant of opportunity of hearing to the petitioner and upon consideration of show cause reply dated 05.03.2018. The petitioner thereafter submitted a supplementary objection dated 17.09.2018 as contained in Annexure-7 to the writ application.

9. Thereafter once again the impugned order as contained in Memo No. 9932(bha) dated 19.09.2018 has been passed whereby the plea of the petitioner as contained in it's explanation dated 05.03.2018 has been rejected.

10. In course of argument, Mr. Kejriwal, learned counsel representing the petitioner submits that earlier this court vide it's order dated 26.11.2018 had called upon the respondents to place on record the materials to show that petitioner and subcontractor namely M/s Prince Contractor had connived with each other for the purposes of hijacking the bid. The order dated 26.11.2018 passed by a learned Bench of this court is quoted hereunder for a ready reference:

“The learned counsel for the respondents seeks four weeks' time to produce on record the materials to show



that the petitioner and the sub-contractor namely M/s Prince Contractor had connived with each other for the purposes of hijacking the bid, which appears to be the case of the respondents in the present case.

Accordingly, the respondents are granted four weeks' time to file the necessary affidavit.

List this case "For Admission" after four weeks under the heading "For Admission".

In the meantime, the interim order dated 22.11.2018 shall continue."

11. Thereafter this court had again vide order dated 26.02.2019 called upon the department to make a positive statement as to whether the department has taken any action in respect of the sub-contractor of the petitioner who had also submitted an independent tender which seems to have created the issue.

12. It is submitted that no material whatsoever has been brought on record on behalf of the department to show that the petitioner and the sub-contractor had connived. It is submitted that despite opportunities granted to the department, even in the second supplementary counter affidavit no material has been placed before this court to demonstrate that it is a case of formation of cartel. Learned counsel has relied upon a recent judgment of the Hon'ble Supreme Court in the case of **Rajasthan Cylinders and Containers Ltd. Vs. Union of India and another (Civil**



Appeal No. 3546 of 2014) decided on 01.10.2018 in which the Hon'ble Apex Court has laid down the test to ascertain the existence of concerted practice. The said judgment has been followed by this court in the case of **M/s Topline Infra Projects Pvt. Ltd. Vs. State of Bihar** reported in **2019 (1) PLJR 667**. It is submitted that the ratio of the judgment of the Hon'ble Apex Court is fully applicable in the facts and circumstances of the present case.

13. Learned counsel submits that the very language of the impugned order would show that it is not a fresh order passed by the authority with fresh mind applied to the facts and materials available on record. In the last line of the impugned order the authority has restored the previous order which was already quashed by this court vide order dated 22.06.2018.

14. On the other hand, learned counsel representing the State has opposed the writ application. It is submitted that the petitioner was issued a fresh show cause dated 06.09.2018 and after giving an opportunity of personal hearing in the Chambers of Engineer-in-Chief and on consideration of the



facts as well as his reply the impugned order dated 19.09.2018 was passed.

15. It is submitted that petitioner has made attempt to manipulate tender process which is illegal and therefore appropriate action was taken against him in accordance with the provisions of Bihar Contractors Registration Rules, 2007. In such circumstances, the suspension of the petitioner's registration for a period of one year has been defended.

16. Learned counsel for the State has drawn attention of this court towards Annexure-C to the second supplementary counter affidavit filed on behalf of respondent no. 1 to 6 in attempt to satisfy this court with regard to the query made vide order dated 26.02.2019 while hearing the writ application. A statement has been made by the Answering Respondents in paragraph-4 that M/s Prince Construction, Baraudhiya, Jamui was restrained from taking part in any tender of the department for one year from the date of issuance of the order.

17. Mr. Kejriwal has at this stage produced a copy of the order dated 10.07.2018 passed in CWJC No. 12685/2018 in the case of M/s Prince Construction to show



that the order as contained in Annexure-‘C’ to the second supplementary counter affidavit of the said respondents was quashed by the learned writ court and the writ application was allowed in line with and on the same terms as the aforesaid judgment dated 22.06.2018 passed in CWJC No. 10768/2018 in case of this petitioner. It is submitted that thereafter no action was taken against M/s Prince Construction but this fact has been concealed in the second supplementary counter affidavit and true and correct facts have not been brought on record.

18. Having heard learned counsel for the parties and on perusal of the records, this court finds that the show cause notice had been issued to this petitioner alleging that the petitioner and M/s Prince Construction had formed a cartel and thereby they had interfered with the confidentiality of the tender. The same allegation was made against M/s Prince Construction also. Both of them challenged the action of the State respondents in passing the order dated 29.05.2018 by which their respective licenses were placed under suspension for a period of one year. A learned Bench of this court



allowed both the writ applications and remanded the matter to the respondent no. 3 to take a decision afresh.

19. Pursuant to the aforesaid direction, as it appears action has been taken once again against the present petitioner vide impugned order dated 19.09.2018 (Annexure-8). In the impugned order, while analysing the explanation of the petitioner, the respondent no. 3 has taken note of the stand of Mokhtar (Munsi) as is commonly known Sri Omkar Yadav of M/s Prince construction who took a plea that the affidavit of M/s Prince Construction was not submitted with the consent of the said firm. Taking note of this statement of the Mokhtar of M/s Prince Construction, respondent no. 3 has come to a conclusion that the petitioner is guilty of submission of uploading of wrong affidavit, and therefore the objection of the petitioner has been rejected.

20. It is also evident that in the second supplementary counter affidavit filed on behalf of the State respondents an impression was given to this court that similar action of suspension of registration was taken against M/s Prince Construction, the subsequent development in case of M/s Prince Construction has not been revealed in the affidavit



but what has come before this court is that the order as contained in Annexure-C to the second supplementary counter affidavit was already quashed by a learned writ court in CWJC No. 12685/2018. This fact has not been revealed in the second supplementary counter affidavit and therefore apparently the order dated 26.02.2019 passed by this court has not been correctly answered by the State respondents. Nothing has been stated by the State respondents to show that after remand of CWJC No. 12685/2018 any fresh order was passed in the case of M/s Prince Construction.

21. This court would however not go into that aspect of the matter and the discussions made hereinabove would not be construed as anything against M/s Prince Construction.

22. It is evident to this court that the show cause notice was issued against both the parties on an allegation that they had formed a 'cartel' and thereby interfered with the confidentiality of the tender but now the impugned order as contained in Annexure-'8' to the writ application has been passed after rejecting the stand of the petitioner on the ground that the petitioner had uploaded a wrong affidavit. This court



is afraid that now the view taken by the respondent no. 3 in the impugned order is not the same which prompted the respondent no. 3 to issue the show cause notice dated 19.02.2018 as contained in Annexure-‘3’ to the writ application. Moreover, a mere statement of the Mokhtar (Munsi) of M/s Prince Construction at this belated stage that the affidavit was submitted without the consent of the firm cannot be made a basis to pass the impugned order. The genuineness of the affidavit has not been contested by the Mokhtar of M/s Prince Construction. The *ex-parte* statement of the Mokhtar of M/s Prince Construction saying that the affidavit was submitted by this petitioner without consent of M/s Prince Construction does not inspire confidence. If an affidavit was sworn by and on behalf of the said M/s Prince Construction the same has been uploaded the bald plea of the Mokhtar could not have been taken as a sacrosant by respondent no. 3.

23. The issue of cartelization has been considered by the Hon’ble Apex Court in the case of **Rajasthan Cylinders and Containers Ltd. (Supra)**. This court has relied upon the said judgment in the case of **M/s Topline**



Infra Projects Pvt. Ltd. Vs. State of Bihar reported in **2019**

(1) PLJR 667. Paragraph 93 and 98 of the judgment of the

Hon'ble Apex Court are reiterated hereunder:

“93. To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, quoting almost the same rates in their bids. The parameters on the basis of which these aspects are to be judged are stated in **Excel Crop Care Limited** as follows:

“50. It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderee's list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

51. Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties.

[Excel Crop Care Limited Vs. Competition Commission of India reported in (2017) 8 SCC 47]



One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a Central secretariat, which will then cost the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

52. We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr. Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by European court of Justice in Dyestuffs:

“By its very nature, then, the concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallize the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers.”

(emphasis supplied)

At the same time, the Court also added that the existence of a concerted practice could be appraised correctly by keeping in mind the following test:

“If the evidence upon which the contested decision is based is considered, not in isolation, but as a



whole, account being taken of the specific features of the products in question.”

Having regard to the aforesaid principles in mind, we deal with the argument on oligopsony raised by the appellant.”

“98. In this regard, the test laid down by the Supreme Court of United States in Monsanto Co. v. Spray-Rite Service Corp. is relevant and is reproduced hereunder:

“The correct standard is that **there must be evidence that tends to exclude the possibility** (emphasis supplied) that the manufacturer and non-terminated distributors were acting independently. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.”

24. On records absolutely no material has been brought to the notice of this court on the basis of which it can be held that the petitioner had formed the ‘cartel’ that too when this court finds that in the impugned order now respondent no. 3 is relying upon the statement of the Mokhtar of M/s Prince Construction and is taking a view that the petitioner had uploaded a wrong affidavit, it appears to this court that the allegation of cartelization is taking a back-seat. Saying that the petitioner had uploaded a wrong affidavit without the consent of M/s Prince Construction would be one thing and to say that both of them have connived and had formed a cartel



would be just opposite, quite different and distinct thing. The learned writ court had remanded the matter to respondent no. 3 with certain hopes that respondent no. 3 shall consider all aspects of the matter and will take a fresh view considering the reply of the petitioner, instead the respondent no. 3 has reiterated his order dated 29.05.2018, albeit on altogether a new ground. He impugned order is thus once again suffering from the vice of non-consideration of the materials available on the record.

25. The impugned order vide Memo No. 9932(*bha*) Patna dated 19.09.2018 as contained in Annexure-‘8’ to the writ application is thus set aside. The matter is remanded once again to respondent no.3, the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Department of Building Construction, Government of Bihar, Patna who may proceed to give a fresh consideration of case if there are materials available with him to form an opinion that the petitioner had formed any ‘cartel’. Respondent no. 3 shall keep in mind the judgment of the Hon’ble Apex Court in the case of Rajasthan Cylinders (Supra). It is expected that the confidence posed by this court in respondent no. 3 to take a



fresh decision if materials are available with him shall be strengthened only when respondent no. 3 considers the matter in accordance with law.

26. The writ application is allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J)

Rajeev/-

AFR/NAFR	
CAV DATE	
Uploading Date	12.03.2019
Transmission Date	

