

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.24011 of 2018

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Anuj Kumar Singh, Son of Sri Parmatma Singh, Vill- Shyampur, P.S- Siwan
Muffasil, District-Siwan.

... .. Petitioner/s

Versus

1. The State Of Bihar through the Secretary, Rural Works Department,
Government of Bihar, Patna.
2. The Engineer in Chief, Rural Works Department, Government of Bihar,
Patna.
3. The Chief Engineer-3, Rural Works Department, Government of Bihar,
Patna.
4. The Superintending Engineer, Rural Works Department, Work Division
Siwan.
5. The Project Manager, Mukhya Mantri Gram Sampark Yojana, M.M.G.S.Y.,
Bihar, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Shekhar Singh, Adv. Mr.Satyendra Rai, Adv.
For the Respondent/s	:	Mr. Mritunjay Kumar, AC to AAG-6

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

7 05-04-2019 Heard learned counsel for the petitioner and learned
counsel representing the State.

Petitioner in the present case is seeking quashing of
the part of the decision of the Technical Core Committee dated
22.11.2018 as contained in memo no.BRRDA(HQ)-
MMGSY(NDB)-262/18 1049 dated 30.11.2018 (Annexure-4)
issued with respect to Notice Inviting Tender
No.RWD/MMGSY(NDB)/HQ/ET/18-07 relating to package
no.MMGSY-NDB-BRRP-58 SIWAN-1 whereby the tender has



been cancelled and recommendation has been made to invite a fresh tender by taking a view that the petitioner had formed cartel with those contractors who had not submitted the original copy of the tender submitted by them at the stage of technical bid.

On the last date when the matter was heard, this Court had passed the order dated 25.02.2019 in the following terms:-

“Learned counsel for the State shall come out with a specific affidavit as to what is the basis of saying that the petitioner had formed cartel along with those who were not found fit at the technical bid stage. The impugned order as contained in Annexure ‘4’ to the writ application at least nowhere shows any such allegation against the petitioner. Prima-facie, it appears to this Court that only because the four bidders did not qualify at the technical bid stage because they had not submitted the required documents, perhaps the authorities have come to a conclusion that all the tenderers had formed a cartel.

As prayed for on behalf of the State, list this case on 07th March, 2019 under the same heading. The Court has been informed that a fresh tender has already been floated. Learned counsel for the petitioner submits that the petitioner may be allowed to participate in the same without prejudice to his rights and contentions in the present writ application. This Court permits the petitioner to participate in the tender without prejudice to his contentions in this case and the decision pursuant to opening of the said tender shall be subject to further order which may be passed in the present case.”

Today, learned counsel for the State has invited attention of this Court towards the statements made in paragraph 7 and 9 of the supplementary counter affidavit which are quoted hereunder for a ready reference:-

“7. That it was clearly mentioned in the said N.I.T. that all the tenders/applicants would require to furnish their original documents at the



time of offline submission of bids but the four tenders deliberately and intentionally did not submit their original documents inspite of specific mentioning condition that the applicants would require to submit their original documents.

9. That it would be necessary to bring to the notice of the Hon'ble Court here that it is not that the four tenders were not found fit by the Technical Bid Committee rather the fact remains that these four bidders were managed to get themselves technically rejected by the Technical Bid Committee by not submitting original documents. As the bidding is a very serious process and is intended to elicit reasonable competition among the bidders, these four bidders by choosing to not submit the requisite documents obviously connived to throttle the competition by dropping out of race and allowing only the two remaining bidders to compete. Of late, such disturbing incidents have come to the notice of the Department and a letter by the Secretary, Rural Works Department to the effect was issued to prevent this kind of bid management."

When this Court called upon learned counsel for the State to inform as to whether any action has been taken against those four tenderers who had not submitted their original documents at the time of offline submission of the bids and against whom there are allegations that they had deliberately and intentionally did not submit their original documents, learned counsel for the State submits that he has not got any instruction in this regard.

In course of hearing apart from the aforesaid submissions that because four tenderers had not submitted their original documents at the offline bid stage and for that reason alone the tender has been cancelled, no further material could be



brought to the notice of this Court to show that it may be a case of irresistible conclusion that the petitioner had formed cartel with those four tenderers. Learned counsel for the petitioner has relied upon a judgment of this Court in the case of **M/s Topline Infra Projects Pvt. Ltd. Vs. State of Bihar** reported in **2019 (1) PLJR 667** which in turn relies upon a judgment of the Hon'ble Supreme Court in the case of **Rajasthan Cylinders and Containers Pvt. Ltd Vs. Union of India and another (Civil Appeal No.3546 of 2014)** reported in **2018 SCC Online SC 1718**. Paragraphs 93 and 98 of the judgment of the Hon'ble Supreme Court in the case of **Rajasthan Cylinders and Containers Pvt. Ltd. (supra)** are quoted hereunder for a ready reference:-

*“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)

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



and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderer'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.

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 nonterminated 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.”

In yet another case of **M/s Ganesh Ram Dokania Vs. State of Bihar and others in CWJC No.20035 of 2018**, this Court had occasion to consider the similar issue where the contractor's registration was cancelled on the ground that he had formed cartel with sub-contractor.

In the present case, I find that the only reason to take a view that the petitioner had formed cartel is that the four other tenderers had not submitted their original documents at the stage of offline submission of the bid. The facts also reveal that despite the fact that those four tenderers did not come forward



to submit their original documents, at least two tenderers were found qualified at the technical bid stage. In the opinion of this Court, the opinion formed by the respondent authorities that the petitioner had formed cartel is not supported by any evidence. It is at best a suspicion which cannot take place of proof so as to cancel the tender and go for retendering. This Court has been also informed that in re-tender no one else than this petitioner has participated, thus there being a single bidder the whole exercise of re-tender has gone futile.

When this Court applies the tests as provided in the judgments referred here-in-above the impugned action cannot sustain the test of law. It is liable to be set aside. This Court accordingly sets aside the part of the decision of the Technical Core Committee dated 22.11.2018 whereby the tender in question has been cancelled on the ground that the petitioner had formed a cartel.

The writ application is, thus, allowed to the extent indicated above.

(Rajeev Ranjan Prasad, J)

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