

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.22216 of 2018

M/s Topline Infra Projects Pvt. Ltd. Having it's place of business at
Ambedkar Chowk, Mirchai Bari, Katihar thorough it's authorized
signatory namely, Rakesh Kumar, son of Sri Nand Lal Khudania
Resident of Deharai Bara Bazar, P.S. and District- Katihar

... .. 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 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 The Additional Secretary-cum-Commissioner Financial Advisor, Department of Building Construction, Govt. of Bihar, Patna.
5. The Chief Engineer (North) Department of Building Construction Vishveshwariya Bhawan, Bailey Road, Patna.
6. The Executive Engineer, Department of Building Construction, Katihar.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr.Gautam Kumar Kejriwal, Advocate
		Mr. Alok Kumar Jha, Advocate
For the Respondent/s	:	Mr. Uday Prasad, AC to GP-22

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 23-01-2019

Heard learned counsel for the petitioner and



learned counsel representing the State.

2. Petitioner is aggrieved by office order, as contained in letter no. 407 dated 05.11.2018, issued under the signature of Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Building Construction Department, Government of Bihar, by which a decision has been taken in terms of paragraph-11(*ka*) of the Bihar Contractors Registration Rules, 2007 (hereinafter referred to as the "Rules 2007") to place the registration of the petitioner under suspension for a period of one year from the date of issuance of letter.

3. Mr. Gautam Kejriwal, learned counsel representing the petitioner has raised a short point for consideration by this court. Attention of this court has been drawn towards earlier round of litigation in CWJC No. 598/2018 and CWJC No. 9127/2018, on both the occasions this court had been pleased to quash the impugned order and directed the Engineer-in-Chief to consider the matter afresh after due consideration of the reply of the petitioner.

4. It is pointed out that after the last order



dated 16.05.2018 was passed in CWJC No. 9127/2018, once again the respondent no. 3 has passed the order dated 05.11.2018 by which the registration of the petitioner has been placed under suspension for a period of one year.

5. Mr. Kejriwal, learned counsel submits that a perusal of the concluding part of paragraph-1 of the impugned order would show that respondent no. 3 has reached to a conclusion that the two contractors while filling up the tender had quoted identical rates with respect to six items under non-scheduled category by forming a cartel. The conclusion so arrived is not based on any positive material or evidence rather it appears that the respondent no. 3 has drawn an adverse inference against the petitioner only because he was of the view that submission of tender by two contractors quoting identical rates as regard six items cannot be a mere coincidence.

6. Learned counsel submits that in the case of **Rajasthan Cylinders and Containers Limited Vs. Union of India and Another (Civil Appeal No. 3546/2014)**, decided on October 1, 2018, the Hon'ble Supreme Court was



dealing with a question as to whether the competition Commission of India (For short, 'CCI') had reached to a conclusion with regard to entering into an agreement by the parties thereto creating a cartel by drawing a mere inference. In the said case as many as 60 bidders had submitted their bid giving identical rate/cost and on a complaint made before the CCI when it was examined the Commission came to a conclusion that because the various suppliers submitted identical bids despite varying cost and also that they have appointed common changes etc. there was a possibility of an agreement among the bidders. CCI had come to a conclusion that there was cartelization among the appellants in the said case with an intention to rig the bids which were submitted pursuant to the tenders issued by the Indian Oil Corporation Limited (in short, 'IOCL').

7. While dealing with the aforesaid issue the Hon'ble Supreme Court in paragraph-93 and 98 of it's judgment quoted the test laid down for this purpose. Paragraph-93 and 98 of the judgment of the Hon'ble Supreme Court in the case of Rajasthan Cylinders (supra) is



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) 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 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."

8. Learned counsel thus submits that in the said case the Hon'ble Supreme Court held that there was no sufficient evidence to hold that there was any agreement among the appellants for bid rigging. The judgment of the CCI was thus set aside.

9. Referring to the present case, it is submitted that the situation in the present case is no better as the respondent no. 3 has come to a conclusion that the



petitioner indulged in cartelization only on his own perception. There was no positive material or evidence before him to come to this conclusion.

10. On the other hand, learned counsel representing the State submits that the petitioner has got a remedy of statutory appeal against the impugned order which he has not availed. It is also submitted that the respondent no. 3 has passed the impugned order on consideration of the reply of the petitioner and the impugned order being a reasoned order, no interference is required. It is pointed out that in the financial bid of the two bidders, it was found that they were verbatim the same and on analysis of the rates, both scheduled and non-scheduled it was apparently clear that they had formed a cartel and such an action could not have been merely by chance.

11. Having heard learned counsel for the parties and on perusal of the records, this court is of the considered opinion that save and except the conjectures and surmises, the respondent no. 3 had no positive material in hand to come to a conclusion that the petitioner had formed



a cartelization. No material has been referred in the impugned order which could have excluded the possibility that the petitioner was acting independently. Order suspending registration of a firm has got civil consequence as it is likely to affect not only the business concern but all those who are attached therewith. Such decision are, therefore, required to be taken with much care and circumspection. It appears that the respondent no. 3 has passed the impugned order without there being any material available on record, and, therefore, the order passed by him being perverse suffers from jurisdictional error.

12. In this view of the matter alone, the plea of alternative remedy taken on behalf of the State cannot be accepted. It is well-settled that plea of alternative remedy is a rule of convenience and not a rule of law. This court is of the considered opinion that the test laid down by the Hon'ble Supreme Court in the case of **Rajasthan Cylinders (Supra)** are not satisfied in the present case.

13. In result, the impugned order dated 05.11.2018 issued by the respondent no. 3, as contained in



Annexure-14 to the writ application, is hereby set aside.

14. The writ application is allowed.

(Rajeev Ranjan Prasad, J)

Rajeev/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	24.01.2019
Transmission Date	

