IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8786 of 2020

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M/s. EMS Infracon Pvt. Ltd. - M/s Technocraft Construction Pvt. Ltd. (JV), a joint venture between two Private Limited Companies, Regd. Office of lead partner at 701, DLF Tower A Jasola, New Delhi 110025 through its Authorized signatory, namely, Pankaj Kumar Srivastava (Male) aged about 50 years, Son of Prakash Chandra Srivastava, Resident of 397/C, Raj Colony, Hussenabad, Jaunpur, Jaunpur Kty, Uttar Pradesh, P.S. Line Bazar Jaunpur, Town and District Jaunpur.

... ... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Main Secretariat, Patna.
2. The Secretary, Urban Development and Housing Department (UD and HD), Government of Bihar cum Project Director, State Program Management Group (SPMG) Vikash Bhavan, Bailey Road, Patna.
3. The Bihar Urban Infrastructure Development Corporation Ltd., near Rajapur Pul, West Boring Canal Road, Patna - 800001 through its Managing Director.
4. The Managing Director, Bihar Urban Infrastructure Development Corporation Ltd., near Rajapur Pul, West Boring Canal Road, Patna - 800001.
5. The Chief Engineer, Design, Planning and Monitoring BUIDCo, Patna.
6. The Union of India, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation through its Secretary having its Office at Shram Shakti Bhavan, Rafi Marg, New Delhi - 110001.
7. The National Mission for Clean Ganga, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi through its Director General.
8. The Director General, National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi.
9. The Executive Director, Technical National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi.
10. The Executive Director, Projects, National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi.
11. M/s Toshiba Water Solutions Pvt. Ltd. in JV with Kevadiya Construction

Pvt. Ltd, a joint venture between two Private Limited Companies having the Office at 4th Floor, Tower-D, Pioneer Urban Square, Sector - 62, Gurugram, Haryana.

... ... Respondents

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Appearance :

For the Petitioner	:	Mr. S.D. Sanjay, Senior Advocate Ms. Parul Prasad, Advocate
For the Resp. Nos.7 to 10	:	Mr. K. N. Singh, Addl. Solicitor General
For the State	:	Mr. Kinkar Kumar, S.C.-9
For the BUIDCo	:	Mr. Lalit Kishore, Senior Advocate
For Resp. No. 11	:	Mr. P.K. Shahi, Senior Advocate Mr. Manoj Kumar Singh, Advocate Mr. Saket Tiwari, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 07-09-2021

This matter has been taken up for hearing online because of COVID 19 pandemic restrictions.

2. The controversy in the present writ application arises out of a tender process undertaken by the respondent - Bihar Urban Infrastructure Development Corporation Limited (in short "BUIDCo") in relation to sewerage and sewerage treatment at Hajipur for pollution abatement of river Ganga in Bihar under Namami Gange Programme at a sharing ratio of 70:30 between the Central and the State Government of Bihar with the following major components:-

(i) Construction of remaining Sewer network: 138.9 km. including 2.5 km. Using trenchless technology.

(ii) Sewage Pumping Station (SPS) – 4 no.

(iii) House Connections Chambers

(iv) Completion of construction of STP of 22 MLD capacity.

Relevant portion extracted from the guidelines issued by the Central Government for the National Mission for Clean Ganga (for short “NMCG”) has been brought on record by way of Annexure-1 to the writ application. From the said extract and the pleadings from the record, it is easily culled out that NMCG has been established as a registered society which is responsible for effective implementation of the overall National Ganga River Basin Authority (for short “NGRBA”) programme at the national level with well defined functions, powers, resources and autonomy. The State Programme Management Group (for short “SPMG”) under the said scheme is also a registered society to ensure effective implementation at State level. The SPMGs are the respective State level counterparts of the NMCG and have State level responsibilities for management and implementation of the NGRBA programme in accordance with the agreed NGRBA programme. These facts are being mentioned at the outset, regard being had to the reference which has been made to the abbreviations NMCG and SPMG etc. in present judgment at different places.

3. Admittedly, the first tender process initiated in respect of project in question was canceled by the BUIDCo which is the executing agency of the project for the State of Bihar. The work was again re-tendered second time, but, in the absence of any participation it could not materialize. With the lapse of time, the cost of the project got inflated which required fresh administrative approval/sanction of the NMCG, Government of India. Ultimately, after its approval, the NMCG came out with a communication dated 05.03.2018 addressed to the Principal Secretary (Urban Development Department) -cum-Project Director, Bihar State Ganga River Conservation Programme Management Society (BGCMS). Accordingly, approval of the project at the revised estimated cost of Rs. 305.19 crores was accorded. The said communication contains in detail the conditions for execution of the project which were binding on the executing agency i.e. SPMG and BUIDCo. Thereafter, another notice inviting tender dated 22.08.2019 was issued by the BUIDCo which was apparently the third attempt to award the contract by inviting bids from the eligible bidders.

4. The petitioner claims to be the joint venture of two private limited companies carrying on their commercial activities within the territorial jurisdiction of this Court (in short M/s. EMS infracon Private Limited). In response to the said third tender notice, the petitioner submitted its bid. The respondent no.11 namely, M/S Toshiba Water Solutions Private Limited in joint venture with Kevadiya Construction Private Limited, another joint venture between two private Limited Companies (hereinafter referred to as M/S Toshiba Water Solutions Private Limited) also submitted its bid. The technical bids of the bidders were opened on 25.10.2019 and the same were placed for technical evaluation before the technical bid evaluation committee. The committee found the technical bid of respondent no.11 to be responsive and that of the petitioner to be non-responsive. The petitioner represented before the Chief Engineer, BUIDCo, asserting that its technical bid ought to have been treated responsive and that of respondent no.11 ought to have been held non-responsive. Several facts asserted in the pleadings on record need not be mentioned in the present judgment which have become inconsequential and are no more material for adjudication of this case in view of subsequent developments leading to filing of the writ application and certain other developments after filing of the writ application which shall be taken note of hereinafter.

5. Suffice it to say at this juncture that the dispute between the petitioner and respondent no.11 on the point of technical and financial evaluation of the bids by the BUIDCo for the project in question had reached NMCG. From a communication dated 21.05.2020 of the NMCG issued under the signature of its Director (Annexure-20 to the writ application) it can be seen that NMCG had lamented the delay in the entire procurement process because of which the original estimated cost of Rs. 113.62 crores of the project had to be revised to Rs.309 crores. Paragraphs 2 and 3 of the said communication are being quoted hereinbelow which go to suggest the dissatisfaction expressed by the NMCG over delayed decision.

> *"2. The entire procurement process has been inordinately delayed for reasons which are matter of record and worth recapitulating to set the matter in proper perspective Namami Gange programme endeavours for such initiative towards creation of infrastructure as is required to ensure rejuvenation of river Ganger such that pollution abatement measure are in place obviously with a mission approach. A detailed sewerage network and STP scheme was sanctioned, on request of State Government for Hajipur on 08.03.2010 by NRCD (under MoEF&CC) concluding with a scope of 198.41 km. of sewerage network, 2 SPS and an STP of 22 MLD capacity at an estimated cost of Rs. 113.62 Cr. with an objective to abate the*

pollution in river Gange sourced from sewage in Hajipur Town. The project was awarded in 2011 but could not be completed within stipulated time due to many reason, one of such important reason was delay in handing over land for STP and SPS for more than 2 years. The earlier contractor also suffered a lot for interrupted cash flow due to non availability of working front STP lands and their own cash flow problems from their company's head quarter at China. After consistent persuasion the company delivered 60% civil works at STP site and laid only 51.4 km sewer line. No work started at the pumping stations NMCG took charge of the project in 2014, identified these bottlenecks and the contract was terminated on 18.08.2017 after it was apparent that contractor will not be able to deliver during periodic review in 2016-2017. In this process, 6 valuable years were lost leading to unwarranted escalation in project cost.

3. *NMCG, further, on the request of State Government, sanctioned the remaining works at revised estimated cost of Rs.305.19 Cr. on 05.03.2018, almost 3 times the original sanctioned cost. The escalation due to time over-run primarily resulted because of non-provisioning of STP and SPS land in time to the contractor which is a pre-requisite for any infrastructure project and was required to be handed over to contractor within 15-30 days after signing of contract."*

6. The Director, NMCG referred to the letter dated 28.04.2020 issued by the Urban and Housing Development Department, Government of Bihar, conveying rejection of petitioner's bid and qualification of the bid of respondent no.11 and opening of the financial bid amounting to Rs. 422.02 crores, negotiated down to Rs. 405 crores, which was still 40.26% more than the estimated cost. The NMCG expressed its reluctance to accept the justification for increase in the cost of bid (Rs.405 crores) extended by SPMG for certain reasons mentioned in the said communication. Finally, the NMCG directed the technical bid evaluation committee of the BUIDCo to comprehensively look into all the issues and arrive at its decision in terms of earlier communication dated 11.02.2020.

7. Visibly, in the light of the said communication of NMCG, the technical bid committee of BUIDCo held another meeting on 12.06.2020 to review its technical re-evaluation earlier done by it in its meeting dated 30.05.2020. The technical bid evaluation committee was of the view that the decision to hold the petitioner's technical bid non-responsive and that of respondent no.11 responsive was justified. However, it was decided by the committee to seek legal opinion from the Law Department, Government of Bihar, before a final decision was taken. After having received the opinion from the office of the Advocate General, Bihar, a meeting of technical bid committee was held on 20.06.2020. After examining the opinion of learned Advocate General, Bihar and other documents, the technical evaluation committee held both, the petitioner and respondent no.11, non-responsive. The committee, accordingly, recommended for re-tender. The BUIDCo thereafter came out with fourth tender notice dated 20.08.2020 after canceling the earlier NIT dated 22.08.2019, for the same project of foregoing description.

8. In the background of the facts narrated hereinabove, the petitioner has filed the present writ application seeking following reliefs:-

> *"(i) For quashing the Tender cancelation notice dt. 20.08.2020 under the signature of Chief Engineer, Design, Planning and Monitoring, BUIDCo, Patna, by which it has been intimated that the NIT No. BUIDCo/YO-871 (part-3)-61 dt. 22.08.2019 for Hajipur Sewerage treatment Plant and Sewerage Network Plan Bihar has been canceled with immediate effect purportedly on the ground that both the bidders have been found to be non responsive, being wholly illegal as it suffers from malafide and arbitrariness on the part of the State Project Management Group (hereinafter referred to as*

SPMG);

(ii) For a declaration that the Respondent Nos. 1 to 5 have arbitrarily, illegally and with malafide intention declared the petitioner to be non-responsive in the technical bid in spite of the fact that the Respondent No.7, National Mission for Clean Ganga (hereinafter referred to be as NMCG) held the Technical bid of the Petitioner to be responsive.

(iii) For a direction to the Respondents to open the Financial Bid of the petitioner and consider its Financial Bid for further action and to award the Contract and issue the work order, if it is found to be the lowest bidder;

(iv) For quashing the fresh Tender bearing NIT No. BUIDCo/ Yo-871/2017(Part-4)-169 published on 20.08.2020, the last date of submission being 28.09.2020 and the Corrigendum-1 dated 24.09.2020 whereby the last date of submission has been amended to 15.10.2020, as the same is wholly arbitrary and illegal and for such other relief or reliefs for which the Petitioner may be found entitled in the facts and circumstances of this case."

9. It is significant to mention here that the date of downloading of documents was mentioned in the fourth invitation for bid as 28.08.2020 to 27.09.2020 and last date and time for receipt of bids as 28.09.2020 upto 3:00 P.M. The last date and time for submission of hard copy of the bid was mentioned as 29.09.2020. By a corrigendum issued by the BUIDCo on 24.09.2020 the bidding schedule was revised and accordingly, the last date of downloading of bid documents was extended to 14.10.2020; for receipt/upload of bids to 15.10.2020 and, for submission of hard copy of the bid upto 16.10.2020. A copy of the corrigendum dated 24.09.2020 has been brought on record by way of Annexure-25 to the writ application. This chronology of events is up to the date of filing of this writ application.

There is no averment in the pleadings brought on record on behalf of the petitioner that the petitioner had downloaded the bid documents for uploading of bids and submission of hard copy of the bid within the time prescribed originally in the notice inviting bid and revised bidding schedule dated 24.09.2020.

10. Subsequent to filing of the writ application certain developments occurred which need to be mentioned at this juncture. In relation to another tender floated by the BUIDCo in which the petitioner had participated by submitting his bid, the BUIDCo blacklisted the petitioner by an order dated 04.11.2020. It is the petitioner’s case that the same was intentionally done to oust the petitioner from participating in the present tender process. The said order of blacklisting dated 04.11.2020 was subsequently set aside by this Court by an order dated 04.02.2021 passed in C.W.J.C. No. 8929 of 2020. This Court after setting aside the order of blacklisting had remanded the matter back by directing the competent authority to pass an order afresh taking into account the explanation offered by the petitioner and all other attendant / relevant factors within a period of 60 days from the date of receipt / production of a copy of the order. The said order dated 04.02.2021 was subsequently clarified/ modified by an order dated 18.02.2021. The fact remains that after 04.02.2021 the order of blacklisting dated 04.11.2020 was not operating against the petitioner. In the meanwhile, BUIDCo issued several corrigenda revising the bidding schedule and finally the last date for downloading the bid documents was extended upto 30.03.2021, receipt (upload) of bids upto 31.03.2021 and submission of hard copy of bid upto 01.04.2021. There is no assertion in the pleading on behalf of the petitioner that it had downloaded the documents let alone uploaded the same. Further in the meanwhile, in the blacklisting matter, the BUIDCo passed an order afresh in compliance of this Court's order dated 04.02.2021 passed in C.W.J.C. No. 8929 of 2020, blacklisting the petitioner for a term of one year.

11. Admittedly, the petitioner did not respond to the N.I.T. dated 20.08.2020. No plea, that it did not submit its bid because it was challenging the very cancelation of the N.I.T. dated 22.08.2019 and the subsequent issuance of notice inviting tender dated 20.08.2020, has been taken in the writ petition nor such plea can be taken, in the Court's opinion, in view of the stand taken in one of its interlocutory applications, reference of which shall be made later. Pursuant to the said N.I.T. dated 20.08.2020, three bids were received by the BUIDCo including that of respondent no.11. The tender committee found technical bid of two bidders responsive including that of respondent no.11. Thereafter, financial bid was opened on 11.06.2021. It has been stated in the supplementary counter affidavit filed on behalf of the BUIDCo that respondent no.11 quoted 318.57 crores which was 10.6% above the estimated cost i.e. Rs.288.01 crores and after negotiation the bidder discounted .75% on the quoted amount. Accordingly, respondent no.11 accepted the amount of Rs.316.18 crores for execution of work, which amount is 9.77% above the estimated cost. The SPMG granted its approval to award the work for a sum of Rs.316.18 crores. Accordingly, the Letter of Acceptance (LoA) has been issued to respondent no.11 on 29.06.2021, a copy of which has been brought on record by way of Annexure-C to the supplementary counter affidavit filed on behalf of the BUIDCo. It is noteworthy that the order of blacklisting dated 04.03.2021 has been set aside by this Court by an order dated 18.07.2021 passed in C.W.J.C. No. 9597 of 2021 (M/s. EMS Infracon Pvt. Ltd. vs. The State of Bihar and Ors.)

12. I have heard Mr. S.D. Sanjay, learned senior counsel appearing on behalf of the petitioner assisted by Miss Parul Prasad, learned counsel, Mr. Lalit Kishore, learned senior counsel appearing on behalf of the BUIDCo, Mr. Kinkar Kumar, learned counsel appearing on behalf of the State and Mr. P.K. Shahi, learned senior counsel with Mr. Manoj Kumar Singh and Mr. Saket Tiwari, learned counsel, appearing on behalf of respondent no.11. Mr. K.N. Singh, learned Additional Solicitor General of India has represented the Union of India and NMCG (respondent nos. 7 to 10).

13. The pleadings are complete. Counter affidavits and supplementary counter affidavit have been filed on behalf of the parties which are there on record.

14. An interlocutory application registered as I.A. No. 01 of 2021 has been filed on behalf of the petitioner seeking amendment in the writ application asserting that the re-tender process was allowed to take place during the period when the petitioner was restrained from participating in the tender process due to blacklisting order dated 04.03.2021. The said Interlocutory Application was filed on 19.03.2021. There is no averment in the said Interlocutory Application that the petitioner had downloaded the bid documents. Another Interlocutory Application registered as I.A. No. 02 of 2021 has been filed seeking amendment in the writ application so as to challenge the LoA dated 29.06.2021 issued in favour of respondent no.11.

Both Interlocutory Application Nos. 1 of 2021 and 02 of 2021 stand allowed. The averments made in the said Interlocutory Applications have been treated to be the part of the main writ application.

15. In the supplementary counter affidavit filed on behalf of the BUIDCo, the averments made in Interlocutory Application no. 02 of 2021 to the effect that the petitioner could not submit its bid in response to the NIT because the website for tender was never opened prior to 31.03.2021, has been disputed being false. It has also been stated that the allegation of the petitioner that for uploading of bid documents the website is opened at a particular time and only for some time and the bid could not be uploaded either prior to the opening time or post the closing time is false. The said statements made by the petitioner in this regard have been specifically denied. It has been stated that petitioner never raised any objection in this regard either orally, in writing or through e-mail or by any means of communication at any point of time. It has been asserted that after uploading of bid on *e-proc* website, the bid is being handled and monitored by *e-proc* website, Government of Bihar and the executing agency (BUIDCo) has no role to play in this regard. The print out of tender bearing NIT dated 20.08.2020 taken out from *e-proc* website along with all the corrigendum has been placed on record to show that above referred N.I.T. is visible on *e-proc* website from 28.08.2020 to 01.04.2021 and then to 11.06.2021.

16. A rejoinder has been filed on behalf of the petitioner to the supplementary counter affidavit filed on behalf of the BUIDCo. On perusal of the said rejoinder, it can be easily noticed that clear averment made in the supplementary counter affidavit filed on behalf of the BUIDCo that NIT in question was visible on *e-proc* website has not been denied. In the supplementary counter affidavit filed on behalf of the BUIDCo there is specific denial of the petitioner’s assertion made in Interlocutory Application No. 02 of 2021 wherein a plea has been taken that the petitioner could not submit its bid in the tender dated 20.08.2020 because the website for accepting the bids of the bidders was never opened prior to 31.03.2021. It is the clear stand of the respondent-BUIDCo that the said statement made in the Interlocutory Application No. 02 of 2021 is false. Though the petitioner has filed a rejoinder but it has not refuted specifically the assertion of fact made in the supplementary counter affidavit.

17. In the counter affidavit filed on behalf of the Union of India and NMCG, it has been stated in relation to the fourth N.I.T. for execution of work in question that the NMCG had received the details of SPMG's recommendation to BUIDCo to award the work to the selected bidder on 28.06.2021. As per record, three bidders participated including respondent no.11. After consideration of the bids, the BUIDCo awarded the work on 29.06.2021 to the respondent no.11 being the lowest bidder at the cost of Rs.316.18 crores. Since the awarded cost is within 10% of the cost put to bid, no approval for award is required to be sought from NMCG. It has further been stated that even after completion of technical evaluation of the bid notice dated 20.08.2020, the petitioner did not register any complain at the BUIDCo or NMCG level. It has also been stated that the NMCG does not find any infirmity in selection of successful bidder and subsequent award of work to L1 bidder.

18. Mr. S.D. Sanjay, learned senior counsel appearing on behalf of the petitioner, has submitted that once the NMCG had formed an opinion on the petitioner's bid to be responsive, the BUIDCo had no occasion to cogitate over the matter and take a different view. He has submitted that the State respondents have discriminated with the petitioner by showing undue favour to respondent no.11. The entire action of the respondents is arbitrary, discriminatory, irrational and actuated with malafide, he contends. Denial of consideration of the financial bid of the petitioner and issuance of fresh tender notice by the State respondents according to Mr. S.D. Sanjay, learned senior counsel, amounts to infringement of fundamental and legal rights guaranteed under Articles 14, 19(1)(G) and 300(A) of the Constitution of India. He has urged that the glaring illegality in the attempt of the BUIDCo to award contract to respondent no.11 is manifest from the fact that whereas respondent no.11 had quoted 412.6 crores for execution of work, the petitioner had enclosed its rate to the tune of Rs.291.6 crores. Further, the approach of the BUIDCo to enter into the negotiation with respondent no.11, which was wrongly held to be single responsive bidder after holding the petitioner non-responsive was in clear breach of the guidelines issued by the Central Vigilance Commission. He has placed heavy reliance on the C.V.C. guidelines dated 03.03.2007 which has considered, the post tender negotiations as a source of corruption in most of the cases. Though in exceptional situations post tender negotiation with L1 can take place, as mentioned in the C.V.C. guidelines, he contends that such exceptional situations have specifically been mentioned therein. He has argued that facts of the present can do not fall within the exceptional circumstances as explained in the said C.V.C. guidelines.

19. He has reiterated his submission that the petitioner was wrongly declared non-responsive. Referring to the statements made in the Interlocutory Application No. 02 of 2021, he has argued that the petitioner could not submit its bid in the tender dated 20.08.2020 because the website for accepting the bids of the tenderers was never opened prior to 31.03.2021 as the date of submission of tender was extended from time to time by corrigenda issued by the BUIDCo from time to time. It has been further stated that website was opened on a particular time only for some time and the bid could not be uploaded either prior to the opening time or post the closing time. It has been asserted in the said Interlocutory Application that bid submission on the website after repeated extensions was opened only at 5:00 P.M. on 31.03.2021 and its hard copy was to be submitted by 3:00 P.M. on 01.04.2021 and the bid opening time was at 4:00 P.M. on 01.04.2021. Since the petitioner was blacklisted on that date as per the subsequent order of blacklisting dated 04.03.2021 he was prevented from participating in the tender, deliberately by the respondent nos. 2 to 5.

20. He has heavily relied on the communication of the NMCG dated 21.05.2020 wherein the NMCG had noted in unambiguous terms that the reasons adduced for disqualification of the petitioner in respect of tender notice dated 20.08.2020 were not acceptable and were flimsy. The NMCG had mentioned in the said communication that the direction of NMCG as contained in the letter dated 11.02.2020 had been selectively implemented. NMCG had opined that the petitioner should be treated as responsive. He has accordingly, submitted that the manner in which the BUIDCo proceeded to declare the petitioner non-responsive in the technical bid pursuant to tender notice dated 22.08.20219 and managed to deny its participation in response to the subsequent invitation of bid dated 20.08.2020 by blacklisting it, clearly demonstrates malafide and arbitrariness. He contends that this Court in the facts and circumstances is required to interfere exercising the power of judicial review.

21. Mr. Lalit Kishore, learned senior counsel representing the BUIDCo, has submitted that the decision of the technical tender committee holding the petitioner non-responsive was based on due evaluation of the technical tender submitted by the petitioner. He has submitted that the allegation of malafide made by the petitioner against the technical tender committee is completely unsustainable. He has further contended that this Court exercising the power of judicial review under Article 226 of the Constitution of India should not go into the correctness of the decision of the technical evaluation committee in the absence of any specific allegation of malafide or arbitrariness. He has argued on the limited scope of judicial review in the matter of award of contracts by State or its instrumentalities, as laid down by the Hon'ble Supreme Court and this Court also in a series of decisions. He has also submitted that mere bald assertion of malafide is not sufficient in the absence of any specific pleadings as to how the decision is actuated by malafide. He has argued that not only the petitioner’s but the technical bid of respondent no.11 was also finally held to be non-responsive by the BUIDCo. Because both the bids were finally held to be non-responsive by the BUIDCo, it was rightly decided to cancel the tender itself. He has further argued that in view of consistent judicial approach adopted by the Hon’ble Supreme Court in catena of decisions, in the present facts and circumstances, this Court exercising power of judicial review should not entertain the petitioner’s challenge to the cancellation of the tender process. More so, when the petitioner deliberately restrained itself from participating in the fresh tender process. He has contended that no person can claim a fundamental right to carry on business with the Government and in the absence of action of the tendering authority being malafide, no interference is warranted by this Court. He has submitted with reference to the statement made in the supplementary counter affidavit filed on behalf of the BUIDCo that the petitioner has taken a false plea of its blacklisting coupled with website for tender process not accessible prior to 31.03.2021 being the reason why the petitioner could not participate in the fresh tender process. He has argued that since the petitioner had not approached this Court with clean hands and has made such statements which are palpably false, this

Court should decline to entertain the writ application.

22. Mr. P.K. Shahi, learned senior counsel representing on behalf of the respondent no.11, has submitted that this writ application deserves to be dismissed on the sole ground of petitioner making false statement to obtain an order from this Court in a proceeding under Article 226 of the Constitution of India which is decided on the basis of the affidavits. He has argued that a person, whose case is based on false statements, has no right to approach the Court and should be summarily thrown out at the very initial stage of litigation on the said ground alone. He has reiterated the submissions made by Mr. Lalit Kishore, learned senior counsel, on the question of limitations of this Court in exercising the power of judicial review over the actions within the contractual powers of the bodies which are State within the meaning of Article 12 of the Constitution of India. He has relied on following decisions in support of his argument that the duty of the Court in such matter is limited to see as to whether the tendering authority has acted arbitrarily, malafide or it smacks of favoritism:-

(i) ***Tata Cellular vs. Union of India*** reported in ***(1994) 6 SCC 651***.

(ii) ***Raunaq International Limited vs. I.V.R.***

Construction Limited and Others reported in ***(1999) 1 SCC 492***.

(iii) ***Air India Limited vs. Cochin International Airport Limited and Ors.*** reported in ***(2000) 2 SCC 617***.

(iv) ***Jagdish Mandal vs. State of Orissa and Others*** reported in ***(2007) 14 SCC 517***.

(v) ***Michigan Rubber (India) Limited vs. State of Karnataka and Ors.*** reported in ***(2012) 8 SCC 216.***

(vii) ***The Silppi Constructions Contractors vs. Union of India and Anr.*** reported in ***(2020) 16 SCC 489***.

Mr. P. K. Shahi, learned senior counsel, has further submitted that in the absence of any sound, concrete or unimpeachable material to demonstrate malafide in the action of the respondents, the decision to cancel the tender notice in the given facts and circumstances of the case cannot be faulted with.

23. Mr. K. N. Singh, learned Additional Solicitor General of India, has submitted that NMCG has now approved the decision of the BUIDCo to award the contract in favour of respondent no.11 on the basis of fourth call as three earlier attempts to award contract had remained unsuccessful. In the first call, two bids were received in September, 2018 but, the bid was canceled by the State Government in May, 2019 because none of the bidders were found meeting with net worth criteria. In the second call, the decision to cancel the bid was challenged by M/S. Trycon EMS (JV) but, later it was withdrawn. The third attempt also stood frustrated because of the facts and circumstances of the case available on record in the present proceeding. He has submitted that for one reason or other the petitioner has attempted to delay tender process for Hajipur project. He has relied on the statement made in the counter affidavit to urge that the NMCG has found no infirmity in selection of the successful bidder and subsequent award of work to L1 bidder i.e. respondent no.11. He has argued with reference to the counter affidavit filed on behalf of the Union of India that the matter relating to prevention, control and abatement of pollution in river Ganga is seized before the National Green Tribunal, in O.A. No.200 of 2014 and also before the Hon’ble Supreme Court wherein the directions have been given to the State respondents to take urgent and time bound measures in completing the work for construction of STP and allied work in a time bound manner. The project work, which is subject matter of the present writ application, is part of the measures being undertaken by the Union of India and NMCG to prevent, control and abate pollution in river Ganga. Each day delay in construction and execution of the STP work is causing hindrance in the efforts of the Union of India and NMCG in completing and accomplishing the work of commissioning the STP in a time bound manner. He has further submitted that the petitioner has not been able to make out a case for interference by this Court in exercise of power of judicial review under Article 226 of the Constitution of India and any interference at this stage shall go against public interest, which is of paramount importance.

24. On the basis of the pleadings on record and submissions advanced on behalf of the parties which have been noticed hereinabove, the following questions have emerged before this Court to be answered in the present case:-

(i) Whether, the statement made by the petitioner in one of its applications in the present proceeding on oath to the effect that it could not participate in the fresh tender process because of inaccessibility of *e-proc* website of the department is false; if so, whether this writ application deserves to be dismissed on the said score alone ?

(ii) Whether, in the light of long line of decisions rendered by the Hon'ble Supreme Court in various cases, as have been relied on by the respondents, is it a fit case for this Court to enter into the correctness of the decision of the technical evaluation committee to hold the petitioner non-responsive on technical evaluation of the bid, in relation to the NIT dated 22.08.2019 which has been canceled ?

(iii) Whether, on the basis of the pleadings on record, a case is made out for interference with the tender cancelation notice dated 20.08.2020 and the fresh notice inviting tender of the same bid ?

(iv) Whether, in any case, the petitioner can maintain any claim in respect of the fresh tender notice dated 20.08.2020 as admittedly he did not participate in the tender process in response to the said tender notice?

25. My answer to question no.1, set out hereinabove, would be in affirmative for the following reasons. The statement made by the petitioner on oath in I.A. No.2 of 2021 that it could not participate in the tender process initiated afresh, because of the operation of the order of blacklisting and because *e-proc* website of the department was inaccessible, is factually incorrect, in the Court's opinion for two reasons. Firstly, there is no averment made in any of the pleadings that the petitioner downloaded the bid documents during the period when the order of blacklisting was not in operation. The question of uploading the bid on *e-proc* website of the department would have arisen had the petitioner downloaded the bid documents. Downloading of bid documents by the petitioner would have given an indication of the petitioner's willingness to participate in the tender process. In fact, he is assailing the tender notice itself in the present writ application. It would have been a different matter altogether, had the petitioner taken a plea that it chose not to participate in the fresh tender process because it had challenged the very tender notice. The petitioner rather is taking a plea that it was making attempts to participate in the tender process but was denied opportunity because of an illegal order of blacklisting and inaccessibility of *e-proc* website of the department. As this plea was taken for the first time by the petitioner about his failure to participate in the tender process despite his willingness in Interlocutory Application No. 02 of 2021 filed on 26.07.2021, the BUIDCo in its supplementary counter affidavit filed on 05.08.2021 has specifically denied the said statement made therein. I have already recorded a finding in the foregoing paragraphs that the statement made by the petitioner to the aforesaid extent in Interlocutory Application No. 02 of 2021 is false. The denial made and the facts asserted in the supplementary counter affidavit filed on behalf of the BUIDCo in response to the statements made by the petitioner in Interlocutory Application No. 02 of 2021 have remained controverted.

26. It has been repeatedly held by Hon'ble Supreme Court that a person whose case is based on falsehood has no right to approach the Court and he deserve to be summarily thrown out at any stage of litigation *(see S.P. Chengalvaraya Naidu vs Jagannath (1994) 1 SCC 1))*. In the case of ***Dalip Singh vs. State of U.P. & Ors.*** reported in ***2010(2) SCC 114,*** the Hon'ble Supreme Court took cognizance of a new creed of dishonest litigants approaching superior Courts invoking provisions of under Articles 136, 226 and 32 of the

Constitution of India and deprecating strongly the conduct of such litigants, the Hon'ble Supreme Court has observed in paragraph no.1 of the said decision as follows:-

> *1. xxx The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings xxx.*

The Hon'ble Supreme Court went on to deprecate the conduct of such litigants in paragraph no.2 as under:-

> *2. xxx Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."*

Noticing the decisions in the case of ***K.D. Sharma vs. Steel Authority of India & Ors.*** reported in ***(2008) 12 SCC 481*** and ***G. Jayshree and Ors. vs. Bhagwandas S. Patel and Ors.*** reported in ***(2009) 3 SCC 141***, the Hon'ble Supreme Court in the case of ***Dalip Singh*** (supra) has concluded in paragraph no.10 as under:-

> *"10. In K.D. Sharma v. Steel Authority of India Ltd. and others (2008) 12 SCC 481, the court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in G. Jayshree and others v. Bhagwandas S. Patel and others (2009) 3 SCC 141."*

27. In the case of ***Amar Singh vs. Union of India*** reported in ***(2011) 7 SCC 69***, the Hon'ble Supreme Court reiterated that such litigation who approach the Courts with unclean hands are not entitled to be heard on merits of the case.

28. In view of clear enunciation of law in the decisions of the Hon'ble Supreme Court, as noted above which are illustrative, I am of the view that this writ application deserves to be dismissed on the sole ground of petitioner making false statements on oath in the present proceeding under Article 226 of the Constitution of India.

29. Be that at it may, I have considered it apt to answer other questions set out in the present judgment since the submissions have been made at length with reference to numerous pleadings on record. Before answering the rest of the questions, it would useful to briefly take note of judicial precedents, reliance on which has been placed on behalf of the parties on the limitations of this Court exercising the power of judicial review in contractual matters.

30. The scope of judicial review on administrative action particularly in tender matters has been lucidly enunciated in the case of ***Tata Cellular*** (supra) wherein the Hon'ble Supreme Court has held that it is undeniable that principle of judicial review apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of that power since the Government is the guardian of the finances of the State and it is expected to protect the financial interest of the State. The Hon'ble Supreme Court in paragraph no.94 of ***Tata Cellular*** case (supra) has enunciated following principles as the guiding factors in exercise of power of judicial review in contractual matters:-

> *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.

31. In the case of ***Raunaq International Limited*** (supra) the Hon'ble Supreme Court reiterating the law propounded in the case of ***Tata Cellular*** (supra) has held that a writ court would not be justified in interfering with the commercial transactions in which the State is one of the parties to the same "*except where there is substantial public interest involved and in cases where the transaction is malafide*".

32. It would be apt to notice at this juncture, the Hon'ble Supreme Court's decision in the case of ***Rishi Kiran Logistics Pvt. Ltd. vs. Board of Trustees of Kandla Port Trust*** reported in ***2015 (13) SCC 233*** wherein the Hon'ble Supreme Court declined to accept the challenge on the ground of malafide there being nothing on record apart from bald statements and no pleadings nor suggestion as to how the impugned action was actuated with malafide and on whose part.

In the case of ***BSN Joshi v. Nair Coal Services Limited,*** reported in ***(2006) 11 SCC 548***, the Hon'ble Supreme Court reiterated that employer is the best judge to award contract and interference in such matters should be minimal and the Courts should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

33. In the case of ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.***, reported in ***(2016) 16 SCC 818*** the Hon'ble Supreme Court has held that a case of malafide, intention to unduly favour someone, arbitrariness, irrationality or perversity must be made before the Constitutional Courts interfere with the decision making process. It has further been held that the owner or employer of a project, having authored the tender documents, is the best persons to understand and appreciate its requirement and interpret its documents. The Hon'ble Supreme Court has further observed that an interpretation to the tender documents may not be acceptable to the Constitutional Courts but, that itself cannot be the reason for interfering with the interpretation given.

34. The scope of interference in exercise of power of judicial review under Article 226 of the Constitution of India in contractual matters has been elaborately considered by the Hon'ble Supreme Court in the case of ***Jagdish Mandal*** (supra), wherein the Hon'ble Supreme Court upon analyzing the judicial precedents held in paragraph no.22 as under:-

> *"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business*

rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. xxx"

After having held as above, the Hon'ble Supreme Court noted that 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 malafide 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 public interest is affected. If the answers to the aforesaid two questions are in the negative, there should be no interference under Article 226, the Hon'ble Supreme Court remarked.

35. The principle laid down in case of ***Jagdish Mandal*** (supra) has since been a guiding rule for the Courts exercising the power of judicial review in contractual matters.

36. In ***Mighigan Rubber (India) Limited*** case (supra) the Hon'ble Supreme Court reiterating the principle propounded in the case of ***Jagdish Mandal*** (supra) has held that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, malafide or actuated by bias, the Courts would interfere.

37. In the case of ***Silppi Constructions Contractors*** (supra) the Hon'ble Supreme Court, after noticing all past precedents summarized the law on the scope of judicial review in contractual matters in paragraph nos. 19 and 20 of the said judgement, which read as under:-

> *"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties*

are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. *The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or*

unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

38. It can be easily discerned on analysis of the law propounded by the Hon'ble Supreme Court, as discussed in the foregoing paragraphs, that under the Constitutional scheme the power of judicial review of administrative action vested under Articles 32 and 226 of the Constitution of India is an important tool to check arbitrariness, irrationality, unreasonableness, bias and malafides in administrative action. However, the Courts exercising such power maintain self imposed restraint while reviewing an administrative action. The Courts do not sit as a Court of appeal over the decision of the executives rather, judicial scrutiny is normally applied to examine the decision making process. More restraint is needed for the Courts exercising their power of judicial review in contractual matters and it is normally required to be loathe in interfering in contractual matters unless the action of the State is found to be patently arbitrary, malafide tainted with bias or irrational. This is for the reason that the Court does not have the expertise to correct the administrative decision in such matters and there can be scope of fallibility in the Court's decision if it decides to substitute its own decision in place of administrative decision. A fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere (***Tata Cellular case, supra).*** Unless a clear case of malafide, irrationality is made out, the Court should not interfere with the decision of executives in contractual matters. A note of caution issued in case of ***Silppi Constructions Contractors*** (supra) needs always to be kept in mind that in the contracts involving technical issues "….the Courts should be even more reluctant because 'most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain". Needless interference in commercial matters by the Courts exercising the powers of judicial review may cause havoc and for this reason also the judicial restraint is more desirable in such matter. The Court should normally give weightage to the opinion of the experts unless the decision suffers from vice of patent arbitrariness, irrationality and malafide.

39. Cognizant of the legal principles noted hereinabove, the submission made on behalf of the petitioner that the decision of the technical tender committee to declare it non-responsive in the third tender process (tender notice dated 22.08.20219) requires interference being tainted with malafide and it was done only to deny it of benefit of award of contract and to favour respondent no.1, cannot be accepted in the absence of adequate pleadings making out a clear case of malafide against either of the respondents. As has been noticed above, an administrative action in contractual matters, can be successfully put to challenge if it is shown that the same is patently actuated with malafide. In my opinion, no such case is made out to interfere with the said decision of declaring the petitioner non-responsive. Secondly, the respondents after reconsideration of the technical evaluation of the bids held respondent no.11 also to be non-responsive. In view of subsequent action of the BUIDCo in declaring respondent no.11 also non-responsive in the technical bid nullifies the allegation of malafide against the respondent- BUIDCo, though vaguely taken. Thirdly, the decision of the respondents to invite a tender afresh through NIT dated 20.08.2020 cannot be challenged on the ground of malafide for the reason that any bidder including the petitioner could have participated in the tender process initiated afresh.

40. In any event, this Court exercising the power of judicial review under Article 226 of the Constitution of India cannot record a finding that the petitioner was responsive in the technical bid which could have been a condition precedent for this Court to grant third relief as sought in the writ application.

41. On analysis of the pleadings on record and submissions advanced by Mr. S.D. Sanjay, learned senior counsel for the petitioner, it is manifest that the communication dated 21.05.2020 of the NMCG (Annexure-20 to the writ application) is the sheet anchor of the petitioner's case to establish the arbitrariness in the action of the BUIDCo to the extent the same related to declaring the petitioner non-responsive. The said communication has been used also to make out a case that the entire exercise of BUIDCo to declare the petitioner non-responsive was to favour the respondent no.11, since, after the petitioner having been declared non-responsive, the respondent no.11 could become the sole successful bidder. The Court could have gone into the said aspect of the matter in the light of certain significant observations made in the said communication dated 21.05.2020. However, since the technical bid of respondent no.11 also came to be rejected leading to cancelation of tender notice itself, the said aspect has lost its significance.

42. In the background of the discussions as above, it can be concluded without any demur that the petitioner's challenge to the decision of the technical tender committee to declare it non-responsive on evaluation of technical bid is not tenable as none of the grounds available for challenge in a proceeding of judicial review could be established. Situated thus, no ground for interfering with the fresh notice dated 20.08.2020 is made out.

43. As has already been discussed above, the petitioner admittedly did not participate in the fourth call in response to the fresh tender notice dated 20.08.2020. The petitioner itself is to be blamed if it failed to do so as the blame put on the respondents-BUIDCo and the State of Bihar by the petitioner, which is said to have incapacitated the petitioner from participating in the process of tender, has been found to be factually incorrect.

44. For the aforesaid reasons, this writ application, in Court's opinion, has no merit and deserves to be dismissed.

45. Before parting with the present judgment, in the interest of justice and in public interest I have considered it useful to refer to the communication dated 21.05.2020 (Annexure-20 to the writ application) issued by the NMCG to the Principal Secretary, Urban Development Department, Government of Bihar -cum- Project Director, SMCG. The factual aspects right from sanction of project in March, 2010 till the decision of the technical evaluation of bids in April, 2020 has been elaborately and clearly mentioned. The Court has noticed from the said communication, manifest lack of coordination among the NMCG and the SMCG and the BUIDCo which is the executing agency, in finalization of technical and financial bids. The said communication depicts instances of different opinions formed by NMCG with that of the BUIDCo in the matter of evaluation of technical bid requiring the BUIDCo to again and again reconsider technical evaluation. The said lack of coordination in the present transaction had three serious adverse consequences effecting public interest. Firstly, the execution of the project itself got delayed by more than a decade. Secondly, the cost of project went northwards from the original cost of Rs.113.62 crores to Rs. 316.18 crores and thirdly, it generated unnecessary litigation which could have been possibly avoided had there been more coordination rather inclusive participation of NMCG in evaluation of technical bids. This is a policy matter, administrative in nature, purely within the domain of the executives to ponder over the situation which arose in the present matter which might have arisen in other similar transactions also. The Hon'ble Supreme Court has laid down the law relating to limitations of the Courts exercising power of judicial review in contractual matters. The respondents, in the given circumstance, may consider laying down more effective and transparent procedure, in a manner which may not give scope for interference in such matters. These observations are certainly not in the nature of direction which may or may not be kept in mind by the State-respondents for the future transactions.

46. Resultantly, this writ application stands dismissed. There shall be no order as to costs.

(Chakradhari Sharan Singh, J)

P. Tiwari/-

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