

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No 18796 of 2021

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M/S Balram Kumar through its Partner Balram Kumar, male, aged about 51 years, S/o Late Bisundeo Singh, R/o Veena Palace, Kapasiya, near alka sinema holl, ward no. 13, Nagdah, PO and P.S.- Nagdah, District- Begusarai.

... .. Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Building Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Building Construction Department, Government of Bihar, Patna.
3. The Engineer-in-Chief, Building Construction Department, Government of Bihar, Patna.
4. The Chief Engineer, Building Construction Department, Government of Bihar, Patna.
5. The Executive Engineer, Building Division, Begusarai.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr Alok Ranjan, Advocate

For the Respondent/s : Mr Syed Iqbal Ahmad, SC XX

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CORAM: HONOURABLE MR JUSTICE CHAKRADHARI SHARAN SINGH
and
HONOURABLE MR JUSTICE MADHURESH PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR JUSTICE MADHURESH PRASAD)

Date : 15-12-2021

Heard learned counsel for the parties.

2 The Building Construction Department, Building Division, Begusarai invited E Tender vide Notice No 8/Begusarai/2021-2022 published in the local daily on 29.08.2021 inviting tender from those desirous of executing the work of construction of Block -cum- Circle Office -cum- Residential Building and Inspection Room along with campus development of



the Sadar Block, Begusarai for the financial year, 2021 – 2022. Estimated cost of the Notice Inviting Tender (for brevity, *NIT*) was Rs 18,41,00,000/-.

3 Petitioner downloaded the Standard Bid Document (for brevity, *SBD*)/Invitation to Bid (for brevity, *ITB*) and the bid form with the intention of participating in the tender process. Petitioner claims that earlier he had successfully completed works of the said Department, which were allotted to him. On going through the *SBD/ITB*, the petitioner felt offended by one of the many requisite qualifications specified in Clause 4.5 A. As per the said Clause, apart from other requisite qualifications for the contract, each bidder, in its name, was required to have experience of having executed in any one year in the last five years, minimum quantity of certain items of work indicated in sub-clause (c) and the Appendix. The petitioner's specific grievance is regarding requisite experience in relation to Furniture quantified at Rs 52, 52, 590/- in any one year in the last five years. The said requirement, as per the petitioner's counsel, has been inserted/introduced for the first time by the Department. It is asserted that this requirement is arbitrary, illegal and contrary to statutory provisions for purchasing item/supply of any item where no experience is required and only financial capacity of the



contractor is defined. In the instant case, requisite financial capacity has already been specified in sub-clause (h) of Clause 4.3. Therefore, requisite qualification as per Clause 4.5A (c) and the Appendix is totally unwarranted. Sub-clause 4.3 (h) relied upon by the petitioner reads as follows:

“(h) Undertaking that the bidder will be able to invest a minimum cash up to 25% of contract value of work, during implementation of work.”

4 Another Corporation of the State Government, namely, Bihar Medical Services and Infrastructure Corporation Limited (for brevity, *BMSICL*) also floated tenders for supply of furniture and other medical equipment by Annexure 4 but no such requisite qualification has been specified. Therefore, such clause in the NIT in question is motivated, arbitrary and legally unsustainable.

5 In order to appreciate the said submissions, this Court examined sub-clause (h) at Annexure 3. Main Clause 4.3 has not been placed on record. Only sub-clause (h) has been placed on record. It is, therefore, impossible to ascertain the context in which sub-clause (h) has been mentioned in Clause 4.3 of SBD. In so far as reliance placed on the tender floated by BMSICL (Annexure 4), this Court would observe that it is impossible to decipher from Annexure 4 the nature of work or supply contemplated under the said tender, much less to conclude that



there is any parity in the NIT issued by the BMSICL and the NIT in question. Annexure 4 from its header is apparently an Appendix to the ITB. The tender notice, of which Annexure 4 is an Appendix, has also not been placed on record. This Court would, therefore, observe that the above submissions founded on sub-clause (h) and Annexure 4 are unsustainable by the pleadings on record. If the petitioner is claiming any parity with the terms of NIT issued by the BMSICL, the least that was required, was to place on record the NIT. Only then this Court could have been in a position to satisfy itself whether writ petitioner had made out any case of parity and whether there was any legal infirmity in the terms of the NIT in question, within the settled limited scope of interference in the terms of an NIT.

6 Petitioner was required to make out a case in its pleadings in the writ petition, based on statements of facts and documentary evidence in the form of annexures, and only then the respondents could have been called upon to respond.

7 In the instant case, pleadings are sketchy, vague and insufficient to invoke the extraordinary discretionary writ jurisdiction, that also for assailing the terms of an NIT, which, as per settled law, itself lies in a very narrow compass. In this connection, this Court would refer to decision of Hon'ble Apex



Court in the case of *Bharat Singh & Others -Versus- State of Haryana & Others*, reported in (1988) 4 Supreme Court Cases 534, paragraph 13 of which is relevant for the present facts and circumstances, which reads as follows:

“13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. ...

... ..”



8 This legal position has recently been reiterated by the Apex Court in paragraph 199 of the decision in the case of *Indian Young Lawyers Association & Others -Versus- State of Kerala & Others*, reported in (2019) 11 Supreme Court Cases 1 with affirmation. This Court would, therefore, consider it useful to reproduce the relevant paragraph 199 which reads:

“199. A fervent plea was made by some of the counsel for the respondents that the Court should not decide this case without any evidence being led on both sides. Evidence is very much there, in the form of the writ petition and the affidavits that have been filed in the writ petition, both by the petitioners as well as by the Board, and by the Thanthri’s affidavit referred to supra. It must not be forgotten that a writ petition filed under either Article 32 or Article 226 is itself not merely a pleading, but also evidence in the form of affidavits that are sworn.”

9 Regarding the petitioner’s submission that the requirement in Clause 4.5 A (c) of SBD/ITB and Clause 5 of the bid form is legally unsustainable or to favour any one, this Court would consider it appropriate to reproduce the relevant extract of Clause 4.5.

“4.5 A

(a)

(b)

(c) Executed in any one year, the minimum quantities of the following items or work as indicated in Appendix.



As per BOQ

<i>Items</i>	<i>Qty</i>	<i>Unit</i>
<i>FURNITURE</i>	<i>5252590</i>	<i>Rs”</i>

10 From bare perusal of Clause 4.5, it is apparent that the requirement is in respect of the works executed in any one year in the last five years from the prospective bidders in relation to furniture. Petitioner's submissions that the requirement is of “supply” of furniture and not a “work”; and that it has been incorporated to favour some contractors is clearly unfounded and legally unsustainable. From the reading of Clause 4.5, it cannot be concluded that the requisite quantity in respect of furniture is in relation to supply in any one year in the last five years. Clause 4.5 A (c) clearly states that quantity of work in respect of the mentioned items is required to have been executed. It is, thus, clear that the requisite qualification is of the prospective bidder having executed the requisite quantification of furnishing work; and not supply. Secondly, this Court would observe that apart from a vague, general and insufficient pleadings and assertion made by the petitioner that this Clause has been incorporated to favour some contractors, there is no material on record to suggest that this requirement is impossible to comply or that it is in any way illegal, within the scope of consideration, permissible in



judicial review while dealing with the terms of an NIT. This Court would observe that the law in this regard is clear and stands settled.

11 In the case of *Silppi Constructions Contractors -Versus- Union of India & Another*, reported in (2020) 16 Supreme Court Cases 489, the Apex Court, after considering several precedents, in paragraph 20, has stated the essence of law derived from the precedents, relevant extract is in the following words:

“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.”

12 It is also apparent from the pleadings on record that the petitioner has not submitted his bid in response to the NIT. From bare perusal of the NIT, it is apparent that the same also contemplates a pre bid meeting. Whether requisite quantity of furnishing work in any one year in the last five years was mandatory clause or an ancillary clause is an issue, the petitioner could have raised after submission of his bid at the pre bid meeting



for consideration of the authorities, who were authors of the tender notice; but only if he had submitted his bid. This has clearly not been done by the petitioner. Petitioner, therefore, cannot be permitted to place reliance on a decision of the Gauhati High Court in *Writ Petition (C) No 612 of 2015*, copy of which has been handed over. Having observed that the judgment is of a Single Judge and that also of another High Court, this Court would also observe that facts of the said case were essentially different. The petitioner there had submitted his bid in response to the NIT. In the instant case, the petitioner is not a bidder.

13 Learned counsel for the petitioner has also relied upon a Division Bench judgment of this Court in the case of *Chairman and Managing Director, Bharat Petroleum Corporation Limited -Versus- Arjik Carrier Private Limited* passed in *LPA No 381 of 2018*, which also has no application in the instant case. In the said case also, petitioner/respondent had submitted his bid and the dispute falling for consideration was whether stapling of the envelope would amount to sealing of the envelope as per requirement in the NIT. The relevant paragraphs of the said judgment are reproduced:

“The learned writ Court has upon hearing the parties and on consideration of the materials available on the record, took a view that the petitioner had duly sealed the envelope, not with



gum/adhesive as required in the NIT but by using stapler pins. The solitary ground taken by the respondents to reject his technical bid is that a stapled envelope does not ensure secrecy which is required for ensuring that there is no malpractice on the part of both the tenderers and the Corporation. The writ Court found that the requirement of using gum/adhesive for sealing the envelope must be held to be only a hyper-technical requirement which had no bearing upon the main object.

In course of argument learned counsel representing the appellants admits that the tender process in the present case is in the nature of on-line e-tender process in which documents are required to be uploaded online and then those documents are required to be furnished in physical form. Even though attempts have been made to argue that while some of the documents were required to be uploaded, there were other documents in addition which had to be submitted in physical form, in the nature of the present case we agree with the view taken by the learned writ Court that the rejection of tender of the writ petitioner on the solitary ground that the envelope sent by him was stapled would not be just and proper in the facts and circumstances of this case where tender process is online and the learned wit Court is correct in taking this ground of rejection as a hyper technical ground.

Thus, we do not find any reason to interfere with the impugned judgment. The Letters Patent Appeal has no merit. It is, accordingly, dismissed.

At this stage, learned counsel representing the appellants submits that the learned writ Court has directed to open the financial bid of the petitioner even though his technical bid has not been opened and was rejected earlier. To that extent, we make it clear that in view of the orders passed by the learned writ Court the technical



bid of the petitioner shall be opened and on his being found to be qualified, his financial bid shall also be considered along with that of the other tenderers.”

14 This judgment, relied upon by the petitioner, is also distinguishable on facts from the case of the petitioner which is under consideration before us today.

15 On the above considerations and observations, this Court would hold that no case has been made by the petitioner for interference with the terms of NIT within the settled parameters of judicial review in respect of terms of NIT and contract matters.

16 The writ petition is devoid of merit and the same is dismissed.

(Madhuresh Prasad, J)

(Chakradhari Sharan Singh, J)

(Chakradhari Sharan Singh, J)

M.E.H./-

AFR/NAFR	NAFR
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