

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8134 of 2021

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M/s B. Rai Construction Company and INSCPL (JV) a Joint Venture through the leading Partner and Managing Partner of M/s B. Rai Construction Company namely Shailendra Kumar Rai @ Shailendra Rai, aged about 51 years (Male), son of Bashistha Rai, Resident of F. No.-38, Gupteshwar Complex Bekar Bandh Dhanbad, P.S.-Dhanbad District-Dhanbad (Jharkhand).

... .. Petitioner

Versus

1. The State of Bihar through the Managing Director Bihar Medical Services and Infrastructure Limited Corporation Limited, Patna.
2. The Managing Director Bihar Medical Services and Infrastructure Limited Corporation Limited, Patna.
3. The Chief Manager, Bihar Medical Services and Infrastructure Limited Corporation Limited, Patna.
4. The Principal Secretary Building Construction Department, Government of Bihar, Patna.
5. The Engineer in Chief cum Additional Secretary cum Special Secretary Building Construction Department, Bihar, Patna.
6. The Executive Engineer Building Division, Sasaram.
7. M/S R.S. Agrawal Infratech Pvt. Ltd., 201, 2nd Floor, Liya Complex, P.P. Compound, Ranchi Jharkhand through its Director Mr. Ravi Raj Agrawal, aged about 43 Years, Son of Sri Radhe Shyam Agrawal, Resident of Basant Kunj, 2pe pe Compound, opp- Mandeep Medical, Hindpuri, P-S-Hindpuri, District-Ranchi, Jharkhand.

... .. Respondents

with

Civil Writ Jurisdiction Case No. 12949 of 2021

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R.S. Agrawal Infratech Pvt. Ltd., 201, 2nd Floor, Liya Complex, PP Compound, Ranchi Jharkhand, through its Director Mr. Ravi Raj Agrawal, aged about 43 years, Male, Son of Sri Radhe Shyam Agrawal, Resident of Basant Kunj, 2 Pe Pe Compound, Opp Mandeep Medical Hindpiri, P.S. Hindpiri, District Ranchi, Jharkhand.

... .. Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Department of Health, Government of Bihar, Patna.
2. The Managing Director, Bihar Medical Services and Infrastructure Limited Corporation Limited, Patna.
3. The Chief General Manager (P), Bihar Medical Services and Infrastructure Corporation Limited, Patna.
4. The Joint Secretary, Department of Health, Government of Bihar, Patna.
5. M/S B. Rai Construction Company and INSCPL(JV), a Joint Venture



through the leading partner and Managing Partner of M/S B. Rai Construction Company namely Shailendra Kumar Rai @ Shailendra Rai, Son of Bashistra Rai, Resident of Flat No. 38, Gupteshwar Complex Bekar Bandh Dhanbad, P.S.- Dhanbad, District- Dhanbad (Jharkhand).

... ... Respondents

Appearance :

(In Civil Writ Jurisdiction Case No. 8134 of 2021)

For the Petitioner	:	Mr. Y.V.Giri, Senior Advocate Mr. Shivendra Prasad, Advocate Mr. Pranav Kumar, Advocate Ms. Shrishti Singh, Advocate Mr. Sumit Kumar Jha, Advocate
For the Respondent State:		Mr. Vikash Kumar, S.C.-11
For the Respondent BMSICL :		Mr. Lalit Kishore, Senior Advocate
For the Respondent No. 7	:	Mr. Ranjeet Kumar, Advocate

(In Civil Writ Jurisdiction Case No. 12949 of 2021)

For the Petitioner	:	Mr. Ranjeet Kumar, Advocate
For the Respondent State:		Mr. Vikash Kumar, S.C.-11
For the Respondent BMSICL :		Mr. Lalit Kishore, Senior Advocate
For the Respondent No.5:		Mr. Y.V.Giri, Senior Advocate Mr. Shivendra Prasad, Advocate Mr. Pranav Kumar, Advocate Ms. Shrishti Singh, Advocate Mr. Sumit Kumar Jha, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 17-01-2022

As both the cases arise out of the same Notice Inviting Tender (NIT) No. BMSICL/Infra/25/2019 dated 17.07.2019 for construction of 191 bedded hospital in the campus of Amar Shaheed Jagdev Prasad Hospital, Jehanabad, published by the Bihar Medical Services and Infrastructure Corporation Limited, Patna (in short ' BMSICL') and are based on the identical set of facts, they have been heard together and are being disposed of by the present common judgment and order.



2. It is noted at the outset that the petitioner of C.W.J.C. No. 12949 of 2021 has intervened in C.W.J.C. No. 8134 of 2021 and has been permitted to be impleaded as the party-respondent No. 7.

3. C.W.J.C. No. 8134 of 2021 has been filed by M/s B. Rai Construction Company and INSCPL (JV), a joint venture through the leading Partner and Managing Partner of M/s B. Rai Construction Company.

4. C.W.J.C. No. 12949 of 2021 has been filed by the Director of R.S. Agrawal Infratech Pvt. Ltd., Jharkhand.

5. For convenience, the petitioner of C.W.J.C. No. 8134 of 2021 has been referred to in the present judgment as the petitioner; and the petitioner of C.W.J.C. No. 12949 of 2021 as respondent No. 7. This judgment follows the party position as obtained from C.W.J.C. No. 8134 of 2021.

6. Before going into the issues, which have arisen in these cases on the basis of pleadings and other materials available on record and the rival submissions made on behalf of the parties, it would be apposite to notice certain basic undisputed facts.

7. The BMSICL issued a notice inviting tender on 17.07.2019 for construction of the hospital in question, the last date of submission of the bid being 27.08.2019. The tender



committee opened the technical bid on 11.05.2020, in which the petitioner and respondent No.7 were found responsive and technically successful. The financial bid was thereafter opened on 09.12.2020, upon which the petitioner was declared L-1/the lowest-bidder. Before issuance of Letter of Acceptance (LoA) of the bid in favour of the petitioner, the BMSICL received a complaint to the effect that one of the parties of the JV, namely, M/s B. Rai Construction Company, was under an order of debarment from entering into contract and, therefore, the petitioner suffered disqualification from participating in the tender process. After having received the said complaint, the said Company, namely, M/s B. Rai Construction Company, was put to a show-cause notice through a letter dated 22.12.2020 asking it to explain its position for further action. The representative of the said M/s B. Rai Construction Company filed its explanation on 23.12.2020 asserting that the order whereby the said Company was allegedly debarred by the Executive Engineer, Building Division, Sasaram, was for the first time uploaded on 18.03.2020 and, therefore, it had no knowledge about passing of the order of debarment.

8. In respect of the said order of debarment, it has been asserted by the petitioner in the writ petition that a construction work of State Polytechnic College, Dehri-on-Sone was awarded to



the M/s B. Rai Construction Company, which it had completed and handed over to the concerned Executive Engineer long back. However, the Executive Engineer had issued an order dated 03.07.2019 debaring the petitioner from award of future contract till completion of construction of the building of the said State Polytechnic College. Once the order was uploaded on 18.03.2020 on the *website* of the Department, the petitioner filed an application before the Chief Engineer (North), Building Construction Department, asserting that the said order of debarment was never communicated and requested to release the petitioner from debarment. It is the petitioner's case that before issuance of the debarment order dated 03.07.2019, no notice was given to him and, therefore, in any view of the matter, the said order of debarment is *non-est* in the eyes of law and in breach of the rules laying down the procedure for debarment. With the facts aforesaid, the petitioner filed this writ application seeking a direction to the BMSICL to issue a Letter of Acceptance (LoA) in favour of the petitioner and award him the contract for construction of the hospital in question.

9. Respondent No. 7 was admittedly the second-lowest bidder. During the pendency of this writ application, the Chief General Manager (P), BMSICL, Patna, came out with a



corrigendum on 20.07.2021 in respect of the NIT in question cancelling the tender itself for some unavoidable reason. It is a brief notice, a copy of which has been brought on record by way of Annexure-1 to I.A. No. 2 of 2021 filed in C.W.J.C. No. 8134 of 2021, and reads thus: -

"1. The tender is hereby cancelled due to unavoidable reason."

10. The petitioner's amendment petition (I.A. No. 2 of 2021) to assail the notice cancelling tender has been allowed by an order passed on 10.09.2021 in C.W.J.C. No. 8134 of 2021. Subsequently, the BMSICL has come out with a fresh NIT No. BMSICL/Infra/19/2021 for construction of the hospital in question. Another amendment petition of the petitioner (I.A. No. 3 of 2021) to challenge the issuance of fresh tender notice No. 19/2021 has also been allowed by this Court, by the same order dated 10.09.2021.

11. To obviate any scope for confusion or ambiguity, we need to record here that there are three interlocutory applications on record in C.W.J.C. No. 8134 of 2021. I.A. No. 1 of 2021 is an intervention application filed by respondent No. 7, which has been allowed by an order dated 10.09.2021. I.A. No. 2 of 2021 and I.A. No. 3 of 2021 are two interlocutory applications seeking



amendment in the prayer portion of the writ petition in C.W.J.C. No. 8134 of 2021, which have been allowed by order dated 10.09.2021. The present judgment has followed the registration numbers of interlocutory applications as they figure in the records of the case and not as recorded in the order of this Court dated 10.09.2021, by which, in substance, the applications have been allowed.

12. The petitioner is, thus, seeking issuance of letter of acceptance and award of contract in question in its favour on the basis of original NIT, being the lowest-bidder; quashing of the order, whereby the said NIT has been cancelled and quashing of the notice inviting fresh tender.

13. Respondent No. 7 in its writ petition, i.e., C.W.J.C. No. 12949 of 2021, on the other hand, is seeking direction for cancellation of tender of the petitioner on the ground that the joint venture was under debarment as on the date of submission of the tender, which they had concealed. It contends that since respondent No.7 is the second-lowest bidder, the work should be awarded to it. Respondent No. 7 has also sought for quashing of the said notice of cancellation of NIT and subsequent issuance of fresh notice inviting tender, mainly on the ground that it was



entitled to be awarded the contract in question, it being the second-lowest bidder, as first lowest-bidder suffered from disqualification.

14. It is, however, an admitted position that respondent No.7 has participated in the tender process pursuant to notice inviting re-tender. In our considered opinion, therefore, respondent No.7 after having participated in the tender process pursuant to the notice inviting re-tender, cannot be permitted either to question the order cancelling the NIT or the notice inviting re-tender.

15. In our view, given the admitted facts, respondent No.7 (the petitioner of C.W.J.C. No. 12949 of 2021) having participated in the tender process, cannot maintain its writ application to challenge the notice cancelling the original tender and notice inviting re-tender.

16. C.W.J.C. No. 12949 of 2021 accordingly stands dismissed.

17. There is another aspect, which is not in dispute. The other party of the joint venture of the petitioner, namely, INSCPL (JV) too had suffered an order of debarment from 17.11.2018 to 11.06.2019, passed by the Bihar State Building Construction Corporation. Further, there was one more debarment against the said INSCPL from 26.05.2017 to 25.05.2018 by an order issued vide Memo. No. 7975 dated 05.09.2017, passed by the Building



Construction Department, Government of Bihar which, according to the petitioner, was subsequently withdrawn vide memo. No. 577 dated 16.01.2019.

18. It is the petitioner's case, however, that since the order of debarment was not operative on the date of tender or submission of tender, its disclosure was not a mandatory requirement, in terms of the applicable rules or the provisions of the NIT including Clause 4.8 of Instruction to Bidders (ITB) and, therefore, the petitioner genuinely did not mention the said debarment in its bid. It is the petitioner's case that the respondents ought to have confined to the allegation, which was made by respondent No.7 in its complaint in respect of debarment of M/s B. Rai Construction Company, which was not uploaded on the *website* of the Department till 18.03.2020, non-disclosure of which, thus, could not be a ground for cancellation of the entire tender process.

19. Mr. Y.V. Giri, learned Senior Counsel appearing on behalf of the petitioner has vehemently argued that it was impermissible for the respondents to consider material facts other than those pointed out by respondent No.7 in its complaint against the petitioner, which disclosed only one debarment of M/s B. Rai Construction Company. He has submitted that non-disclosure of



information regarding the order of debarment against M/s B. Rai Construction Company could not have any adverse effect on the award of contract in the petitioner's favour for the reason that the said order of debarment was not made known till the date of submission of the tender papers. He has further submitted that the petitioner could not have disclosed something, which was not within its knowledge. It is his next contention that the said order of debarment is *per se* illegal, the same having been passed without giving M/s B. Rai Construction Company any opportunity of hearing, in clear breach of various provisions under Bihar Contractor Registration Rules, 2007. He has further contended that the notice cancelling the tender is arbitrary as the same does not contain any reason. He has relied on various decisions including the Supreme Court's decisions rendered in ***Oryx Fisheries (P) Ltd. v. Union of India***, reported in (2010) 13 SCC 427 and ***Kranti Associates (P) Ltd. v. Masood Ahmed Khan***, reported in (2010) 9 SCC 496. He has reiterated, in respect of debarment of one of the partners of the joint venture, namely, INSCPL that since the order of debarment against the said company was no more effective as on the date of submission of the tender, non-disclosure of such debarment is inconsequential. He has argued that though the authorities were alive of the so-called infirmity in the tender paper



on account of non-disclosure in the affidavit in respect of the other partner of the JV, namely, INSCPL, they in their assessment had rightly not considered the debarment, not existing on the date of tender and submission of forms as a factor relevant for determining whether the tender of the petitioner's firm should be cancelled. He has further argued that non-disclosure, if any, was merely an oversight out of which the petitioner could not derive any benefit. He has argued that once the JV was declared L-1, the disqualifying criteria as mentioned in Clause 4.8 of the NIT only could have been invoked, which does not include the previous debarment.

20. Mr. Lalit Kishore, learned Senior Counsel representing the BMSICL, on the other hand, has submitted that the petitioner does not have any legal right to be awarded the contract in question and, therefore, this Court in the exercise of writ jurisdiction, which is a public law remedy, should dismiss the writ petition at the very threshold. He further submits that the respondents, considering the facts and circumstances in their entirety have taken a conscious decision to cancel the tender process itself, which cannot be said to be wholly unjustified, arbitrary or unreasonable. He would further argue that the order cancelling the entire tender process being purely administrative in



character, does not require recording of reasons. He has contended that in view of well-settled principles of law on the point of the limited scope of judicial review by this Court in a proceeding under Article 226 of the Constitution of India, no interference is required by this Court in the facts and circumstances.

21. Before we proceed to consider rival submissions made on behalf of the parties, we, first, need to take note of the admitted factual position that the bidders were required to submit an affidavit in the following prescribed form: -

“1. I, the undersigned, do hereby certify that all the statements made in the required attachments are true and correct.

2. The undersigned also hereby certifies that neither our firm m/s has been Debarred/Blacklisted nor has abandoned any work in any government department, in India nor any contract awarded to us for such works have been rescinded, during last five years prior to the date of this bid.

3. The undersigned hereby authorises and request(s) any bank, person, firm or corporation to furnish pertinent information deemed necessary and requested by the Department to verify this statement or regarding my (our) competence and general reputation.



4. The undersigned understands and agrees that further qualifying information may be requested, and agrees to furnish any such information at the request of the Department Project implementing agency."

22. The petitioner has not disputed that it did not disclose the debarment of one of the partners of the joint venture, namely, INSCPL from 17.11.2018 to 11.06.2019. There was another order of debarment against INSCPL for the period 26.05.2017 to 25.05.2018, which, according to the petitioner, was subsequently withdrawn by an order dated 16.01.2019 passed by the Building Construction Department on 16.01.2019. This fact was also not disclosed. Clause 4.8 of the Instructions to Bidders (ITB), which is part of NIT specifically prescribed that even though the bidders met the qualifying criteria, they would be subjected to disqualification, if they had made misleading or false representations in the form, the statements and attachments submitted in proof of the qualification requirements, the statements and attachments submitted in proof of the qualification requirement and/or have record of poor performance. Clause 4.8 reads as under : -

"4.8 Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have:



- *made misleading or false representations in the forms, statements and attachments submitted in proof of the qualification requirements, and/or*
- *have record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc; and/or*
- *participated in the previous bidding for the same work and had quoted unreasonably high bid prices and could not furnish rational justification to the employer."*

23. In our considered view, the petitioner was under obligation to disclose correct facts in its affidavits filed at the time of submission of tender. The submission that suppression regarding debarment of one of the partners of the Joint Venture INSCPL from 17.11.2018 to 11.06.2019, i.e., within the last five years, could not have attracted disqualification of the petitioner and that such disclosure was not compulsorily required to be made in the affidavit, in our view, is unacceptable. The information, which was sought through the affidavit can be safely said to be germane to assess the capability of the contractor to execute the work in question.



24. Be that as it may, the respondent BMSICL has not disqualified the petitioner, rather it has decided to cancel the tender process itself and issue notice inviting re-tender. The petitioner has not demonstrated any bias or malice against the impugned action nor do we find any arbitrariness, irregularity and unreasonableness in the impugned action, warranting interference in exercise of the power of judicial review under Article 226 of the Constitution of India.

25. The supreme court has repeatedly outlined limited scope of judicial review in the matters of evaluation of tenders and award of contracts by the State or instrumentalities of State. Reference may be made in this regard to a recent decision by the Supreme Court, in the case of *Uflex Ltd. Vs. Government of Tamil Nadu and Others* reported in (2022) 1 SCC 165, which has taken note of almost all relevant previous decisions in this regard. The Supreme Court has reiterated that the enlarged role of the Government in economic activities and its corresponding ability to give economic 'largesse' was the bedrock of creating, what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, beyond the issue of strict



enforcement of contractual rights under the civil jurisdiction. The Supreme Court has, however, noticed the ground reality of today to the effect that almost no tender remains unchallenged. Referring to the observations made in case of ***Jagdish Mandal v. State of Orissa***, reported in (2007) 14 SCC 517, the Supreme Court reiterated in the case of ***Uflex Ltd.*** (supra) that in evaluating tenders and awarding contracts, the parties are to be governed by the principles of 'commercial prudence'. To that extent, principles of equity and natural justice have to stay at a distance. The Court observed in paragraph 3 in the case of ***Uflex Ltd.*** (supra) as under:

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“3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “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.”

26. The Supreme Court further observed that in a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any



responsible authority acting reasonably and in accordance with law would have reached such a decision.

27. The Supreme Court in the case of *Uflex Ltd.* (supra) made the aforesaid observations taking into account the law laid down in the case of *Michigan Rubber (India) Ltd. v. State of Karnataka*, reported in (2012) 8 SCC 216, *Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd.*, reported in (2019) 14 SCC 81, *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, reported in (2016) 16 SCC 818.

28. It would be useful mention that in the case of *Hindustan Petroleum Corpn. Ltd.*(supra), the Supreme Court has observed that because of the Government and Public Sector Enterprises, venturing into economic activities, it has been found appropriate to build in certain checks and balances of fairness in the procedure. This approach, the Court has held, has given rise to the scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. "The window has been opened too wide", the Supreme Court has cautioned, so much so that almost every small or big tender now is challenged in writ proceedings almost as a matter of routine, which, in turn, affects the efficacy of the commercial interest in Public Sector. The Court added in the case of *Hindustan Petroleum Corpn. Ltd.*(supra) that an unnecessary,



close scrutiny of minute details, contrary to the view of the tendering authority makes awarding of the contracts by the Government and Public Sectors a cumbersome exercise and long-drawn litigation at the threshold. This works to the great disadvantage to the Government and the Public Sector, the Supreme Court observed.

29. In the present case, as has been noticed, the NIT itself has been cancelled. The said decision to cancel the tender cannot be said to be quasi-judicial in nature, determining the rights of any party. It is a purely administrative decision of the respondents, which does not require recording of reasons.

30. Following the aforesaid decisions of the Supreme Court and in the light of abovementioned discussions, in our view, the impugned action requires no interference. These writ applications have no merit and are dismissed accordingly, however, without costs.

(Chakradhari Sharan Singh, J)

Madhuresh Prasad, J : I Agree.

(Madhuresh Prasad, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	06.12.2021
Uploading Date	04.02.2022
Transmission Date	N/A

