IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11234 of 2023

Rajeev Kumar Son of Late Chandradeep Singh Resident of Tothan Lalganj, P.S. Lalganj, District-Vaishali, Bihar.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Rural Works Department, Government of Bihar, Patna.
2. The Engineer-In-Chief, Rural Works Department, Government of Bihar, Patna.
3. The Chief Engineer, Rural Works Department, Government of Bihar, Patna.
4. The Superintending Engineer, Rural Works Department, Works Circle, Muzaffarpur Cum Chairman Technical Bid Evaluation Committee, Muzaffarpur, Bihar.
5. The Executive Engineer, Rural Works Department, Works Division-Mahnar, District Vaishali, Bihar.

... ... Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Prabhat Ranjan, Advocate
For the Respondent/s	:	Mr. P.K. Shahi, Advocate General assisted by Mr. Anjani Kumar, AAG 4

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 18-10-2023

The petitioner has prayed for the following relief/reliefs:

*"(i) Quashing of the Notice Inviting Tender No. RWD/PMGSY/HQ/ET/23-24/06 issued by the Engineer-In-Chief, Rural Works Department in so far as it relates to the work of **"T19- Mahnar Railway Station Bajrangwali Chowk Se To Salha Chowk NH 103 Tak at Serial No. 97"** by which*

without complying the direction of this Hon'ble Court dated 24.07.2023 in CWJC No. 10068 of 2023, the aforesaid work has been readvertised;

(ii) Direction upon the respondents to cancel the tender process in connection with "T19 – Manhar Railway Station Bajrangwali Chowk Se To Salha Chowk NH 103 Tak at Serial No. 97" arising out of Notice Inviting Tender No. RWD/PMGSY? HQ/ET/23-24/06;

(iii) Direction upon the respondents to finalize the tender process followed by other formalities in connection with the first Notice Inviting Tender No. RWD/PMGSY/HQ/ET/22-23/34 dated 06.12.2022 for financial bid has also been opened; and

(iv) Restraining the Respondents from proceeding further and finalizing the Tender process arising out of Notice Inviting Tender No. RWD/PMGSY/HQ/ET/23-24/06 dated 28.07.2023 during the pendency of the present writ application and/or without the leave of this Hon'ble Court."

Brief facts of the case are as under:

2. The petitioner is one of the bidders to the NIT dated 06.12.2022 insofar as item No. 139 is concerned and name of work is *T 19 Mahnar Railway Station Bajrangwali Chowk Se To Salha Chowk NH 103 Tak.* He was held to be successful bidder in the technical bid evaluation held on 01.02.2023. Further, in the financial bid, he has been declared as L1 on 09.02.2023 having quoted a price 0.77 % below the schedule rate for an amount of

Rs. 10,05,49,535.00/-. The estimated cost of the work is sum of Rs. 10,13,29,774.28/-. On 14.07.2023, Engineer-in-Chief cancelled the tender while assigning the reason that *'in the interest of administrative'*. The petitioner questioned the cancellation of tender dated 14.07.2023 in C.W.J.C. No. 10068 of 2023.

3. This Court has set aside the order dated 14.07.2023 on 24.07.2023 while remanding the matter to pass fresh order insofar as cancellation of tender while assigning the reasons. Before complying the order of this Court dated 24.07.2023, fresh tender was issued on 28.07.2023 which is the subject matter of the present writ petition.

4. On 31.07.2023 a reasoned order has been passed insofar as cancellation of tender in the light of the order of this Court dated 24.07.2023 passed in C.W.J.C. No. 10068 of 2023. The petitioner filed interlocutory application in questioning the validity of the order dated 31.07.2023 by which earlier tender was cancelled. Hence, the present writ petition.

Dates and events are as under:

Sl.No.	Dates	Events
1	**06.03.2014**	State Government evolved a policy while fixing the minimum rates for the tenderers i.e. a ceiling of 10 % less than the rate of Bill of Quantity (BOQ), issued by the Road Construction Department, Government of Bihar. Central Government evolved a scheme called

		Pradhan Mantri Gram Sadak Yojana (hereinafter referred to as 'PMGSY') in the year 2015. The object of PMGSY – III envisages consolidation of the existing rural road network by upgradation of existing through routes and major rural links that connect habitations to Gramin Agriculture Markets (GrAMs), Higher Secondary Schools and Hospitals and includes various linkages.
2	**06.03.2014**	*Vide* letter No. 2046, State of Bihar evolved a policy decision in respect of quoting minimum rates for the tenders that is ceiling of 10 % less than the rate of BOQ, issued by the Road Construction Department, Government of Bihar.
3	**16.01.2020**	Road Construction Department abolished quoting of minimum rates for the tenders i.e. ceiling of 10 % less than the BOQ.
4	**29.11.2022**	Project proposal of 236 roads have been sanctioned by Ministry of Rural Development, Government of India under PMGSY – III (Page II), 2022 – 2023.
5	**02.12.2022 to 22.12.2022**	State Government issued brief letters while granting administrative approval, tenders were invited for the aforementioned works. 06.12.2022 is one of the letter relates to the present case.
6	**21.12.2022**	In C.W.J.C No. 9941 of 2022, this Court has passed the following order *"we stay the operation of the impugned notification dated 16.01.2020. We clarify that our order would operate only for such of those tenders, for which bids are yet required to be submitted"*. Notification dated 16.01.2020 for abolition of minimum rates for the tenders i.e. on ceiling of 10 % less than the rate of Bill of Quantity meaning thereby earlier letter No. 2046 dated 06.03.2014 issued by the Road Construction Department, Government of Bihar was restored and it has to be given effect.
7	**26.12.2022**	Rural Works Department by its letter dated 26.12.2022 communicated to all the respective Executive Engineers to ensure compliance of the order of this Court dated 21.12.2022. This communication was shared with the Ministry of Rural Development, Government of India.
8	**27.12.2022 to 17.02.2023**	State proceeded to issue tenders/re-tenders with the conditions of minimum limit of quoted rate up to 10 % less than the BOQ for unawarded works of PMGSY – III by various letters.
9	**24.02.2023**	Ministry of Rural Development, Government of India informed that programme of PMGSY provides that any matter of tender of works sanctioned under PMGSY of States/UTs will follow the provisions prescribed in the

		Standard Bid Document (SBD) issued by the National Rural Infrastructure Development Agency (NRIDA). It was further clarified in paragraph Nos. 4 and 6, they are as under: **4.** In no case any variations would be allowed or any limits placed on the quantum of bid which can be submitted for a particular work in case of violation/deviation of States/UTs of the above SBD provisions, such work shall be frozen on OMMAS, and no payment would be allowed on OMMAS from PMGSY funds for such works. **6 (b)** The award process of PMGSY works sanctioned to the State be kept in abeyance till matter is finally decided judicially.
10	**09.05.2023**	Ministry of Rural Development, Government of India intervened and so also added as respondent No. 10 in C.W.J.C. No. 9941 of 2022 *vide* order dated 09.05.2023.
11	**06.07.2023**	C.W.J.C. No. 9941 of 2022 in which 16.01.2020 order relating to withdrawal of 10 % minimum was dismissed.
12	**14.07.2023**	Ministry of Rural Development, Government of India directed that there should be no impediment to process of tender for PMGSY works as per the Standard Bidding Document (SBD) norms of the programme. State Government of Bihar is requested to take required action expeditiously as per the SBD of PMGSY.
13	**14.07.2023**	On receipt of communication from the Ministry of Rural Development, Government of India all tenders invited from 02.12.2022 to 17.02.2023 were cancelled on administrative reasons.
14	**15.07.2023**	Fresh tenders were issued (other than the subject matter of this case).
15	**24.07.2023**	The present writ petitioner – *Rajiv Kumar* filed C.W.J.C. No. 10068 of 2023 connected with C.W.J.C. No. 10069 of 2023, C.W.J.C. No. 10126 of 2023 and C.W.J.C. No. 10125 of 2023 wherein cancellation of tender dated 14.07.2023 was subject matter and this Court set aside the order dated 14.07.2023 and remanded the matter to the Engineer-in-Chief, Rural Works Department, Bihar, Patna to proceed with fresh detailed reasoned/speaking order to be passed for cancellation of tender, if it is warranted.
16	**31.07.2023**	Engineer-in-Chief, Rural Works Department proceeded to pass a reasoned order insofar as cancellation of various tenders.
17	**07.08.2023**	Ministry of Rural Development, Government of India has set timeline of completion of PMGSY – III works as

		31.03.2025. On 07.08.2023 in C.W.J.C. No. 10966 of 2023 *Rita Singh @ Reeta Singh vs. State of Bihar and others* passed the following order *"Re-tender dated 15.07.2023 shall not be processed till next date of hearing."*
18	**24.08.2023**	In C.W.J.C. No. 12030 of 2023 in the case of *Alok Kumar vs State of Bihar and Others,* identical order was passed to that of order passed in C.W.J.C. No. 11271 of 2023.
19	**01.09.2023**	In C.W.J.C. No. 11234 of 2023 *Rajiv Kumar vs. State of Bihar and others* and connected matters, it is ordered that concerned respondents are hereby directed stall the re-tender process dated 28.07.2023 till the next date of hearing.
20	**04.09.2023**	In compliance of the order dated 01.09.2023 passed in C.W.J.C. No. 11234 of 2023 in the case of *Rajiv Kumar vs. State of Bihar and other* and connected cases, State of Bihar have taken a decision to not to open the bid.

5. Learned counsel for the petitioner submitted that letter bearing No. 2046 dated 06.03.2014, relating to ceiling of 10 percent less than the rate of BOQ read with its withdrawal dated 16.01.2020 and order of this Court dated 06.07.2023 passed in C.W.J.C. No. 9941 of 2022, is not applicable to the subject matter of tender issued on 06.12.2022 read with evaluation of technical bid dated 01.02.2023 wherein petitioner and others were successful and further, financial bid was opened on 09.02.2023 in which petitioner has been declared as L1. It is submitted that subject matter of contract is one of the contract under PMGSY – III.

6. The aforementioned policy decision of the State Government dated 06.03.2014 and its withdrawn on 16.01.2020 is not applicable to the case in hand, for the reasons that PMGSY – III is covered by SBD document issued by National Rural Infrastructure Development Authority (herein after referred to as 'NRIDA'). SBD of NRIDA does not stipulate the minimum limit of 10 % less than the scheduled rate in the light of said policy decision. On the other hand, bid pricing in SBD issued by NRIDA is silent on the minimum limit of percentage to be quoted by the bidder, therefore, the official respondent cannot take shelter of this Court's decision dated 06.07.2023 passed in C.W.J.C. No. 9941 of 2022 and proceed to cancel the tender dated 06.12.2022 on 31.07.2023 and re-tender dated 28.07.2023.

7. It is further submitted that for cancellation of tender, another reason assigned is that bid validity was for 90 days with reference to last date of submission of tender, the same cannot be good ground to cancel the tender dated 06.12.2022 in view of the fact that technical bid evaluation was held on 01.02.2023 and financial bid was concluded on 09.02.2023. It is also submitted that another reason for cancellation is that tenders became six months old and further Government of India brought certain variations in standard of construction, in other words, ceiling improvement in road construction which has resulted in increase in cost of the tenders.

8. Learned counsel for the petitioner submitted that yet another reason is that tenders are six months older, therefore, respondents have cancelled tenders may not be a good ground for the reasons that technical bid as well as financial bid have attained finality five months earlier to the proposed cancellation. It is further submitted that if there are any change in standard of construction, it is applicable to future tenders. Therefore, reasons assigned for cancellation in the order dated 31.07.2023 are not tenable. It is also submitted that respondents have discriminated in cancelling the tender. In other words, some of the tender processes prior to order of this Court dated 06.07.2023 passed in C.W.J.C. No. 9941 of 2022 have been given effect. In this regard, he has pointed certain documents like Annexure P – 19 to the connected writ petition, which is delinked. Those documents are relating to maintenance of roads constructed under PMGSY scheme.

9. It is submitted that EMD pursuant to NIT dated 06.12.2022 paid was refunded during the intervening period from 16.07.2023 to 22.07.2023. Such refund of EMD is not at the behest of the petitioner. On the other hand, respondents on their own deposited EMD amount in the petitioners' bank account. Therefore, returning EMD amount at the behest of the respondents would not be a hurdle in questioning the cancellation of tender and re-tendering process.

10. *Per contra* the learned Advocate General submitted that the present writ petition is not maintainable in view of the fact that EMD amount furnished by the petitioner was refunded during the period from 16.07.2023 to 27.07.2023. Re-tender process was undertaken on 28.07.2023. Further, reasons have been assigned as to why the tender notification issued on 06.12.2022 has been cancelled. It is for the employer to take a decision as to whether earlier NIT issued could be cancelled and whether to proceed with re-tender or not. In the present case, reasons assigned are in the guise of implementation of the order dated 21.12.2022 passed in CWJC No. 9941 of 2022, validity is for 90 days from the last date of submission of tender. The last date of submission of tender being 16.01.2023 and it has not attained finality as on 14.07.2023, the date on which initially NIT dated 06.12.2022 was cancelled. Nodoubt 14.07.2023 cancellation of tender was subject matter of CWJC No. 10068 of 2023 and it was quashed on 24.07.2023 which resulted in passing a fresh cacellation order on 31.07.2023 read with re-tender process dated 28.07.2023. It was also noticed by the competent authority before cancellation that tender dated 06.12.2022 is six months old tender, in such an event the authorities could proceed for re-tendering. That apart Central Government has taken a policy decision on resurfacing and there are certain changes in the standard of construction of the subject matter road work. Therefore, there is no arbitrariness in the impugned action of the respondents.

11. The question of discrimination in implementation of certain NIT and cancellation of certain NIT is not a ground to interfere. In fact there is no discrimination insofar as the present case with reference to Annexure P - 13 series and Annexure P – 19 series furnished by the petitioner read with later document. The later document is relating to maintenance of the roads which was already constructed. Therefore, factual aspect of the matter of the present case and giving effect to such of those NITs are relating to maintenance of various roads. On this ground, there is no discrimination. He also submitted that time and again Courts have held that Courts shall not interfere unless and until there are arbitrariness in the process of tendering and its consideration. In the present case there are no arbitrariness in respect of any of the action. Hence, petitioner has not made out a case. Consequently, writ petition is liable to be dismissed.

12. Controversy in the present matter is whether principle of arbitrariness or irrationality is attracted in cancelling the tender dated 06.12.2022 on 31.07.2023 while re-tendering on 28.07.2023 or not?

13. Before adverting to the merits of the case, it is necessary to take note of the general principles relating to interference in a tender matter under Article 226 of the Constitution of India. In a recent decision of the Apex Court in the case of ***Tata Motors Limited Vs. BEST and others*** reported in **(2023) SCC Online SC (671)** in paragraph-48, it is held as under:

> ***"48.*** *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 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. 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. (See : Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489)"*

14. Undisputed factual matrix are that the State Government evolved a policy on 06.03.2014 while fixing minimum rates for the tenderers i.e. ceiling of 10% less than the rate of BOQ, issued by the Road Construction Department, Government of Bihar. Central Government evolved a scheme called 'PMGSY' in the year 2015. One of the scheme is road construction projects and they were required to be implemented by the State Government, whereas the Central Government is funding to some extent and State Government is also contributing certain funds. The State Government is required to execute 'PMGSY' projects in the light of the rate of standard bid documents issued by the NRIDA. Therefore, the policy of the State Government dated 06.03.2014 cited *supra* is not applicable to 'PMGSY' projects. Therefore, withdrawal of State Policy decision dated 06.03.2014 on 16.01.2020, the interim order dated 21.12.2022 passed in C.W.J.C. No.9941 of 2022 and, thereafter, dismissal of C.W.J.C. No.9941 of 2022 on 06.07.2023 have no bearing on the 'PMGSY' projects like in the present case of 'PMGSY' project *vide* NIT dated 06.12.2022 read with technical bid evaluation dated 01.02.2023 and declaring the petitioner as L1 in the final bid on 09.02.2023.

15. No doubt, at given point of time while cancelling the Tender Notification dated 06.12.2022 on 14.07.2023 and 31.07.2023, respondents have taken a decision that the policy decision of the State Government dated 06.03.2014 read with its withdrawal dated 16.01.2020, interim order dated 21.12.2022 passed in C.W.J.C. No.9941 of 2022 and its dismissal on 06.07.2023 have bearing to the extent that State Government Policy dated 06.03.2014 is applicable as narrated in the cancellation of tender dated 14.07.2023 read with 31.07.2023. Later on, learned Advocate General fairly submitted that State Policy dated 06.03.2014 is not applicable to the 'PMGSY' project like the present one in the light of SBD issued by the NRIDA.

16. The other reasons for cancellation of tender are that the tender is valid for 90 days only, six months older tender and it has not attained its finality. There is some substance in reasons assigned for cancellation of tender even though the one of the reasons for cancellation, i.e., the event arising out of order dated 06.03.2014 may not favour the State Government. We find *prima facie* there is no arbitrariness or irrationality insofar as assigning the reasons for cancellation of tender.

17. Learned Advocate General submitted that EMD deposited by the petitioner and others have been refunded to the respective bidders before re-tendering the subject matter of 'PMGSY' project. That apart, the petitioner has not protested the same and he has also not apprised this Court in the writ petition pleadings to the extent that he is in receipt of refund of EMD deposit.

18. On the other hand, learned counsel for the petitioner submitted that refund of EMD deposit was not at his request. The concerned authority deposited in the petitioner's account. Therefore, the petitioner is not prevented in questioning the cancellation of tender or re-tendering process. In all fairness, the petitioner should have accepted the EMD fund under protest or he should have refunded EMD amount to the concerned authority, if he really intends to question the validity of cancellation of tender and retender process. Recently the Bombay High Court in its order dated **15.03.2023** in the case of ***Ram Omprakash Patil vs.***

The Secretary and others in **WRIT PETITION (L) NO. 31918 of 2022** held that wining bidder cannot challenge tender cancellation after accepting the refund of deposit. Therefore on this score also petitioner has not made out a case.

19. The learned Advocate General in support of cancellation and re-tendering submitted that during the pendency of the NIT dated 06.12.2022 and present petition, State Government is in receipt of certain changes in the Central Government policy insofar as the implementation of 'PMGSY' project. In other words, Central Government has revised the standard of construction with certain variations. This is also one of the reasons for cancellation of tender and re-tendering process.

20. Learned counsel for the petitioner submitted that such a decision of the Central Government is much later than the opening of the financial bid dated 09.02.2023 and the same is not applicable. Petitioner's above contention cannot be appreciated for the reasons that the Government must have freedom of contract as held by the Apex Court in the case of ***Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd.*** reported in **(2005) 6 SCC 138** in paragraph-12 reads as under:

> ***"12.*** *After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in*

administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The Government must have freedom of contract. In other words, 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 principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)"

21. Time and again the Courts have held that the Court does not have expertise to correct administrative decisions in the tender matters. The issue involved in the present matter is whether the State Government in cancelling the tender and re-tendering in the light of the certain administrative reasons like the tender is valid for 90 days, six months older tender and the tender not attaining finality and before execution of the project, the Central Government proceeded to revise certain standard of construction resulting in escalation of cost and other technical factors. These issues cannot be examined by the Court as if the Court is the expert body.

22. In the light of these facts and circumstances, the petitioner has not made out a case so as to interfere with the impugned decisions of the State authorities in cancelling the tender dated 06.12.2022 on 31.07.2023 read with re-tender dated 28.07.2023.

23. Accordingly, the present writ petition stands dismissed. No order as to costs.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

GAURAV S.
P.S./-

AFR/NAFR	
CAV DATE	10.10.2023
Uploading Date	18.10.2023
Transmission Date	