

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12330 of 2018

=====

M/s N P C C- P S K- J V, Plot No. 148, Sector 44, Guru Gram-122003,
through its power of Attorney Holder Mr. Raman Prasad Gupta son of Surya
Prakash Gupta.

... .. Petitioner

Versus

1. The Indira Gandhi Institute Of Medical Science, Sheikhpura, Patna-14
through its Director.
2. Superintending Engineer, The Indira Gandhi Institute of Medical Science,
Sheikhpura, Patna- 14.

... .. Respondents

=====

Appearance :

For the Petitioner/s	:	Mr. P. K. Shahi, Sr. Advocate Mr. Vikas Kumar, Advocate
For the Respondent/s	:	Mr. Sunil Kumar Singh, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
C.A.V. JUDGMENT

Date : 14-03-2019

This writ application has been preferred seeking the
following reliefs:-

“i. For issuance of an appropriate writ/order/order/direction quashing the office order containing memo number 149/EC/18 Dated- 08/06/2018 whereby and whereunder tender notice published by NIT No. -Re- Tender Notice No. Engg/138/C/E/E- Tender published for construction work of 500 Bedded Hospital Building in the Campus of IGIMS was cancelled.

ii. For direction to the respondent authorities to allocate the aforesaid work for construction of 500 Bedded Hospital Building in the Campus of IGIMS was cancelled as petitioner was declared L-1 and price negotiation was also finalized by the parties.



iii. For further direction to not to proceed in Tender notification in Tender notification No.- Tender Notice namely – Re- Tender Notice No. - Engg/07/C/E/E – Tender / 2018-19 Dated- 13/06/2018 by which Tender has been published for 500 Bedded Hospital Building in the Campus of IGIMS, Sheikhpura.”

It is the case of the petitioner that pursuant to the tender notice inviting application for construction of the work of 500 Bedded Hospital Building in the campus of Indira Gandhi Institute of Medical Science (hereinafter in short ‘IGIMS’) vide Annexure-2 to the writ application, the petitioner finding itself qualified and eligible participated in the tender. Along with tender document the petitioner also filed an affidavit as required stating that his firm has neither been blacklisted/debarred nor has abandoned any work in any Government Department, India nor any contract awarded to him for such works have been rescinded till date. A copy of affidavit dated 05.04.2018 has been annexed as Annexure-3 to the writ application.

It is further case of the petitioner that in Technical Bid the petitioner qualified, 21 days after opening of the Technical Bid, Financial Bid of all the participants were opened and vide letter no. 18 dated 22.05.2018 the petitioner was informed that the tenders submitted by him in the aforesaid work has become lowest. The Tender Committee had called for justification of rates,



thereafter, the petitioner submitted a detail analysis. A meeting for rate negotiation was also held on 23.05.2018. Pursuant to the said negotiation, showing a good gesture petitioner vide letter no. 145 dated 24.05.2018 to the 'IGIMS' offered a lump sum discount of Rs. 55 lakhs from the quoted price. A copy of the letter dated 24th May, 2018 written on behalf of the petitioner firm is Annexure-7 to the writ application.

It is thereafter, when a complaint was received in the office of the 'IGIMS' whereunder it was informed that the name of the petitioner firm finds place in the debarred list. The petitioner was called upon vide Annexure-8 series issued under the signature of the Superintending Engineer, IGIMS, Patna to submit his clarification on the complaint received regarding debarment in Road Construction Department, Ranchi (Jharkhand). The petitioner, thereafter, vide letter dated 28th May, 2018 as contained in Annexure-9 to the writ application submitted it's clarification. It was the contention of the petitioner in it's reply that the petitioner company has been restricted to participate in other tenders of the Road Construction Department, Government of Jharkhand, Ranchi only till the completion of the work being executed by NPCC Limited (the petitioner). A contention was raised that the blacklisting/debarment means suspension of



business. The debarment, in the opinion of the petitioner, in effect constitutes blacklisting and debarment is as one for blacklisting as the result of both actions are identical. The action of blacklisting/debarment is to be taken under enlistment rules by the Registering Authority only and therefore, it was submitted that NPCC Ltd. (petitioner) is not registered with Road Construction Department, Ranchi. The petitioner was still continuing with the work and was doing business with Road Construction Department and was getting payment for the work being executed. The letter bearing No. 1271 (S) dated 28.02.2018 issued by the Road Construction Department, Government of Jharkhand, Ranchi was sought to be construed and interpreted as restricting only the participation in the work of that Department. It was contended that the same cannot be used by other public authorities and bodies to disqualify a party.

In course of argument Mr. P. K. Shahi, learned Senior Counsel representing the petitioner has drawn the attention of this Court towards the orders dated 07.06.2018 and 08.06.2018 passed by the learned Single Judge of the Hon'ble Jharkhand High Court in W.P. (C) No. 2701 of 2018. It is submitted that the letter dated 28.02.2018 which was impugned in the said writ application, was declared applicable only in respect of the Department of Road



Construction in the State of Jharkhand. Referring to the subsequent development, learned Senior Counsel has placed before this Court the Hon'ble Division Bench judgment of the Jharkhand High Court in L.P.A. No. 312 of 2018 which had arisen out of the order passed by the learned Single Judge. The Hon'ble Division Bench while disposing of the Letters Patent Appeal on 25th June, 2018 not only quashed the impugned letter dated 28.02.2018 issued by the Road Construction Department, Government of Jharkhand, Ranchi, it is also held that the State Government had failed to acquire the land in question, therefore, it should not have issued the impugned order dated 28.02.2018. A cost of Rs. 2000/- was also imposed against the State.

It is submitted that in the aforementioned circumstances, the respondents were not justified in cancelling the re-tender of 2017-18 in which the petitioner had become the lowest tenderer and had also participated in the price negotiation. It is further submitted that from the impugned office order as contained in Annexure-1 to the writ application it would appear that the re-tender notice was cancelled without giving any reason thereof. The impugned office order is dated 08.06.2018 on which date the learned Single Judge of the Hon'ble Jharkhand High Court had already declared that the impugned letter dated 28.02.2018 will be



applicable only in respect of the department of Road Construction in the State of Jharkhand.

Learned Senior Counsel has further extended his argument referring to the contents of the affidavit submitted by the petitioner. It is submitted that on perusal of the said affidavit it would appear that the respondents provided the format of affidavit under which there required an information regarding the blacklisting /debarment or abandonment of work in any 'Government Department, India' (emphasis supplied). It is contended that this part of the declaration would give an impression that the respondents were looking for an information with regard to any of the Department of Government of India and not of the State Government. Reliance has also been placed on Clause 7.6 (J) of the notice inviting tender (Annexure-A to the counter affidavit) to show that it talks of an affidavit in the format annexed with the Bid.

On the other hand, learned counsel for the respondents has contested the writ application on the ground that in the Technical Bid stage the Tender Committee found only two Bidders including the petitioner's Technical Bid qualified. The Financial Bid was thereafter, opened and the Tender Committee found the rate quoted by the petitioner was 4.9 % above the estimated cost



which was the lowest. At this stage an unanimous complaint was received through mail stating that the Road Construction Department, Government of Jharkhand had debarred the petitioner from participating any tender process of Road Construction Department until the said work is not completed. The petitioner had suppressed this fact and submitted an affidavit dated 05.04.2018 stating therein that it had neither been blacklisted / debarred nor has abandoned work in any Government Department, India. This was not a true and correct statement in the affidavit. If the petitioner was debarred in any government department in India, it was required to be disclosed. The contention of the petitioner that the debarment of the Road Construction Department Government of Jharkhand would not have been a ground to disqualify in the present Bid could have been tested in such circumstance only.

It is submitted that a clarification was sought from the petitioner and thereafter, the respondents have sought opinion from the learned Advocate General, the matter was placed before the Board of Governors in its meeting held on 01.06.2018 a copy of the minutes of the meeting of the 100th (Extraordinary – Special) meeting of Board of Governments held on 01.06.2018 has been brought on record with the counter affidavit as Annexure-F. A



decision was taken therein that re-tender should be done, therefore, the impugned office order came to be issued on 08.06.2018 and subsequently a re-tender notice as contained in Annexure-H to the counter affidavit has been issued.

It is further submitted that the plea which is being taken by learned Senior Counsel referring to the format of the affidavit is wholly unacceptable inasmuch as it is apparent from the format of the affidavit that the information was sought with regard to any works in any Government Department in India. It is submitted that even though the word 'in' is missing in the format of affidavit before the word 'India' the fact that it is the petitioner knew the true purpose and meaning of the cluster of words as otherwise there was no need to right 'any Government Department'. The information sought for was with respect to 'any work in any government department, India' which was well understood by the petitioner, otherwise the petitioner could have sought a clarification in this regard in the pre-bid meeting on 26.03.2018 itself.

Learned counsel further submits that his aforesaid submission finds support from the fact that in the clarification submitted by the petitioner as contained in Annexure-9 to the writ application the petitioner did not take any plea with regard to the



format of the affidavit giving any wrong impression to him, therefore, at this stage, in course of argument learned Senior Counsel for the petitioner cannot be allowed to take a plea which was not part of the contentions of the petitioner in Annexure-‘9’ to the writ application.

Learned counsel has relied on the settled legal proposition enunciated by the Hon’ble Supreme Court in the case of **Air India Limited Vs. Cochin International Airport Ltd. & Ors.**, reported in **(2000) 2 SCC 617** in which it has been held that even when some defect is found in decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out a legal point. A copy of the judgment of the Hon’ble Jharkhand High Court in case of **Chhatisgarh Distilleries Ltd. Vs. The State of Jharkhand and Others** passed in **W.P. (C) No. 5056 of 2014** has been submitted before this Court in which the learned Single Judge of the Hon’ble Jharkhand High Court has further quoted the view of the Hon’ble Supreme Court in the case of **Michigan Rubber (India) Ltd. Vs. State of Karnataka & Ors.**, reported in **(2012) 8 SCC 216**.



The respondents have also filed Interlocutory Application being I.A. No. 01 of 2019 for vacating the interim order dated 09.07.2018. As according to the respondents, the construction of a 500 Bedded Hospital has been stalled because of the pendency of the writ application.

CONSIDERATION

Having heard learned Senior Counsel for the petitioner, learned counsel representing the respondents and upon perusal of the records, this Court finds that in terms of Clause 7.6 (J) of the NIT the petitioner was required to submit an affidavit in the format annexed with the Bid. Clause 7.6 (J) reads as under:-

“(J) Affidavit on Rs. 1000 Non Judicial stamp before 1st Class Magistrate regarding black listed, debar or rescined of their work on the format annex with the Bid.”

In terms of the aforesaid rules 7.6 (J) the Bid document provided a format of the affidavit which is quoted hereunder for a ready reference:-

AFFIDAVIT

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

2. The undersigned also hereby certify that neither our firm M/s National Projects Construction Corporation Limited has been blacklisted/debarred nor has abandoned any work in



any government department, India nor any contract awarded to us for such works have been resigned till date.

3. The undersigned hereby authorizes 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 understand 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.”

The petitioner was debarred by the Road Construction Department, Government of Jharkhand on 28.02.2018, therefore, on 05.04.2018, when the petitioner was submitting the aforesaid affidavit, the fact that it was facing a debarment order issued by the Road Construction Department, Government of Jharkhand was very much in existence. On the said date the declaration of the learned Single Judge of the Hon’ble Jharkhand High Court available with the petitioner.

The letter dated 28.02.2018 issued by the Road Construction Department, Government of Jharkhand as contained in Annexure-10 to the writ application is quoted hereunder for ready reference:-



**“झारखण्ड सरकार
पथ निर्माण विभाग, राँची**

सं0सं0-प0नि0वि0/06-विविध-71/2017 1271 (S) दिनांक - 28/02/18

प्रेषक,

अभियंता प्रमुख,

पथ निर्माण विभाग झारखण्ड, राँची ।

सेवा में,

सभी मुख्य अभियंता (रा0उ0प0 उभाग सहित)/

सभी अधीक्षण अभियंता, (रा0उ0प0 अंचल सहित)/

सभी कार्यपालक अभियंता, (रा0उ0प0 प्रमण्डल सहित)

पथ निर्माण विभाग, झारखण्ड ।

विषय:- कार्य आवंटन एवं एकरारनामा के पश्चात् कार्य सम्पादन में शिथिलता बरतने के कारण संवेदक मेसर्स नेशनल प्रोजेक्ट कन्स्ट्रक्शन कॉरपोरेशन लि0, राँची को निविदा में प्रतिभागिता से वंचित (Debar) करने के संबंध में।

महाशय,

उपर्युक्त विषय के संबंध में कहना है कि संवेदक मेसर्स नेशनल प्रोजेक्ट कन्स्ट्रक्शन कॉरपोरेशन लि0, राँची को पथ प्रमण्डल, सरायकेला-खरसावाँ अंतर्गत खरसावाँ-हुरंगदा-रायजमा कान्दरकुटी (रंगामाटी) रडगाँव पथ के कि0मी0 0.00 से कि0मी0 29.407 के चौड़ीकरण एवं मजबूतीकरण/पुनर्निमाण कार्य आवंटित किया गया था।

मुख्य अभियंता (या0), प0नि0वि0, झारखण्ड, राँची का कार्यालय आदेश सं0-34 सह ज्ञाप सं0-800, दिनांक-27.04.2017 के आलोक में विषयांकित कार्य का जाँच किया गया। जाँच प्रतिवेदन में कार्य को त्रुटिपूर्ण बतलाया गया है।

उपरोक्त के आलोक में संवेदक मेसर्स नेशनल प्रोजेक्ट कन्स्ट्रक्शन कॉरपोरेशन लि0, राँची को पथ निर्माण विभाग, झारखण्ड के अंतर्गत दूसरे अन्य निविदाओं में Participation से वंचित (DEBAR) किया जाता है। यह आदेश तब तक लागू रहेगा जब तक संवेदक द्वारा उन्हें आवंटित विषयांकित कार्य विशिष्टियों के अनुरूप पूर्ण नहीं कर लेते। कार्य समाप्ति के पश्चात् प्रमण्डल द्वारा निर्गत पूर्णता प्रमाण-पत्र (Completion Certificate) समर्पित करने के पश्चात् ही अधोहस्ताक्षरी द्वारा भविष्य में उन्हें DEBAR से मुक्त करने से संबंधित आदेश निर्गत किया जाएगा। इस बीच की अवधि में संवेदक मेसर्स प्रोजेक्ट कन्स्ट्रक्शन कॉरपोरेशन लि0, राँची को निविदाओं के लिए अपात्र/अयोग्य माने जाएंगे।”

विश्वासभजन,

ह0अ0

अभियंता प्रमुख,

प0नि0वि0, झारखण्ड, राँची ।”

To this Court it appears that the officers of the petitioner company had no ambiguity in their mind with regard to the information required to be submitted on the affidavit, therefore, they never raised issue with respect thereto in the pre-bid meeting. A reading of the format of the affidavit leaves no room to doubt.



The respondents were looking for an information wide enough to cover any debarment order issued by any Government Department in India. The cluster of words 'any work in any Government Department, India' widely convey that the petitioner was required to furnish information with regard to debarment in any Government Department in India. The meaning of these words as is being sought to be canvassed by the learned Senior Counsel cannot be restricted to mean an understand the Government Departments of the Central Government alone.

This Court also finds that this contention has been raised for the first time before this Court as no such plea was taken by the petitioner in Annexure-'9' to the writ application which is the clarification furnished by the petitioner when he was called upon to do so on receipt of the complaint. In no word the petitioner has taken a plea in his Annexure-'9' that he either misconstrued the format of affidavit or was given a wrong impression with regard to the informations sought for. In his explanation he has rather tried to say that the office order dated 28.02.2018 issued by the Road Construction Department, Government of Jharkhand cannot be said to be a blacklisting order issued by the Registering Authority.

In the facts and circumstances as appearing from the records, this Court is of the considered opinion that on 05.04.2018



when the deponent on behalf of the petitioner company sworn the affidavit, he had not disclosed the fact that the petitioner company was facing a debarment order in respect of a work in the Road Construction Department, Government of Jharkhand. This information was necessary to be disclosed in the circumstances where the petitioner was facing debarment, but as it appears the deponent on behalf of the petitioner company had withheld the correct information may be under some apprehension that the disclosure may render the petitioner company ineligible, only to qualify at the Technical Bid stage.

The respondents have made it clear in their counter affidavit that only two participants had qualified at the Technical Bid stage, therefore, when the petitioner was found suffering from the debarment, on 01.06.2018 when the Board of Governors meeting of the respondents took place there was no other option but to go for re-tendering otherwise it would have been a case of single Bidder.

In the facts of the present case, this Court finds that what has been held by the Hon'ble Supreme Court in the catena of judicial pronouncements would be fully applicable. It may be found from the judgment of the Hon'ble Supreme Court in the case of **Raunaq International Ltd. vs. IVR Construction Ltd.**



And Ors., reported in **(1999) 1 SCC 492** that the Hon'ble Supreme Court has held that it is only a decision making process which leads to the ultimate decision may be opened to judicial review provided that there is an element of public interest involved in the case requiring a review of the administrative decision by the Court.

In the case of **Jagdish Mandal and Another vs. State of Orissa & Others** reported in **(2001) 2 SCC 451**, in paragraph 22 the Hon'ble Supreme Court held as under:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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 be decide contractual disputes.”

In the case of **Siemens Public Communication Networks (P) Ltd. Vs. Union of India** reported in **(2008) 16 SCC 215** the Supreme Court has held that “the court should always



keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere”.

In **Air India Limited** (supra) it has been held that the court should exercise its discretionary power under Article 226 only in furtherance of public interest and not merely on the making out a legal point.

On the analysis of the aforesaid judicial pronouncements, keeping in mind the facts of the present case would lead to an irresistible conclusion that the decision of the respondents in the present writ application has been taken in view of the attending circumstances as they had no option but to go for re-tendering when it was found that the petitioner was facing a debarment order by one of the departments of the Government of Jharkhand which was not disclosed in the affidavit. No doubt, subsequently the Hon’ble Division Bench of the Jharkhand High Court has quashed the order dated 28.02.2018 issued by the Road Construction Department, Government of Jharkhand but that would not be a factor to be considered while judging the decision making process of the respondents. The fact remains that on the date the affidavit was sworn by the deponent of the petitioner firm



and on the date when the Board of Governors of respondents took a decision to go for re-tendering, on both dates, the debarment order issued by the Road Construction Department, Government of Jharkhand was very much in existence non-disclosure of which has led to the present situation.

In result, this Court finds no merit in the writ application. It is dismissed accordingly. Since the writ application has been dismissed I.A. No. 01 of 2019 is rendered infructuous.

Before this Court parts with this case, it would be just and proper to observe that in this case construction of a five hundred bedded hospital has been delayed because of this litigation. The Larger Public Interest is that the construction of the hospital be started forthwith and the parties looking for the award of work should resist from litigating such matters causing delay which ultimately affects those who are facing the critical diseases and are looking for their timely Medi-care. After all every business entity has certain social responsibilities to fulfill.

(Rajeev Ranjan Prasad, J)

avin/-

AFR/NAFR	AFR
CAV DATE	08.03.2019
Uploading Date	14.03.2019
Transmission Date	

