

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2991 of 2019

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Aarpee Infra Projects (P) Ltd., a Company registered under the Companies Act, having its Registered Office at 606, Akashdeep Building, 26, Barakhamba Lane, Barakhamba Road, New Delhi through its Authorized Signatory Subodh Kumar Singh, aged about 44 years (Male) Son of Sri Jeet Narayan Singh, Resident of Sirkohiya, P.S- Jaintpur, Dist. - Muzaffarpur

... .. Petitioner/s

Versus

1. The State of Bihar, Department of Road Construction, Visheshwaria Bhavan, Bihar, Patna through its Principal Secretary
2. The Principal Secretary, Department of Road Construction, Government Of Bihar Visheshwaria Bhavan, Bihar, Patna
3. The Engineer- in Chief Cum Additional Commissioner Cum Special Secretary, Department Of Road Construction, Government of Bihar, Visheshwaria Bhavan, Bihar, Patna
4. The Superintending Engineer, North Bihar Road Division, Department of Road Construction, Muzaffarpur at Muzaffarpur
5. The Executive Engineer, Department of Road Construction, Road Division, Purnia
6. The Assistant Engineer, Department of Road Construction, Road Division, Purnia

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Alok Kumar Agrawal, Adv.
For the Respondent/s : Mr. Raj Ballabh Pd. Yadav, AAG-11

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT
Date : 29-03-2019

Heard learned counsel for the petitioner and the State.

2. This writ application has been preferred for the following reliefs :-

“1. For directing the Respondents, including the Tender Evaluation Committee consisting of Respondents as also Respondent no.5, the Executive Engineer R.C.D., Road Division, Purnia to consider the Tender submitted by the Petitioner for NIT No.19/2018-19/RCD/Purnia as the petitioner has



submitted the same for the work for which tender notice has been issued but is being sought to be excluded arbitrarily;

(ii) For direction that since the defect pointed out by the respondent was in fact a removable/innocent defect, the petitioner could not have been declared to be disqualified thereby denying his participation in the financial bid;

(iii) For directing the Respondent to open the financial bid of the petitioner along with other bidders as the petitioner has qualified all the required qualification for submission of the Bid; and/or to pass such other relief or reliefs for which the petitioner is found entitled to the facts and circumstances of the present case.”

3. The petitioner is a private limited company engaged in the execution of works contract in various states including the State of Bihar. It is stated that pursuant to the Notice Inviting Tender (NIT) bearing no.19/2018-19/RCD/Purnia dated 05.01.2019 issued from the office of the Executive Engineer, Road Construction Department, Road Division, Purnia (hereinafter ‘RCD’) for widening and strengthening of Dhamdahad (Nehru Chowk) to Bihariganj Border via Barhara Kothi road from KM. 0.00 to 20.25 at the estimated cost of Rs.9268.91702 lacs, the petitioner submitted its tender with the required Earnest Money Deposit (EMD) of Rs.1,02,70,000.00 (one crore two lacs seventy thousand) by way of bank guarantee dated 8.2.2019 issued from the Axis Bank Branch, Office at Spectrum House, Sevoke Road, Siliguri, West Bengal addressed



to the Executive Engineer, Road Construction Department, Road Division, Purnia. A copy of the bank guarantee has been brought on record as Annexure-2 to the writ application.

4. It is submitted that when the technical bid was opened on the scheduled date, the petitioner came to know from the website of the Road Construction Department that its bid was not accepted showing reason “the bank guarantee has been pledged in favour of the Executive Engineer, Road Construction Department, Road Division, Siwan so EMD not valid”. A copy of the reason shown on the website of the RCD has been brought on record as Annexure-3 to the writ application. At this stage, when the petitioner came to know about the reason of non-acceptance of its tender, it was pointed out to the Principal Secretary of the Department and the Executive Engineer vide letter no.13.02.2019 that the bank guarantee issued by the Axis Bank and submitted by the petitioner in the first two pages is clearly addressed to the Executive Engineer, Road Construction Department, Road Division, Purnia , but on the 3rd page due to typographical error instead of ‘Road Division, Purnia’, ‘Road Division, Siwan’ has been printed which is nothing but a typographical error. Copies of the representations dated 13.02.2019 addressed to the aforesaid authorities have been



marked as Annexure-4 and 4/A respectively.

5. It is further submitted that on detection of inadvertent error the bank authority had issued an amendment letter dated 13.02.2019 addressed to the Executive Engineer, Road Construction Department, Road Division, Purnia by which amendment has been made by the bank in page 2/Para 2/Line No.8 by which it has been stated that the existing words 'the Executive Engineer, Road Construction Department, Road Division, Siwan' is to be read as 'the Executive Engineer, Road Construction Department, Road Division, Purnia'. However, the other terms and conditions of the original guarantee dated 8.2.2019 remain unchanged. The xerox copy of the amendment letter dated 13.02.2019 issued by the Axis Bank has been enclosed as Annexure-5 to the writ application.

6. It is the case of the petitioner that for the aforesaid inadvertent error committed by the bank while issuing bank guarantee, if the bid of the petitioner is not opened, it will cause grave injustice to the petitioner.

7. Mr. Alok Kumar Agrawal, learned counsel representing the petitioner has relied upon a judgment of the Hon'ble Apex Court in the case of **Tata Cellular Vs. Union of India** reported in **AIR 1996 SC 11** wherein the Hon'ble



Supreme Court has laid down the principles of judicial review applicable to contractual matters. It is submitted that the Hon'ble Supreme Court has in the aforesaid case clearly held that the principles of judicial review would be applicable to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. It is submitted that the principles laid down under Article 14 of the Constitution will guide the decision making process by government bodies.

8. Relying upon another judgment of the Hon'ble Supreme Court in the case of **Poddar Steel Corporation Vs. Ganesh Engineering Works and others** reported in (1991) 3 SCC 273, learned counsel submits that the requirements in tender notice may be classified into two categories, the first category will cover those conditions which lay down the essential requirements of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

9. On 15.02.2019 when this matter was taken up for



consideration, this Court took note of the submission of the petitioner briefly and passed an interim order in the following terms:-

“Considering the nature of the discrepancy which has now been corrected by the Bank and the fact that the correction is in the nature of a typographical error which was committed by the Bank, this Court would direct that subject to result of the writ application, the financial bid of the petitioner shall also be opened tomorrow and shall be considered by the State authorities.”

10. After passing of the aforesaid order, the petitioner filed one Interlocutory Application seeking amendment in the relief portion of the writ application by adding additional prayer for a declaration that the rejection/non-consideration of the technical bid of the petitioner on the ground of technical defect in the EMD is illegal and arbitrary.

11. The State respondents no.1 to 6 have filed a counter affidavit. Their contention is that when ‘EMD’ submitted by the petitioner was opened to authorize on the website for opening technical bid of the petitioner, it was found that bank guarantee has not been pledged in favour of the Executive Engineer, RCD, Road Division, Purnea and therefore it was not in terms of the NIT. It is for this reason that the petitioner has been excluded as his bid was not authorized. It is further submitted that in an electronic tender uploaded



documents cannot be rectified after the day of uploading which has already passed. It is also pointed out that for the aforesaid reason the technical bid of the petitioner could not be opened, hence question of opening of financial bid does not arise. A supplementary counter affidavit has again been filed to place on record the fact that no step has been taken in the matter for opening of financial bid. It is submitted that the financial bid process is being awaited till further direction/modification issued by this Court. One Interlocutory Application being I.A. No.02 of 2019 has also been filed for modification/recall of the order dated 15.02.2019.

CONSIDERATION

12. Having heard learned counsel for the petitioner and learned counsel representing the State as also in the facts and circumstances of the case, I find that the bid of the petitioner has been rejected only because at page '2' of the bank guarantee (Annexure-2) the issuing bank committed a typographical error in the 2nd paragraph by writing the name of the district of the Road Division as 'Siwan' whereas it should have been 'Purnea'. On perusal of the deed of guarantee it is crystal clear that it has been duly addressed to the Executive Engineer, RCD, Road Division, Purnea. The contents of the deed at page '1' reads as under:-



*“we forward herewith the above inland Bank Guarantee in original issued by **us in your favour**. (emphasis supplied)*

2. The above Guarantee is issued subject to the condition that the Bank's liability is restricted to the amount mentioned above and in the said Guarantee. Our Guarantee shall remain in force till the expiry date. Unless a demand or claim under the guarantee is made on the Bank in writing and delivered to the bank on or before the Expiry date/Claim Expiry Date, the Bank shall be discharged from all liability under the said guarantee thereafter.

3. The beneficiary in their own interest should verify the genuineness of this guarantee from following office of the Bank in writing.

*Axis Bank Limited
BG Confirmation Desk,
Transaction Banking
Operations 5th Floor,
Glgoplex, Building No.1,
Plot No. I.T.5,MIDC, Airoli
Knowledge Park, Airoli,
Navi Mumbai 4000708
(Telfax:022-71315803*

4. BG confirmation can also be sought by sending email to ibg.confirmation@axisbank.com. ”

13. Again I find that after the covering letter of Annexure- ‘2’, the first page of the deed printed on the stamp paper of Rs.100/- is also rightly addressed to the Executive Engineer, RCD, Road Division, Purnea. It contains the same bank guarantee number which is mentioned in the covering letter and also at page ‘2’ of the Annexure-2. The mistake appears in paragraph ‘2’ of the bank guarantee where Road Division, Siwan has been mentioned in place of Road Division,



Purnea.

14. To me it is crystal clear that the mistake in paragraph '2' of the bank guarantee has crept in because of the typing error while entering the name of beneficiary. It should have been the same which was appearing at first page and the covering letter. It is evident from the covering letter and page one of the bank guarantee that the beneficiary to whom the bank guarantee has been addressed is the Executive Engineer, RCD, Road Division, Purnea, but due to typographical error it has been mentioned at page '2' as Executive Engineer, RCD, Road Division, Siwan. The name of the work mentioned at page '2' is the same for which the tender has been submitted.

15. It is evident from the bank guarantee that the mistake in respect of the division's name is not such that it would render the bank guarantee invalid or unexecutable. In any case the bank has in so many words mentioned the name of work against which the guarantee has been offered and the fact that it has been addressed to the Executive Engineer, RCD, Road Division, Purnea and uses the word 'in your favour' in the covering letter clearly shows that the bank has committed to pay the guaranteed amount to the beneficiary. To me it appears that it is nothing but a typographical error in usual course of banking



transaction for which the petitioner cannot be held responsible and for this reason alone if his tender is not opened at this stage, it will cause prejudice to the petitioner inasmuch as the petitioner may lose its chance to get the above contract.

16. It is also clear from the facts that the petitioner had immediately on knowing the reason from the screen shot submitted his representations to the Executive Engineer, RCD, Road Division, Purnea as also the Principal Secretary of the Department vide Annexure-4 and 4/A. The petitioner submitted an amendment letter from the bank immediately on 13.02.2019. It is also an admitted position that the financial bid of none of the tenderers have been opened, therefore, this Court finds no reason as to why this inadvertent mistake on the part of the bank be allowed to be a reason for not opening of the technical bid of the petitioner.

17. The Hon'ble Apex Court has in the case of Tata Cellular (supra) after noticing a catena of decisions on the subject took note of the principles of Wednesbury unreasonableness. Paragraphs 96, 97 and 98 of the said judgment are quoted hereunder for a ready reference:-

“96. What is this charming principle of Wednesbury unreasonableness? Is it a magical formula? In R.v. Askew, (1768) 4 Burr 2186, Lord Mansfield considered the question whether



mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They gained greater value two centuries later:

“ It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practise this profession is trusted to the College of Physicians; and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased, much less, warped by resentment, or personal dislike.”

97. To quote again. Michael Supperstone and James Goudie; in their work 'Judicial Review (1992 Edition) it is observed at pages 119 to 121 as under:

“ The assertion of a claim to examine the reasonableness been done by a public authority inevitably led to differences of judicial opinion as to the circumstances in which the Court should intervene. These differences of opinion were resolved in two landmark cases which confined the circumstances for intervention to narrow limits. In Kruse v. Johnson a specially constituted divisional Court had to consider the validity of a bye-law made by a local authority. In the leading judgment of Lord Russell of Killowen, C.J. the approach to be adopted by the Court was set out. Such bye-laws ought to be given to those who have to administer them that they would be reasonably administered. They could be held invalid if unreasonable: where for instance bye-laws were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, or if they involved such oppressive or gratuitous interference with the rights of citizens as could find no justification in the minds of reasonable men. Lord Russell emphasised that a bye-law is not unreasonable just because particular judges might think it went further than was prudent or necessary or convenient.



In 1947 the Court of Appeal confirmed a similar approach for the review of executive discretion generally in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. (1948(1)KB223:1947(2)All ER 680). This case was concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that 'no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not'. In an extempore judgment, Lord Greene M.R. drew attention to the fact that the word 'unreasonable' had often been used in a sense which comprehended different grounds of review. (At page 229, where it was said that the dismissal of a teacher for having red hair (cited by Warrington LJ in Short v. Poole Corpn, (1926)1 Ch66,91, as an example of a 'frivolous and foolish reason') was, in another sense, taking into consideration extraneous matters, and might be so unreasonable that it could almost be described being done in bad faith; see also R. v. Tower Hamlets London Borough Council, ex Chetnik Development Ltd., (1988) AC 858 at page 873, Chapter 4, p. 73, (supra). He summarised the principles as follows”

“The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or conversely, have refused to take into account or neglected to take into account matter which they ought to take into account, or conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a



case, again, I think the Court can interfere. The power of the Court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them."

This summary by Lord Greene has been applied in countless subsequent cases.

The modern statement of the principle is found in a passage in the speech of Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service, (1985(1) AC 374):

"By "Irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses v. Wednesbury Corpn, (1948) 1 KB 223(233). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at."

98. At this stage, the Supreme Court Practice 1993 Volume, 1 Pages 849-850, may be quoted:

"4. Wednesbury principle – A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it" (Associated Provincial Picture Houses Limited v. Wednesbury Corpn., (1948)1KB223:(1947) 2 ALL ER 680 per Lord Greene M.R.)"

18. In the case of **Poddar Steel Corporation** (supra), the Hon'ble Supreme Court was considering a case where the tenders of respondent no.1 and some other bidders were rejected



as defective and the appellant's offer being the highest was accepted. The appellant deposited a sum of Rs.15 lakhs, but respondent no.1 challenged the decision by a writ petition before the Hon'ble Allahabad High Court contending that there was no defect in its tender and that the tender of the appellant could not have been validly accepted as the necessary condition of payment of Rs.50,000 as earnest money with the tender had not been complied with. The application was contested on the ground (i) that the respondent no.1 had not deposited the earnest money at all, thus was not entitled to a consideration of its tender and had no locus standi in the matter and (ii) that the appellant had substantially complied with the requirement by sending with its tender a banker's cheque marked and certified by the Union of India as good for payment. The Hon'ble High Court accepted the appellant's first ground, holding that the tender of the respondent had been rightly rejected for failure to deposit the earnest money, but allowed the writ petition on the finding that the appellant also did not satisfy condition of the tender notice as the earnest money was offered by the banker's cheque of a bank other than the State Bank of India. Against the said order of the High Court, an appeal was preferred before the Hon'ble Apex Court. In paragraph '6' and '7' of its judgment in



the case of **Poddar Steel Corporation** (supra) the Hon'ble Apex

Court held as under:-

“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank Clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories – those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka³ a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India⁴ but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which



amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However, it remains to be seen as to which of the two clauses, the present case belongs.

7. The nature of payment by a certified cheque was considered by this Court in Sita Ram Jhunjhunwala v. Bombay Bullion Association Ltd.⁵ Several objections were taken there in support of the plea that the necessary condition in regard to payment was not satisfied and in that context this Court quoted the observations from the judgment in an English decision (vide spargo case⁶) that it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing of the money backwards and forwards. This Court applied the observations to a transaction requiring payment by one to another. The High Court's decisions in B.D.Yadav Case¹ and T.V. Subhadra Amma Case² are also illustrations where literal compliance of every term of the tender notice was not insisted upon.”

³ (1990) 2 SCC 488

⁴ (1979) 3 SCC 489

⁵ (1965)35 Comp Cas 526: AIR 1965 SC 1628

⁶ Harmony and Montague Tin and Copper Mining Co.,In re, (1873) 8 Ch A 407:28 LT 153



19. The judgment of the Hon'ble Allahabad High Court was set aside by holding that the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the tender committee took the abundant caution by a further verification from the Bank.

20. In the present case also, I have noticed that in the covering letter addressed to the Executive Engineer, RCD, Road Division, Purnea the bank had clearly printed its address for verification of the correctness of the bank guarantee if required and therefore it was open for the respondent authorities to bring the discrepancy to the notice of the bank and verify the same when it was noticed before opening of the technical bid. In other words, the bank guarantee could have been verified and bank could have made necessary correction which was nothing but a kind of typographical error.

21. The respondents have come with a plea that in the electronic e-tender process uploaded documents cannot be rectified after the day of uploading which has already passed. This Court is not ready to subscribe the submission of the respondents for a simple reason that no system including the electronic system adopted by an organization for any purpose



may come in the way of correction of an inadvertent error. It is well said that “to err is human”. The electronic system has been developed by human beings, its software and programming are prepared by human skill, it has been introduced in the works department to facilitate processing of the work. It has not completely dispensed with the requirement of submission of the hard copies of the tender documents. When error of this nature which has been noticed in this case at the time of authentication before opening of the technical bid, a reasonable approach has to be adopted and no technicality be allowed to come in the way. If the error is such that it is an apparent typographical error which does not render the whole document ineffective, there is no reason as to why such errors be not allowed to be corrected within the time prescribed for opening of technical bid. It will depend upon the particular facts of the case and the nature of error which occurred. It is not to be construed as suggesting to extend the date and time of technical bid. I remember the well said quote “law bends before justice”. This Court would, therefore, take a view that in the given facts and circumstances the petitioner cannot be ousted from participating in the bid. The reason for not authorizing the bid of the petitioner is no longer even in existence now. This Court, therefore, allows this writ



application.

22. In the counter affidavit one of the pleas of the respondents is that the petitioner has been debarred by National Highways and Infrastructure Development Corporation Ltd., New Delhi vide Annexure- 'B' to the counter affidavit. It is submitted that as per the NIT conditions debarred/blacklisted contractors are not eligible, hence the writ application is fit to be dismissed. On this issue, learned counsel for the petitioner has relied upon a judgment of the learned Single Judge of this Court in the case of HCL Infosystems Vs. The Bihar State Electricity Board, Patna and others reported in 2013(2) PLJR 753 to submit that the learned Single Judge has in the said case taken a view in paragraph 31 that ".....in the absence of the constitutional power under Article 298 or similar statutory power, any action of a public body like the Electricity Board in the matter of blacklisting , even if exercised as being permissible in a rare case must remain confined to itself and cannot be used by other public authorities and bodies to disqualify a party.

23. I have taken note of submissions of both the parties on this point because it has been pleaded on behalf of the respondents as an additional ground to reject the writ petition. However, I am not going into this issue in the present writ



application for the reason that it would be pre-mature to enter into this issue. Such a question will arise only if the technical bid of the petitioner is rejected on the ground of blacklisting. Presently the only reason for which the technical bid of the petitioner has not been opened is the error which crept in the 2nd paragraph of the bank guarantee.

24. In the abovementioned backgrounds of facts and discussions, I allow this writ application and direct the respondent authorities to open the technical bid of the petitioner and if the petitioner qualifies in the technical bid his financial bid shall be opened along with other qualified bidders.

25. The writ application is allowed in terms stated hereinabove.

(Rajeev Ranjan Prasad, J)

Arvind/-

AFR/NAFR	AFR
CAV DATE	28.03.2019
Uploading Date	29.03.2019
Transmission Date	

