
(2006) 11 PAT CK 0004
In the Patna High Court
Case No : CWJC No. 10027 of 2006

Hot Mix Plant Contractors" Association	APPELLANT
Vs	
The State of Bihar	RESPONDENT

Date of Decision : 23-11-2006

Acts Referred:

Citation : (2006) 4 PLJR 584

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Chandra Shekhar, Anil Kumar Upadhyay, Yashraj Pradhan, Bishwa Bibhuti Kumar Singh in 10027, M/s Abhay Singh, L.B. Singh, Bishwa Bibhuti Kumar Singh in 10214, M/s Y.V. Giri, Mithilesh Kumar Rai and Virendra Kr. Roy in 10035, for the Appellant; Prashant Kumar Shahi (in all), Mr. Rakesh Kumar Sinha (in 10027), Mr. Rajesh Kumar (in 10214), M/s Mahesh Prasad and Archana Prasad (in 10035), for the Respondent

Final Decision : Dismissed

Judgement

Navaniti Pd. Singh, J.—The present three writ applications raise a common question and, as such, have been taken up for final disposal at the stage of admission itself with the consent of parties. The learned Advocate General has appeared on behalf of the State to oppose the writ applications. The petitioner in the first writ application is Association of Road Contractors espousing the cause of local contractors and petitioners in the other two writ applications are contractors themselves. Their common ground of challenge is to the notice inviting tender as issued by State Government in the Department of Road Constructions calling for competitive bidding in respect of integrated road development project in the State of Bihar being notice dated 2.8.2006 issued under the signature of Commissioner and Secretary, Road Constructions Department, Government of Bihar, Patna (Annexure-3 to the first writ application).

2. The challenge primarily is on the ground that the competitive bid is contrary to

statutory rules framed by the State Government and, therefore, to the extent of inconsistency, the said notice inviting tender being subordinate to the rules would have to be read down or modified or declared bad to that extent for being in conflict. The second challenge is to Clause-5 of the said notice inviting tender which provides for eligibility/criteria for prospective tenderers. With reference to the said Clause-5, it is submitted that the qualification/criteria has been so fixed that almost all local contractors of Bihar would automatically become disqualified or excluded from consideration and the last primal ground of challenge is that the State Government had taken a policy decision which had a long practice whereby short stretches of road were approved for repair or construction whereafter financial sanction was taken and tenders issued. This practice without any cogent research and without any cogent reason or rationale was given up while issuing the impugned notice inviting tender and large length of roads were unreasonably clubbed which could not have been done. In other words, there were no materials or lawful justification for clubbing large lengths of road. The effect of these alleged arbitrary and discriminatory actions was a total elimination of local contractors from participating in road tenders such as the present.

3. On the other hand, on behalf of State, the learned Advocate General would submit that it became important and necessary for the State Government to have an integrated plan for an integrated development of roads which is a basic infrastructural requirement in the State in order to boost the economic development of the State. What was submitted, inter alia, was that fragmented development and repair of roads had left the road communications in a bad shape directly and adversely affecting economic growth. It is these rival submissions that have to be decided in the present writ applications.

4. Before proceeding further, I deem it necessary to place on record the contents, in brief, of the impugned notice inviting tender being the competitive bidding as issued by the State Government in the Department of Road Constructions.

5. In the preamble of the impugned notice inviting tender, it is stated that the Government of Bihar has taken up an integrated road development project for upgradation of major district roads in the State at an estimated cost of Rs. 1400 crores. What has basically been done is that roads requiring major repairs and upgradation in a particular district/region have been clubbed in packages and it is intended that a prospective tenderer bid for one or more such packages. Under the said notice, there are about twenty such packages. Each package is of the value of above Rs. 35 crores or more. Most of them are above Rs. 50 crores. In other words, a contractor would have to bid for one package as a whole and cannot bifurcate or fragment it.

6. Clause-5 which is allegedly the main stumbling block for the writ petitioners in even applying for any single package is quoted hereunder:

5. The primary criteria for qualifications are:

(i) The bidder should, in the last five years, have had a minimum annual financial turnover {in all classes of Civil Engineering Construction Works) of at least an amount equal to 50% (fifty percent) of the estimated cost of package for which he proposes to bid.

(ii) Satisfactorily completed as a Prime Contractor (or as a nominated Sub-Contractor) at least one similar work of value not less than 25% (twenty five percent) of estimated cost of package for which he proposes to bid.

The details of qualifying criteria may be seen in the bid documents/ available for references at the location mentioned in column 6 of above table.

7. From the aforesaid, it would be seen that firstly various roads in one area have been clubbed together and the total value of work accordingly estimated. The by operation of Clause-5, it is provided that the contractor/tenderer should have an annual financial turnover of minimum an amount equal to 50% of the estimated cost of package. In other words, if the package is of Rs. 50 crores then he must have a minimum annual financial turnover in last five years of at least Rs. 25 crores. Secondly, the contractor should have executed at least one similar work of value not less than 25% of the estimated cost of package. In other words, if the package is of rupees Rs. 50 crores, he must have executed at least one work of Rs. 12.5 crores.

8. The petitioners state that the combined effect of Clause 5 is that if the package is of Rs. 50 crores, only those contractors who have had annual turnover of Rs. 25 crores in last five years and having executed at least one work of Rs. 12.5 crores can only be qualified to file their tenders. This, according to them, apart from other reasons, is quite arbitrary inasmuch as virtually no contractor of Bihar can fulfill these conditions as a consequence whereof they all would be eliminated leaving them with no work. All contracts would then go to big contractors or consortiums outside the State.

9. In substance, the question is whether the respondents have any authority to club roads in one area and whether the clubbing of roads is not arbitrary and discriminatory?

10. Shri Chandra Shekhar, learned Senior Counsel appearing for the first writ petitioner submitted with reference to letter dated 22.3.2006 (Annexure-12 to the first writ application) that the said letter which was addressed by the Secretary of the Road Constructions Department to, inter alia, the Chief Engineers laying down policy guidelines clearly envisaged that there would be one approval and one sanction and one tender for one work. One work would be a small part of the road for which cost evaluations are done. With reference to one such work (Annexure-10), it was sought to be impressed that financial sanctions from Accountant General were also taken for individual works. Now several such individual works falling within an area were clubbed and one tender dated 2.8.2006 was issued as one package which was clearly against the policy as disclosed in the letter dated 22.3.2006. It was, thus, submitted that as

administrative approvals and sanctions were separate for each such work, they could not be clubbed for tender and, as such, tender, as now issued, would be in violation of the said policy. It was then submitted by him that no policy change has been brought on record to justify such a tender. It is further submitted that what was the purpose behind clubbing of individual works is not disclosed nor is such a policy of clubbing based on any debate, deliberation or rationale. No reason for this abrupt change has been disclosed.

11. To this, the respondents have clearly averred and submitted that though previously long stretches of road were fragmented into small portions and cost worked out, approval and sanction sought for the work, but this resulted in fragmented workmanship and, therefore, the Government took a policy decision through Infrastructural Development Board constituted and that Board recommended integrated development of roads which had the approval of the State Cabinet and consequently this tender was issued. The very object of the tender was for an integrated road development whereby contiguous roads or roads in a particular area were clubbed together for an integrated repair and/or development by a single person which would be convenient to monitor and convenient to implement. It is further stated that the policy decision for such an integrated development of roads is neither detrimental to public interest nor arbitrary or discriminatory even though it may have effect of eliminating small local contractors keeping in view the magnitude of work and experience required.

12. To the submission of the petitioner that under the Bihar Contractors Enlistment Rules, petitioners being Class-1A contractors and, as such, eligible to apply for any contract of any value putting Clause-5 in the tender, thus, restricted the rights available to contractors of Bihar to participate in the present tenders and, thus, the tender was in conflict with the said Rules, the reply is that the Contractors Enlistment Rules are nothing but set of Rules framed by the State Government providing for registration of contractors, as work is to be allotted to such registered contractors. It does not provided that tenders cannot provide for special eligibility conditions. In other words, State submits that as a consequence of registration, contractors would be eligible to participate in Government tenders subject to their eligibility as per tender conditions. For example, if a tender is for construction of a bridge then it is not that any Class-1A contractor who has no experience of construction of bridge could be permitted to undertake the work. Similarly, a Class-1A contractor who has never executed any work of this magnitude and, as such, lacks the experience or the financial wherewithal cannot be given the contract merely because he is a Class-1A contractor.

13. To my mind, the submissions on behalf of petitioners are misconceived. With regard to the first part that there was a policy guideline issued by virtue of letter dated 22.3.2006 (Annexure-12), first suffice to say that once a policy is laid down, it does not follow that the policy cannot be changed. We are in a growing economy and in an organic State. Mere changes in policy cannot be termed as

arbitrary unless the policy itself is shown to be arbitrary or discriminatory in its application or is without any reason or rationale. In the present case, it would be seen that the Government has taken up integrated development of road as against fragmented development thereof as being done in the past. The policy of integrated development of road which is a basic infrastructure cannot by any stretch of imagination be said to be arbitrary or discriminatory. Packages, as indicated above, are with regard to roads in a particular district or in a compact region of more than one district. This clubbing is for the purposes of integrated development within one region as a package. It is different fragments of road within an area put together in one basket to be taken up for repairs or development as one package. Merely because approvals/sanctions were taken in parts but put together in one tender as a package cannot make it bad or arbitrary. If individually they were valid and good, compositely they cannot become bad and arbitrary.

14. Secondly, the State has produced the files which clearly show that the matter was considered by the Infrastructural Development Committee constituted by the State Government who had approved the model tender forms and approved the policy of integrated road development. This policy and decision of the Government is itself reflected in the preamble of the impugned notice inviting tender. This itself shows a change in the governmental policy and that too with a valid purpose.

15. To my mind, once it is held that the policy on the face of it is neither arbitrary nor capricious nor discriminatory then it is not open to the Courts to go into the question as to what were the deliberations which led to the change in the policy or whether Government had enquired into, obtained statistics to justify the change of policy. Merely because policy is abruptly changed this, by itself, does not render the policy arbitrary in view of this Court.

16. Shri Chandra Shekhar, learned Senior Counsel relied on the decision of the Apex Court in the case of Bangalore Medical Trust Vs. B.S. Muddappa and others, and in particular para-graphs-48 and 49 thereof to submit that change of policy was akin to exercise of discretion and thus in words of the Apex Court, the discretion being effective tool in administration. But wrong notions about it results in ill conceived consequences. In law it provides an option to the authority concerned to debate one or the other alternative but a legal exercise of discretion is one where authority examines the fact and is aware of law and then decides objectively and rationally what serves the interest better. The manner in which discretion is exercised would fall below the minimum requirement if it does not take into account relevant considerations. To my mind, there can be no exception to the said principle but policy making and exercise of discretion are two different things. Policy is the general direction in which the Government decides to move or function. It is the guiding principle for exercise of discretion in particular matters. They are two different and distinct things. Discretion is guided by disclosed policy, may be a policy of Government or the policy

emanating from legal provisions. In that case, the Apex Court disapproved the conversion of park land into land for nursing home without following the procedure prescribed by law. It was found that there were no notifications as envisaged under the relevant statute authorising such a change. Various statutory provisions were not complied and, therefore, the exercise was considered to be on a wrong notion of discretion. From this, it does not follow that what the Apex Court held was that even so far as policy decisions are concerned, the State has to satisfy the Courts that the State has examined various facts and decided objectively and rationally what serves the interest better. Government, in my view, is free to lay down policy for guidance of its future actions subject to the policy not being arbitrary or discriminatory or falling foul with constitutional or statutory provisions. To my mind, applying the above test, it cannot be said that merely by clubbing roads in a region for integrated development, the Government policy in this regard is either arbitrary, discriminatory or fanciful in any manner nor does it conflict with any constitutional or statutory provision having force of law.

17. Coming to the question of conflict between the Contractors Enlistment Rules and the terms of qualification, as contained in Clause-5 of the notice inviting tender, suffice to say that the two are different. The submission on behalf of the State, as made by the learned Advocate General, is correct. Enlistment Rules are for the purposes of registration of different categories of contractors. It does not say or provide that once registered, they, as a matter of right, be eligible for being considered to be given any tender without any further qualifications. The example given earlier is appropriate to exemplify the situation. A contractor who has no experience of construction bridges cannot be entrusted with a bridge construction contract even though he may be a Class-1A contractor. Every tender has its peculiarity and it is for Government to decide the eligibility therein so long as such a decision is not shown to be arbitrary. In the present case, the only thing that is repeatedly urged to be arbitrary is that on application of the qualification terms as contained in Clause-5 of the notice inviting tender, the small contractors of Bihar get eliminated. In my view, there is nothing arbitrary or fanciful about it. A Government is free to decide that if a work of the order of about Rs. 50 crores is to be given, it should be given to persons who have had requisite experience to carry out a work of such magnitude. Therefore, the essential criteria is work experience which cannot by any stretch of imagination be said to be arbitrary. Work experience has a rational connection to the work to be done. The nexus is neither illusory nor arbitrary.

18. Next it is submitted that there was no Government decision to support the tender. As noticed above, apart from the notice inviting tender itself disclosing of Government policy of integrated road development, Government files have been produced to show that it was Infrastructural Development Board/Committee which had considered these matters and decided the policy of integrated road development which had Cabinet approval. This is also stated in the counter affidavit of the State. The challenge on this count, to my mind, cannot be

entertained.

19. It is next submitted by Shri Chandra Shekhar that petitioners had a legitimate expectations to get such tenders. In support of this submission, he referred to the letters of the State informing petitioners and their like that Nationalised Banks were willing to give loans to contractors for, inter alia, setting up hot mix plant. These were circulated to contractors who had purchased hot mix plants in the expectation of getting business. Now with the abrupt change of policy, their investments would be a futile exercise and cause great financial hardship. My answer to this would be that this notice inviting tender for integrated development of roads is not the only tender in respect of roads that are to be issued or that are being issued. There is ample work available otherwise. It is not that all roads of Bihar have been taken care of by the present tender. Contractors are essentially business people and they make investment not for one tender but for business in general. It is not that their investment would go in vain. It is not that the Government had assured them at any point of time that if they had a hot mix plant or had made such investments, they would be given these road construction contracts. In absence of any such assurance, the doctrine of legitimate expectation cannot be applied. The petitioners cannot take aid of the doctrine of legitimate exception to force the Government into giving them the contracts even though they have no experience of working contracts of this magnitude. On behalf of petitioner, reliance has been placed on the judgment by Apex Court in the case of J.P. Bansal Vs. State of Rajasthan and Another, and in particular Paragraph-26 thereof where the Apex Court has held that for legitimate expectation to arise the decision of the administrative authority must effect the person by depriving him of some bona fide right or advantage which either (i) he had in the past been permitted by decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. This is in two parts. First, the procedural part dealing with representation and substantive part that representation conferring benefit would be continued. It would be seen from this citation that to invoke this principle of legitimate expectation, there must be an express promise or representation by one who is not permitted to change without notice or hearing or informing other. In the present case, there was no such representation. Moreover, the doctrine of legitimate exception cannot be used to stifle policy changes which is an inherent part of governmental function. In my view, the case as cited has no application to the present case.

20. Now coming to the submissions of Shri Abhay Singh, Senior Advocate made on behalf of the petitioner in the second case. He has filed a written submission as well in support of the arguments as made. His first submission is that the Secretary-cum-Commissioner, Road Constructions Department was not

competent to change the policy decision. It was only the Minister or the State Cabinet in terms of Rule of Executive Business and in his view, this fact had not been denied by the State in their counter affidavit. His second submission was that the scheme as provided under the PWD Code which was followed for a long period of time of issuing tenders for small portions in consonance with the administrative approval and other sanctions must be adhered to on the grounds of legitimate expectation and predictability of decision. His third submission was that if there was a change in policy contemplated by the State then it must show that it had taken an informed decision and State must establish compelling facts to justify the change of policy. In other words, he wanted the Court to apply the "Hard Look Doctrine" to test the exercise of discretion by the State and reliance was placed in the case of *M/s Prathibha RCC Spun, Pipe and Cement Products and Ors. vs. State of Karnataka and Anr.* since reported in AIR 1991 Karnataka 205 and in particular paragraph-16 thereof. Reliance was also placed on Administrative Law, Third Edition by P.P. Craig and discussion therein with regard to test for substantive review of exercise of discretionary powers.

21. So far as the first issue raised by Shri Abhay Singh, learned Senior Counsel with regard to the power of Secretary-cum-Commissioner, Road Constructions Department to alter a policy is concerned, suffice to say that Rules of Executive Business, as framed, are internal rules for Executive Government and are directory. Secondly, in the counter affidavit, it has been stated that the change of policy was duly considered by the Bihar Infrastructural Development Authority, a body constituted under the Bihar Act 8 of 2006 being an Act passed by the State Legislature and enforced with effect from the 21st of April, 2006. This Bihar Infrastructural Development Authority in its meetings had approved the present tender system in principle which is under challenge. It is stated in the counter affidavit that this has Cabinet approval. Further, the very preamble to the notice inviting tender would show that this action was taken pursuant to governmental policy decision for integrated infrastructural development. In the counter affidavit, it has been specifically stated that the past experience in road construction/maintenance, there were a lot of drawbacks leading to bad roads which had gained notorious proportions in the State and, therefore, there was a need for change in policy to ensure better growth in this sector and, therefore, the entire policy was changed. To my mind, this is sufficient justification for change of policy even if the Court is permitted to go into this question though, in my mind, this Court cannot in such matters direct the State to justify its policy as may be the case in exercise of discretionary powers. What the Court can look into is whether the effect of policy is arbitrary and discriminatory or the policy itself is violative of any constitutional provision and/or requirement. It is established that it is the governmental body with State Cabinet approval which changed the policy and not merely the Secretary-cum-Commissioner, Road Constructions Department, Government of Bihar.

22. Coming to the second ground that PWD Code must be adhered to on grounds of legitimate expectations. I think firstly that PWD Code again is a Code not akin

to any statute nor is it a statutory Code for implementation of which any writ could lie. In relation to contractual matters, as contained in the PWD Code, they are set of guidelines laid down by the Government for its officers and for conduct of its business. They do not confer any right on any party nor bind Government as a statute. No mandamus can be issued in this regards and one may refer to the decisions of the Apex Court in the case of G.J. Fernandez Vs. State of Mysore and Others, and in the case of Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, . In my view, the learned Advocate General is correct in submitting that no specific provision or rule, as contained in PWD Code, has been shown which restricts the right of Government in any manner of clubbing different sections/parts of roads in an area for the purposes of tender. He is again correct in saying that if the Government is within its right to issue notice inviting tenders for small stretches of road then merely by clubbing those small stretches within a region to make it a package for integrated development would not render it arbitrary or discriminatory in any manner.

23. Coming again to the aspect of legitimate expectation, the said doctrine would have no application in the present case. The present case is not one where under the same policy, some procedure is changed without informing the concerned parties. If under an existing policy, a person has been conducting himself in a particular manner, legitimately expecting that the State would be conducting itself in a particular manner of long standing practice then if the State desires to change its practice, it must inform the person concerned before hand and cannot do it in middle of an ongoing process. In the present case, the long outstanding policy was altered and replaced by a new policy and it is under that new policy, the notice inviting tender has been issued. Therefore, it cannot be said that there is any legitimate expectation that the petitioners to be informed or consulted before change of policy by the Government. So far as predictability of decision is concerned, again the arguments suffers from the same fallacy. Under the new policy, the decisions are predictable as all terms and conditions are laid down in the notice inviting tender. If the learned counsel meant that merely because old policy is being changed radically it falls foul with the concept of predictability, of governmental decision then in my view the submission is misconceived. As noted above, policies are organic. They grow. They change. This is inherent in governmental functions. The change cannot be restricted on grounds of legitimate expectations and/or predictability of governmental decision. Policy once made has been made known by the notice inviting tender to all concerned. In my view, therefore, this submission does not ensure in support of the petitioner.

24. It is then submitted that the Court must adopt the "Hard Look Doctrine" to examine the policy. To my mind, the application of this doctrine has not yet received judicial recognition by Courts in India. "Hard Look Doctrine" is an American doctrine used by American Courts whose acceptance in the United

Kingdom is itself a matter of debate. Wade in his Third Edition on Administrative Law has pointed out that the "Hard Look Doctrine" was originally one of judicial restraint, restricting review of decisions of policy provided that the Agency had taken a hard look at the whole matter and decided rationally but the same title has been given to an intensive technic of review where the Court investigates relevance of motives, of evidence and preparatory studies, and other such factors. To my mind, in India, governmental policy decisions cannot be investigated into in that manner as it is well settled that judicial review of governmental policy decisions is extremely limited. As stated above, judicial review of policy decisions in India is limited to seeing whether the policy is within the forecorners of the Constitution and is not arbitrary or capricious in itself or in its application. What went behind and what led to the change of policy is not to be enquired into by the Courts to see whether the Government had conducted any exercise or collected any data or had taken relevant considerations in formulating the policy. What is to be seen is the policy as enunciated is in accordance with the constitutional provisions that is whether it is within the competence and whether the policy is not arbitrary or discriminatory or unreasonable in itself and in its application. In other words, Courts could look to the policy and what follows from it and generally not what was behind the policy and how and why it was formulated. The reason, to my mind, is that it is the policy and its implementation that affects a citizen and not how and in what manner and on what consideration policy was made. It is something akin to challenge to a legislation. It is the legislation or provisions thereof in its application that is challenged. It is not procedure by which legislation was made is challenged unless the procedure is in conflict with the procedure established by the Constitution. What led to the introduction of a Bill, what were the considerations thereof, what were the debates in the Parliament and how it was passed are not readily open to judicial scrutiny.

25. Now come to the passage from P. P. Craig Third Edition on Administrative Law and the discussion with regard to the "Hard Look Doctrine". Under the heading, "The appropriate test for substantive review," the author gives one option and discusses it in relation to the hard look standard of review for discretionary decisions. The objection would be to ensure that policy alternatives are adequately considered, that reasons are proffered for agency decisions and that diverting interests can present their views to the agency and have those views adequately discussed. The author points out the difference between the Anglo Saxons approach of review jurisdiction and those adopted by Courts in United States and points out that the difference lies in the evaluation and the meaning given to hard look doctrine. The label "Hard Look" developed in essence because the United States" Courts began to desire more control than allowed by this limited test of review within United Kingdom under the Wednesbury Test. "Hard Look" is nothing but a review of "Adequate Consideration".

26. To my mind, if we were to adopt American concept of "Hard Look" and enter into the realm of questioning of policy making jurisdiction of Government, the

Courts then would start substituting its own views on policy rather than testing the policy and its application. To my mind, administrative law and judicial review jurisdiction of Courts in India have not gone to that extent. Even in the case of *M/s Pratibha RCC Spun, Pipe and Cement Products and Ors.* (supra) when the Court notes the "Hard Look Doctrine", it does not say that it is open for the Court to adopt the said doctrine and investigate into the policy making process. To my mind, those observations as made in paragraph-16 of the reports are in relation to the locus standi of the petitioners to assail the constitutionality of the impugned action which lacked statutory warrant but goes no further.

27. In substances, a policy is open to challenge as being contrary to the constitutional provisions or in its application it falls foul with constitutional requirement but the policy making process cannot be gone into by Courts like decision making process. The judicial review is available on very limited score.

28. In the present case, it is clear that the matter was considered by a statutory committee constituted by the Government and a policy for integrated road development was taken and approved by the State Cabinet which led to the notice inviting tender, as such, one can only attack the provisions of the notice inviting tender but not the policy behind it.

29. So far as the challenge to the effect of the policy as apparent from the notice inviting tender is concerned, the challenge is that the right to enter into contracts with the Government is being restricted and that too for no good reason and on no justifiable grounds. To my mind in the facts of the present case both these grounds of challenge is not sustainable for the simple reason the right to enter into contract is neither being restricted nor taken away. What is being restricted is that certain minimum experience and financial qualifications have been put which cannot be termed as arbitrary. A Government has to be satisfied with the requisite experience and financial capability of a party with whom it would like to interact. If a contract of Rs. 50 crores has to be given then surely it cannot be given to a person who has never handled contracts of such proportions. He lacks the experience both in the matter of magnitude of contract and its financial implication. So far as justifiable ground is concerned, the policy statement itself is adequate justification coupled with past experience. I may hasten to add that a policy which, on the face of it, is not arbitrary, non-discriminatory nor is it such in its application may in the end turn out to be not as effective as thought/expected but that would be a matter to be considered by the policy maker and such other persons concerned who would be rich by experience of implementation of new policy and would make amends to the earlier policy but Courts cannot speculate at this juncture about failure of policy or the policy failing to achieve its object and declare the policy invalid at its initial stage itself.

30. It would, thus, be seen that the contentions as raised by Shri Abhay Singh does not find favour with this Court.

31. Mr. Y.V. Giri, learned Senior Counsel appearing for the third writ petitioner,

while adopting the arguments as made by the earlier counsel as noted above, submits firstly that the procedure having been prescribed in PWD Code then by implication all other procedures are prohibited on the principle that when law prescribes a procedure then an act must be done in accordance of that procedure and all other modes are impliedly prohibited. There is no exception to the principle of law as enunciated but the question is that does the PWD Code have a statutory sanction and whether there is any provision therein which prohibits the notice inviting tender or the manner in which it has been issued. No provision has been brought to the notice of this Court of the PWD Code which could be said to be violated by the notice inviting lender. Moreover PWD Code cannot control the express power of formulating new policies and implementing them. As noted above, PWD Code has not been framed with reference to any statute nor is it in aid of any statute nor has it been framed in exercise of any statutory powers. The challenge is, thus, misconceived.

32. Reliance was then placed on a decision of Apex Court in the case of Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, and in particular paragraphs-32 and 33 thereof. In paragraph-32, the Apex Court has quoted from G. P. Singh's Principles of Statutory Interpretation and in paragraph-33, reference has been made to earlier decisions of the Apex Court. What has been pointed by the Apex Court is the grounds on which delegated legislation can be challenged. It has been held that delegated legislation has to follow the policy formally, broadly and substantially. In the present case, it has not been shown that while issuing notice inviting tender any part of the policy has been violated, the policy being of integrated road development and not a fragmented road development.

33. Therefore, considering all aspects of the matter, I am of the view that now there is a new governmental policy towards integrated infrastructural development for the purposes of which Bihar Act 6 of 2006 has been made. It is pursuant to the said policy decision as approved by the State Cabinet that the impugned notice inviting tender was issued under the signature of the Secretary-cum-Commissioner, Department of Road Construction. The said notice inviting tender does not suffer from any constitutional infirmity and in particular Clause-5 thereof which is qualification terms is neither unreasonable nor arbitrary nor discriminatory even though by its application, small contractors of Bihar get excluded. I may again hasten to add that it is not that no work is left for the petitioners. There is substantial works still available under different schemes. I, therefore, find no merit in the writ applications and they are, accordingly, dismissed.