

(2006) 12 PAT CK 0068
In the Patna High Court
Case No : CWJC No. 12197 of 2006

National Project Construction Corporation Limited and Another **APPELLANT**
Vs
The State of Bihar and Others **RESPONDENT**

Date of Decision : 21-12-2006

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2007) 2 PLJR 40

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Ashwani Kumar Sinha and G.P. Singh, Ram Balak Mahto, Ravi Shankar Dwivedi, Pathak Dhananjay Kumar and Ranjan Kumar Dubey, for the Appellant; P.K. Shahi and Vikas Kumar, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—The present writ application has been filed by the petitioners for quashing the notices inviting tender being tender notice No. 9 of 2006-2007 as published on 7.10.2006. The parties have filed their counter affidavits and replies and with consent of parties, the matter has been heard at length for final disposal at the stage of admission itself. The matter was finally heard and order reserved on 5.12.2006. The learned Advocate General even at that stage did not inform this Court that pursuant to the challenged notice inviting tender, selection had been made as probably the Department also did not take him in confidence in this regard. When this Court was to deliver order, the intervention application was filed by M/s Interlink Coal Private Limited for being heard in the matter as by the Department's letter dated 9.12.2006, they were informed that for part of the work as per the impugned tender notice, they had been selected in the meeting of the Tender Committee finally held on 5.12.2006, the day the hearing concluded and order reserved by this Court. This Court, considering creation of third party rights before order was delivered, though after hearing concluded, considered it proper to hear the intervener in the matter as

well before delivering order even though the actions of the Department in doing so was itself questionable at this late stage. At the hearing, the intervener frankly admitted that their right depended upon validity of the impugned tender notice and that their selection was made by the Department which had notice of the pendency of the writ application and the consequence that could follow if the notice was set aside.

2. The petitioners, National Project Construction Corporation Limited (hereinafter referred to as "the Corporation") is a Central Government Undertaking established for facilitating construction of public buildings. It has taken up large number of contracts including civil buildings contracts within India and outside India as well over past several decades.

3. The facts, in brief, may be noted hereunder. After the bifurcation of the State of Bihar into Bihar and Jharkhand, State of Bihar decided to set up an Institute of Technology as a premier institute in the State at Chapra to be named as Lok Nayak Jai Prakash Institute of Technology. This was to be an integrated scheme whereby at one place all facilities, amenities for students, teachers and studies were to be developed within the same campus. With this object, the entire project was divided into thirteen building projects and tenders were floated in the year, 2004 for a total estimated construction cost of about Rs. 30 crores. For various reasons, nothing could come out of the tenders and the project kept languishing and a second notice inviting tender was again unsuccessfully issued. Then for the thirteen projects within the scheme, notice inviting tender was again issued on 7.5.2005. Certain tenders were received in response this time. One of them was from M/s S.R. Constructions for one item out of the thirteen tenders and that too appears to have been at about 38% higher than the prescribed rates. It appears by the time those tenders were being considered, the State was put under President's Rule. Normally, as per the PWD Code, if any work of public nature is to be executed as per PWD Code, public tenders have to be invited from public at large subject of course to various eligibility conditions. In the present case as well as in several other cases, the Government was finding it difficult to get public works done as responses for various reasons were not forthcoming or not encouraging and, therefore, the Chief Secretary sought permission of the Governor to relax the provisions of the PWD Code and permit the Government to seek tenders from Public Sector Undertakings or such national reputed contractors exclusively. One apparent reason for this departure or a change in policy appears to be that if public participation was restricted then the inappropriate practices of groups of private contractors and their extra legal methods of getting contracts for themselves or restricting others would be eliminated leaving public sector and reputed construction companies to come within the State to take up and complete public work. The Governor approved this proposal thereby permitting Government to call for tenders only from Public Sector Undertakings and such other contractors. Accordingly, when advertisement was again issued on or about 16.5.2005 calling upon Public Sector Undertakings, the petitioners and certain other Public Sector Undertakings

applied for the job. It would, thus, be seen that there were two sets of tender. One pursuant to the first advertisement dated 7.5.2005 and the second pursuant to advertisement dated 16.5.2005 which was restricted to Public Sector Undertakings.

4. It appears thereafter that the matter was considered by the State Government and ultimately they issued letter dated 13.9.2005 to the petitioners-Corporation (Annexure-2) clearly indicating that pursuant to the tenders invited for Lok Nayak Jai Prakash Institute of Technology, Chapra, the petitioners-Corporation had been selected on the terms and conditions stated in that letter. In the said letter, it was, inter alia, stated that the date of commencement of the work would be fifteen days after land and plans were made available to the petitioners and the petitioners would be required to execute appropriate agreement in form F2 for the said work on the rate tendered by them which was 9.5% above tender rate including agency charges.

5. As pointed out above, at this time, there was one other tender of M/s S.R. Constructions Private Limited for some of the work pursuant to the first advertisement. It appears that the said firm being aggrieved by the action of the State Government in giving a go by to its tender and calling upon Public Sector Undertakings to file their tenders and ultimate selection of the petitioners-Corporation by the aforesaid letter dated 13.9.2005 filed a writ application before this Court being CWJC No. 12510 of 2005 and on 6.10.2005 obtained an absolute stay of the selection of petitioners by letter dated 13.9.2005. The result was all further proceedings in relation to allotment of work to the petitioners-Corporation came to an absolute halt. Petitioners-Corporation, apart from State, was a party to the said writ application. Regrettably, at this stage, the State did not consider it urgent enough to promptly contest the matter which would be evident from order dated 18.10.2005 passed in the said writ application whereby two months' time was sought to file counter affidavit and, as such, the matter stood adjourned with the interim order for three months to enable petitioners to file rejoinder to counter affidavit to be filed.

6. It would, thus, be seen that in the said writ application what was in question was not only the challenge to the change in governmental policy in awarding such tenders to Public Sector Undertakings and their like to the exclusion of general public but also to the manner in which petitioners-Corporation was selected by the Government. Thus, the challenge was to the validity of governmental action in selecting the petitioners-Corporation for the entire work in question.

7. Ultimately, it appears, Government appeared and filed its counter affidavit which was apparently sworn by one Md. Serajuddin, the Executive Engineer, Buildings Division, Building Constructions Department, Government of Bihar, Chapra on behalf of the State. This fact, I am mentioning because of some relevance which would be apparent at a later stage of this order. The stand of the State in the counter affidavit was that the policy was justifiedly changed. It was

validly changed and the selection of the petitioners-Corporation was neither mala fide nor invalid on any count. Petitioners-Corporation was respondent No. 8 in the said proceedings. It also appeared and defended its selection. Thus, it would be seen that the Government defended and stood by its selection of petitioners-Corporation. The writ application was then heard at length and dismissed by order dated 17.2.2006 (Annexure-4). A reference to the said order would show that the State fully supported its actions and justified the selection of petitioners-Corporation which was accepted by this Court. Thus, the selection of petitioners-Corporation and allotment of constructions works of Lok Nayak Jai Prakash Institute of Technology at Chapra in favour of the petitioners-Corporation was held to be valid in law on contest as between the said S.R. Constructions Private Limited on one hand and State of Bihar, its officials and petitioners-Corporation on the other hand.

8. Soon thereafter, the petitioners-Corporation was informed by letter dated 8.3.2006 (Annexure-5) that as the writ application had been dismissed and the stay granted earlier vacated, the petitioners should get in touch with the authorities and proceed further in the matter. Petitioners-Corporation, acknowledging the aforesaid, by their letter dated 11.3.2006, requested that before entering into agreement, they be informed the total value of work for which agreement had to be executed to which the response was that the estimate which had been approved in 2003 was of the amount of about Rs. 30 crores for which there was administrative approval. For some time thereafter, there was a lull in the matter. On 18.5.2005. the petitioners suddenly received an innocuous letter from the Secretary to the Engineer-in-Chief referring to the petitioners-Corporation's selection by letter dated 13.9.2005 and subsequent dismissal of the writ application challenging the selection and asking the petitioners-Corporation whether in view of lapse of over seven months since the selection, they were still ready to take up the work on the same conditions. I have referred to this as innocuous inasmuch as from immediately earlier correspondences, it would be clear that there was no misgiving so far as the petitioners-Corporation is concerned about their commitment to undertake the work. This was immediately responded by the petitioners-Corporation by Their letter dated 29.5.2006 saying that they would abide by the rates, terms and conditions as per the letter dated 13.9.2005 and they were ready to sign the agreement, furnish guarantee etc. figures for which may be supplied so that the work could start in full swing after signing the agreement. This was so as the petitioners-Corporation had made all arrangements for executing the work. Again, apparently finding no proper response, they wrote by their letter dated 31.5.2006 that as technical sanctions for certain buildings were still in process, they were interested in taking up work for those buildings for which technical sanction had already been accorded and, as such, they were prepared to furnish bank guarantee so that work could start. To this, there was a response asking for a bank guarantee of about Rs. 5.50 lacs. This was only on basis of rough estimates. The petitioners asked one of their sub-contractors to whom some

work was outsourced to furnish the bank guarantee which was, accordingly, issued on 14.6.2006 and submitted to the respondent Executive Engineer by the said sub-contractor and the guarantee bond clearly stated that they were sub-contractors and on behalf of petitioners, they were submitting the bank guarantee. It appears while the matter was getting delayed, the petitioners-Corporation which had taken steps to make arrangements for execution of the work, posted officers etc. at Chapra. They approached the Minister concerned directly as by then the new Government had been formed. Apparently, the Chief Minister was also apprised and to push matters, he made a formal inauguration of the construction work of the project on or about 19.7.2006. As petitioners assert that this apparently did not carry well with the Department, they by their letter dated 14th September, wrote to the Commissioner-cum-Secretary, Building Constructions Department, Government of Bihar and requesting that he should intervene in the matter and direct the officials for signing agreement and issuing drawings etc. so that the work may be started expeditiously. Now, instead of any further communication, the impugned tender notice dated 7.10.2006 (Annexure-1) has been issued calling for fresh tenders meaning thereby that all earlier process was set at naught and all the efforts, time and money spent by the petitioners-Corporation consequent to their selection went down the drain. This brought the petitioners-Corporation to this Court in the present writ application.

9. In the counter affidavits filed by the State, sworn by one Md. Serajuddin, the Executive Engineer who had on behalf of State sworn the counter affidavit in the earlier writ proceedings supporting petitioners-Corporation's selection, the stand that has been taken is virtually that the selection of the petitioners-Corporation, relaxing the PWD Code, was not proper. What is further urged then by the learned Advocate General appearing for the State was that in any view of the matter there being no formal agreement executed, the writ application was misconceived. In other words, State now took upon itself to challenge its own actions and decisions as not being appropriate. It is the correctness of this, in the facts above noted, that has to be decided.

10. Having considered the aforesaid facts, I am of the considered opinion that once State has defended its action in selecting the petitioners before this Court then the State cannot now be permitted to resile from the said stand or take a contrary position as it is bound by its stand and the order of this Court in the earlier writ application holding that the selection of the petitioners was valid and could not be assailed. The principle of constructive res judicata would come into play inasmuch as the finding given by this Court in the earlier writ application was as between the that writ petitioner, the State and the petitioners-Corporation and the issue was the validity of petitioners' selection which was then supported by the State and a finding invited from the Court on that account. That finding would bind all the parties and the parties cannot now resile from that. On this short issue itself, it can safely be held that once this Court held the selection of the petitioners-Corporation by the State valid, it does not lie in the mouth of the

State to say that the selection was invalid in a subsequent proceeding in respect of the same very matter.

11. Secondly, I may also point out that it is not open for the State to assail its own action only because Government has changed. Petitioners-Corporation was duly and properly selected. Selection was upheld by this Court. Now Government cannot be permitted to retract and give it a go by because, Government is a continuing body. Its constituents may change but the Government continues.

12. One fact I would like to notice here is that the counter affidavit on behalf of the State in the earlier writ application was sworn on behalf of the State by the same very person who therein sought to justify the selection of petitioners-Corporation. He has now sworn the counter affidavit challenging the validity of selection of the petitioners in respect of the same very matter in the present writ application. To the Court, this appears to be highly inappropriate and probably the respondents do not realise their responsibilities, duties and the consequences of such an action which cannot be countenanced by this Court and has to be strongly condemned.

13. Lastly, to the contention of the learned Advocate General that there being no agreement executed as yet and, therefore, no writ will lie, the answer is two fold. Firstly, the failure to execute the agreement is on the State Government because petitioner has been repeatedly requesting for executing the agreement. It is common principle of law that no one can take advantage of his own default. In this respect, I may refer to what Chief - Justice Chagla had to say in the case of All India Groundnut Syndicate Limited vs. Commissioner of Income Tax, AIR 1954 Bombay 232:

But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under sub-section (2) of Section 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person--we take it that the income tax Department is included in that definition--can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default".

14. Secondly, even in pre-contractual stage, a person has a right to move the Court for appropriate writ. Without dilating, by way of illustration, I may refer to cases dealing with promissory estoppel and/or legitimate expectation which are all cases of pre-contractual stage because once a contract is entered into then parties are to be governed by the contract. Here, the grievance is that the petitioners having been duly selected, the agreement was of a matter of formality to follow and depended upon the State itself. The selection could not be set at naught except for justifiable reasons. In the present case, there is no justifiable reason and. as such, in absence of any justifiable reason, the action of

the State would be per se arbitrary. Action being arbitrary per se would be violative of Article 14 of the Constitution of India. It is too late in the day to urge that in contractual matters, the State action is not governed by Article 14 of the Constitution of India. To my mind, the proposition that all governmental actions including that in contractual field, are governed by Article 14 of the Constitution of India is now so well established principle. It needs no precedence to support.

15. Now I must consider the contention of the intervener. His right is totally dependant on the validity of the impugned tender notice because if the notice is held to be invalid then all consequential actions fall including selection of the intervener. The intervener adopted the argument of the learned Advocate General which has been considered above and repelled. That being so, the intervener do not get any right over and above, or in conflict with the right and entitlement of the petitioners-Corporation. However, in fairness to the learned Advocate General, it may be noted that to the extent of work for which petitioners-Corporation was selected, the intervener respondent cannot get any claim or right but to that part of the work which is not to be given to the petitioners-Corporation and for which the intervener respondent has been selected, its selection for the remaining part may not be interfered with even though the very tender notice, pursuant to which intervener respondent had responded, is held to be bad. I, accordingly, hold that the entire notice inviting tender is not invalidated but only to the extent to which petitioners-Corporation had been selected. To put it simple, the entire project, if consisted of ten different and distinct parts out of which seven were to be allotted to petitioners-Corporation then only remaining three would be deemed to be covered by the impugned tender notice and open for settlement with any other person including intervener respondent.

16. In the result, I find that the writ application must succeed and the impugned notice (Annexure-1) is bound to be quashed and is quashed as such to the extent as indicated above. The State would be well advised to proceed expeditiously in the matter as for one reason or the other, a project of public importance has got delayed for almost two years and it is expected that work is taken up in real earnest before matters get further complicated. The writ application is, accordingly, allowed.