

(2019) 09 PAT CK 0125

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 14241 Of 2018

Raj Informatics Construction

APPELLANT

Vs

State Health Society And Ors

RESPONDENT

Date of Decision : 18-09-2019

Acts Referred:

Contract Labour (Regulation And Abolition) Act, 1970 — Section 13(3)
Contract Labour (Regulation And Abolition) Central Rules, 1971 — Rule 29
Constitution Of India, 1950 — Article 226

Citation : (2020) 1 PLJR 21

Hon'ble Judges : Rajeev Ranjan Prasad, J

Bench : Single Bench

Advocate : Aditya Prakash Sahay, Kishore Kumar Sinha, Shashi Shekhar, Gyan Prakash, Siya Ram Sahi

Final Decision : Dismissed

Judgement

1. This writ application has been preferred for issuance of a writ of Mandamus commanding the respondents District Health Society, Gaya (hereinafter referred to as the 'Society') to make public the proceedings of the opening of Technical and Financial Bid submitted with respect to the tender notice dated 24.07.2018 for the work of cleanliness and maintenance of the Hospital Compounds and its surrounding area, laundry work and electricity supply from silent generators in Sadar Hospital, Sub-Divisional Hospital, Referral Hospitals, Society Health Centers, Primary Health Centers, Additional Primary Health Centers and L1 (delivery point). The petitioner thereafter, prays for setting aside of the proceedings of the Tender Committee by which the Technical Bid of the petitioner has been rejected.

2. It appears that during pendency of the writ application the petitioner has filed Interlocutory Application No. 01 of 2019 for impleading the qualified Bidders/ Agencies. I. A. No. 01 of 2019 was allowed by this Court on 03.04.2019. By virtue of the same, respondents no. 7 and 8 came to be impleaded as party

respondents and they were served. The private respondents in whose favour the work orders have been issued have appeared and filed their respective counter affidavits. Here it is important to take note of the prayer made in the I. A. No. 01 of 2019 which are as under:

"That the present interlocutory application is being filed for impleading qualified bidders/agencies with respect to tender notice dated 27/04/2018 in the array of respondents in the main writ application as they have become necessary parties and their rights have been created in view of the facts stated herein below."

3. Initially when the writ application was taken up for consideration, before notice, learned counsel for the petitioner had shown a prima facie case that the respondents have rejected his Technical Bid on flimsy grounds. This Court, therefore, while issuing notice to respondents no. 7 and 8 passed an interim order that "the third party interest, which has been created during pendency of the writ application shall be subject to the result of the case".

4. On 26.08.2019 learned counsel for the petitioner argued the matter for some time and this Court took note of the submissions in its order passed on the said date which is being reproduced hereunder:

"26.08.2019. Mr. Aditya Prakash Sahay, learned counsel for the petitioner has argued the matter for sometime. He has attempted to demonstrate from his reply and conditions of the NIT that if both are taken together, the reasons provided by the respondent authorities for rejecting the technical bid of the petitioner, as contained in Annexure 'C' to the counter affidavit, would not sustain the test of law. It is his submission that his technical bid has been rejected basically on three grounds, firstly that he had not submitted the labour licence, secondly that he had not submitted the history-sheet of the employees covered under the ESI and thirdly that he had not submitted the Chalan showing the deposit of service tax commensurate to the experience of work shown by him.

Learned counsel submits that so far as the first ground is concerned, in view of the judgment of this court in CWJC No. 11952/2019 the labour licence is not required to be provided at this stage.

It is further submitted that condition no. 05 of the NIT provides for submission of registration certificate of ESI/EPF meaning thereby that either ESI or EPF is to be provided and if the petitioner has submitted the EPF certificate of registration, his bid cannot be rejected on the ground that he had not submitted history-sheet of the workers covered by the ESI.

Learned counsel has further submitted that it is none of the job of the tender committee to see whether the petitioner has made adequate payment of service tax against the work done by him or not because if there is any shortcoming in payment of service tax it will be a matter to be taken up by the concerned department and not by the State respondents in this case.

In course of argument, this court called upon learned counsel for the petitioner

to satisfy that the petitioner had fulfilled the conditions as prescribed under condition no. 17 of the NIT which specifically talks of submission of the copy of the return and self-attested Chalan showing deposit of tax every year during the given period in the light of the money received by the petitioner from all the work done by him in this government department.

Learned counsel for the petitioner at this stage prays for some time to satisfy the court.

Learned counsel for the State as well as the private respondents are present.

A counter affidavit on behalf of respondent no.6 and another supplementary counter affidavit on behalf of respondent no. 8 has been filed today. Let both be taken on the record.

List this case day after tomorrow i.e. 28.08.2019 at 1:00 P.M."

5. Learned counsel for the petitioner has, thereafter, argued that the petitioner has complied with the conditions provided under Clause 17 of the Notice Inviting Tender by submitting its return and self attested copies of Challans of service tax of the financial year 2015-16, 2016-17 and 2017-18 along with registration in similar work of the petitioner's firm. It is stated that in the financial year 2016-17 (April to September) the petitioner has got total Bill amount of at Rs. 2,05,76,935/- and has received service tax at Rs. 30,47,346/- and accordingly he has paid the service tax at Rs. 30,47,346/- in 11 Challans. Similarly for financial year 2016-17 (October to March) the petitioner received total Bill amount at Rs. 78,61,280/- and has received service tax at Rs. 11,79,193/- and accordingly, he paid the service tax amount in six challans. Learned counsel has further submitted that in similar manner the service tax were deposited with the concerned department during the financial year 2014-15 and 2015-16. It is, thus, his submission that the Technical Bid of the petitioner could not have been rejected on the grounds stated in Annexure 'C' to the counter affidavit of the Society.

6. Learned counsel for the Society has contested the submissions of learned counsel for the petitioner. It is his stand that much before presenting/filing of the present writ application, the work orders have already been issued and the agreements were executed with the private respondents on 13.06.2018 and 18.06.201 respectively. The work had been started with effect from 01.07.2018 therefore, the interim order passed by this Court saying that during pendency of the writ application a third party right has been created is not based on a correct information and the Court was misled in passing of the interim order by contending that during pendency of the writ application third party right has been created.

7. It is further submitted that by filing Interlocutory Application No. 01 of 2019 though the petitioner prayed for impleading respondents no. 7 and 8 herein but at no point of time the writ application was amended to challenge the work

orders and the agreements executed in favour of the private respondents, therefore, in absence of there being a prayer for quashing of the work orders / agreements, this Court may not interfere with the same that too when the private respondents are already working for last almost one and half year approximately and have invested huge amount and have also completed almost half of the contract period.

8. Learned counsel for the Society has submitted that from the pleadings available on the record, it would appear that the petitioner was earlier having a labour license but the said labour license was not renewed after 18.07.2015. It is, thus, not a case where a tenderer was participating in the tender for the first time and therefore, he could not have obtained a labour license. It is submitted that the judgment passed in C.W.J.C. No. 11952 of 2019 would not apply in respect of a contractor who has failed to obtain renewal of his license. Learned counsel for the Society has relied on sub-section (3) of Section 13 of the Contract Labour (Regulation and Abolition) Act, 1970 to submit that a license granted under Chapter IV of the Act of 1980 may be renewed from time to time for such period and on payment of such fees and on such conditions as may be prescribed. He has also referred to the terms and conditions of the license, the relevant Rule 29 of the Rules framed and the Contract Labour (Regulation and Abolition) Central Rules 1971 (hereinafter referred to as the 'Rules of 1971') and the Format of the renewal form no. vii to submit that there would be a distinction between the case of a tenderer participating for the first time in a tender and in case of a tenderer who had earlier obtained labour license but the same has not been renewed.

9. Learned counsel further submits that in terms of the Tender Notice, the petitioner was required to submit registration certificate of ESI and EPF which have been issued prior to the date of publication of tender. There should have been at least 200 workers registered under the ESI and EPF and the tenderer was required to submit the relevant proof in this regard of last three years but the petitioner had not submitted the registration certificate under ESI with the history-sheet which could have been the proof of fact of registration of his establishment with the ESI.

10. It is submitted that the contention of the petitioner that ESI and EPF be read interchangeably as if it is 'either / or' is not correct, inasmuch as, both are governed by two different enactments and there are separate provisions for registration under the two statutes. It is submitted that it is not the case of the petitioner that he had submitted history-sheet of 200 workmen registered under the EPF with the petitioner and further as regards the requirement of deposit of each of the returns of the service tax showing the total amount received by the petitioner from a government department and the proof of payment of the service tax, in course of consideration of the tender document, it was found that the petitioner had submitted Challans of Service Tax relevant to the three years in which he had shown deposit of Rs. 53,70,574/- on account of service tax

through challans. The reasons furnished in Annexure 'C' to the counter affidavit are not being disputed by the petitioner but what is now being contested by filing reply to the supplementary counter affidavit of respondent no. 8 is that the petitioner had deposited the service tax during three financial years 2014-15, 2015-16 and 2016-17 through different Challans which if calculated will come to Rs. 53,70,574/-, therefore, it is crystal clear that the amount of service tax deposited by the petitioner were not in consonance with the work experience of the petitioner.

11. The Society has filed a rejoinder to the reply of the petitioner. In paragraph 4 and 5 of it's rejoinder the society has emphatically asserted as under:-

"4. That with regard to statement made in paragraph nos. 5 and 6 of reply of the petitioner it submitted that so far financial year 2014-15 is concern, petitioner had received payment of Rs. 11215024 from Sadar Hospital Bihar Sharif, Nalanda as evident from the certificate issued by its superintendent as well it received payment of Rs. 9110521, Rs. 1803841 and Rs. 5259920 from Railway i.e. in total Rs. 27389306 though it has shown its received payment as Rs. 23,54,979 only and paid service tax of Rs. 2,91,087 only. So far financial year 2015-16, petitioner had received payment of Rs. 19810507 from Sadar Hospital Bihar Sharif, Nalanda as per certificate issued by its superintendent and received payment of Rs. 8497189 and Rs. 1385560 from Railway as per his own showing i.e. in total Rs. 29693256/- though it has show his received payment as Rs. 6060771 only and paid service tax as Rs. 852952 only. So far financial year 2016-17, petitioner had received payment of Rs. 12400152 from Sadar Hospital, Bihar Sharif, Nalanda as per certificate issued by its Superintendent and Rs. 97419 from Railway i.e. in total Rs. 12497571 and petitioner had received payment of Rs. 14320258 during financial year 2014-15, 2015-16 and 2016-17 from E.C. Railway, Sonapur but did not included in its received payment so far this amount is concern though it has shown received payment as Rs. 28438215 only and paid service tax as Rs. 4226540.

5. That from the paper related to Audit of financial year 2014- 15 to 2016-17 it appears that in financial year 2014-15 petitioner had got income of Rs. 81336242 in financial year 2015-16 got income of Rs. 113783872 and in financial year 2016-17 got income of Rs. 150162946 i.e. in total Rs. 345283060."

12. It is further submitted that the petitioner had submitted a complaint with regard to irregularities committed in respect of outsourcing of tenders, the same was examined by three members committee and the committee has found that the petitioner had been submitting the complaint after he was declared unsuccessful in the tender only with an intention to create hindrance in the work.

13. It is contended that with regard to non-submission of the proof of payment of service tax through Challans in consonance with the work experience of the petitioner, the stand of the Society is based on correct information and record.

14. Respondent No. 7 has also opposed the writ application. Apart from

contending and endorsing the submissions made on behalf of the Society, Respondent No. 7 has contended that altogether 316 employees of the petitioners were working in Nalanda District till May, 2018 and he had taken amount of ESI and EPF from the State Government as is apparent from the Bills but did not deposit the same and that is the reason why the petitioner had not enclosed the history of the employees. As regards the rates it is contended that the petitioner has suppressed the material facts that in many districts his respective rates are higher than the rate of Gaya District. In this respect respondent no. 7 has enclosed rate of Aurangabad District and has contended that petitioner had got work in other district at higher rate than the district of Gaya. It is submitted in course of hearing by learned counsel for the respondent no. 7 that the respondent no. 7 has procured a loan of Rs. 2 Crores to complete the work and at this stage in the midst of the on-going work, if any interference is made with the work order, respondent no. 7 will be nowhere and would be unable to service his loan.

15. Respondent no. 8 has made similar contentions as regards the huge investments made by him after getting the work order. Respondent no. 8 has also opposed the writ application. In his rejoinder to the reply of the petitioner he has stated that the return with ECR filed on behalf of the petitioner in the office of ESIC, Patna from the month of October, 2017 to March, 2018 shows that only 94 persons were deployed in the company of the petitioner, thus, the certificate submitted by the petitioner showing man power of more than 200 persons is out and out a wrong and false statement.

16. Learned counsel for the private respondents have relied upon a Division Bench judgment of this Court in the case of M/s Madras Scurities Printers Pvt. Ltd.. Vs. The State of Bihar and Ors. reported in 2014 (1) PLJR 227 to submit that in the said case after considering the series of judgments of the Hon'ble Apex Court even though the Hon'ble Division Bench took a view that mere non-renewal of empanelment as enrolled agency would not have non-suited the appellant from competing in the selection process ultimately refused to interfere by recording as under in paragraph 17 :

"17. Nevertheless, we are not inclined to interfere in the present proceedings. As recorded hereinabove, the contract has already been awarded to the Firm and the Firm has been supplying the materials as agreed. The non-selection of the appellant or non-consideration of the appellant on comparative merits has no relevance to the public interest. On the contrary, the public interest demands that the process of issuance of the Unique Identification Number to the citizens is completed at the earliest without any interruption. In view of the materials before us; particularly, the above referred clarification dated 12th September, 2012 submitted by the UIDAI, nobody can give any certificate of good conduct to the appellant. No prejudice can be said to have been caused to the people at large because the appellant was not allowed to participate in the selection process. Further, in view of the above referred information contained in the letter

dated 19th September, 2012 and considering the credibility of the appellant, no fruitful purpose shall be served by allowing the appellant to participate in the selection process at this stage. The Court exercising power of judicial review under Article 226 of the Constitution will refrain from issuing such futile directions."

17. Having heard learned counsel for the parties and on perusal of the records, this Court finds more than one reasons not to interfere with the impugned decision rejecting the Technical Bid of the petitioner. This Court has seen from the materials discussed hereinabove that learned counsel for the Society has been able to demonstrate that in the present case the petitioner was already having a labour license and what was required to be done by him was to get the same renewed and keep renewed in accordance with the relevant rules in the given Format. If he has not renewed the license, the petitioner may not claim benefit of the judgment of this Court in C.W.J.C. No. 11952 of 2019.

18. Further as regards the non-submission of the proof of registration of 200 workers under ESI and EPF, the petitioner is not able to place on record even before this Court that he had 200 workers registered under the ESI and EPF, therefore, even this ground taken by the Society for rejecting the Technical Bid of the petitioner cannot be faulted with. The petitioner is an old contractor, he was knowing the requirements of laws particularly those welfare legislations meant for workers. His non-submission of the history-sheet of deposits of ESI and EPF contribution in respect of at least 200 workers has to be taken seriously particularly when the respondents have alleged that the petitioner though received those amount in his Bills but did not deposit.

19. The third ground with regard to service tax cannot be thrown out at the outset. There are ample materials on the record which show that at least no arbitrariness may be found in the decision making process of the Society in rejecting the Technical Bid of the petitioner when the Society found that the service tax amount said to have been paid by the petitioner were not in consonance with his work experience with the Government department.

20. The another reason for which the Court need not proceed further is that even though by filing Interlocutory Application No.01 of 2019, the petitioner sought impleadment of respondents no. 7 and 8, the writ application was not amended and no challenge has been thrown to the work orders and the agreements executed by the Society with the private respondents.

It is also a matter of record that the writ application was presented before this Court on or about 13.07.2018 but much before that on 18.06.2018 itself the agreement had been executed, therefore, even the interim order of this Court passed on 03.04.2019 seems to be based on an incorrect information that a third party right has been created during the pendency of the writ application. The fact that even after the work orders have been issued in favour of the private respondents and agreements have been executed, if the petitioner has not

chosen to challenge the same, there is no reason why this Court will proceed to examine those work orders on its own. The petitioner is virtually looking for a writ in the nature of Certiorari. It has been said times and again by the Hon'ble Supreme Court that in tender matters unless the arbitrariness is found to be in the nature of "Wednesbury unreasonableness" and it is shown to have been done with an intention to favour someone no interference is required. There is also no public interest involved in this case rather to this Court it appears that the allegations against the petitioner that he has not deposited the ESI, EPF and service tax in tune with the money received on those accounts in his Bills from Government department are serious and if proved the petitioner may be found acting against the public interest. It is, always open for the concerned agencies to examine the same.

21. Further, a writ of Certiorari need not be issued only on a mere asking. There are catena of decisions of the Hon'ble Supreme Court where the "Certiorari Jurisdiction" has been explained. It has been held that the jurisdiction is supervisory and not appellate. The Court exercising this jurisdiction does not act as an appellate Court and would not re-appreciate evidence.

22. This Court has taken note of the judgment of the Hon'ble Division Bench of this Court following the views of the Hon'ble Supreme Court and the Hon'ble Division Bench of this Court, this Court is of the considered opinion that the discretionary jurisdiction of this Court under Article 226 of the Constitution of India is not required to be exercised in the totality of the facts and circumstances of this case.

23. The writ application is thus, dismissed.