
(2015) 03 JH CK 0053

In the Jharkhand High Court

Case No : Writ Petition(C) No. 4539 of 2013

A.K. Construction Co.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-03-2015

Acts Referred:

Citation : (2015) 3 AJR 650 : (2015) 2 JLJR 321

Hon'ble Judges : S. Chandrashekhar, J.

Bench : Single Bench

Advocate : Shresth Gautam, for the Appellant; Mahesh Tewari and Rahul Dev, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S. Chandrashekhar, J.—Aggrieved by order dated 28.09.2012 whereby, the contract awarded to the petitioner was terminated and the earnest money deposit, has been forfeited, the petitioner has approached this Court by filing the present writ petition.

2. The brief facts of the case are that, pursuant to NIT dated 21.11.2011, the petitioner submitted its bid and in the negotiation, the petitioner wanted that the Railways should provide ballast depot in two parts however, the same was not accepted by the respondent-South Eastern Railways. Work Order dated 18.06.2012 was issued to the petitioner which was received by the petitioner-company on 27.06.2012. Immediately thereafter, the petitioner-company wrote letter dated 06.07.2012 intimating the respondent-Railways that unless, the ballast depot in two parts is allotted to the petitioner, the petitioner-company would not be able to start work. The petitioner-company made further representations also however, request for providing ballast depot in two parts was not accepted by the respondent-Railways and finally, vide letter dated 28.09.2012, the agreement was terminated and E.M.D. was forfeited.

3. The learned counsel for the petitioner submits that it would appear from the

proceeding dated 18.06.2012 that the condition of the tenderer for providing ballast depot in two parts was not accepted by the respondent-Railways and thus, contract between the parties cannot be said to be concluded. It is submitted that immediately after receiving the Work Order dated 18.06.2012, the petitioner wrote letter dated 06.07.2012 which should have been treated as revocation of agreement between the parties. It is further submitted that without issuing any notice, the agreement was terminated and E.M.D. was forfeited which cannot be justified by the respondent-Railways. Relying on decision in "M/s. Kailash Nath Associates Vs. Delhi Development Authority and Anr. [Civil Appeal No. 193 of 2015], it is submitted that since there is no pre-estimation of damage to the respondent-Railways, the entire E.M.D. amount could not have been forfeited. The learned counsel for the petitioner relied on decisions of the Hon'ble Supreme Court in ORYX Fisheries Private Limited Vs. Union of India (UOI) and Others, and a judgment of this Court in " Modi Projects Ltd., Ranchi Vs. State of Jharkhand and Others, .

4. As against the above, Mr. Mahesh Tewari, the learned counsel appearing for the respondent-Railways refers to Work Order dated 18.06.2012 and submits that in terms of Condition No. 7, the contractor was required to submit performance guarantee at the rate of 5% of the total contract value which admittedly, the petitioner-company failed to deposit and therefore, the agreement was terminated and in terms of paragraph No. 11(a) of the tender document, E.M.D. was forfeited.

5. From the materials brought on record, it appears that Work Order was issued to the petitioner on 18.06.2012 and along with Work Order the proceeding dated 18.06.2012 was also furnished to the petitioner. The contention raised on behalf of the petitioner that since the offer made by the petitioner-company was not accepted by the respondent-Railways, there was no concluded contract, is liable to be rejected. In matters of contract an offeree is required to give its consent to the offer made by the offeree. In the present case, it is not the case of the petitioner that the offer made by the respondent-Railways that is, offer/invitation to offer through NIT dated 21.11.2011 was not accepted by the petitioner-company rather, the case put-forth by the petitioner-company is that it wanted the respondent-Railways to provide ballast depot in two parts which has not been accepted by the respondent-Railways. Admittedly, this was not part of NIT issued on 21.11.2011. The petitioner participated in the tender and submitted its bid and its bid has been accepted. It is not the case of the petitioner that it has refused to accept the Work Order dated 18.06.2012. I further find that there is no dispute that the petitioner-company failed to furnish performance guarantee at the rate of 5% of the total contract value and the contract document provides termination of contract and forfeiture of E.M.D. in the event, the performance guarantee at the rate of 5% is not furnished within 30 days from the date of issuance of acceptance. It is not the case of the petitioner-company that it made request for extension of time for furnishing performance guarantee as indicated in Clause 7 of the Work Order dated 18.06.2012 and thus, I find that it cannot be

in dispute that the petitioner-company committed breach of the condition of the tender document. In terms of conditions of contract and the Work Order dated 18.06.2012, the contract has been terminated and E.M.D. has been forfeited. The further contention of the learned counsel for the petitioner that before the termination order dated 28.09.2012 was issued, a show-cause notice was required to be issued to the petitioner, is also liable to be rejected. It cannot be contended by the petitioner that it was not aware of the conditions of the contract which provides that in case, if performance guarantee is not furnished, the contract may be terminated and E.M.D. would be forfeited. It is admitted by the petitioner that letter dated 06.07.2012 was replied by the Railways. The respondent-Railways has made it clear that it is the concern of Railways to train out the ballast and in the process if any delay occurs, no penalty would be imposed. The petitioner-company has not disputed the fact that it failed to furnish performance guarantee within time. The only plea taken by the petitioner-company is that though it wanted the respondent-Railways to provide ballast depot in two parts, the respondent-Railways failed to provide the same and therefore, it did not execute the work.

6. From the facts noticed above, I find that since the Work Order dated 18.06.2012 was accepted by the petitioner-company and the petitioner-company failed to satisfy the terms of contract, no infirmity can be found in order dated 28.09.2012. The reliance placed on decisions in "M/s. Kailash Nath Associates case, Oryx Fisheries Private Limited case and Modi Projects Ltd., Ranchi case are misplaced. In so far as estimation of damages is concerned, the petitioner was required to file a suit challenging the termination and forfeiture of E.M.D., for which it was required to lead evidence. Merely stating that without pre-estimation of damages entire E.M.D. cannot be forfeited, is not sufficient, inviting interference by the Writ Court. Without any evidence led by the petitioner the said issue cannot be adjudicated in the writ proceeding. As noticed above, there is a specific clause in the Work Order and tender document for furnishing performance guarantee, which the petitioner failed to furnish and therefore, in terms of condition in tender, the E.M.D. has been forfeited. Vide letters dated 01.08.2012 and 02.08.2012 the petitioner has been put to notice and therefore, the contention that a separate show-cause notice should have been issued, before the contract was terminated and E.M.D. was forfeited, is liable to be rejected. I find no merit in the writ petition and accordingly, the writ petition is dismissed.