
(2022) 02 GAU CK 0064
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 717 Of 2017

Chandan Bhattacharjee

APPELLANT

Vs

Union Of India And 5 Ors

RESPONDENT

Date of Decision : 24-02-2022

Acts Referred:

Citation : (2022) 02 GAU CK 0064

Hon'ble Judges : Arun Dev Choudhury, J

Bench : Single Bench

Advocate : A Singha

Final Decision : Dismissed

Judgement

1. Heard Mr. KK Mahanta, learned Senior counsel assisted by Mr. K Sinha, learned counsel for the petitioner and Mr. B Sarma, learned standing counsel for the Railways.

2. The case projected by the petitioner:

I. The petitioner is an approved contractor of NF Railway. The respondent No. 6 issued a tender notice being No. DY.CF/CON/JRBM/Maintenance-Water Supply/2013/17 for maintenance of security barrack and water supply arrangement including other ancillary works between Ch. 0.00 & 32.74 km under Dy.CE/CON/JRBM/I at Silchar in connection with the construction of new BG railway line from Jiribam to Tupul (Imphal).

II. The petitioner participated in the said tender process and was successful and accordingly letter of acceptance dated 08.04.2014 was issued to the petitioner.

III. Subsequently by the impugned communication dated 25.09.2014, the contract was terminated on the ground that the petitioner has failed to submit the performance guarantee as per clause 5.2 of the tender document as well as the petitioner has not honoured the letter of acceptance.

IV. By the said impugned termination notice, amongst other the petitioner was debarred from participating in the re-tender process for the same work.

V. Subsequent to this, by another notice dated 27.10.2014, a fresh tenders were called for notice was issued for the same work wherein a clause was inserted to the effect that the petitioner is debarred from participating in the re-tender.

VI. As no bidder participated in the aforesaid tender process initiated by notice dated 27.10.2014, the Railways once again issued a tender notice on 23.01.2015 for the same work.

VII. In the said tender notice dated 23.01.2015, a similar clause was incorporated debarring the petitioner from participating in the re-tender process for the work.

VIII. Though there was debarment clause, the petitioner vide his communication dated 28.02.2015 preferred a representation before the Deputy Chief Engineer, Construction Jiribam 1, NF Railways, praying for issuance of tender papers pursuant to the tender notice dated 23.01.2015.

IX. Accordingly, the petitioner was allowed to submit his tender. However, the said tender process was also discontinued / withdrawn/ discharged by communication dated 10.06.2015.

X. Thereafter, another tender notice dated 28.12.2016 was issued inviting bid for the same work. In this notice, there was no clause debarring the petitioner.

XI. Accordingly, the petitioner vide his communication dated 11.01.2017 requested the Deputy Chief Engineer, Construction 1, Jiribam to issue him tender papers and the petitioner expressed his eagerness to deposit required Rs. 5,000/-.

XII. Subsequent to this, 'corrigendum 1' was issued to the tender notice dated 28.12.2016 debarring the petitioner in the said process of re-tender. Accordingly, the petitioner has preferred this petition.

3. Though at the time of filing the writ petition the initial termination notice dated 25.09.2014 and subsequent debarment was not challenged, however, during the pendency of this writ petition, the writ petition was amended and the termination was challenged.

4. Ground of challenge as urged by Mr. KK Mahanta, learned Senior counsel: Mr. Mahanta challenges the aforesaid conduct and decision of the respondent Railways on the following grounds.

I. The Railways could not have terminated the contract taking recourse to the clause 5.2 of the tender document. According to Mr. Mahanta, the letter of acceptance reveals that the total security deposit amounting to Rs. 10,26,344/- is to be adjusted with the earnest money of Rs. 2,15,100/- and remaining amount of Rs. 8,11,244/- is to be either deposited in cash or to be recovered from the

running bills of the contract as per condition of the contract. Therefore, Mr. Mahanta submits that since the execution of the work did not start and since there was a scope for the railways to recover the performance guarantee, therefore the condition precedent to exercise the power under clause 5.2 of the tender document, was not available.

II. Mr. Mahanta further submits that there is total violation of principle of natural justice. The action debarring the petitioner from participating in the tender process amounts to black listing the petitioner. According to Mr. Mahanta law is well settled that without any notice being given, a person cannot be black listed. Therefore, the whole exercise of the Railways need to be interfered for violation of principle of natural justice. In this regard, Mr. Mahanta relies upon decision of the Hon'ble Apex Court reported in (2021) 2 SCC 551 and (2021) 1 SCC 804.

III. The initial termination is bad being passed in derogation of the tender condition and general clauses of contract all subsequent actions are liable to set at naught.

IV. Accordingly, the petitioner be directed to continue with his work on the basis of letter of acceptance dated 08.04.2014 and the petitioner is willing to do whatever is required to perform the contract.

5. Counter submission of Mr. B Sarma, learned standing counsel for the Railways:

I. Countering such argument, Mr. Sarma learned Standing Counsel, Railways submits that there is a marked difference between performance guarantee and the security deposit. The letter of acceptance clearly stipulates that the petitioner was required to submit a performance guarantee in the form of an irrevocable bank guarantee for an amount of Rs. 10,26,344/- within 3 days as per clause 5.2 (a) of the tender document. In case the petitioner fails to submit such required performance guarantee even after 60 days from the date of issuance of acceptance letter, the contract shall be terminated duly forfeiting the earnest money deposited and other dues against the contract and the contractor will be debarred from participating in re-tender for this work. Therefore, Mr. Sarma submits that the whole argument of Mr. Mahanta that it relates to security deposit is having no legs to stand, in the given fact and the contents and recital of the acceptance letter dated 08.04.2014.

II. The contract has not been terminated for any violation of non-deposit of security. The contract has been terminated for non-fulfillment of condition as recited at paragraph 3 of the letter of acceptance. Mr. Sarma further submits that when it is clearly stipulated in the letter of acceptance as well as general condition of the contract that the petitioner shall be debarred from participating in the re-tender for the same work, therefore, there is no necessity of issuing any notice before terminating such contract.

III. Mr. Sarma further submits that this is not a case of black listing rather a case of debarment which is already known to the petitioner in the shape of not only

the acceptance letter but in the shape of tender document under clause 5.2.

IV. Mr. Sarma submits that this writ petition is liable to be dismissed inasmuch as the whole work is stalled due to the interim order passed by this court and therefore, public interest is suffering.

6. I have given anxious consideration to the submissions made by the learned counsels for the parties.

7. The basic issue before this court is whether the respondent railway was right in terminating the contract by way of the impugned termination notice dated 25.09.2014 taking recourse to the clause 5.2 of the tender document and whether, there is violation of principle of natural justice while issuing the impugned termination of the contract.

8. The clause 5 of the tender document deals with security deposit and performance guarantee. Clause 5.2 deals with performance guarantee (PG).

Clause 5.2.2 provides that the performance guarantee shall be furnished by the successful contractor after the letter of acceptance has been issued but before signing of the agreement.

The agreement should normally be signed within 15 days after issuance of letter of acceptance and performance guarantee shall also be submitted within this time.

The said clause further provides that such guarantee shall be initially valid up to stipulated date of completion plus 60 days beyond that. Clause 5.2.4 of the tender document provides that wherever the contract is rescinded, the security shall be forfeited and the performance guarantee shall be encashed and balance work got done independently without risk and cost of failed contractor.

The said clause also provides that the failed contractor shall be debarred from participating in the tender for executing the balance work. If the failed contractor is JV or partnership firm, than every member/ partner of a firm shall be debarred from participating in the tender for the balance work, either in his or her individual capacity or as a partner of any joint venture part.

9. Under the said clause 5, security deposit is being defined as the earnest money deposited by the contractor with his tender and the same is retained by railways as part security for the due fulfillment of the contract.

10. The letter of acceptance dated 08.04.2014 mandates that the contractor petitioner is to submit performance guarantee in the form of irrevocable bank guarantee for an amount equal to 5% of the contract value. Such performance guarantee was required to be submitted within 30 days as per clause 5.2.a of the tender document. If such deposit is made beyond 30 days then the said amount is to carry a panel interest of 15% p.a.

It is further provided in the Letter of Acceptance that in case the petitioner

contractor fails to submit requisite bank guarantee even after 60 days from the date of issue of the acceptance letter, the contract shall be terminated duly forfeiting EMD and other dues against the contract and the contractor will be debarred from participating in re-tender for the same work.

By the said letter of intent, it was further requested that the petitioner should execute the formal contract agreement work after acceptance of the performance guarantee for which the documents were made ready for signature of the petitioner.

It was clarified in the communication that the acceptance letter dated 08.04.2014 itself shall be legal and enforceable contract between the contractor and the railway.

It was provided that if the contractor fails to execute the work or fails to execute the formal contract agreement in accordance with the stipulation in the acceptance letter, it would make liable for breach of contract and railway administration shall be entitled to take recourse to an action deem fit in accordance with stipulation of the tender.

11. The petitioner has not disputed the fact that he has failed to deposit the performance guarantee as stipulated in the letter of acceptance and in the Tender documents. However, the petitioner has made an explanation in the writ petition that due to ill-health of his son and for the purpose of treatment of his son, he could not do the needful during the stipulated period. It is also the case of the petitioner that accordingly he requested the railways to allow him to do the needful and to extend the time.

12. The further case of the petitioner is that the total security deposit was already with the railway authorities and in the failure of the petitioner to deposit the performance guarantee, the same could have been recovered from the running bills of the contract. Therefore, the railway has wrongly interpreted the clause 5.2 of the tender document and terminated the contract.

13. However, such argument of the learned Senior counsel has failed to impress upon this court.

The reading of the Letter of Acceptance and the tender clause 5 reveals that there is a mark difference between the Performance Guarantee and Security Deposit. From the perusal of the letter of intent as well as clause 5 of the tender document reveals that the petitioner was well aware the fact that he needs to deposit the performance guarantee within a period of 30 days from 08.04.2014. Further time of 30 days was given to submit such performance guarantee with a penal interest of 15% above the stipulated amount of performance guarantee. The said document clearly indicates that in the event of failure to deposit performance guarantee beyond 60 days of the acceptance letter, the contract shall be terminated duly forfeiting the EMD. Thus, by way of the Letter of Acceptance it was put to the notice upon the petitioner. The Security Deposit was

to be furnished at the time of submission the contract. Therefore, the aforesaid argument of Mr. Mahanta, learned Senior counsel is rejected.

14. The petitioner was well aware of the facts as the letter of acceptance was issued in the name of the petitioner. Being a part of the contract, it is presumed that the petitioner was well aware of the tender clauses including the clause 5. The clause 5 clearly stipulates that on the failure of the petitioner to execute the work and if it so happens that there is re-tender, the petitioner shall not be allowed to participate in the said tender process. Therefore, it was also within the knowledge and notice of the petitioner that in his failure to execute the contract he is debarred from participating in the next tender process relating to the same work. Therefore, the petitioner cannot say that the debarment made against him is without any notice. Therefore, this court unhesitantly holds that this is not a case of black listing, however, a case of debarment as per terms of the contract. Therefore, the case laws relied upon by the learned counsel for the petitioner has no applicability in the given facts and circumstances of the present case.

15. In view of the aforesaid discussion and reason, this court holds that the railways has rightly exercised its power under the terms of the contract, in terms of the tender clauses as well as in terms of the letter of acceptance which is treated as legal and enforceable contract between the petitioner and the railways.

16. It is further held that there is no violation of principle of natural justice while issuing the impugned termination notice dated 25.09.2014 as the petitioner was well aware of the situation that may arise for the reason of his default and that such contingencies were put to notice of the petitioner in very clear term in the shape of the letter of acceptance dated 08.04.2014 and in the shape of clause 5 of the tender Document..

17. In view of the aforesaid, this writ petition is dismissed, however no order as to cost. Interim order passed earlier stands vacated.