

(2016) 07 JH CK 0076

In the Jharkhand High Court

Case No : Writ Petition (C) No. 6000 of 2015.

**GKC Projects Limited - Petitioner @HASH The State of Jharkhand through
the Principal Secretary, Road Construction Department**

Date of Decision : 28-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 4 AIRJharR 417 : (2017) 1 JBCJ 148 : (2017) 2 JCR 162 :
(2016) 4 JLJR 350

Hon'ble Judges : Aparesh Kumar Singh, J.

Bench : Single Bench

Advocate : M/s Sunil Kumar, Sr. Advocate, Sumeet Gadodia, S.R. Zafar,
Advocates, for the Petitioner; Mr. Ajit Kumar, A.A.G, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Aparesh Kumar Singh, J. - Heard counsel for the parties.

2. Applicability of Clause 2.2.8 of Request for Qualification (in short "RFQ") Document framed by the Respondent No. 2 ? State Highways Authorities of Jharkhand while inviting tender for improvement and up-gradation of Rangamati-Tikar-Hazam-Banta-Silli Road (MDR-025), is called into question in the present writ application. Petitioner has prayed for following relief (s).

(i) For issuance of an appropriate writ/order/direction, including Writ of Certiorari, for quashing the order dated 8.12.2015 passed by Principal Secretary, Road Construction Department, Government of Jharkhand communicated to the petitioner by Respondent No. 3 whereby and where under he has held that Clause 2.2.8 of the Request for Qualification (for short "RFQ") Document is applicable to the petitioner.

(ii) For issuance of appropriate writ/order/direction including Writ in the nature of Declaration, declaring that Clause 2.2.8 of the RFQ Document, as promulgated by State Highways Authority of Jharkhand for award of "Engineering, Procurement & Construction Contract" is not applicable in the facts and

circumstances of the present petitioner.

(iii) For issuance of further appropriate writ/order/direction, including Writ of Mandamus, directing the Respondent No. 2 not to debar and/or disqualify the technical bid of the petitioner in respect of the Tender floated by Respondent No. 2 pertaining to Engineering, Procurement and Construction (for short "EPC") contract by taking aid of clause 2.2.8 of the RFQ Document.

(iv) For issuance of further appropriate writ/order/direction, including Writ of Mandamus, directing the Respondents to consider the technical bid of the petitioner in respect of Notice Inviting Tender (for short "NIT") for the work of "Improvement and Up gradation of Rangamati-Tikar-Hazam-Banta-Silli Road (MDR-025)" and to consequentially allot the work in question to the petitioner if the petitioner's bid is found most competitive.

3. Earlier, on 15.12.2015 when the matter was first taken up, a Coordinate Bench of this Court granted time to the Respondent State to file counter affidavit. Petitioner being aggrieved therefrom, approached the Letters Patent Court in LPA No. 749/2015 with a grievance that no stay have been granted. Learned Division Bench vide judgment dated 17.12.2015 directed the Respondent not to finalise any technical bid for the contract in question, till WPC No. 6000/2015 is finally decided by the learned Single Judge or till the prayer for stay in the said writ petition is finally decided by the learned Single Judge or whichever is earlier.

4. The matter was running on board in today's list and has been taken up on the request of the learned counsel for the parties. Order dated 08.12.2015, impugned at Para-1(i) (Annexure-15) has been passed by the Principal Secretary, Road Construction Department communicated by the Respondent Member Technical, State Highways Authorities of Jharkhand Pursuant to the direction passed in WPC No. 1640/2015 preferred by the same petitioner in connection with NIT dated 23.01.2015 for widening/Strengthening/Reconstruction of Hazaribagh-Bargakagaon-Tandwa-Khelari-Bijupara (SH-7) Road. The Bid Evaluation Committee of the aforesaid tender had ascertained that the contract between joint venture entity of SADBHAV ? GKC Ltd. (petitioner) and Bihar State Road Development Corporation Limited (in short " BSRDCL), Patna stood terminated by BSRDCL, a public entity, and no Court of law or Arbitral Tribunal had quashed the termination order or given injunction on Clause 2.2.8 of RFQ Documents of State Highways Authorities of Jharkhand.

5. The representation of the petitioner was rejected by the Principal Secretary, Road Construction Department, Government of Jharkhand by the impugned order dated 08.12.2015, holding that clause 2.2.8 shall be applicable to the petitioner. Petitioner was a partner of joint venture Company SADBHAV ? GKC Ltd.

It is to be taken note of that Clause 2.2.8 is not under challenge in the present writ application as being arbitrary or contrary to law.

6. Learned Senior Counsel for the petitioner has advanced two fold arguments on the prayer made.

(i) That the respondents are becoming a Judge of their own cause while interpreting Clause 2.2.8 against the petitioner. The termination of the contract entered into with BSRDCL is also a subject matter of Arbitration before the learned Tribunal of Hon"ble Mr. Justice Uday Sinha. Till any decision is rendered by the learned Arbitrator, it cannot be concluded that the petitioner has committed breach of contract. Reliance has been placed upon a judgment of the Apex Court in the case of J.G. Engineers Private Limited v. Union of India & Another [(2011) 5 SCC 758, para-19], which is quoted herein below.

"19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal."

(ii) It is urged that the petitioner was a partner in the joint venture Company SADBHAV ? GKC Ltd contract executed with BSRDCL. The language of Clause 2.2.8 does not dis-entitle the applicant ? present petitioner in the capacity as a Company to be held liable for breach by the joint venture Company to declare itself as ineligible. In that sense, learned counsel for the petitioner has relied upon disclaimer clause contained in the RFQ Document as per which, information provided therein to the applicants on wide range of matters may depend upon interpretation of law. In that sense, provisions of Clause 2.2.8 being in teeth of the principles rendered by the Apex Court in the J.J. Enterprises case (Supra) and also in the light of liability of a partner in the joint undertaking as decided in the case of New Horizons Limited and Another v. Union of India and Others [(1995) 1 SCC 478], cannot be applied against the petitioner for participating in the present tender.

7. The impugned order has held that the provisions of Clause 2.2.8 shall be applicable to the petitioner Company as he was a partner/member of Joint venture Company whose contract was terminated by BSRDCL, Patna, a public entity, for breach of contract. Reference has also been made to orders passed by the learned Division Bench in LPA No. 749/2015 where an interim relief was also granted to the present petitioner at par with that of M/s Patel Engineering Ltd. However, thereafter the writ petition WPC No. 1640/2015 preferred by the petitioner, was allowed directing the Principal Secretary, Road Construction Department, Government of Jharkhand to dispose of the petitioner's representation by speaking order. It is also stated that the aforesaid order has been passed on the assurance of the petitioner that they will not dispute the contract arising out of NIT dated 23.01.2015 in relation to widening/strengthening/reconstruction of Hazaribagh-Bargakagaon-Tandwa-Khelari-Bijupara (SH-7) Road vide judgment dated 20.08.2015 (Annexure-13). The order passed thereafter upon the petitioner's representation is impugned herein as it

has held the Clause 2.2.8 applicable to the petitioner. As a result, petitioner would also be held ineligible for participating in the present NIT for Rangamati-Tikar-Hazam-Banta-Silli Road (MDR-025).

8. Learned counsel for the State has opposed the plea of the petitioner. Much reliance has been placed on the provisions of Clause 2.2.8 to submit that in terms thereof, petitioner who has been a partner of a joint venture Company SADBHAV? GKC Ltd has faced termination of contract executed with BSRDCL, a public entity, within three years of submission of bid work, in which no stay or injunction has been granted by the learned Arbitrator where the matter is sub-judice. It is submitted that terms and conditions of RFQ Document such as Clause 2.2.8, are not specifically under challenge. Therefore, it has to be applied uniformly as per its terms and language to any such bidder like the petitioner. Petitioner has consciously participated in the NIT and did not lay any challenge to the said Clause on any grounds of law or fact. Because of the interim order passed by the learned Division Bench in LPA No. 749/2015, the entire tender in question relating to Rangamati-Tikar-Hazam-Banta-Silli Road (MDR-025), has remained in abeyance, a very important public road. In such circumstances, the order passed by the Respondent Authority at Annexure-15 after full application of mind and on consideration of all available ground taken by the petitioner, does not suffer from any legal or factual infirmity warranting interference by this Court under judicial review.

9. Having considered the entire factual matrix of the case pleaded in the light of the submissions made, it is to be observed at the outset that the petitioner has not laid any conscious challenge to the provisions of Clause 2.2.8 of RFQ Document under NIT in question as being arbitrary or contrary to law. The employer has, in his wisdom, laid down specific terms and conditions which apply uniformly to all the prospective bidders like the petitioner. The provisions of Clause 2.2.8, which is quoted hereunder, specifically in relation to portion underlined seems to have hurt the interest of the petitioner as he would be treated ineligible on account of termination of the contract by BSRDCL with the joint venture entity SADBHAV? GKC Ltd.

2.2.8 "An applicant including any Member should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Applicant or Member, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Applicant or Member."

10. The contention of the petitioner that the Respondent/Employer who are acting as a Judge of their own cause in strict sense, would not apply as termination of the contract of the joint venture by BSRDCL being sub-judice in Arbitration Proceeding, is not in connection with the present case. The provisions of Clause 2.2.8 only lay down a condition that an applicant including any Member should not, in the last three years, have failed to perform any contract, as

evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against it; or that it should not have been expelled from any project or contract by any public entity or any of its contract have been terminated by any public entity for breach.

11. In the absence of any challenge to the aforesaid provisions, this Court is not required to make any observation as to the legality or rationality of such a condition. The Respondent Principal Secretary, Road Construction Department after due consideration of the grounds taken by the petitioner in his representation, has come to the conclusion that as per the provisions of joint venture contract with BSRDCL, petitioner and other partner are both collectively responsible. Therefore, it has been held that it is not a case of debarment of the petitioner, rather provisions of Clause 2.2.8 shall be applicable to the petitioner Company as contract of joint venture of M/s SADBHAV? GKC Ltd was terminated by BSRDCL, a public entity. The impugned decision therefore does not suffer from non-application of mind to the relevant materials on record and the provisions of Clause 2.2.8 of the RFQ, warranting interference in exercise of the powers of this Court under judicial review.

12. In view of the aforesaid reasons, contention of the petitioner that the provisions of Clause 2.2.8 of RFQ Document in the instant NIT is not applicable to the present petitioner also, cannot be accepted. This Court therefore does not find any reason to interfere in the present writ application. It is accordingly dismissed.