

(2012) 06 CHH CK 0039
In the Chhattisgarh High Court
Case No : Writ Petition (C) No. 331 of 2011

M/s. Shiva Enterprises

APPELLANT

Vs

NTPC - Sail Power Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 11-06-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : AIR 2012 Chh 170 : (2013) 2 BC 110

Hon'ble Judges : Manindra Mohan Shrivastava, J; Abhay Manohar Sapre, J

Bench : Full Bench

Advocate : Vishnu Koshta, for the Appellant; B.P. Misra and C.R. Sahu, for the Respondent

Judgement

Abhay Manohar Sapre, J.—Heard. By filing this writ petition under Article 226/227 of the Constitution of India, the writ petitioner seeks quashing of communication dated 18-8-2010 (Annexure P-7) issued by the respondents, whereby, the respondents not only rejected the writ petitioner's tender which they had submitted with the respondents but also forfeited the earnest money deposited by the writ petitioner along with their tender and further debarred the writ petitioner from doing any business dealing with respondent No. 1 for a period of three years w.e.f. 29-7-2010.

1-A. Respondent No. 1 is a Government of India undertaking. In fact, the respondent is in the nature of joint venture of two Government of India companies known as NTPC and SAIL. It is engaged in the business of generation of electricity.

2. Pursuant to tender inquiry bearing No. 0230/CS/8173, dated 31-12-2009 issued by the respondent (for short hereinafter called as "NSPCL") for doing some electrical engineering works at their plant, as specified in the tender inquiry, the writ petitioner submitted their tender offering to do the said work. The writ petitioner also deposited certain earnest money as specified in the tender inquiry with the NSPCL. It is this tender, which was opened by the

respondent on 20-2-2010 and further on 27-5-2010 along with tenders submitted by others and the same was rejected by NSPCL. The NSPCL then communicated their decision of rejection to the writ petitioner by impugned letter dated 18-8-2010, which, as stated above, included their decision to forfeit the earnest money deposited by the writ petitioner as also debarring them from doing business with NSPCL for a period of three years. The letter reads as under:--

Ref. No. : 0230/CS/8173/686 Dated 18-8-2010

To,

M/s. Shiva Enterprises,

Near Pendalwar Clinic, Main Road Torwa,

Gurunanak Chowk Bilaspur (C.G.)

Telefax : 07752-412780 (O) Mob : 9329611573

Kind Attn. : Miss G. K. Lata (Partner)

Sub : Bulk Services (Electrical Engineering Works) of NSPCL-Bhilai Township.

References :--

(i) Out Tender Enquiry No. 0230/CS/8173, dated 31-12-2009.

(ii) Your Technical Bid Opened on 20-2-2010.

(iii) Your Price bid opened on 27-5-2010.

Dear Sir,

This has reference to the above. You had submitted your offer along with various documents for fulfillment of the qualifying requirement for tendering of the above subject. You had also submitted work order and completion certificate issued by NCR, Jhansi as mentioned below :

1. Work Order No.-El/Con/JHS/C-267 dated 18-5-2003 for the work of "Part-A) Provn. of Power transformer 33/11/KV, 1000 KVA CAP with 33 KV Switch Yard, 33 KV Vacuum Circuit Breaker and equipment and accessories HT Cable at Rayru Station. (Part B) S. E. T. C. of 11 KV Vacuum Circuit Breaker with CT's and panel shifting of 11, KV sub-stn. with IX-250 KVA Transformer and distribution network at Sikroda in Hetampur-Morena Section" issued from the office of Dy. CEE (Const.), NCR, Jhansi.

2. Completion Certificate bearing reference No. EL/Con/JHS/402 Dated : 18-3-2010 & 10-6-2004 issued from the office of Dy. CEE (Const) NCR, Jhansi.

While verifying the above mentioned work order and completion certificate from NCR Jhansi it was revealed that no such work has been awarded from NCR-Jhansi and the documents submitted by you are forged. Thus it is a case of

submission of forged documents with mala fide intentions, which has been viewed very seriously by NSPCL management.

In view of the submission of forged documents your offer has been rejected and you are debarred for any business dealing with NSPCL for a period of 3 years w.e.f. 29-7-2010 also the Earnest money deposited by you stands forfeited.

Thanking you.

For & behalf of NSPCL (S. K. Mitra) Sr. Manager (CS)

Copy To:

1. Dy. CEE (Const.) NCR, Jhansi.

2. HOD (C&M)-NSPCL-Raurkela & Durgapur

3. HOD (C&M)-All NTPC Projects

3. It is against this communication; the writ petitioner has felt aggrieved and filed this writ petition for its quashing.

4. The notice of this writ petition was served on the NSPCL. A return is filed justifying the decision taken to reject the tender so also forfeiting the earnest money and further debarring the writ petitioner from doing the business with NSPCL. It is contended that in order to secure the tender work, the writ petitioner indulged in manipulating and forging certain documents besides giving false and incorrect information and hence, the NSPCL was constrained and rather justified in rejecting the tender submitted by the writ petitioner after making proper verification of the documents and all other inquiries from their sources.

5. Having heard learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the writ petition in part and quash that part of the letter/communication by which the NSPCL forfeited the earnest money deposited by the writ petition and further debarred the writ petitioner from doing business for a period of three years.

6. Coming first to the question as to whether NSPCL was justified in rejecting the writ petitioner's tender, in our opinion; we are inclined to uphold the decision of such rejection in favour of NSPCL. In our view, judicial interference in such issue is very limited and the writ petitioner was not able to make out any case to interfere in such decision of the NSPCL. Indeed the rejection seems to be on merits finding that writ petitioner failed to fulfill some of the important requirements of the tender conditions as would be clear from mere reading of the impugned letter quoted supra. In fact, the writ petitioner did not make any effort to counter these reasoning in this writ petition. Even if the same had been done, then also, this Court would have been very slow to probe into the same, they being technical in nature and not falling in judicial arena. It also does not involve any arbitrariness nor any kind of mala fides on the part of the NSPCL in rejecting the tender bid. The same, in our opinion, therefore does not call for any

interference in this writ petition. The challenge to rejection of tender is therefore found to be devoid of any merit.

7. In the light of the foregoing discussion, we uphold the decision of the NSPCL insofar it deals with rejection of the tender bid of the writ petitioner.

8. Now coming to the next question as to whether, NSPCL was justified in forfeiting the earnest money deposited by the writ petitioner along with tender document? This question, in our opinion, has to be answered in favour of the writ petitioner and against the NSPCL. Indeed, it remains no more *res integra* and settled by the decision of the Supreme Court in favour of the writ petitioner in a case reported in the matter of *Yogesh Mehta Vs. Custodian Appointed under the Special Court and Others*,

9. In this case, their Lordships held that right to forfeit the earnest money arises only when parties enter into a concluded contract. This is what was held :

30 there is another aspect of the matter which also cannot be lost sight of. Forfeiture of the earnest money, in our opinion, in the aforementioned situation, could not have been directed.

31. In *Chairman of The Bankura Municipality Vs. Lalji Raja and Sons*, , this Court noticed the definition of the work "forfeiture" in the following terms:

The word "forfeiture" is defined in Murray's Oxford Dictionary The fact of losing or becoming liable to deprivation of goods in consequence of a crime, offence, or breach of engagement" ".....the penalty of the transgression" or a "punishment for an offence".

32. While directing forfeiture of the "earnest money" the provisions of the Indian Contract Act, 1872 are to be kept in mind. Forfeiture is permissible only when a concluded contract has come into being and not prior thereto. (See *Maula Bux Vs. Union of India (UOI)*, & *Saurabh Prakash Vs. DLF Universal Ltd.*,

10. In the light of this authoritative pronouncement of the Supreme Court, we have no hesitation in quashing that part of the impugned communication by which NSPCL forfeited the amount that was deposited by the writ petitioner along with their tender. Indeed, it is indisputable that tender was rejected at its threshold and no concluded contract in relation to the tender work was executed between the parties. Since parties could not execute the concluded contract and the tender was rejected at the threshold and prior to its taking a shape of concluded contract and hence, we are of the opinion that law laid down by the Supreme Court in the case of *Yogesh Mehta supra* would apply on all force in favour of the writ petitioner. It is apart from the fact that even the tender documents provided certain conditions to be made out for forfeiture but not otherwise. No such Condition could be pressed in service by the respondent against the writ petitioner in support of this forfeiture.

11. In the light of the foregoing discussion, we quash the decision of the

respondent - NSPCL as contained in the impugned communication dated 18-8-2010, by which, they (NSPCL) forfeited the earnest money deposited by the writ petitioner along with their tender. It is now required to be refunded to the writ petitioner by the respondent.

12. This takes us to the last question as to whether NSPCL was justified in debarring the writ petitioner from doing any business for a further period of three years. This question also, in our opinion, deserves to be answered in favour of the writ petitioner and against the NSPCL. Indeed it also remains *ho more res integra* and stands decided by two decisions of the Supreme Court reported in the matters of *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, and in the matter of *Raghunath Thakur Vs. State of Bihar and Others*, .

13. This is what the Supreme Court held in *M/s. Erusain Equipment and Chemicals Ltd. (supra)*:

19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspect of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which this power is exercised and the nature of sanctions involved therein.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

14. The same principle was then reiterated by their Lordships in *Raghunath Thakur (supra)* in the same words as under :

4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of nature justice. It has to be realized that blacklisting any person in respect of business ventures has civil consequences for the future business of the person concerned in any event. Even

if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order, will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is entitled to do so in accordance with law, i.e. giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefore. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of.

15. It was not disputed that the writ petitioner was not afforded any opportunity of hearing and no show-cause notice setting out therein the grounds to debar was given by the NSPCL and straightaway, the impugned communication was sent to the writ petitioner which inter alia included the decision of NSPCL. It is for this reason, in our opinion; the law laid down in two aforementioned cases would apply for setting aside such decision taken by NSPCL. In other words, it was necessary for the NSPCL to have given separate show-cause notice to the writ petitioner setting out therein the grounds to debar them from doing any future business with NSPCL and only after the writ petitioner had been afforded an opportunity to file a reply to the show-cause notice and submit their say in answer to the proposed action, an appropriate order could have been passed by NSPCL but not without resorting to this exercise. Since it was not done by the respondent and hence, interference is called for on this issue in favour of the writ petitioner.

16. In the light of foregoing discussion, the decision of NSPCL to debar the writ petitioner as communicated to the writ petitioner by impugned letter dated 18-8-2010 is also quashed by issuance of writ of certiorari.

17. In view of the foregoing discussion, the writ petition succeeds and is allowed in part as indicated above. The order/decision of the respondent- NSPCL insofar as it relates to forfeiture of the earnest money deposited by the writ petitioner with the tender document is concerned, the same is set aside/quashed by issuance of writ of certiorari. A writ of mandamus is issued against the respondent - NSPCL directing them - NSPCL to refund/return the earnest money to the writ petitioner, which the writ petitioner had deposited along with tender within a period of three months from the date of this order. In case, if the amount is not refunded within three months, then, respondent would be liable to pay interest at the rate of 6% on the said amount till paid.

18. Similarly, the decision of NSPCL to debar the writ petitioner from doing business with them for a period of three years, as contained in impugned letter dated 18-8-2010 is also quashed by issuance of writ of certiorari.

19. However, we wish to make it clear that we have not given any finding either way on the issue relating to commission of fraud and forgery committed by the writ petitioner as alleged by the NSPCL in the impugned letter and hence, this order should not be construed accordingly. We also wish to grant liberty to the respondent (NSPCL) to give show-cause notice to the writ petitioner, in case, if they so wish to take any action to debar the writ petitioner from doing any future business with them and after serving a notice setting out the grounds for such proposed action and after obtaining the reply from the writ petitioner, the appropriate orders can always be passed on such issue. In such process, this order would not come in their way. No Cost.