
(2015) 08 JH CK 0080

In the Jharkhand High Court

Case No : W.Ps.(C) 1436 and 1458 of 2015

Rajhans Transport

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Citation : (2016) 1 AJR 97 : (2015) 4 JLJR 186

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : Indra Pratap Singh and Kumar Gaurav, for the Appellant; Prashant Kumar Singh, Sr. C.G.C. and Sanjay Kumar, C.G.C., Advocates for the Respondent

Final Decision : Allowed

Judgement

S. Chandrashekhar, J—Aggrieved by termination of contract and debarment from participating in future tenders vide order dated 11.02.2015, the present writ petitions have been filed.

2. The brief facts of the case are that, the petitioner is engaged in the business of transportation and handling of materials. The respondent-Corporation floated tender notice dated 01.09.2013 for work of handling and transportation from RH (Rail Head) Madhupur to PEG (Private Enter Pioneer Godown), Jamtara for an estimated cost of Rs. 3.36 crores. The petitioner's bid was accepted on the condition that if the petitioner qualifies as L1 it would be required to submit additional 10% bank guarantee. Vide letter dated 21.11.2013 petitioner's bid was accepted and an additional work order was issued on 27.11.2013. The petitioner furnished security deposit amounting to Rs. 1,68,000/- on 09.12.2013 and it furnished bank guarantee for Rs. 67,20,000/-. Subsequently, the petitioner submitted rectified bank guarantee. The petitioner claims that it commenced work of handling and transportation from RH Madhupur to PEG Jamtara and the work performed by the petitioner was duly entered in the measurement book maintained by the Depot Incharge of the respondent-Corporation however, no formal work-order/appointment letter was issued to the petitioner. Consequently,

the petitioner could not obtain labour licence and EPF number. The petitioner made representations on 24.02.2014 and 06.03.2014 for appointment letter at the earliest and, in the meantime, the petitioner raised bill for Rs. 32,77,619.24/- for handling and transportation of work for the period between 28.11.2013 to 03.01.2014 however, the General Manager (R)-respondent No. 4 stopped the work. Since appointment letter was not issued to the petitioner even though it had started work as directed vide, letter dated 27.11.2013, it approached this Court in W.P.(C) No. 6582 of 2014. During the pendency of the writ petition, respondent No. 4 issued show-cause notice dated 20.01.2015 and finally vide order dated 11.02.2015, allotment of work to the petitioner was cancelled and security deposit was forfeited. The petitioner was also debarred from participating in future tenders of the Corporation for a period of five years. The writ petition was dismissed on 13.03.2015 however, a liberty was reserved with the petitioner to challenge order dated 11.02.2015.

3. Heard the learned counsel for the parties.

4. The learned counsel for the petitioner submits that the petitioner furnished bank guarantee (B.G.) on 17.01.2014 which was within the stipulated period for submission of B.G. with penalty at the rate of 2% and, the bank guarantee was subsequently rectified mentioning the period of validity till 15.07.2016 however, the petitioner was not communicated deficiency, if any. For one year no show-cause notice was issued to the petitioner nor allotment letter was issued to the petitioner and without affording an opportunity to rectify the alleged defects, after issuing letters dated 20.01.2015 and 04.02.2015, contract was summarily terminated and earnest money was forfeited. A further penalty debarring the petitioner from participating in future tenders of the Corporation for a period of five years was imposed. Objecting to the action taken by the respondent-Corporation vide order dated 11.02.2015, the learned counsel for the petitioner submits that action taken by the respondent-Corporation is illegal and it is in breach of principles of natural justice.

5. Per contra, the learned counsel for the respondent-Corporation submits that the petitioner submitted a consolidated bank guarantee of Rs. 67,20,000/- whereas, it was required to submit two separate bank guarantees of Rs. 33,60,000/- each. Bank guarantee for Rs. 67,2000/- was valid only upto 15.01.2016 whereas, it should have been valid till 20.05.2016 and thus, the bank guarantee furnished by the petitioner was not in terms of MTF Clause 7(i) (b) & (c). Alleging serious breach of MTF conditions, the learned counsel for the respondent-Corporation submits that action has been taken against the petitioner vide letter dated 11.02.2015 in terms of conditions governing the contract for transportation, unloading/loading/handling of foodgrains etc. It is further submitted that MTF terms and conditions provide forfeiture of earnest money and blacklisting of the contractor in case of termination of contract and therefore, no illegality can be alleged against order dated 11.02.2015. It is contended that the petitioner was issued show-cause notices dated 20.01.2015 and 04.02.2015 and

thereafter, the contract has been terminated and thus, there is no breach of rules of natural justice.

6. I have carefully considered the rival contentions raised on behalf of the parties and perused the documents on record.

7. Letter dated 11.02.2015 discloses following discrepancies in the bank guarantee;

"(a) In place of two BG amounting 33,60,000/- each party has submitted only one BG, amount to Rs. 67,20,000/- in appendix-IV format only.

(b) Validity period of BG is only upto 15.01.16 while as per MTF clause No. 7(I) (b&c), BG shall be enforceable till further six months after completion of the Contractual period i.e. upto 20.05.2016 (from the date of communication of acceptance of offered rate of 475% ASOR).

(c) In point No. 5 & 8 of page No. 2 of BG, "date" has been mentioned as 15.01.2016 instead of 20.05.2016. In point No. 6 & 7 of page No. 2 of BG, "word" has been written as "Tendered" in place of "Tenderer".

(d) The sentence written in page No. 2 of earlier BG as "this guarantee shall be valid until 15.01.14" is now changed in page No. 2 of modified BG as "this guarantee shall be valid until 15.01.16".

(e) Under the heading of "NOTWITHSTANDING ANYTHING CONTAINED HEREIN ABOVE", in Clause "B" in page No. 2 of modified BG, it has been written that "This Bank Guarantee shall be valid up to 15.01.2016" whereas in Clause "C" it has been written by Bank authority that "We are liable to pay the guarantee amount or any part thereof under this bank guarantee only and only if you serve upon us written claim or demand on or before 15.07.2016."

8. The relevant provisions under MTF are extracted below:

"7. Security Deposit

....

....

(ii) In case of failure of tenderer to deposit the Bank Guarantee as stipulated in Clause 7(i)(b) & (c) within 15 working days of acceptance of his tender, further extension of 1 working days can be given subject to levy of penalty @ 1% of the whole amount of the Security Deposit and another 15 working days with levy of penalty @ 2% on the whole amount of the Security Deposit by the GM(R).

....

IX. Security Deposit

....

....

(b) In case of failure of tenderer to deposit the Bank Guarantee as stipulated in Clause 7(i)(b) & (c) within 15 working days of acceptance of his tender, further extension of 15 working days can be given subject to levy of penalty @ 1% of the whole amount of the Security Deposit and another 15 working days with levy of penalty @ 2% on the whole amount of the Security Deposit by GM (R).

....

....

(d) The General Manager shall have the rights to forfeit the entire or part of the amount of security deposit lodged by the contractors or to appropriate the security deposit or any part, thereof in or towards the satisfaction of any sum due to be claimed for any damages, losses charges, expenses or costs that may be suffered or incurred by the Corporation. The decision of General Manager (Region) in respect of such losses, damages, costs or expenses shall be final and binding on the contractors.

(e) Whenever the Security Deposit falls short of the specified amount the Contractor shall make good the deficit so that the total amount of Security Deposit shall not at any time be less than specified amount.

(f) In the event of the Tenderer failure, after the communication of acceptance of the tender by the Corporation, to furnish the requisite Security Deposit by the due date including extension period, his Contract shall summarily terminated besides forfeiture of the Earnest Money and the Corporation shall proceed for appointment of another contractor. Any losses or damages arising out of and incurred by the Corporation by such conduct of the contractor will be recovered from the contractor, without prejudice to any other rights and remedies of the Corporation under the Contract and Law. The contractor will also be debarred from participating in any future tenders of the Corporation for a period of five years. After the completion of prescribed period of five years, the party may be allowed to participate in the future tenders of FCI provided all the recoveries/ dues have been effected by the Corporation and there is no dispute pending with the contractor/party."

9. It is not in dispute that Clause 7 (ii) of the MTF terms and conditions provide extension of 15 days" time for submission of B.G. with penalty at the rate of 1% of the whole amount of the security deposit and another 15 days" time with penalty at the rate of 2%. The respondents have admitted that the petitioner furnished security deposit on 17.01.2014 which was the last date for submission of bank guarantee. Objection that one single bank guarantee for Rs. 67,20,000/- instead of two separate bank guarantees for Rs. 33,60,000/- was furnished by the petitioner, is apparently untenable. The object behind insistence on security deposit is to ensure proper execution of work. The petitioner's capacity to furnish security deposit is evident from the fact that it furnished bank guarantee

for whole of the amount. The error regarding validity period of the bank guarantee was corrected by the Canara Bank and submitted to the respondent No. 4 on 20.01.2015. It appears that on the bank guarantee there was typographical mistake due to which instead of "tendered", word "tenderer" was typed. The respondents have taken objection to endorsement on B.G. by the bank that, "we are liable to pay the bank guarantee amount or any part thereof under this bank guarantee only and only if you serve upon us written claim or demand on or before 15.07.2016". In my opinion the aforesaid objections do not render the bank guarantee invalid. Moreover, such errors/omissions cannot be termed as violation of mandatory conditions. These errors/omissions were capable of correction/clarification. In " M/s. G. J. Fernandez Vs. State of Karnataka and others, AIR 1990 SC 958 : (1990) 1 JT 134 : (1990) 1 SCALE 117 : (1990) 2 SCC 488 : (1990) 1 SCR 229 , the Hon"ble Supreme Court, after taking note of the previous decisions of the Court, observed that it is not that the employer cannot deviate from the guidelines in any situation at all. The Hon"ble Supreme Court observed that only in situations where non-conformity with conditions or relaxation from the conditions prescribed would result in substantial prejudice to other parties or it would not be in public interest, the employer may decline to grant relaxation. In the present case as noticed above, the discrepancies disclosed in letter dated 11.02.2015 were not of such nature which would have rendered the bank guarantee invalid. The petitioner has contended that he rectified the defects pointed out by the respondents and the said stand taken by the petitioner in the writ petitions has not been disputed by the respondents. The order contained in letter dated 11.02.2015 merely recites various clauses under which the respondents sought to take action against the petitioner. It is not in dispute that only 7 days" time was granted to the petitioner to reply and thereafter, 5 days" further time was granted to the petitioner. Order contained in letter dated 11.02.2015 nowhere takes note of the representations submitted by the petitioner. The said letter also does not disclose the reason why show-cause notice has been issued to the petitioner after about one year and in the meantime, the petitioner was permitted to carry additional work vide letter dated 27.11.2013. One year after the petitioner submitted the bank guarantee, the first show-cause notice was issued to the petitioner on 20.01.2015 and thus, it is apparent that time was not the essence of the contract. All other communications are prior to 17.01.2014 when the petitioner furnished the bank guarantee. In the meantime, the petitioner had commenced additional work and made representations for issuing letter of appointment however, no action was taken by the respondents. Grant of further time for rectifying the alleged discrepancies in the B.G. would have been in the interest of the Corporation. The action of the respondents is definitely against principles of fair play in action. I am of the opinion that on the grounds mentioned in letter dated 11.02.2015, the contract could not have been terminated. Accordingly, the impugned order dated 11.02.2015 is hereby quashed. The forfeiture of earnest money and the order debarring the petitioner from participating in future tenders of the Corporation for five years are held illegal. However, in view of the fact that

a fresh tender notice has been issued by the respondent-Corporation, I am not inclined to issue a direction to the respondents for award of work to the petitioner. The respondents are directed to refund the earnest money to the petitioner. The writ petitions stand allowed.