
(2019) 03 MP CK 0161

In the Madhya Pradesh High Court

Case No : Writ Petition No. 25256 Of 2018

Sai CoMadhya Pradeshuter Limited, Meerut

APPELLANT

Vs

Madhya Pradesh Poorv Kshetra Vidyut Vitran Co. Ltd. And
Anr.

RESPONDENT

Date of Decision : 12-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 03 MP CK 0161

Hon'ble Judges : S.K. Seth, CJ;Vijay Kumar Shukla, J

Bench : Division Bench

Advocate : Anshuman Singh, A.P. Shrotri

Final Decision : Dismissed

Judgement

Vijay Kumar Shukla, J

1. The present writ petition is filed under Article 226 of the Constitution of India challenging the legality and validity of the orders dated 03-6-2017 (Annexure-P/17 & Annexure-P/18) and further communication dated 24-9-2018 (Annexure-P/21), whereby Letter of Award (LOA) of contract in favour of the petitioner dated 10-3-2017 was revoked and Earnest Money Deposit (EMD) submitted by the petitioner was forfeited and the petitioner has been debarred from further business for a period of two years with the respondents on account of termination of LOA. By communication dated 24-9-2018 (Annexure-P/21) the petitioner was informed that since the respondents have already closed the issue regarding termination of contract and blacklisting, therefore, no further correspondence shall be entertained.

2. At the outset, learned counsel for the petitioner submitted that he is confining the challenge only to the order dated 03-6-2017 (Annexure-P/18) by which the petitioner has been debarred from further business with the respondents for a period of two years and has abandoned the challenge to the order of termination

and forfeiture of the EMD in the instant writ petition, though initially the order of termination of contract as well as forfeiture of EMD was also challenged in the present petition.

3. The main plank of contention of the petitioner is that before issuance of the order impugned debarring him from future business, the respondents have failed to comply with the principles of natural justice, as the so called show cause notice which has been issued to him before passing of the order of debar/blacklisting is generic in nature and it does not specify the grounds on which the action is proposed. It is put forth that the aforesaid order is cryptic and passed without due application of mind. To bolster his submission, learned counsel for the petitioner has placed reliance on the judgment of the Apex Court rendered in the case of *Gorkha Security Services vs. Government (NCT of Delhi) and others*, (2014) 9 SCC 105.

4. Per contra, learned counsel for the respondents submitted that the impugned order of debar/blacklisting has been passed in accordance with terms and conditions of the bid document which was unconditionally accepted by the petitioner. He also submitted that the show cause notice has clearly mentioned the grounds on the basis of which the action of debarring from future business/blacklisting was proposed. Further, the petitioner has not come to this Court with clean hands. He submitted that the letter, Annexure-P/5 sent by the petitioner to the respondents, filed as Annexure-R/2 does not bear any date whereas the same document filed as Annexure-P/5 shows a hand-written date as 14-03-2017.

5. Before advertising to the said issue it is apposite to refer certain facts in brief. The petitioner has submitted that the respondents floated a tender for "Appointment of Billing and Collection Operator for providing specified services in respect of all consumers (excluding HT) of Shahpura D/C bid area under Dindori O & M Division in Mandla O & M Circle of MPPKVVCL, Jabalpur". It is stated that a Letter of Award (LOA) was issued in favour of the petitioner on 10-3-2007. He deposited the entire amount of contract bank guarantee amounting to Rs.5,24,000/- on 12-5-2017. It is further asserted that the petitioner deposited balance bank guarantee of Rs.11,300/- on 23-5-2017. It is urged that the respondents did not sign the draft agreement and instead issued a notice alleging that there was no commencement of the operation and also the petitioner failed to deposit the contract bank guarantee. According to the petitioner he duly corresponded through letter on 25-5-2017 and stated that the bank guarantee had already been deposited and further, to start the operation on 01-6-2017 and all necessary arrangements had already been made. According to him it was the fault of the respondents that they did not sign the agreement and in a most arbitrary and capricious manner they revoked the LOA by order dated 3-6-2017 and on the same date an order dated 3-6-2017 was issued informing him that no further communication in regard to issue of debarring/blacklisting would be reconsidered by the respondents.

6. After notice the respondents filed reply and submitted that as per clause 23.1

of Section III of the Bid Document/Request for Proposal (RFP) provided for issue of Letter of Award (LOA) to the successful bidder. Clause 23.2 of Section III provided that post issuance of LOA, contract agreement shall be signed between the two parties and thereafter work order shall be issued. Clause 24.1 of Section III provided that from the date of signing of the contract agreement, the successful bidder shall be given commencement period of 30 days to understand the present process and infrastructure of Discom and to arrange for necessary resources to carry out the contract. As per Clause 24.2 of Section III, the contract shall start after 30 days of signing of the contract and shall be deemed as effective date of contract for the purpose of contract. Clause 13 of Section V provided for blacklisting of the billing and collection operator in case(s) or severe default(s) if deemed necessary by the Discom. Clause 7.3 read with Clause 7.1 and 7.2 of Section VI provided that within 21 days from the issue of LOA, the successful bidder shall furnish the requisite contract performance bank guarantee. Clause 7.4 of Section VI provided inter alia that failure of successful bidder to furnish prescribed contract performance guarantee or to execute the agreement within the period specified shall entail action as deemed appropriate by the Discom [including forfeiture of the Earnest Money Deposit (EMD). Cancellation contract, blacklisting of the bidder etc.]. Clause 9 of Section VI postulates that the successful bidder was required to furnish security deposit.

7. The respondents also asseverated that the offer of the petitioner was accepted and accordingly vide letter dated 10-3-2017 (Annexure-P/4) Letter of Award (LOA) for appointment as Billing and Collection Operator for the bid area of Shahpura D/C of Mandla Circle was issued providing inter alia for submission of performance bank guarantee within a period of 21 days and security deposit within a period of three months from the date of LOA. It was further provided that the petitioner should submit its unconditional acceptance within seven days from the date of LOA and failure to comply with the requirements of LOA may result in cancellation of LOA, annulment of award and forfeiture of Earnest Money Deposit.

8. The respondents also submitted that by letter dated 14-3-2017 (Annexure-R/1) the petitioner submitted 'unconditional acceptance' to the LOA and requested inter alia for issuance of agreement which was sent to the petitioner vide e-mail, dated 18-3-2017 (Annexure-P/9). It is stated that the petitioner started raising several queries demanding data for purposes of execution of work contrary to clause 24.1 of Section III of the bid document which provides that from the date of signing of the contract agreement, the successful bidder has to commence the work within a period of 30 days. They have filed e-mail communication as Annexure-R/2. It is also stated that petitioner, in order to mislead this Court, has deliberately filed incorrect copy of Annexure-P/5 it is not the same which was sent to the respondents. It is stated that the document (Annexure-R/2) was doctored as letter, dated 14-3-2017 which has been filed as Annexure-P/5. It is argued that on 24-7-2017 a reminder was sent by the respondents to the petitioner to complete all the contractual formalities as per

terms and conditions of LOA to take up the work from 01-5-2017, failing which action shall be taken in accordance with the terms and conditions of LOA and bid document. Thereafter, the petitioner sent e-mail dated 5-5-2017 and requested for a meeting with the respondent No.2 on 7/8th May 2017. After telephonic discussion a meeting was scheduled on 15-5-2017 but the petitioner did not attend the meeting and thereafter a show cause notice, dated 23-5-2017 was issued asking him to explain as per Clause 7.4 of Section VI of the tender document, failing which action in the matter as deemed fit as per provisions of LOA was cancelled and the order impugned of debar/blacklisting was ordered and EMD was forfeited.

9. According to the respondents the petitioner did not file any response and, therefore, as per terms and conditions of the bid documents, the order of cancellation of LOA cancelling the same and forfeiture of EMD was passed. The respondents also debarred the petitioner from future contracts for a period of two years, due to non-compliance of the terms and conditions.

10. The objection of the respondents regarding conduct of the petitioner not approaching this Court with clean hands, as he has filed a different copy of Annexure-P/5 along with the writ petition from Annexure-R/2 which was sent to the respondents, we observe, the only difference in both the documents is that Annexure-R/2 does not bear the date, whereas Annexure-P/5 mentions a date. The same was not intentional or deliberate, as it does not have direct bearing to the issue raised in the present petition. Therefore, we refrain ourselves to address on the said issue.

11. In the factual backdrop of the case, it is apposite to consider the centripetal issue, whether the show cause notice in the present case is generic in nature or it enables the petitioner to meet the grounds on which the action was proposed against him. In order to appreciate the aforesaid contention, it is apt to refer Condition No.13 of the General Conditions of Contract (GCC) :

"13. Blacklisting - In case(s) of severe default(s) by the Billing and Collection Operator (including but not limited to clause 16 of this Section), the process of blacklisting or debarring of Billing and Collection Operator and recoveries (if any) thereof may be undertaken by the Discom if deemed necessary."

The aforesaid condition of the LOA which has been unconditionally accepted by the petitioner, confers power on the respondents to pass an order of blacklisting.

12. The respondents issued the letter dated 27-4-2017, Annexure-P/10, requesting the petitioner to comply with the condition regarding submission of contract performance guarantee and execution of the agreement. Relevant portion of the said letter reads thus:

"The subject LOA has been placed on you on dtd.10-3-17 for appointment of Billing and collection operator providing specified services as per scope of work in Shahpura D/C of Dindori (O&M) Division under Mandla (O&M) Circle. As per

terms and conditions of the LOA and tender document you have to submit the contract performance guarantee and execute the agreement and complete other related contractual formalities. In this reference it is to mention here that till date you have not submitted the requisite contract performance guarantee as per clause 7 Section IV special conditions of contract of the tender documents and also not executed the contract agreement. The draft of agreement has already provided to you.

In above context it is requested to complete all the contractual formalities immediately as per terms and condition of the LOA/tender document to take up the work from 1st May 2017. Further delay in the matter shall be viewed seriously and action as deemed fit shall be taken against you as per terms and conditions of the LOA and tender document.

Please complete the above formalities at the earliest to avoid any complications in the matter."

13. Thereafter, a show cause notice was issued on 23-5-2017 wherein respondents have quoted Clause 23.2 of Section III that a successful bidder has to execute a contract agreement within 7 days from the date of issuance of LOA. Clauses 7.1 to 7.4 of Section VI were also referred in the notice. Clause 7.4 being relevant, is extracted hereunder:

"7.4. Failure by the successful bidder to furnish the prescribed Contract performance guarantee or to execute the agreement within the period specified in Bid document after his/her bid has been accepted or notice to start the work within such time as is determined by the Engineer-in-charge/Controlling Officer after notification of the acceptance of the bid shall entail action as deemed appropriate by the Discom (including forfeiture of the earnest money deposit (EMD), cancellation of the Contract, blacklisting of bidder, etc."

After reproduction of the clauses, the notice reads as under :

"In this context it is to mention that as per terms of the LoA and bid document, till date you have not submitted the requisite contract performance guarantee as per clause 7 section IV special conditions of contract and also not executed the contract agreement as per clause 23, Section III of the tender document."

14. Upon perusal of the aforesaid contents of the show cause notice, we are unable to accept the contention of the learned counsel for the petitioner that the notice to show cause was generic in nature. We find that though in the notice, it was not specifically mentioned about the action of blacklisting, but clause 7.4 was reproduced and the respondents had afforded opportunity to the petitioner to explain the grounds proposed for action in the notice, and it was further made clear, that in case of failure to present his case within the stipulated time or if no justification is found valid, the respondents will be free to take action in the matter as deemed fit, as per provisions of the LoA and bid document.

15. In the case of Gorkha Security Services (supra) the Apex Court has ruled

that before passing an order of blacklisting, a show notice be issued enabling the noticee to meet the grounds on which action is proposed to be initiated. At this juncture it is useful to refer para 22 of the said judgment:

"22. The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz :

(i) The material/grounds to be stated which according to the department necessitates an action.

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

16. In the light of of the factual matrix of the present case and enunciation of law, we have tested validity of the impugned order, but we do not perceive any illegality or impropriety in the same, warranting interference of this Court under writ jurisdiction.

17. Exconsequenti, the writ petition stands dismissed.

There shall be no order as to costs.