
(2019) 08 JH CK 0045

In the Jharkhand High Court

Case No : Letter Patent Appeal No. 104 of 2019, I.A. No. 7359, 7580 of 2019

Tribhuvan Carrier Private Ltd., Ranchi

APPELLANT

Vs

Bharat Coking Coal Limited And Ors

RESPONDENT

Date of Decision : 26-08-2019

Acts Referred:

National Highways Act, 1956 — Section 3

Citation : (2019) 08 JH CK 0045

Hon'ble Judges : H.C. Mishra, J;Deepak Roshan, J

Bench : Division Bench

Advocate : K.N. Choubey, Sumeet Gadodia, Ritesh Gupta, Indrajit Sinha

Final Decision : Dismissed

Judgement

H.C. Mishra, J

1. Heard learned senior counsel for the appellant Company and learned counsel for the respondents BCCL.

2. The appellant Company is aggrieved by the impugned Judgement dated 21.1.2019, passed by the Hon'ble Single Judge, in W.P.(C) No. 6502 of 2018, whereby, the writ application, filed by the appellant herein, challenging the show cause notice dated 30.10.2018, issued by the respondent BCCL, has been dismissed by the Hon'ble Single Judge.

3. The facts of the case lie in a short compass. An e-tender notice being e-Tender Notice No. H-HEMM-13, was issued by the respondent BCCL, for 'Hiring of HEMM for removal of OB, extraction and transportation of Coal with fire-fighting from XVA, XV, XIV, XIII, XI/XII, XII, XI, XA, IX/X, X, IX, VIIIA, VIII/VII(T), VIII, VII(T) & V/VI Seams of AKJ SIMLA Patch of Amalgamated Fast Bhuggatdih-Simlabahal Colliery of Bastacolla Area', with the Bid Validity Clause-11 of the e-tender notice, stating that "The validity of bids shall be not less than 120 (one hundred twenty) days from the final end and date of submission of bid considering all extensions, if any". In Clause-4.1 of the Instructions to the Bidders, it was stated

that "Each Bidder shall submit only one Bid, either individually, or as a partner in a partnership firm or a partner in a Joint Venture / Consortium or a Public Ltd. / Private Ltd. company". In Clause-14.3 of the said Instructions to the Bidders, it was stated that "The EMD of the rejected bidders will be refunded at any stage directly to the account from where it had been received (except the cases where the EMD is to be forfeited)", whereas in Clause-14.9 thereof, it was stated that "In case the tender is cancelled then EMD of all the participating bidders will be refunded unless it is forfeited by the department". In the Integrity Pact, in Clause-3.6 it was stated that "The Bidder will not collude with other parties interested in the contract to impair the transparency, fairness and progress of the bidding process, bid evaluation contracting and implementation of the contract".

4. It is an admitted position that the appellant Company had submitted two bids, one in their individual capacity and one in the capacity of partner in joint venture of M/s SGPL TCPL BP (JV). It is also an admitted position that the entire tender process was cancelled, due to bid rigging and collusive bidding, on 16.10.2018. Thereafter, on 30.10.2018, a show cause notice was given to the appellant Company, stating therein that while examining the quoted price of the bidders, it was observed that Tribhuvan Carrier Private Ltd., (the appellant herein) had quoted exactly the same price, i.e., Rs. 2425,84,10,745.80 (rupees two thousand four hundred twenty five crores, eighty four lakhs, ten thousand seven hundred forty five and eighty paise only). It was also found that in both the bids the appellant Company had participated. This breached the provision of 'one bid per bidder', under Clause-4 of the Instructions to Bidders and this also showed that the appellant Tribhuvan Carrier Private Limited and M/s SGPL TCPL BP (JV) had indulged in the act of collusion. The show cause notice was, accordingly, issued to the appellant Company to explain as to why action as per Clause-6 of the Integrity Pact of Tender Document for referred NIT and also accepted by the appellant, be not taken against them, including debar from participating in the future bids for the minimum period of five years. It is this show cause notice, which was challenged by the appellant Company, by filing W.P.(C) No. 6502 of 2018 in this Court.

5. The said writ application was adjudicated by the Hon'ble Single Judge, who relied upon the decisions of the Hon'ble Apex Court, in Union of India & Anr. Vs. Kunisetty Satyanarayan, reported in (2006) 12 SCC 28, Secretary, Ministry of Defence Vs. Prabhash Chandra Mirdha, reported in (2012) 11 SCC 565, and also in State of Uttar Pradesh Vs. Brahm Datt Sharma & Anr., reported in (1987) 2 SCC 179, laying down the law that the Courts should be reluctant to interfere with show cause notice to offer an opportunity of hearing before taking a final decision in the matter, unless the notice is shown to have been issued palpably without jurisdiction / competence to do so, or it is shown to have been issued without any authority of law. In view of the law laid down by the Hon'ble Apex Court, the writ application was thus, dismissed by the Hon'ble Single Judge.

6. Learned senior counsel for the appellant has submitted that the impugned

order, passed by the Hon'ble Single Judge, cannot be sustained in the eyes of law, as admittedly, the show cause notice had been issued to the appellant after the expiry of the validity period of 120 days, and also after cancellation of the tender process, by order dated 16.10.2018. Learned senior counsel also submitted that once the tender was cancelled, as per Clause-14.9 of the Instructions to the Bidders, the EMD of all the participating bidders ought to have been refunded and no show cause notice could be issued against the appellant. It is further submitted by learned senior counsel that in the present case, not only that the show cause notice issued against the appellant is against the settled principle of law, rather the EMD of the appellant has also been forfeited. In support of his contention, learned senior counsel has placed reliance upon the decision of the Hon'ble Andhra Pradesh High Court in *Fly Wheel Travels, Hyderabad, Vs. Bharat Sanchal Nigam Limited, Hyderabad & Anr.*, reported in 2005 SCC OnLine AP 432, holding that once the tender itself is cancelled, the question of blacklisting or forfeiture of EMD deposit does not arise. Further reliance has been placed upon the decision of the Delhi High Court in *Emami Power Limited Vs. NTPC Limited & Anr.*, reported in 2018 SCC OnLine Del 6525, holding that in case the offer is neither rejected nor accepted during the term of its validity, the question of forfeiture of EMD does not arise. Learned senior counsel has relied upon this decision due to the fact that in that case also, more than one bids were submitted under the common signatory, and in the facts of that case, the Delhi High Court had held that even if this fact is accepted, it does not necessarily follow that the petitioners had practiced any deception, nor the NTPC in its reply had been able to establish as to how this had caused any wrongful gain to the petitioners or any wrongful loss to NTPC. Learned senior counsel has further placed reliance upon the decision of the Hon'ble Apex Court in *Gorkha Security Services Vs. Government (NCT of Delhi) & Ors.*, reported in (2014) 9 SCC 105, holding that the action of blacklisting amounts to civil death.

7. Placing reliance upon these decisions, learned senior counsel has submitted that the show cause notice could not have been issued against the appellant Company, as the tender process itself was cancelled on 16.10.2018. It is further case of the appellant that it was only due to inadvertence that two bids were submitted by the appellant Company, but thereafter, the appellant did not take part in reverse auction process, as the appellant Company had realised their mistake. Learned counsel has submitted that in the facts of this case no mens rea could be attached to the appellant, simply because of the fact that two bids were submitted by the appellant Company, as it does not necessarily follow that the appellant had thereby practiced any deception, nor the respondents BCCL has been able to establish as to how this has caused any wrongful gain to the appellant Company or any wrongful loss to the respondents BCCL, and in view of the law settled as aforesaid, in *Emami Power Limited's* case (*supra*), the show cause notice could not be sustained in the eyes of law.

8. By way of I.A. No. 7359 of 2019, the order passed by the respondent BCCL, on 31.7.2019, has also been brought on record, whereby the order has been

passed, debarring the appellant Company from participating in future bids in all tenders of BCCL, for a period of five years and their EMD of Rs. 50 lakhs has also been forfeited. Without challenging this order, only a prayer has been made in the interlocutory application to stay the operation of this order, though according to learned senior counsel, these actions are not permissible once the tender itself was cancelled.

9. Learned counsel for the respondent BCCL, on the other hand, has opposed the prayer, and has submitted that it was a deliberate action on the part of the appellant Company, whereby, two bids were submitted by the appellant, one in their own capacity and the other being a partner in the joint venture of M/s SGPL TCPL BP (JV). It is also pointed out that pursuant to the show cause notice dated 30.10.2018, the appellant had already submitted their reply on 19.11.2018 to the respondent BCCL, and after considering the reply, the final order has been passed on 31.7.2019, debarring the appellant from participating in all future bids of the BCCL for 5 years and forfeiting the amount of EMD. Learned counsel for the respondent BCCL has, accordingly, submitted that the present cause of action does not survive to the appellant at all, and fresh cause of action has accrued, which cannot be looked into in this appeal. It is further submitted by learned counsel, that the BCCL was always authorized to give the show cause notice to the appellant, in view of the impugned action of the appellant, irrespective of the facts that the tender process was cancelled, or the validity period of the bid had expired. In this connection learned counsel has placed reliance upon the decision of Hon'ble Apex Court in *Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchal Nigam Limited & Ors.*, reported in (2014) 14 SCC 731, wherein the law has been laid down by the Hon'ble Apex Court as follows:-

"17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court."

(Emphasis supplied).

10. Further reliance has been placed by learned counsel for the respondent BCCL upon the decision of Hon'ble Apex Court in Patel Engineering Limited Vs. Union of India & Anr., reported in (2012) 11 SCC 257, wherein the law has been laid down as follows:-

"15. It follows from the above judgment in Erusian Equipment case that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary - thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors.

*** **

24. The second respondent, being a statutory corporation, is equally subject to all constitutional limitations, which bind the State in its dealings with the subjects. At the same time, the very authority to enter into contracts conferred under Section 3 of the NHA Act, by necessary implication, confers the authority not to enter into a contract in appropriate cases (blacklist). The "bid document" can neither confer powers, which are not conferred by law on the second respondent, nor can it substract the powers, which are conferred by law either by express provision or by necessary implication.

25. The bid document is not a statutory instrument. Therefore, the rules of interpretation, which are applicable to the interpretation of statutes and statutory instruments, are not applicable to the bid document. Therefore, in our opinion, the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the second respondent from blacklisting a delinquent bidder, if it is otherwise justified. Such power is inherent in every person legally capable of entering into contracts."(Emphasis supplied).

11. Placing reliance on these decisions, learned counsel for the respondent BCCL has submitted that issuing the show cause notice was in exercise of the inherent power of BCCL, and it was not subject to the bid document, which could neither confer any power, nor substract any power from the respondent BCCL. Learned counsel, accordingly, submitted that there is no illegality in the impugned order, passed by the Hon'ble Single Judge, and there is also no merit in this appeal.

12. Having heard learned counsels for both the sides and upon going through the record, we find that the appellant had challenged the show cause notice, issued to it on 30.10.2018. Though the appellant had challenged the show cause notice in the writ application also, but it had submitted its reply to the respondent BCCL as well on 19.11.2018, and after consideration of their reply, the final order has again been passed on 31.7.2019 by the respondent BCCL, debarring the appellant Company from participating in future bids in all tenders of BCCL for a period of five years and its EMD of Rs. 50 lakhs have also been forfeited. This order is not challenged in the present LPA and it could not have been, as it has been passed after the impugned order, passed by the Writ Court. The ground taken by the learned senior counsel for the appellant, challenging the show cause notice is only that after the expiry of the validity period of 120 days, or after cancelling the tender process, there was no question of forfeiture of EMD, or of blacklisting the Company, debarring it from participating in future bids in all tenders of BCCL for a period of five years. As such, the impugned notice, could not have been issued against the appellant Company. It is also the case of the appellant that by the action of the appellant Company in submitting the two bids, it cannot be ipso facto presumed that there was any wrongful act on part of the appellant, causing any wrongful gain to the appellant and wrongful loss to the respondent, and in any case, after the tender process itself was cancelled, there was no question of issuing the show cause notice. All these submissions of learned senior counsel for the appellant are fully answered in the decisions of the Hon'ble Apex Court in Patel Engineering Limited's case and Kulja Industries Limited's case (supra), relied upon by the learned counsel for the respondent BCCL, wherein it is specifically held that the power to blacklist a contractor is inherent in the party, allotting the contract, and is not subject to any bid document. When such action is taken by the State or any of its instrumentalities, it should pass the test of the principles of natural justice and the doctrine of proportionality. A fair hearing to the party being blacklisted, is thus an essential precondition for a proper exercise of the power, and such decisions are subject to judicial review by the Courts. In the present case, since the respondent BCCL was contemplating to take the action against the appellant Company, the requirements of the principles of natural justice have been fulfilled by issuance of the show cause notice to the appellant. In view of the admitted fact that the appellant Company had submitted two bids, one in their individual capacity and one in the capacity of partner in joint venture of M/s SGPL TCPL BP (JV), as also in view of the fact that it was found that in both the bids exactly the same price, i.e., Rs. 2425,84,10,745.80 (rupees two thousand four hundred twenty five crores, eighty four lakhs, ten thousand seven hundred forty five and eighty paise only) was quoted, we are not in a position to accept the contention of learned senior counsel for the appellant that these actions were only bona fide mistakes on part of the appellant, without there being any element of mens rea or intention to defraud. The fact remains that the entire tender process had to be cancelled due to bid rigging and collusive bidding, on 16.10.2018.

13. In the facts of the present case, we find that the show cause notice was issued to the appellant in order to follow the principles of natural justice and in that view of the matter, the Writ Court was perfectly justified in not interfering with the issuance of show cause notice, relying upon the decisions of the Hon'ble Apex Court, as mentioned hereinabove.

14. We find no illegality in the impugned Judgement dated 21.1.2019, passed in W.P.(C) No. 6502 of 2018, by the Hon'ble Single Judge, worth any interference in exercise of LPA jurisdiction.

15. Even otherwise, by passing of the final order by the respondent BCCL on 31.7.2019, debarring the appellant Company from participating in future bids in all tenders of BCCL for a period of five years and forfeiting its EMD of Rs. 50 lakhs, the question of deciding the legality or otherwise of the show cause notice, no more remains alive and this LPA for all practical purposes has become infructuous. It is for the appellant to challenge the final order before the appropriate forum.

16. In view of the aforesaid discussions, we find no merit in this appeal and the same is, accordingly, dismissed. The pending interlocutory applications also stand disposed of.