(2009) 10 PAT CK 0018

In the Patna High Court

Case No : CWJC No. 12343 of 2009

Vishal Builtech (India) Pvt. Ltd. APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 16-10-2009

Acts Referred:

Citation : (2009) 10 PAT CK 0018

Judgement

V.N. Sinha, J.—Heard learned Counsel for the petitioner and the State.

2. Petitioner company is a works contractor registered with the Road Construction Department of the State Government. The Company has filed this writ application challenging the order bearing Memo No. 3411(E) dated 9.9.2009, Annexure-13 whereunder with reference to the provisions contained in Sub-rule (vii) of Rule-11(ka) of the Bihar Contractors Registration Rules, 2007 (hereinafter referred to as "the Rules"), the Company has been black listed by the competent authority, namely, Engineer-in-Chief cum Additional Commissioner-cum-Special Secretary of the Department on the ground that the company in collusion with the departmental authorities/officers changed the last page of the financial bid submitted by it in connection with tender notice dated 29.12.2008 published in Dainik Jagran newspaper for IRQP work in between kilometers 1 to 22 (part) of Narayanpur Chowk, N.H. 57 to Karjain Bazar (N.H. 106) via Jhilla-Sahpur-Pirithvipatti- Chhitai-Satanpatti-Sah Tola-Pandit Tola-Jagdishpur. In this connection, petitioner was initially served with the memo of charge bearing letter No. 1547(E) dated 5.5.2009, Annexure-8 on the basis of the report of the flying squad calling upon the Company to submit show cause reply within ten days explaining as to why the Company be not black listed with reference to the provisions contained in Sub-rule (vii) of Rule 11(ka) of the Rules on the allegation that the Company in connivance with the departmental authorities changed the last page of the financial bid submitted pursuant to the aforesaid tender notice.

3. Having received the charge memo petitioner requested the Engineer-in-Chief

under letter dated 11.5.2009, Annexure-9 to furnish the copy of the enquiry report on the basis of which charge memo has been drawn, so that the Company could submit its reply to the show cause notice. In consideration of the request of the petitioner contained in letter dated 11.5.2009, Annexure-9 the Superintending Engineer under letter dated 5.6.2009, Annexure-10 informed the petitioner that he may peruse the concerned report as also other relevant document kept in the files and submit his explanation within three days.

4. Petitioner company having received the instructions dated 5.6.2009, Annexure-10 to peruse the reports by inspecting the file authorized Shri Rajeev Kumar under letter dated 12.6.2009 to inspect the file and peruse the report. In the light of the authorization dated 12.6.2009, Shri Rajeev Kumar visited the office of the Superintending Engineer and inspected the file as also perused the report on 12.6.2009 itself but in the file the financial bid last page whereof is alleged to have been changed by the petitioner was not available, which fact was duly brought to the notice of all concerned by Shri Rajeev Kumar. In this connection, Shri Rajeev Kumar also made endorsement in the letter of authorization dated 12.6.2009, Annexure-11. Shri Rajeev Kumar further informed the Company that, although report of the flying squad was available for inspection but copy thereof was not given to the petitioner. The Company having made the inspection of the file and the report of the flying squad on 12.6.2009 proceeded to comply the direction of the Superintending Engineer contained in letter dated 5.6.2009, Annexure-10 and filed the show cause reply within three days of the inspection vide show cause reply dated 12.6.2009, Annexure-12 in which it was categorically asserted that the copy of the report of the flying squad has not been given to the petitioner, as such petitioner could submit his explanation without obtaining appropriate advice about the contents of the report. In the show cause reply it was further asserted that the tender papers including the financial bid last page whereof is said to have been changed was also not available for inspection. It was further asserted in the show cause reply that the technical bid was submitted by the petitioner in a sealed cover to the respondent Superintending Engineer on 10.1.2009, who forwarded the envelop containing the financial bid of the petitioner to the respondent Executive Engineer on 10.1.2009 itself, which was received by the Executive Engineer on 11.1.2009 and since then the envelop containing the financial bid remained in the custody of the Executive Engineer. On 14.2.2009 the financial bid was opened by the Authorized Assistant Engineer without any prior intimation to the petitioner. The Assistant Engineer having opened the financial bid of the petitioner put his signature on each page of the financial bid without raising any objection.

5. With reference to the aforesaid fact it was stated in the show cause reply that the financial bid was submitted by the petitioner in a sealed envelop before the Superintending Engineer on 10.1.2009 who forwarded the same to the Executive Engineer on the same day, which was received by the Executive Engineer on 11.1.2009 and till the opening of the bid on 14.2.2009 the envelop remained in

the custody of the Executive Engineer and was opened by the Authorized Assistant Engineer, in the circumstances, petitioner cannot be held responsible for changing its last page. In this connection, it is further pointed out that the rate quoted by the petitioner i.e. (-) 3.4% was above the rate quoted by M/s Ghanshyam Lal Madhogarhia, who quoted (-) 3.51%, as such according to the petitioner had he played the fraud he should have quoted rate even lower than M/s Ghanshyam Lal Madhogarhia.

6. The competent authority, namely, the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary considered the show cause reply filed by the petitioner in detail under his note dated 3.8.2009 discussing different aspects of the matter including the fact that the sealed envelop containing the financial bid of the petitioner remained in custody of the Executive Engineer for one month and five days and was opened behind the back of the petitioner by the authorized Assistant Engineer and with reference to the two facts the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary concluded that petitioner had no opportunity to change the last page of the financial bid submitted by him. Aforesaid findings of the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary contained in the notes dated 3.8.2009 was considered by the Secretary of the Department under his notes dated 27.8.2009, the learned Secretary having perused the original financial bid as also having considered several other aspects of the matter overruled the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary and concluded that the last page of the financial bid submitted by the petitioner was changed by him. Petitioner has placed on record the aforesaid two notes of the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary dated 3.8.2009 and that of the Secretary of the department dated 27.8.2009 by obtaining the copy of the entire file from the department by applying in terms of the provisions contained in the Right to Information Act. The copy of the file was given to the petitioner under letter No. 10136(s) dated 14.9.2009, which is placed on record in this application by filing supplementary affidavit and is contained in Annexure-14 to this application.

7. The Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary was overruled by the Secretary of the Department under notes dated 27.8.2009 and it appears the impugned order bearing Memo No. 3411(E) dated 9.9.2009, Annexure-13 black listing the petitioner was passed by the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary in compliance of the findings recorded by the Secretary of the Department under notes dated 27.8.2009 and served on the petitioner.

8. Learned Counsel for the petitioner has assailed the said order on the ground that under the Rules it is the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary is vested with the jurisdiction to consider the show cause reply filed by the petitioner as to why the Company be not black listed on the ground of committing fraud, the competent authority, namely, Engineer-in-Chief-

cum-Additional Commissioner-cum-Special Secretary could not have been overruled by the Secretary of the Department who under the Rules had no jurisdiction in the matter and as the impugned order has been issued in the light of the opinion of the Secretary, the same is fit to be set aside.

9. Learned Counsel for the petitioner further assailed the memo of charge dated 5.5.2009, Annexure-8 as also the findings recorded by the Secretary of the Department in his note dated 27.8.2009 as according to him without there being any particulars making out the allegation of fraud in the memo of charge no such finding that petitioner committed fraud could have been recorded. According to learned Counsel it was incumbent upon the authorities to have indicated in the memo of charge itself as to which of the three or all the three departmental functionary assisted the petitioner in committing fraud by replacing the last page of the financial bid. In this connection, he further submitted that the charge sheet ought to have named the three functionaries who handled the envelop containing the financial bid submitted by the petitioner company on 10.1.2009, namely, the Superintending Engineer who received the sealed envelop containing the financial bid, the Executive Engineer with whom the sealed envelop remained for one month and five days and the authorized Assistant Engineer who opened the envelop behind the back of the petitioner and signed every page of the bid document.

10. Learned Counsel further submitted that the envelop remained in the custody of the Executive Engineer for about one month and five days and was opened behind the back of the petitioner by the authorized Assistant Engineer, who signed every page thereof he cannot be held responsible for changing the last page of the financial bid sheet. Learned Counsel for the petitioner in this connection relied on the following passage from KERR ON THE LAW OF FRAUD AND MISTAKE, 7th Edition.

Page No. 3: Lastly, there must be damage to the party deceived, even where there is a willful false representation, before a cause of action can arise. Fraud without damage or damage without fraud gives no cause of action. But fraud gives a cause of action if it leads to any sort of damage.

Page No. 672: The law in no case presumes fraud. The presumption is always in favour of innocence, and not of guilt. In no doubtful matter does the Court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established. Circumstances of mere suspicion will not warrant the conclusion of fraud. The proof must be such as to create belief, and not merely suspicion.

He also relied on the judgment of the Hon''ble Supreme Court in the case of Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, Paragraphs-24 to 28, in the case of Svenska Handelsbanken v. Indian Charge Chrome and Ors. reported in (1994) 1 Supreme Court Cases 502, Paragraph-42 and in the case of State of A.P. and Anr. v. T. Suryachandra Rao reported in (2005) 6 Supreme

Court Cases 149, Paragraph-8 and submitted that the allegation of fraud levelled against the petitioner can be alleged and enquired into by the authorities only after particulars constituting the element of fraud is stated in the memo of charge with the name of those departmental officers who colluded with the petitioner in changing the last page of the bid sheet.

11. Learned Counsel for the petitioner with reference to the note dated 27.8.2009 of the Secretary of the department submitted that no useful purpose will be served if this Court directs the petitioner to file appeal against the impugned order before the appellate authority, namely, the Principal Secretary of the department as the Secretary of the department who recorded note dated 27.8.2009 is presently officiating as Principal Secretary of the department and is likely to take the same view, which he has taken in his note dated 27.8.2009.

12. Counsel for the State has opposed the prayer. He states that the charge sheet may not have included the name of the Superintending, Executive, Authorized Assistant Engineer who handled the envelop containing the financial bid but it is evident from the contents of the charge sheet that petitioner in collusion with the departmental/field authorities succeeded in replacing the last page of the financial bid. In the circumstances, it is quite obvious that those who received the financial bid, kept the same for one month and five days as also opened the envelop colluded with the petitioner in replacing the last page of the financial bid and this Court may not take any adverse view against the department for omission to name the departmental authorities in the charge sheet. Learned Counsel for the State further pointed out that from perusal of the impugned order it does not appear that the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary passed the impugned order in compliance of the findings of the Secretary of the Department contained in his note dated 27.8.2009. In this connection, he pointed out that the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary on his own may have revised the opinion recorded by him in his note dated 3.8.2009 and the impugned order has been passed by him without any reference to the notes of the Secretary dated 27.8.2009.

13. Having heard counsel for the parties and having perused the writ application and the supplementary affidavit as also the contents of the relevant file contained in Annexure-14 to the supplementary affidavit, I am of the view that the charge against the petitioner is of committing fraud in collusion with the departmental functionaries, the details of the allegation constituting the overt act including the names of those who colluded with the petitioner was required to be mentioned in the charge memo. The copy of the internal inquiry report on the basis of which charge of fraud was drawn against the petitioner was also required to have been given to him. The financial bid last page whereof is alleged to have been replaced by the petitioner in collusion with the departmental authorities should also have been shown to the representative of the petitioner who took inspection of the file on 12.6.2009. The Engineer-in-Chief-cum-Additional

Commissioner-cum-Special Secretary who is authorized under the Rules to consider the show cause reply exonerated the petitioner of the charge under his note dated 3.8.2009 whereafter the matter was considered by the Secretary on 27.8.2009 who having perused the original financial bid document as also having considered other circumstances connected therewith overruled the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary under his note dated 27.8.2009 and soon thereafter the impugned order bearing Memo No. 3411(E) dated 9.9.2009, Annexure-13 was issued by the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary black listing the petitioner. In the circumstances, it is not difficult for this Court to conclude that the impugned order has been passed by the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary on the basis of the findings recorded by the Secretary of the Department in his note dated 27.8.2009. The authority to consider the show cause reply being the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary having already exonerated the petitioner of the charge of fraud under note dated 3.8.2009 could not have issued the impugned order on the basis of the findings recorded by the Secretary in his note dated 27.8.2009. The competent authority, namely, the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary has issued the impugned order on the basis of the findings recorded by the Secretary who was not authorized to deal with the show cause reply of the petitioner and to record his finding in terms of the provisions of the Rules. In view of the fact that the impugned order is passed on the basis of the findings of the Secretary of the department who is not authorized to deal with the show cause as per provisions of the Rules there is no difficulty in holding that the impugned order is without jurisdiction, which is accordingly, set aside and the matter remitted back to the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary to reconsider the matter and pass fresh orders in accordance with law without being impressed by the opinion of the Secretary of the Department. In the event, the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary is of the view to again examine the charge levelled against the petitioner he should amend the memo of charge so as to include the name of the departmental authorities who colluded with the petitioner in replacing the last page of the financial bid and further indicate therein the manner in which fraud was committed by the petitioner in collusion with the named departmental authorities.

14. This writ application is allowed to the extent indicated above.

