

HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_
WP(C) No.317 of 2023

Sri Debashish Bhowmik owner of JMC Bricks Industry, situated at Santirbazar, Sub-division- Santirbazar, P.S. Santir Bazar, P.O. Santir Bazar, South Tripura.

..... *Petitioner(s)*

V E R S U S

1. The State of Tripura, represented by the Commissioner & Secretary, Department of Industries & Commerce, Government of Tripura, having his office at New Capital Complex, P.O. Kunjaban, P.S. New Capital Complex, Sub-division-Agartala, District- West Tripura.
2. The Commissioner & Secretary, Department of Industries & Commerce, Government of Tripura, having his office at New Capital Complex, P.O. Kunjaban, P.S. New Capital Complex, Sub-division-Agartala, District- West Tripura.
3. The Tripura Small Industries Corporation Limited, represented by its Director, having his office at Kunjaban Colony, Agartala-799005, West Tripura.
4. The Director, Tripura Small Industries Corporation Limited, having his office at Kunjaban Colony, Agartala-799005, West Tripura.
5. The District Magistrate & Collector, having his office at Belonia, South Tripura.

..... *Respondent(s)*

For Petitioner(s) : Mr. Somik Deb, Sr. Advocate,
Mr. Abir Baran, Advocate.

For Respondent(s) : Mr. Mangal Debbarma, Addl. G.A.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE S.D. PURKAYASTHA

Date of argument and delivery of Judgment & Order : 10th February, 2025.

Whether Fit for Reporting : YES

JUDGMENT & ORDER (ORAL)

Heard Mr. Somik Deb, learned senior counsel assisted by Mr. Abir Baran, learned counsel appearing for the petitioner and also heard Mr. Mangal Debbarma, learned Additional Government Advocate appearing for the respondent-State.

[2] Reference is made to the order dated 29th May, 2023 which encapsulates the grievance of the petitioner as under:

Mr. Somik Deb, learned senior counsel for the petitioner submits that the notice dated 31st August, 2021 (Annexure-2) did not propose to forfeit the lease rent for the period 2019-20 amounting to Rs.17,10,777/- for non-execution of the lease deed in respect of Sonaicharri Brick Field allotted to the petitioner through a tender process pursuant to the advertisement at Annexure-1 bearing number File Ref. No. TSIC/ BRICK/ GEN/1(75)/VOL-I/2000-2001/. Learned senior counsel for the petitioner further submits that even if the plea of alternative remedy to approach the competent court of civil jurisdiction may be held against the petitioner so far as the forfeiture of D. call amount of Rs.3,00,000/- is concerned on failure to execute the lease deed despite extensions but in the absence of any notice to forfeit the lease rent deposited sans a proper lease agreement and with no reference thereof in the impugned order dated 4th November, 2022 (Annexure-4) issued by the Managing Director of the respondent Corporation, petitioner would be at a loss to agitate the instant issue as it is still inchoate. As such, respondents Nos.3 and 4 may be called upon to respond to this limited contention.

Issue notice upon respondents No.3 and 4.

Learned counsel for the petitioner undertakes to effect 'Dasti' service of notice for which requisites be filed by Thursday (01.06.2023). Office to issue notice by Saturday (03.06.2023). After effecting 'Dasti' service of notice in the aforesaid mode, an affidavit containing proof of service of notice be filed by 21st of June, 2023.

Notice is made returnable on 03.07.2023. ”

[3] Counter affidavit has been filed by the respondent-State. Counter affidavit has also been filed by the respondents No.3 and 4. The response of the State and the TSICL in their counter affidavit on facts is on similar lines. It is averred that petitioner though made a deposit of Rs.17,10,777/- after being selected in the advertisement at (Annexure-1) for operation of the brick field of TSICL at Sonaichari, South Tripura from the financial year 2019-20 onwards on the basis of payment of yearly lease-rent in advance to TSICL in 1st week of April of every year (lease period of four years initially subject to extension as per needs of TSICL) but petitioner never entered into an agreement despite repeated notices. The lease amount of Rs.17,10,777/- was deposited after 90 days instead of 7 days on 19th February, 2020. The work order was issued on 17th November, 2019. Further opportunities for signing of the agreement were offered vide letter dated 16th

November, 2020 which the petitioner did not reply to. He was reminded on several occasions not only over phone but through letters dated 02.01.2021, 03.03.2021 and 16.06.2021. However, petitioner sought for extension of time which was provided till 31st September, 2021. Evidently, he was avoiding signing of lease agreement. Petitioner never informed TSICL nor met the authorities to avoid signing of the lease agreement which has resulted in cancellation of tender and forfeiture of his D. Call amount since the tender could not be kept pending for indefinite period.

[4] In the process the Corporation has incurred huge loss of Rs.18,81,854/- (Rs.17,10,777 + 10% on account of lease rent from 19.02.2020 to 18.02.2021) and Rs.20,70,039/- (Rs.18,81,854/- + 10% on account of lease rent from 19.02.2021 to 18.02.2022) for non-compliance on his part in performing the formalities which is recoverable from the petitioner. The total recoverable lease rent is Rs.39,51,893/- from the petitioner along with 24% panel interest + administrative and legal cost. At paragraph 14 of the State's counter affidavit, the respondents have furnished a tabular chart of the total losses and damages to TSICL amounting to Rs.1,07,85,520/- recoverable from the petitioner. The respondents have further stated that at least 100 workers per day were deprived from the works for last 3 years from 2020 to 2022. Local people are depended on such brick field and earn their livelihood out of that. The same stand is taken in the counter affidavit of the respondent-TSICL.

[5] The learned counsel for the State has referred to Clause (xiv) under Part-I and Clause (iii) under the heading 'Award of contract, signing of agreement and take up the assignment of the NIT' at Annexure-R/1. He

submits that as per sub-clause (iii) for non-acceptance of letter of award/offer within the stipulated period of time, the EMD in the form of D. Call will be forfeited. Learned counsel for the State has however not pointed out any other terms of the NIT under which the lease rent amount can be forfeited.

[6] It is not in dispute that no lease agreement was executed between the petitioner and the TSICL apparently as petitioner did not come forward to sign it despite repeated reminders. In the wake of such factual and legal position, the forfeiture of the D. Call amount of Rs.3,00,000/- which is essentially an earnest money deposit at the time of participation in the tender cannot be faulted since the petitioner did not execute the lease deed. It is in conformity with the terms of the NIT. However, it is rightly pointed out by learned senior counsel for the petitioner that forfeiture of the lease rent deposited for 2019-2020 to the tune of Rs.17,10,777/- cannot be made as there was no executed agreement between the parties under which such forfeiture can be made in the nature of a penalty. As observed in the forgoing paragraph, learned senior counsel for the petitioner has also not pressed the forfeiture of the D. Call amount i.e. the earnest money deposit as captured in the order dated 29.05.2024.

[7] Mr. Somik Deb, learned senior counsel for the petitioner has placed reliance upon a recent decision of the Apex Court in case of *South Eastern Coalfields Limited and others versus S. Kumar Associates AKM (JV)*, reported in (2021) 9 SCC 166. He submitted that since there has been no formal agreement between the parties and there is no subsisting contract inter se parties to attract such general terms and conditions as are applicable

to the contract, as such an agreement could have been entered into only upon completion of certain formalities by the tenderer-petitioner, which was never completed, the forfeiture of the lease rent amount deposited cannot be upheld in the eye of law. The letters issued upon the petitioner which are at Annexure-R/2 dated 17th December, 2019, letter dated 16th November, 2020, Annexure-R/3, letter dated 2nd January, 2021, Annexure-R/4 and letter dated 31st August, 2021, Annexure-2 all of them indicate that the respondent-authorities of TSICL also were conscious that only the D. Call amount or EMD could be forfeited for failure to execute the lease agreement. However, neither has any notice being issued for forfeiture of the lease deposit amount of Rs.17,10,777/- nor such order has been passed. The impugned order dated 4th November, 2022 also refers to cancellation of the work order and forfeiture of the D. Call amount. In such circumstances, the impugned action of the respondent-TSICL to forfeit the amount deposited as lease rent for the year 2019-20 is unsustainable in law and on facts. The respondents have failed to justify it on any valid legal grounds. The respondents may be directed to refund the said amount to the petitioner.

[8] We have considered the submissions of learned counsel for the parties and also taken note of the relevant material facts referred to from the pleadings on record. We have also perused the judgment in case of *South Eastern Coalfields Limited* (supra) relied upon by learned senior counsel for the petitioner. It is evident from the narration of facts recorded above that no lease agreement was executed between the parties despite the fact that petitioner had deposited the lease amount of Rs.17,10,777/- on 19.02.2020 for the year 2019-2020 and despite reminders to that effect by the

Corporation from time to time. Forfeiture of the earnest money deposit of Rs.3,00,000/- called as D. Call amount is permissible as petitioner failed to sign the agreement in terms of Clause (iii) under the head of 'Award of contract, signing of agreement and take up the assignment,' as per NIT at (Annexure-1). However, since admittedly no lease agreement was entered into between the parties, forfeiture of the amount of Rs.17,10,777/- on the part of the Corporation cannot be sustained. The lease agreement remained unexecuted till the work order was cancelled and communicated to the petitioner by the impugned order dated 4th November, 2022 i.e. over a period of three years since the award of work. However, if the Corporation is aggrieved by such act for omission on the part of the tenderer, the remedy to recover any losses, damages lies elsewhere.

[9] The Apex Court in case of *South Eastern Coalfields Limited* (supra) was in seisin of such a situation where though LOI was issued in favour of the respondent for commencement of work by the appellant-South Eastern Coalfield Limited but no agreement was entered. The appellant, therefore, asked the agency to show-cause as to why penal action be not initiated for (a) termination of work; (b) blacklisting of the respondent company; and (c) award of execution of work to other contractor at the cost and risk of the respondent. The appellant being dissatisfied with the reply issued a letter upon the respondent seeking an amount of Rs.78,07,573/- being the differential in the contract value between the respondent and the new contractor which was challenged in a writ petition before Chhattisgarh High Court. The Division Bench of the Chhattisgarh High Court opined that there was no subsisting contract inter se the parties to attract the general

terms and conditions as applicable to the contract. Various clauses of the NIT were referred to and opined that there could not be a valid contract inter se the parties as it was subject to completion of certain formalities by the respondent, which were never completed. As a consequence, the appellants were within their rights to cancel the award of work and forfeit the bid security. Thus, only forfeiture of bid security was upheld while the endeavour of the appellants to recover the additional amount in award of contract to another contractor as compared to the respondent-agency was held not recoverable.

[10] This was taken up to the Apex Court in Civil Appeal No.4358 of 2016 decided on 23.07.2021. The Apex Court after discussing the facts of the case, the terms of the NIT and certain decisions rendered earlier concluded at paragraph Nos.20 to 27 that the failure of the successful bidder to comply with the requirement constitutes a sufficient grounds for cancellation of the award of work and forfeiture of the bid security but since there was no executed agreement nor even integrity pack was signed the appellants could not seek to recover the additional amount in award of contract to another contractor as was rightly held by the Chhattisgarh High Court.

[11] The case at hand stands on similar footing as no agreement has been executed between the parties on failure of the writ petitioner to undertake the formalities for signing of the agreement despite deposit of lease rent amount for the year 2019-20 to the tune of Rs.17,10,777/- and despite reminders thereto. The respondents, therefore, could not have

forfeited the lease rent amount as in the absence of an executed agreement there were no such terms and conditions which could be invoked for forfeiture of the said amount whether be in the nature of a penalty or liquidated damages etc. As such, the respondent-Corporation is bound to refund the said amount to the petitioner within a period of four weeks from the date of receipt of copy of this order. We leave it open for the respondent-Corporation to invoke any other remedy as may be permissible in law for the alleged loss and damage said to have sustained on account of non-execution of the lease agreement by the petitioner before the appropriate forum subject to just limitations as per law.

[12] Accordingly, the writ petition stands disposed of.

Pending application(s), if any, also stands disposed of.

(S.D. PURKAYASTHA), J

(APARESH KUMAR SINGH), CJ

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