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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 395 of 2015

M/s. National Construction Co., A partnership firm registered under the Indian Partnerships Act, 1932, having its registered office at Harsh Plaza, First Floor, Opp Mandavi – Octroi, College Road, Bhuj-Kuctchh – 370001 (Gujarat).

---- Petitioner

Versus

1. South Eastern Coalfields Ltd. A company registered under the Companies Act, 1956, having its registered office at SECL Bhawan, Seepat Road, Bilaspur, District Bilaspur Chhattisgarh, through its Chairman-cum-Managing Director.

2. General Manager (Contract Management Cell) SECL, Bilaspur SECL Bhawan, Seepat Road, Bilaspur, District Bilaspur, Chhattisgarh.

3. Area General Manager, Office of the General Manager, Kusmunda Area, Korba, District Korba Chhattisgarh.

4. General Manager (Operations) Office of the General Manager, Kusmunda Area, Korba, District Korba Chhattisgarh.

---- Respondents

For Petitioner	:	Shri Harsh Wardhan, Advocate.
For Respondents	:	Dr. N.K.Shukla, Senior Advocate with Shri Vaibhav Shukla, Advocate.

HON'BLE SHRI NAVIN SINHA, CHIEF JUSTICE &
HON'BLE SHRI P. SAM KOSHY, J.

Order On Board

Per NAVIN SINHA, C.J.

16/4/2015

1. Heard Learned Counsel for the Petitioner and Learned Senior Counsel for the Respondents.

2. The Petitioner assails order dated 22.2.2015 forfeiting Earnest Money Deposit (hereinafter called 'the EMD') of Rs. 50,00,000/-, black-listing for one year and directions that the incomplete works shall be carried out at the risk and cost of the Petitioner under Clause 9.2 of the Notice Inviting Tender (hereinafter called 'the NIT').

3. Learned Counsel for the Petitioner submits that no prior show cause notice was given before black-listing. The notice dated 15.12.2014 and others preceding it only indicated that action under the terms and conditions of the contract, such as forfeiture of the EMD, debarring from participating in future tender for one year and risk and costs etc. may be imposed. Apparently, there was more than one choice open to the Respondents and unless the Petitioner was specifically told that the Respondents proposed to invoke the choice of black-listing, it does not fulfill the requirement of law, relying on (2014) 9 SCC 105 (Gorkha Security Services v. Government (NCT of Delhi).

4. It is next submitted that only a Letter of Intent (hereinafter called 'the LoI') had been issued to the Petitioner. No agreement had been signed between the parties. The question for any breach of contract and consequently execution of works through another at the risk and cost of the Petitioner does not arise. If the Petitioner did not submit the performance guarantee, the Respondents could have terminated the LoI which they have done and forfeited the EMD also. There was no concluded contract between the parties.

5. Lastly, with regard to termination, our attention was drawn to letter dated 29.12.2014 requesting the authorities to grant certain further time for completion of the works with an assurance that it would be done within the extended time.

6. Learned Senior Counsel for the Respondents submitted that it cannot be said that no show cause notice was given before black-listing. It was one of the penalties provided for in the NIT. The Petitioner was therefore well aware of the same. He has not been prejudiced in any manner because of the lack of any separate show cause notice specific with regard to black-listing. It was next submitted that the Petitioner was issued an LoI but the contract could not be executed between the parties as the Petitioner did not submit the performance guarantee. The contract documents provided for risk and costs clause also. The termination cannot be faulted with as it is apparent from the letter dated 29.12.2014 of the Petitioner that he was only making a mercy appeal which has been considered and rejected by the Board of the South Eastern Coalfields Limited. No allegations have been made of any *malafides* against the Board.

7. The submission on behalf of the Petitioner with regard to black-listing need not detain us in view of Gorkha Security Services (supra) at paragraph 25, 26 and 27, observing as follows:

> "26. In the present case, it is obvious that action is taken as provided in sub-clause (ii). Under this clause, as is clear from the reading thereof, the Department had a right to cancel the contract and withhold the agreement. That has been done. The Department has also a right to get the job which was to be carried out by the defaulting contractor, to be carried out from other contractor(s). In such an event, the Department also has a right to recover the difference from the defaulting contractor. This clause, no doubt, gives further right to the Department to blacklist the contractor for a period of 4 years and also forfeit his earnest money/security deposit, if so required. It is thus apparent that this sub-clause provides for various actions which can be taken and penalties which can be imposed by the Department. In such a situation which action the Department proposes to take, need to be specifically stated in the show-cause notice. It becomes all the more important when the action of blacklisting and/or forfeiture of earnest money/security deposit is to be taken, as the clause stipulates that such an action can be taken, if so warranted. The words "if so warranted", thus, assumes great significance. It would show that it is not necessary for the Department to resort to penalty of blacklisting or forfeiture of earnest money/security deposit in all cases, even if there is such a power. It is left to the Department to inflict any such penalty or not depending upon as to whether circumstances in a particular case warrant such a penalty. There has to be due application of mind by the authority competent to impose the penalty, on these aspects. Therefore, merely because of the reason that Clause 27 empowers the Department to impose such a penalty, would not mean that this specific penalty can be imposed, without putting the defaulting contractor to notice to this effect.
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> 27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause

> notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same....."

8. The LoI does not amount to a concluded contract. It is only an expression of intention for entering into a contract creating no right and which can be withdrawn for valid reasons. In such an event, the EMD can be forfeited as done presently even if the Petitioner had not furnished the performance guarantee. If no concluded contract had been signed between the parties, we find it difficult to uphold the impugned order to the extent that it directs risks and costs of the works at the behest of the Petitioner.

9. In so far as the termination is concerned, in view of the recitals in the reply filed by the Petitioner himself seeking further time for completion with an assurance to do so within the extended time sought, there being no error in the decision making process, we find it difficult to interfere with the order of termination.

10. In view of the fact that pursuant to the interim order dated 3.3.2015, the Petitioner had not submitted his bid documents in accordance with the requirement of law, the interim order automatically becomes inoperative and merges with the final order.

11. The writ application is therefore allowed only to the extent that the Petitioner has been black-listed and execution of the works ordered at his risk and costs.

12. The writ petition is dismissed in so far as challenge to the order of termination is concerned.

(Navin Sinha)	(P. Sam Koshy)
CHIEF JUSTICE	**JUDGE**

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