

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

WRIT PETITION No.27848 of 2011

Between:

K.Madhava Krishna,
S/o K.Suryanarayana

... Petitioner

And:

Govt of A.P., repled by its Principal
Secretary (Fisheries), Hyderabad and
three
others.

...

Respondent

DATE OF JUDGEMENT PRONOUNCED: 12.8.2015

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

1. Whether Reporters of Local newspapers
may be allowed to see the Judgment? No
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? Yes
3. Whether Their Ladyship/Lordship wish to
Yes
see the fair copy of the Judgment?

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< Gist:

> Head Note:

! Counsel for the Petitioner: Sri Ch.Dhanamjaya

^ Counsel for the Respondents: GP for Fisheries (AP)

? Cases Referred:

NIL

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Counsel for the Respondents: GP for Fisheries (AP)

The Court made the following:

ORDER:

This Writ Petition is filed for a *Mandamus* to set aside proceedings No.890/C1/2010, dated 15.4.2011 and the consequential final notice No.890/C1/2010, dated 19.9.2011, of respondent No.2.

The brief facts which are not disputed are that in pursuance of tender notification, dated 29.5.2010, issued by respondent No.2, the petitioner has submitted his tender and emerged as L-1 tenderer in respect of six districts for supply of Catla fish seed (Fry-25 mm) of a quantity of 965.44 lakhs. As the petitioner was eligible for supply of 306.75 lakhs of Catla fish seed only, a supply order was given on 30.7.2010 for supply of 214.11 lakhs of Catla fish seed to six districts before 15.8.2010 and 105.19 lakhs of Rohu fish seed to Nizamabad District before 31.8.2010. The petitioner entered into an agreement with the Department of Fisheries on 31.7.2010 for supply of 214.11 lakhs of Catla fish seed in six districts before 15.8.2010 and remitted a sum of Rs.3 lakhs towards the Earnest Money Deposit and an additional sum of Rs.3 lakhs as the Additional Earnest Money Deposit towards performance guarantee. As the petitioner has failed to commence the supply Catla fish seed, respondent No.2 has sent notices, to which the petitioner has sent a legal notice, dated 10.8.2010. In view of the failure of the petitioner to adhere to the contractual obligation, respondent No.2 has issued show cause notice, Lr.No.890/C4/2010, dated 03.9.2010, wherein while alleging that the petitioner failed to supply Catla fish seed within the time schedule, he asked the latter to show cause why the penal provision under Clause-23 (i), (ii) & (iii) of the agreement, for forfeiture of the Earnest Money Deposit and the Additional Earnest Money Deposit paid by him, shall not be enforced and he shall not be blacklisted for a period of three years. The petitioner submitted his explanation, dated 22.10.2010, to the said show cause notice. Not satisfied with the same, respondent No.2 has issued the impugned proceedings on 15.4.2011, whereby he has forfeited the Earnest Money Deposit of Rs.3 lakhs and directed recovery of Rs.32,89,816/- being twice the value of 214.11 lakhs of Catla fish seed, out of which a sum of Rs.3 lakhs deposited by the petitioner towards the Additional Earnest Money Deposit was forfeited and the balance amount of Rs.29,89,816/- was directed to be recovered

duly invoking the provisions of the Revenue Recovery Act. Respondent No.2 has also blacklisted the petitioner from taking part in the tenders for supply of fish seed to any State Government Department for a period of three years from 2011-12 to 2013-14 season.

This Court while admitting the Writ Petition on 12.11.2011, has stayed the operation of the impugned proceedings and the consequential final notice only to the extent of recovery of the sum of Rs.29,89,816/- from the petitioner, while permitting the respondents to proceed against the petitioner in respect of all other aspects.

Mr.Y.Prakasa Rao, Additional Director of Fisheries, has filed a counter-affidavit, wherein he has sought to justify the impugned action of respondent No.2.

At the hearing, Mr. Ch.Dhananjaya, learned counsel for the petitioner urged that the impugned order proposing to recover Rs.32,89,816/- is contrary to the show cause notice, wherein the proposed penalty was confined to the extent of forfeiture of the Earnest Money Deposit and the Additional Earnest Money Deposit already paid by the petitioner.

Learned Government Pleader for Fisheries (Andhra Pradesh) submitted that as per Condition-13 of the terms and conditions of the tender notification, which forms part of the agreement, the successful bidder has to provide performance guarantee in the shape of bank guarantee to the extent of twice the value of the fish seed up to 5 crores fry and that therefore by the impugned order, respondent No.2 has rightly directed recovery of Rs.32,89,816/-, which represents twice the value of 214.11 lakhs of Catla fish seed in respect of which the petitioner was liable to furnish bank guarantee towards the performance guarantee. He has further submitted that even though the petitioner was liable to furnish bank guarantee for the aforesaid sum, in view of the request made by him to allow him to start supply of Catla fry seed due to early breeding, permitted him to deposit Additional Earnest Money Deposit of Rs.3 lakhs in lieu of furnishing performance guarantee for the entire value as it is likely to take at least 10-15 days' time for furnishing such bank guarantee, respondent No.2 has issued letter, dated 30.7.2010, permitting the petitioner to furnish the Additional Earnest Money

Deposit of Rs.3 lakhs towards performance guarantee and that by the said proceedings, the petitioner is not absolved from furnishing performance guarantee as prescribed under the tender conditions.

The fact that as per the tender conditions, the petitioner is liable to furnish performance guarantee in the shape of bank guarantee to the extent of twice the value of the fish seed for which the supply order was given is not in dispute. However, in the show cause notice issued to the petitioner, respondent No.2 has proposed to impose penalty only to the extent of forfeiture of the Earnest Money Deposit and the Additional Earnest Money Deposit already paid by him.

In this context, it is useful to reproduce the relevant portion of the show cause notice herein below:

“Hence, as per the penal provision under Clause-23 (i), (ii) and (iii) of agreement executed i.e., **the EMD and Addl. EMD paid by you is liable to be forfeited completely** and your firm is liable to be blacklisted from taking part in tenders for supply of fish seed to any State Government department for a period of three years.” **(Emphasis supplied)**

Though respondent No.2 would have been well within his jurisdiction to propose forfeiture of the entire performance guarantee as stipulated under Condition-13 of the tender Conditions read with Clause-23 (i), (ii) & (iii) of the agreement, for the reasons best known to him, he has confined the proposal to impose the penalty only to the extent of forfeiture of the Earnest Money Deposit and the Additional Earnest Money Deposit already paid by the petitioner towards performance guarantee.

It is trite that imposition of penalty being penal in nature, the contents of the show cause notice proposing such penalty must be strictly construed. Having confined the proposal to impose the penalty only to the extent of forfeiture of the Earnest Money Deposit and the Additional Earnest Money Deposit already paid by the petitioner, it is not permissible for respondent No.2 to impose a higher penalty than what was proposed. Contrary to what was proposed in the show cause

notice, respondent No.2 has calculated the value of the performance guarantee as per the tender conditions and directed recovery of the balance after adjusting the Additional Earnest Money Deposit of Rs.3 lakhs paid by the petitioner.

In my opinion, this action of respondent No.2 cannot be sustained as, the same travels far beyond the proposal made by him in the show cause notice.

At the hearing, it is not disputed that the penalties imposed under the impugned order, viz., forfeiture of the Earnest Money Deposit and the Additional Earnest Money Deposit paid by the petitioner and blacklisting of the petitioner for three years, have been implemented and the impugned order only to the extent of recovery of Rs.29,89,816/- is not enforced.

On the analysis undertaken hereinbefore, the impugned proceedings and the consequential final notice to the extent of ordering recovery of sum of Rs.29,89,816/- cannot be sustained and the same are, accordingly, quashed.

The Writ Petition is partly allowed to the extent indicated above.

As a sequel to the disposal of the Writ Petition, WPMP.No.34347 of 2011 and WVMP.No.4590 of 2011 shall stand disposed of as infructuous.

*JUSTICE C.V.NAGARJUNA
REDDY*

12th August 2015

Note:

LR copies to be marked.

B/o

DR