

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7745 of 2011

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1. M/s Steelco, Hill View, South of Gandhi Maidan, Gaya through its Proprietor, Madan Prasad.
 2. Madan Prasad, son of late Ram Chandra Prasad, resident of Hill View, South of Gandhi Maidan, P.O. & District Gaya, Proprietor, Hill View, South of Gandhi Maidan, Gaya

.... Petitioners

Versus

1. The Union of India through the Secretary, Ministry of Railways, New Delhi.
2. The General Manager, East Central Railway, Hajipur.
3. The Divisional Railway Manager, East Central Railway, Mughalsarai.
4. Chief Commercial Manager, East Central Railway, Hajipur.
5. The Divisional Commercial Manager, East Central Railway, Mughalsarai.

.... Respondents

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Appearance :

For the Petitioners : Mr. Ray Shivajee Nath, Sr. Advocate
Mr. Ray Saurabh Nath, Advocate
For the Resp. Railway : Mr. S.D.Sanjay, Sr. Advocate, Addl. SC of India
Mr. Anil Kumar Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 20-04-2016

Heard learned counsel for the petitioners, for the Union and for the Respondent Railway.

2. The present writ petition has been filed for a direction to the Respondent Railway to refund the petitioner's deposit of Rs. 2,84,000/- with interest which has been deposited towards "Advertising Rights", and for quashing the letter dated 02.09.2010 issued by the Divisional Commercial Manager, East Central Railway by which the refund of the amount in question

has been held to be wrong, unjustified and not tenable.

3. The short facts of the case are that the petitioner no. 1 is the proprietary concern of the petitioner no. 2, and is engaged in the business of advertisement and other business. It participated in a tender issued by the respondents in the year 2001 for the work of display of advertisement in Gaya Railway Station through advertising rights. The petitioner's tender was accepted and after negotiation the petitioner was directed to make payment of Rs. 2,84,000/- for the first year namely 2001-02, in pursuance of which the petitioner deposited a sum of Rs. 2,76,000/- through bank draft over and above Rs. 8,000/- earlier deposited by way of earnest money to be adjusted, in all aggregating to Rs. 2,84,000/-. The petitioner was required in terms of the tender to make payment of Security Deposit, but the same was not paid as the petitioner sought exemption from such payment. It appears that even though the petitioner was made to sign an agreement on 28.12.2001 (Annexure-12) the same was not executed by the Respondents and thus no concluded contract as such was brought into existence by the parties. The respondents thereafter made demand for payment of Rs. 3,12,400/- for the second year, namely 2002-03, in respect of the advertising rights. The petitioner having not been able to avail the

advertisement rights, demanded refund of the amount of Rs. 2,84,000/- which had been paid for the first year namely, 2001-02 to the respondents.

4. Mr. Rai Shivajee Nath, learned Senior Counsel appearing for the petitioner submits that the impugned order dated 02.09.2010 is wholly arbitrary and illegal and that the respondents are bound to refund the amount paid by the petitioner, at least to the extent of Rs. 2,76,000/-, even if the earnest money of Rs. 8,000/- was liable to be forfeited. It is submitted that in terms of Clause 12 of the tender document itself, the execution of an agreement between the parties within a fortnight was a mandatory condition, which in the instant case, never came into existence as the respondents did not execute the agreement and the same thus remained unenforceable. It is further submitted that Clause 13 of the tender document required money to be deposited as security deposit as a mandatory condition, which in the instant case was admittedly not deposited. The authorization letter with requisite permission as per Clause 2(2) of the purported agreement was denied to the petitioner who thus could not avail of the advertising rights, resulting in huge loss to the petitioner. The petitioner requested the respondents for execution of the agreement by the respondents which was not



done and in due course the petitioner sought refund of the amount of Rs. 2,84,000/- deposited by him together with interest and further also claimed compensation. It is submitted that the respondents are not justified in not refunding the amount in question in the absence of any such term or authority in the tender document to retain such amount by the respondents, moreso when no concluded agreement between the parties came into existence.

5. Mr. S.D. Sanjay, learned Senior Counsel for the Respondent Railway on the other hand, submits that the petitioner is not entitled to the relief sought and no fault can be found with the action of the respondents. It is submitted that the contract between the parties contemplates redressal of disputes through the forum of arbitration in terms of the General Conditions of Contract and instead of availing the same, the petitioner has approached this Court in its writ jurisdiction. It is further submitted that the tender was floated as far back as in the year 2001 and after several opportunities to the petitioner to make payment of the security deposit, the respondents finally terminated the contract by letter dated 31.05.2004 (Annexure-7). Instead of raising any objection at that stage, the petitioner took no action for a long time. Finally the petitioner sent a legal notice



dated 25.05.2010 for claiming refund of its deposit. It is therefore, evident that the petitioner is pursuing a stale claim which is barred by limitation in view of the termination of the contract having been effected as far back as on 31.05.2004 itself. A submission is also made on the basis of para 3 of the supplementary counter affidavit that in view of the petitioner having deposited the first instalment of the advertising charges, it had been allowed to use the space for advertisement, which had in fact been used by the petitioner and its advertisement had been displayed on the Gaya Railway Station platform.

6. In reply it is submitted on behalf of the petitioner that the basic fact that an agreement between the parties never came into existence is not in dispute. Any recourse to arbitration was available only under an agreement which in the present case was non-existent and hence such remedy is not available to the petitioner. It is further submitted that a perusal of the respondents' letter dated 31.05.2004 would disclose that it has been decided by the competent authority to terminate the contract, though ironically, no contract has been entered into between the parties at all which could be terminated. Such letter was intimated to the petitioner much later on in connection with the petitioner's demand for refund. In any event the petitioner's

demand for refund was rejected for the first time by the impugned letter dated 02.09.2010 and it is only then that the cause of action arose for the petitioner to approach this Court by filing the instant writ petition.

7. Having heard the parties and on consideration of the materials on record, this Court finds merit in the submissions on behalf of the petitioner. It is not in dispute that payment of the security deposit was a mandatory condition of the tender, which was not deposited as the petitioner was claiming exemption from payment of the same. It is also not in dispute that the agreement did not fructify into an enforceable contract, having not been executed by the respondents. In that view of the matter, the objection on behalf of the respondents on the ground of maintainability of the writ petition cannot be upheld as the forum of arbitration was available only under the contract which never saw the light of day. This Court is also in agreement with the petitioner that the demand for refund of the amount in question was turned down by the respondents for the first time by the impugned letter dated 02.09.2010 and as such the claim for refund cannot be said to be barred in law. The claim of the respondents that the petitioner had used the advertisement space on the platforms at Gaya Railway Station prima facie appears to



be in conflict with their earlier stand in para 5 of the counter affidavit to the effect that the “space i.e. P.F. No. 01 and P.F. No. 06 of Gaya Railway Station allotted to the petitioner M/s. Steelco remained unutilized from 28.02.2001 to 31.05.2004”. In any event the plea that the petitioner had utilised the space for advertisement has not been taken into consideration in the impugned order and the respondents cannot be allowed to improve their position by taking fresh grounds in their counter affidavits. The validity of the impugned order has to be tested on the basis of the reasons contained therein alone. This Court is of the view that if the respondents continued to grant indulgence to the petitioner to make payment of the security deposit rather than rejecting the petitioner’s tender for failure to comply with the mandatory condition of payment of the security deposit, they did so at their own risk and responsibility. There was nothing to prevent the respondents from awarding the contract to another suitable tenderer if the terms so permitted, or to opt for re-tender. The respondents have also not been able to point out any specific term in the tender authorizing retention of the amount deposited by the petitioner towards advertising rights, in absence of a valid contract between the parties.

8. For the above reasons, the writ petition is allowed

and the Respondent Railway is directed to refund the deposited amount of Rs. 2,76,000/- to the petitioner together with simple interest @ 6% per annum from the date of deposit till the date of actual payment, within a period of eight weeks from the date of receipt/production of a copy of this judgment.

(Vikash Jain, J)

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