

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Jurisdiction Case No.3253 of 2014

In

Civil Writ Jurisdiction Case No. 17448 of 2013

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M/s Magadh Construction Works, a Partnership Firm having its Head office at New Area, Nutan Nagar, Gaya, through one of its' Partner Shri Ram Naresh Sharma S/O Late Ambika Sharma, resident of New Area, Nutan Nagar, Gaya, P.S. & District-Gaya.

.... Petitioner

Versus

1. The State of Bihar. through Arun kr. Singh the Secretary , Road Construction Department, Govt. of Bihar, Patna.
2. Mr. Yodhan Chaudhary, the Superintending Engineer, Rural Works Department, Works Circle, Gaya.
3. Mr. Alok Kumar, the Executive Engineer, Rural Works Department, Works Division, Sherghati, Gaya.
4. Mr. Ramlal Ram, the Executive Engineer, Rural Works Department, Works Division, Tikari, Gaya.
5. Mr. Abhishek Kumar, the Divisional Accounts Officer, Rural Works Department, Works Division, Tikari, Gaya
6. Mr. D.D. Chaudhary, the then Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Rural Works Department, Govt. of Bihar, Patna
7. Mr. Kamlesh Chaudhary, present Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Rural Works Department, Govt. of Bihar, Patna

.... Respondents

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Appearance :

For the Petitioner : Mr. Raj Kishore Prasad

For the Respondents : Mr. Devendra Kr Sinha

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

ORAL ORDER

11 17-11-2016 Heard learned counsel for the petitioner and learned counsel for the opposite parties.

The opposite parties are present.

The contempt application has been filed for willful disobedience of the interim order dated 05.02.2014 passed in C.W.J.C. No.17448/2013, by which this Court while granting adjournment to learned counsel for the State on his prayer to file the counter affidavit in the matter, directed that the operation of the orders dated 25.04.2013 and 30.07.2013 shall remain stayed.



The said orders dated 25.04.2013 and 30.07.2013 were orders of blacklisting passed against the petitioner by the Engineer-in-Chief and the appellate authority, the Principal Secretary, Road Construction Department, Government of Bihar respectively.

Earlier, the petitioner pursuant to Notice Inviting Tender No.03/2012-13 had applied against the same. A complaint was made against the petitioner that he had uploaded forged and fabricated documents in the tender filed by him. The petitioner contested the same, but ultimately the petitioner was blacklisted by the order dated 25.04.2013 issued by the Engineer-in-Chief, Road Construction Department which was affirmed in the appeal filed by the petitioner by order dated 30.07.2013 of the Secretary, Road Construction Department, Government of Bihar. The same was challenged in C.W.J.C. No.17448/2013, in which this Court had issued an interim order dated 05.02.2014 staying the operation of the two blacklisting orders passed by the original and the appellate authority.

The petitioner had also been debarred from participating in future tenders by an order dated 04.10.2013 of the Engineer-in-Chief, Rural Works Department which was challenged by the petitioner in another writ petition being C.W.J.C. No.5794 of 2014 and by order dated 25.4.2014, this Court had directed that the order of debarment dated 04.10.2013, in so far as it concerns the petitioner, shall remain stayed.

Thereafter, the tenders were invited for construction



and maintenance for five years of 409 rural roads of the State of Bihar under the PMGSY in which the petitioner participated with respect to three groups in package No.12 PMGSY-79,96 and 97. While uploading the three tenders, the petitioner had specifically uploaded an affidavit to the effect that the order of blacklisting dated 25.04.2013 as also debarment order dated 04.10. 2013 have been stayed by this Court and the certified copies of the two interim orders dated 05.02.2014 and 25.04.2014. passed by this Court had also been uploaded.

However, when the Technical Bid Committee met to decide the matter on 9.08.2014, the petitioner was declared disqualified in all the three tenders. In two tenders the petitioner has been declared disqualified in terms of clause 4.7 (i), 4.7 (ii) and 4.6 of the S.B.D., whereas in the third tender he has been disqualified in terms of clause 4.7 (i) and 4.7 (ii) of the S.B.D. only. It is further pointed out that although the petitioner had filed a writ petition against the debarment order but the Engineer-in-Chief of the Rural Works Department had already deleted the name of the petitioner from the list of debarred contractors dated 04.10.2013 by order dated 29.10.2013 which, however, was not communicated to the petitioner, allegedly as a deliberate measure.

In a supplementary affidavit, the petitioner has further pointed out the fact that the petitioner had filed representations before the concerned authorities of the Rural Works Department, pursuant to which the Chief Engineer-1, RWD, Patna was directed



to make proper enquiry about the allegations made by the petitioner with respect to the decision of the Technical Bid Committee on the three tenders filed by the petitioner and the Chief Engineer submitted his detailed report by his letter dated 23.09.2014.

In the said report, the Chief Engineer mentioned that the petitioner has specifically stated on affidavit that the order of blacklisting as well as debarment order have been stayed by this Court and further mentioned that the Rural Works Department has already removed the name of the petitioner from the debarment list by the letter dated 29.10.2013. It is also stated that the orders of this Court have also been enclosed with the affidavit submitted by the petitioner and, therefore, the decision of the Technical Bid Committee declaring the petitioner as disqualified in the technical bid is not correct and the Department should take an appropriate decision. It was the further opinion of the Chief Engineer that the rejection under clause 4.6 of the SBD was also not justified as the petitioner has already submitted three certificates issued by the concerned Engineer with respect to existing commitment and ongoing works. Thereafter, a meeting was held on 22.10.2014 headed by the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Rural Works Department, Government of Bihar, opposite party No.6, with respect to the complaint received against the tenders of PMGSY including the tenders in which the petitioner had participated. In the said meeting the complaint of



the petitioner was examined in the light of the report dated 23.09.2014 of the Chief Engineer and it was held that the petitioner had suppressed the litigation history with the Road Construction Department, as CWJC No.17448 of 2013 was pending and therefore, the decision taken by the Technical Bid Committee headed by the Superintending Engineer would remain as it is.

On the strength of the aforesaid facts, it is submitted by learned counsel that the finding of the Technical Bid Committee with respect to the applicability of clause 4.7 (i) and clause 4.7 (ii) as also clause 4.6 of the SBD was held to be unjustified by the Chief Engineer himself and further the said fact was not relied upon even by the Reviewing Technical Bid Committee headed by the Engineer-in-Chief, opposite party No.6, and the ground for treating the petitioner as disqualified was only the fact that the petitioner had suppressed the litigation history with the Road Construction Department.

It is submitted that the said finding is directly in conflict with what has been clearly held in the report of the Chief Engineer that the petitioner has not only stated on affidavit regarding the matter but has also annexed the interim order passed by the Court and thus there was no question of suppression of any document. It is submitted that the use of the said ground by the opposite parties was with the sole purpose of not complying with the stay order granted by this Court of the blacklisting order and



keeping the petitioner out of the tender process, which was the purpose of getting the stay order from the High Court. It is, thus, submitted that the action of the respondents is a deliberate attempt to violate the order of this Court without straightaway referring to the said order but to achieve indirectly the goal, which could not have been done directly, by relying upon vague and inapplicable grounds.

Learned counsels for the opposite parties, on the other hand, rely upon the stand taken in the show cause filed by them stating that there has not been any willful disobedience of the stay order granted by this Court by the opposite parties. It is submitted that the rejection of the tender of the petitioner with regard to the tender package No. 12 PMGSY 79, 96 and 97 was in terms of clause 4.6, 4.7 (i) and 4.7 (ii) of the SBD and not on the ground that the petitioner has been blacklisted and, thus, there was no disobedience of the stay order, as the petitioner was permitted to participate in the tender process and subsequently disqualified on the basis of clauses of the SBD.

It is further emphasized by learned counsel for the opposite parties that in the column for information, i.e., column No.3 and in paragraph No.1.10 of the tender document, the petitioner had quoted his litigation history as Nil and he further uploaded the undertaking clearly stating “No any litigation history within last five years”, whereas the petitioner had litigation and cases were pending in the High Court. It is, thus, submitted that



although the petitioner had uploaded the certified copy of the order of this Court but by writing 'NO' in the litigation history column, he tried to mislead the authorities. Therefore, his bid was also rejected under SBD clause No.4.7 (i).

It is the further stand of learned counsel for the opposite parties that the petitioner had pending works with respect to certain earlier agreements executed which were to be completed by June and July 2013, but the work was pending till the date of the tender on 02.07.2014. From the above, it is clear that the petitioner had record of poor performance, not completing the contract and inordinate delay in completion of work. Hence, the bid of the petitioner was rejected in terms of clause 4.7 (ii).

It is also the stand of the opposite parties that the petitioner had uploaded the bid capacity as Rs. 48.9288 crore in his tender document whereas he also uploaded details of bids already submitted. As per the papers the value of the bid pending decision was Rs. 45.13 crore whereas the petitioner had submitted tender for bid value of Rs.15.566 crore in Group Nos. 79, 96 and 97. The bid capacity of the petitioner after the bids already submitted thus had a remaining balance of Rs. 7.3988 crore only. Therefore, out of three groups of tender only one group approximately qualified under clause 4.6 of the SBD.

On the basis of the aforesaid facts, it is submitted by learned counsel for the opposite parties that there has been no violation of the order of stay of blacklisting or even debarment



order passed by this Court and the rejection of the tender in terms of clauses of the SBD was justified.

I have considered the submissions of learned counsels for the parties and perused the materials available on the record. It is evident from a perusal of the facts and circumstances mentioned that the attempt to utilize clause 4.6, 4.7 (i) and 4.7 (ii) was made with the real intent to nullify the stay order granted by this Court. Clause 4.6, 4.7 (i) and 4.7 (ii) of the S.B.D. are quoted below:-

“4.6. Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity for construction work is equal to or more than the total bid value. The available bid capacity will be calculated as under:

Assessed Available Bid capacity= (ANM-B)

Where

A Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the last year at the rate of 8 percent a year) taking into account the completed as well as works in progress.

N Number of years prescribed for complete of the works for which bids are invited (period up to 6 months to be taken as half-year and more than 6 months as one year).

M. 2 or such higher figure not exceeding 3 as may be specified in the Appendix to ITB.

B Value, at the current price level, of existing commitments and on-going works to be completed during the period of completion of the



works for which bids are invited.

Note: The statements showing the value of existing commitments and on-going works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent.

4.7 Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have

(i) made misleading or false representations in the forms, statements, affidavits and attachments submitted in proof of the qualification requirements; and/or

(ii) record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc.”

From a perusal of the aforesaid clauses as read with the report dated 29.03.2014 of the Chief Engineer, it is evident that none of the three clauses is applicable to the case of the petitioner. Nothing could be brought in the show cause filed that the S.B.D. clauses were applicable on the basis of the formula provided therein and the same has been negated by the Chief Engineer in his report.

With regard to the application of clause 4.7 (i), it is evident that no misleading or false representation had been made by the petitioner as not only the affidavit stated the fact regarding



the pendency of the writ petition but also the interim order passed therein, copy of which was further enclosed. The Chief Engineer had also correctly come to the conclusion that there was absolutely no suppression of any such fact of pending litigation by the petitioner.

Similarly, clause 4.7 (ii) could also not have been utilized for the purpose of showing the record of poor performance such as abandoning in the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc. and it has been found prima facie that the delay had occurred on account of the action of the officers of the Department themselves and not on account of laches of the contractor. It has been clearly laid down by this Court in the case of M/s. N.C.C. Ltd. vs. The State of Bihar and others: 2013 (1) PLJR 952, that it is not open to the Department officials to unilaterally debar or blacklist a contractor where there are allegations for delay on account of lapses on the part of officers of the Department and such issue can only be decided by an independent adjudicatory forum, i.e., a Court or an Arbitral Tribunal. It is evident that clause 4.7 (ii) of the SBD has been deliberately and mala fide used so as to disobey willfully the interim order of this Court staying the order of blacklisting as also the debarment order.

The Reviewing Technical Bid Committee itself did not find the application of the other clauses, except with regard to the



petitioner having made a false statement regarding pending litigation for the purpose of disqualifying the petitioner. The tender of the petitioner had to be examined as a whole and not merely on the basis of one column in which the statement had been made. It was not a litigation pending with respect to any contract between the petitioner and the State and even with respect to the same, it is not open to the respondents to utilize such clause for disqualifying any contractor as any such provisions are contrary to be the public policy as contained under Section 28 of the Indian Contract Act, 1872. The aforesaid action in its proper perspective clearly shows that the entire stand of learned counsel is a hyper technical one to support willful disobedience of the order of this Court so as to completely nullify the said interim order with regard to stay of blacklisting or even the debarment, passed by the Court.

For the aforesaid reasons, I am of the view that all the five opposite party Nos. 2 to 6 are guilty of willful disobedience of the order dated 05.02.2014 passed in CWJC No.17448/2013 and they are, accordingly, found guilty of contempt of this Court.

On the question of punishment, learned counsel for the State submits that opposite party Nos. 2 and 6 have since superannuated and they may not be sent behind bar. With regard to opposite party Nos. 3, 4 and 5. it is stated that they are juniors to opposite party Nos. 6 and 2 and they should not be meted out any punishment greater than what is to be given to opposite party



Nos. 6 and 2. It is further submitted that all the opposite parties are expressing their unconditional apology in the matter.

So far as the question of unconditional apology is concerned, it does not appear to be borne out from the show causes that have been filed or the conduct of the parties. However, considering the fact that the opposite party Nos. 6 and 2 have since superannuated and the other three opposite parties were their subordinate officials at the relevant time and had merely followed the stand taken by the higher authorities, the five opposite parties Nos. 2 to 6 are sentenced to imprisonment till the rising of the Court.

The contempt application is, accordingly, disposed of.

(Ramesh Kumar Datta, J)

V.P.Sinha/-

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