IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.395 of 2016

==

M/s Micro Ranjan Construction Pvt. Ltd. through its Director, Mr. Rajeev Ranjan, S/o- Late Thakur Girijanand Singh, R/o Vill.- Khilwat, P.S.- Bidupur, Distt.- Vaishali having its registered office at Usha Complex, Bidupur Bazar (Khilwat), Distt- Vaishali.

.... Petitioner/s

Versus

1. The Union of India through its Secretary, Ministry of Railways, New Delhi.
2. The Chief Administrative Officer, E.C.R. (W.P.), J.C. Road, Patna- 800001
3. The Chief Engineer Workshop Projects E.C.R. Patna, Bihar.
4. The Chief Engineer II Workshop Projects, E.C.R. Patna, Bihar.

.... Respondent/s

==

Appearance :

For the Petitioner/s : Mr. Y.V. Giri, Sr. Adv.

For the Respondent/s : Mr. Anil Kr. Sinha, Adv.
Mr. Yash Mathur, Adv.

==

CORAM: HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

Date: 16-07-2018

Heard Mr. Y.V. Giri, learned senior counsel for the petitioner and Mr. Anil Kumar Sinha, learned counsel appearing on behalf of the Respondents-Railways.

The petitioner has filed this writ application for the following reliefs:

> *"i. To quash the letter no. 2014/WP/(RWP)/Type-ii QTR/775 dated 18.09.2015 whereby and whereunder credential submitted by the petitioner have been found as fake and forged, in term of Clause 6 (vi) a, chapter IIIrd of Tender Condition of subject Tender, and accordingly the Railways have*

forfeited the Total earnest money amount to Rs. 18,62,000/- (Eighteen Lacs Sixty Two Thousand) only received through demand draft No. 366738 dated 27.05.2015 in favour of FA & CAO/WP, PATNA along with subject Tender. A copy of letter dated 18.09.2015 is attached herewith and marked as Annexure-1 to this application.

ii. Further to direct to the respondent authority allot the Tender No. 2015/Workshop Project/RWP/Engg./WT-01 (Open, Two Packets) for the work of "construction of 184 Units Type" Quarters incorporating sanitary, plumbing, water supply, including electrification and telecom, complete in all respect for setting up staff colony at Rail wheel Plant Bela, in Saran district of Bihar.

iii. Further to direct Respondent authority to return the earnest money amounting to Rs. 18,62,000/- which the petitioner has submitted through demand draft no. 366738 dated 27.05.2015 if the petitioner fails to meet the other different parameters as has been fixed by the Tender committee with appropriate statutory."

However, learned senior counsel for the petitioner does not press relief no. 2 as now the work contract has already been allotted to another contractor.

Petitioner seeks quashing of Letter No.

2014/WP/(RWP)/Type-ii QTR/775 dated 18.09.2015 whereby the tender of the petitioner for construction of 184 Units Type Quarters incorporating sanitary, plumbing, water supply, including electrification and telecom, complete in all respect for setting up staff colony at Rail Wheel Plant Bela, Saran has been turned down and the earnest money amounting to Rs. 18,62,000/- received through Bank Draft No. 366738 dated 27.05.2015 has been forfeited under clause 6(vi)(a) of the tender document, on the ground that along with the tender papers, the petitioner, in proof of turn over, had submitted a certificate dated 26.05.2015 issued by TULSYAN SAPNA & Co. Chartered Accountants, Nawahata, Dhobi Mohalla, Daltonganj. During verification from the said chartered accountant, the credentials were found fake and forged as confirmed by the issuing authority i.e. TULSYAN SAPNA & Co. Chartered Accountants, Nawahata, Dhobi Mohalla, Daltonganj.

The main thrust of the argument of the petitioner is that such a forfeiture would not be permissible as it violates principles of natural justice as forfeiture of earnest money was an imposition of penalty for which no notice was given to the petitioner. The tender document is Annexure-2 to the writ application and the clause under which the said forfeiture is made i.e. clause 6 (vi) (a) which is quoted hereinbelow:

> *"6 (vi) False/Incomplete Statement: Any statement/declaration made by the tenderer, if proved wrong or false or incomplete or such as to withhold any information relevant to the award of the tender, at any stage of the tender or in the event of his tender having been accepted at any stage of the contract, shall render his/their tender(s)/contract(s) liable to be cancelled/rescinded, in addition to the followings:*
>
> a. *If such statement is found at the tender stage, his total earnest money shall be forfeited.*

Petitioner submits that the allegation that the certificate of the turn over by the chartered accountant, which had been tendered by the petitioner for availing the contract, was not proved and the respondent Railways have forfeited the earnest money without any show cause notice relying on the report of the chartered accountant, which has been brought on record by the counsel appearing on behalf of the Railways Annexure-R/5 and submits that even the report of the said chartered accountant stating that the said turn over certificate was fake and forged was also not a conclusive proof as the further request of the said chartered accountant in Annexure-R/5 is that the matter regarding forgery was to be enquired and pursued further. He submits that the charges were not proved hence, clause-6 (vi) (a) of the Special Conditions of Tenders and Instructions to Tenderers could not be invoked. He submits that forfeiture of earnest money amounts to penal action and in this connection he relies in the case of **Gorkha Security Services Vs. Government (NCT of Delhi) and Ors.** since reported in **(2014) 9 SCC 105** especially para 26, 27 and 32, which reads 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 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, assume 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.

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. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it *can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.*

32. It was sought to be argued by Mr. Maninder Singh, learned Additional Solicitor General appearing for the respondent, that even if it is accepted that the show-cause notice should have contained the proposed action of blacklisting, no prejudice was caused to the appellant inasmuch as all necessary details mentioning defaults/prejudices committed by the appellant were given in the show-cause notice and the appellant had even given its reply thereto. Accordingly to him, even if the action of blacklisting was not proposed in the show-cause notice, the reply of the appellant would have remained the same. On this premise, the learned Additional Solicitor General has argued that there is not prejudice caused to the appellant by non-mentioning of the proposed action of blacklisting. He argued that unless the appellant was able to show that non-mentioning of blacklisting as the proposed penalty has caused prejudice and has resulted in miscarriage of justice, the impugned action cannot be nullified.

For this proposition he referred to the judgment of this Court in Haryana Financial Corpn. V. Kailash Chandra Ahuja." (SCCpp. 38, 40-41 & 44, para 21, 31, 36 &44).

"21. From the ratio laid down in B. Karunakar it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside.

31. At the same time, however, effect of violation of the rule of audi alteram partem has to be considered. Even if hearing is not afforded to the person who is sought to be affected or panelised, can it not be argued that 'notice would have served no purpose' or 'hearing could not have made difference' or 'the person could not have *offered any defence whatsoever'. In this connection, it is interesting to note that under the English law, it was held few years before that non-compliance with principles of natural justice would make the order null and void and no further inquiry was necessary.*

* * * *

36. The recent trend, however, is of 'prejudice'. Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

* * * *

44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show 'prejudice'. Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent *employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."*

He submits that forfeiture of security deposit is a penal action and in case of imposition of any penalty a notice is required which has not been given, which amounts to violation of principles of natural justice and on this ground he seeks quashing of the letter dated 18.09.2015 passed by the respondent no. 4 i.e. the Chief Engineer II Workshop Projects, Patna Bihar.

However, respondent Railways submits that the order of forfeiture has been passed as the turn over certificate submitted by the petitioner at the tender stage was on verification found to be fake and forged by the chartered accountant himself which is Annexure-R/5 and as such, Clause 6 (vi) (a) of the Special Conditions of Tenders and Instructions to Tenderers has rightly been invoked. He further submits that the parties are bound by contract. The tender notice clause 5 deals with eligibility criteria which has been annexed as Annexure-R/1 to the counter affidavit. As per clause 5 (2) an audited balance sheet had to be certified by the chartered accountant for the last three financial years and of the current financial year. He submits that the petitioner had himself submitted gross turn over as well as total turn over for Civil Engineering Construction Works for the financial year 2011-12 to 2013-14 and provisional balance sheet of financial year 2014-15 through a certificate of Tulsyan Sapna & Co. (chartered accountant) which on verification by the said chartered accountant itself was found to be fake and forged. He submits that in contractual matters the principles of natural justice is not to be applied in a straitjacket formula and since the petitioner himself had submitted forged and fake balance sheet which was certified so by the chartered accountant, the forfeiture in absence of notice to the petitioner would not result in miscarriage of justice.

Heard learned senior counsel for the petitioner and the learned counsel for the Railways.

Clause-6 (vi) (a) of the Special Conditions of Tender and Instruction to Tenderers stipulates that the declaration which was made by the tenderer would be rescinded, cancelled if proved wrong, false or incomplete and if it is detected at the tender stage, the total earnest money shall be forfeited. The letter of the chartered accountant Tulsyan Sapna & Company is Annexure-R/5 dated 15th July, 2015 is annexed in the counter affidavit filed on behalf of the railways. Although, it says that the signature, sign and letter head has been forged, but the letter further requests the respondent-Railways to furnish the details so that the matter could be pursued further. Hence the allegations were not proved at that point of time. The forfeiture of earnest money amounted to penalty imposed on the petitioner without notice and such penal action caused infraction of principles of natural justice and gross miscarriage of justice as held in the case of **Gorkha Security Services** (supra).

The impugned order, Annexure-1 dated 18.09.2015, thus, stands quashed. The Railways are directed to proceed in accordance with law, issue show cause notice to the petitioner within four weeks. The petitioner is directed to file reply within two weeks of the receipt of show cause notice and the decision to be taken by the respondent-Railways within four weeks thereafter.

Writ application is allowed.

(Nilu Agrawal, J)

Devendra/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	19.07.2018
Transmission Date	NA