

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.19212 of 2012

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JITF URBAN INFRASTRUCTURE LTD., JINDAL ITF CENTRE, 28, SHIVAJI MARG, NEW DELHI - 110015 REPRESENTED THROUGH ITS AUTHORISED SIGNATORY, MR. MAHESH MAHANI S/O LATE SH. B.D. MAHANI HEAD LEGAL, JITF URBAN INFRASTRUCTURE LTD., JINDAL ITF CENTRE, 28, SHIVAJI MARG, NEW DELHI - 110015

... .. Petitioner/s

Versus

1. THE STATE OF BIHAR, THROUGH PRINCIPAL SECRETARY, URBAN DEVELOPMENT AND HOUSING DEPARTMENT, GOVT. OF BIHAR, PATNA
2. THE PRINCIPAL SECRETARY, URBAN DEVELOPMENT AND HOUSING DEPARTMENT, GOVT. OF BIHAR, PATNA
3. THE DISTRICT MAGISTRATE, PATNA, BIHAR
4. THE MUNICIPAL COMMISSIONER, PATNA, MUNICIPAL CORPORATION
5. THE MANAGING DIRECTOR, BIHAR URBAN INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. (BUIDCO), 303, MAURYA TOWER, BUDDH MARG, PATNA - 800001

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Sanjay Singh, Advocate Mr. Anurag Saurav, Advocate
For the Respondent No.5:	:	Mr. Rabindra Kr. Priyadarshi, Advocate
For the PMC	:	Mr. Sanjay Prakash Verma

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
C.A.V. JUDGMENT

Date : 08-01-2019

This writ application has been filed for following reliefs:-

- (i) “For issuance of an appropriate Writ/Writs, direction/directions in the nature of Mandamus or Writs, order or orders for directing the respondents to refund the ‘Bid Security’ amount of Rs. 1.21 Crore as submitted by the Petitioner Company vide Bank Guarantee dated 29.05.2012 at the time of submission of the bid for the Development of Integrated Solid Waste Management Project in Patna having been rescinded on account of ‘Suppression and Concealment



of material facts' by the Patna Municipal Corporation (hereinafter referred to as PMC) and Bihar Urban Infrastructure Development Corporation Ltd. (BUIDco).

- (ii) For further direction to the concerned Competent authority to launch and to conclude an appropriate enquiry against the erring respondents for deliberately harassing the Petitioner and causing financial hardships to the Petitioner by retaining the Bid Security amount without any authority of law despite intimation having been made by the Petitioner company for having rescinded the contract and further the Corporation be restrained from taking any coercive measures in any manner during the pendency of this application.
- (iii) For further kind indulgence of this Hon'ble Court to look into the matter and the concerned respondents may be directed to produce all connected records for perusal for passing an appropriate order.
- (iv) For any other relief / relief(s) which the Hon'ble Court may grant in general interest checking these kinds of harassments to the Petitioner by the officials of PMC that may be deemed appropriate and necessary in this case for protecting the interest and rights of the Petitioner."

During the pendency of the writ application this Court passed order dated 12.10.2012 by which the respondents Corporation was



restrained from encashing the Bank Guarantee till a decision is taken on the reply furnished by the petitioner to the notice dated 01.10.2012 issued to the petitioner-company by BUIDCO (hereinafter referred to as the 'Corporation') as contained in Annexure-6.

In view of the aforesaid order the Managing Director of the Corporation passed order dated 14.02.2013 rejecting the request of the petitioner-company to give further period of three months to execute the Concession Agreement with the Corporation and then after taking a view that the petitioner is misleading the Corporation on the basis of false allegations, decided to encash the Bank Guarantee of Rs. 1.21 Crore and accordingly encashed the same. By the same order as contained in letter dated 14.02.2013 (Annexure-10 to I. A. No. 7169 of 2013) the Managing Director of the Corporation debarred the petitioner-company from participating in all future projects of the Corporation. Challenging the decision, the petitioner has filed I. A. No. 7169 of 2013 seeking an amendment in the writ application to the effect that the letter dated 14.02.2013 be also quashed and cancelled by this Court.

Brief Facts of the case

It is the case of the petitioner-company that having come to know about the project undertaken by the Corporation for



development of Integrated Solid Waste Management through advertisement dated 28.03.2012 (Annexure-1 to the writ application), the petitioner-company purchased the Bid Document and participated in the Bid held at Patna and was declared Successful Bidder. The advertisement was issued by the PMC. As required, in terms of the advertisement and the terms and conditions of the Request For Proposal (hereinafter in short as 'RFP'), Petitioner Company submitted the Bid security amount of Rs. 1.21 Crore vide Bank Guarantee dated 29.05.2012. A Letter of Award (LOI) dated 28.08.2012 was issued in favour of the petitioner-company which the petitioner accepted by acknowledging the same through its letter dated 31.08.2012 (Annexures-3 and 4 to the writ application).

It is further case of the petitioner-company that after receipt of letter of award dated 28.08.2012 the petitioner started the process of incorporating the Special Purpose Vehicle (SPV) for the purpose of said project and in course of the same the petitioner company informed all its consortium members for ensuring and taking effective steps for the financial closure of the project. It is stated that the consortium members of the petitioner company were from different parts of the world viz. Spain and UAE, therefore, some



time was taken by the petitioner-company from the Corporation for the purpose of incorporation of the SPV.

It is at this stage, that all of a sudden the petitioner-company came to know about filing of two Civil Writ Petitions bearing C.W.J.C. No. 4117 of 2012 and C.W.J.C. No. 15855 of 2011 and further one Letters Patent Appeal No. 1104 of 2012 having been filed by one M/s A 2 Z Infrastructure Ltd. an another Concessionaire against the 'PMC' and 'Corporation' for the various reliefs including a direction to the respondent-Corporation to extend the work of the petitioner-company of C.W.J.C. No. 4117 of 2012 from 9 wards to other 63 wards and circles of the Corporation in the light of the agreement dated 09.01.2010. Further by filing I. A. No. 2595 of 2012 in the said writ application the petitioner had prayed for quashing of the RFP of the Integrated Solid Waste Management Project, Patna advertised on 28.03.2012. It was the case of the writ petitioner in C.W.J.C. No. 4117 of 2012 that the 'RFP' was contrary to the agreement dated 09.01.2010 between the petitioner of the said case and the Corporation. In the second writ application being C.W.J.C. No. 15855 of 2011 the petitioner of the said case had sought a writ of Mandamus for payment of admitted dues of Rs. 7,62,65,817/- along with 18 % interest thereon for conducting the work of daily primary collection of Mechanical Street Sweeping



(MSW), Drain cleaning and transportation of waste as per M.S.W. Rules, 2000 in the 9 wards and 9 main roads of PMC.

After coming to know about the aforesaid cases, the financial institutions from whom the investments were sought, examined the issues, situation and the status of the pendency of the aforesaid litigations and appeal thereon before this Hon'ble Court and then the management also sought legal opinion from the experts. It was found that the main objection of the petitioner/appellant in these cases were relating to the validity and issuance of advertisement dated 28.03.2012 by the Corporation inviting fresh Bids from the new Bidders in respect of Ward No. 11 to 29 of Circle 1 and other three Circles of PMC in which the petitioner-company was declared successful Bidder.

It is under these circumstances that the petitioner-company decided to rethink over the whole issue before entering into agreement with the PMC and the Corporation. The management of the petitioner-company have finally concluded that all these facts were material in nature which were intentionally concealed by the Corporation while issuing the advertisement and thereby had totally kept petitioner-company in dark regarding the above mentioned litigations and proceedings pending in the court relating to the project, which work had been awarded to the



petitioner-company. Taking it a case of concealment of material fact and misrepresentation, the petitioner-company finally decided to drop/withdraw from the said project as being unviable and uncertain in nature.

It is further pointed out that the petitioner-company was issued a letter dated 01.10.2012 alleging that the company is at fault by not signing the agreement as according to the Corporation, the pendency of the cases did not restrain the implementation of the project in any manner and further the Corporation showed its intention of forfeiting the Bid Security and initiation of legal /criminal action. It is pointed out that in the letter dated 01.10.2012 the respondent Corporation did not propose any debarment or blacklisting of the petitioner-company and thus, no explanation was called for against any such proposal.

On 10.10.2012 the Corporation invoked the Bank Guarantee for encashment and the same was lodged with the Union Bank of India, SDA branch, New Delhi. The petitioner moved this Court by filing I. A. No. 6920 of 2012 in which, as stated above, the interim order was passed. Pursuant to the aforesaid order when the Managing Director of the Corporation considered the reply of the petitioner-company, not only the reply was rejected and the Bank Guarantee was encashed but by the same order dated 14.02.2013



the petitioner-company has been permanently debarred from participating in all the future projects of the Corporation.

Submission on behalf of the Petitioner

Learned counsel representing the petitioner-company submits that a bare perusal of the RFP which is Annexure-7 to the writ application it would appear that there is no stipulation to the effect that in case of withdrawal of the selected Bidder the Bid Security shall be forfeited. Learned counsel submits that under clause 1.3.6 of the RFP a Bidder is required to deposit, along with its Technical Bid, a Bid Security of Rs. 1.21 Crore (Rupees One Crore and Twenty One Lakhs only) refundable no later than 180 days from the Bid Due Date, except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security for Constructions Works and Performance Security for O&M under the Concession Agreement. It is submitted that under Clause 3.6.8, in the event that the Successful Bidder withdraws or is not selected for any reason in the first instance, the Corporation may invite the second lowest Bidder to revalidate or extend its respective Bid Security, as necessary, and match the Bid of the aforesaid Successful Bidder but in the present case after the petitioner-company withdrew itself, the Corporation did not invite the second lowest Bidder rather decided to go on its own for the project.



Again it is submitted that the RFP does not provide forfeiture of the Bid Security in case of withdrawal of the Successful Bidder. It is pointed out that the only condition under which Bid Security may be forfeited is a case of conflict of interest as envisaged under Clause 2.2.1.

It is further submitted that in absence of any stipulation present in the RFP conferring power upon the Corporation or PMC to encash the Bank Guarantee in case of withdrawal of Successful Bidder, the Corporation was not justified in terms of the contract to take action for invocation of the Bank Guarantee. It is further submitted that no show cause notice was issued in the matter of debarment of the petitioner-company but when the final order was issued on 14.02.2013 a permanent debarment order was passed which has got a civil consequence and is liable to be quashed on the ground of violation of principles of natural justice. It is lastly submitted that in any case the decision of the petitioner-company to withdraw from the project has got a valid reason as the Corporation is itself guilty of not coming clean in the advertisement by not disclosing the fact that the advertisement dated 28.03.2012 was under challenge before this Court.

Submission on behalf of the Corporation



On the other hand, learned counsel representing the Corporation has opposed the submission of the petitioner. At first instance, Mr. Rabindra Priyadarshi representing the Corporation took a plea that the forfeiture of Bid Security is in terms of the provisions contained in the Standard Bid Document (hereinafter in short SBD) approved by the government but very soon learned counsel realized that the SBD has not been adopted by the Corporation and there is no stipulation in the RFP dated 28.03.2012 providing for applicability of the terms and conditions contained in the SBD. Learned counsel therefore, did not press this submission based on SBD and took his argument to support the action of the Corporation with the help of the terms and conditions present in the RFP itself. In course of argument, however, learned counsel representing the Corporation could not show any provision in the RFP whereunder the Corporation is empowered to invoke the Bank Guarantee submitted towards the Bid Security by the petitioner on its withdrawal from the project. The only condition whereunder the Bid Security could have been encashed is Clause 2.2.1 of the RFP whereunder in the event of disqualification of any Bidder bound to have a conflict of interest, the Corporation shall be entitled to forfeit and appropriate the Bid Security or Performance Security for constructions works and Performance Security for O&M, as the



case may be. Save and except this one condition provided in Clause 2.2.1, no other condition could be placed before this Court to satisfy that in case of withdrawal of Successful Bidder he would be liable to forfeit his Bid Security.

Mr. Priyadarshi has relied upon stipulations present in the Bank Guarantee and referring to the same learned counsel submits that the Bank Guarantee in question was an unconditional and irrevocable Bank Guarantee for Bid Security. It is submitted that the Bank Guarantee specifically states that at the request of the Bidder in terms of Clause 1.3.6 of RFP document irrevocable and unconditional Bank Guarantee was issued without reservation and the Bank had undertaken to pay the amount without any protest or demur. It is submitted that since the petitioner had backed out and had withdrawn from the project, the Corporation was fully justified in invoking the Bank Guarantee.

So far as the debarment order is concerned, learned counsel for the Corporation is unable to demonstrate from the records that any show cause was issued to the petitioner in the matter of debarment. The letter dated 01.10.2012 which was issued by the Corporation to the petitioner-company, nowhere calls upon the petitioner to explain as to why the petitioner-company should not be blacklisted.



Learned counsel has, however, submitted that the plea taken by the petitioner-company alleging concealment and misrepresentation on the part of the Corporation are liable to be rejected. It is submitted that no doubt A 2 Z Infrastructure Limited had moved this Court by filing writ application as submitted by the petitioner but the Writ Court had not stayed the action taken by the Corporation towards issuance of advertisement dated 28.03.2012 and at no point of time the petitioner-company was allowed to suffer due to any order passed by the Court. The order dated 29.06.2012 passed in C.W.J.C. No. 4117 of 2012 has been placed at Annexure-8 series with the supplementary affidavit filed on behalf of the petitioner. The Letters Patent Appeal No.1104 of 2012 was also dismissed on 22.08.2012 and then C.W.J.C. No. 15855 of 2011 was disposed of by referring the dispute to the Arbitrator along with interim payment of 50 % allowed by the Court. Learned counsel submits that the non-disclosure of the filing of the writ application was not a suppression of fact inasmuch as the said writ application was never an impediment in the matter of execution of agreement by the petitioner-company.

CONSIDERATION

Having heard learned counsel representing the petitioner-company as well as the Corporation and on perusal of the record,



this Court is of the considered opinion that whatever be the reason for the petitioner-company behind it's withdrawal from the project, one thing is apparent from the records that in the RFP dated 28.03.2012 there is no stipulation under which in case of withdrawal by the Successful Bidder from the Project, the Bid Security amount is to be forfeited. Learned counsel for the Corporation has already submitted that the terms and conditions contained in the SBD were not adopted in the RFP and therefore, those terms and conditions, in the opinion of this Court, will not come to the rescue of the Corporation. If the RFP /Bid Document did not provide forfeiture of the Bid Security in case of withdrawal of the Successful Bidder, the Corporation could not have invoked the Bank Guarantee which was submitted by way of Bid Security. Clause 3.6.8 of the RFP categorically provides that in the event that the Successful Bidder withdraws or is not selected for any reason at the first instance, the Corporation may invite second lowest Bidder to revalidate or extend its respective Bid Security, as necessary, and match the Bid of the aforesaid Successful Bidder. The terms and conditions contained in the RFP therefore, clearly give an indication that the maker of the Bid Document were fully aware of the situation where a Successful Bidder may withdraw, still no provision has been made in the RFP whereunder Corporation is



empowered to invoke the Bid Security. Despite a detail hearing given to the learned counsel for the Corporation, no such provision could be pointed out to this Court. It is well settled in law that no Court can create a contract for the parties howsoever good it may be if the parties have not chosen the same for themselves. It is, thus, evident from the terms and conditions from the RFP that the action taken towards forfeiture of the Bid Security amount is not in tune with the conditions on which the petitioner-company had participated in the Bid.

Prima facie this Court is also of the opinion that the fact that the advertisement dated 28.03.2012 was under challenge before this Court was required to be disclosed in the advertisement dated 28.03.2012. Well it is true that there was no order of restrain by this Court in going ahead with the advertisement dated 28.03.2012 but in the business world this information has got a significance because the person participating in the tender / Bid process is required to invest substantial amount in the project and they have to consider the various aspects including the viability of the project taking into consideration the litigation aspect also. The petitioner is not wholly unjustified in taking a plea that the non-disclosure of writ application in the RFP /Bid Document and then subsequent



knowledge thereof had made a difference in their mind and it raised a doubt as to the viability of the project.

As stated above, this Court is of the considered opinion that invocation of the Bid Security in the given circumstance was not envisaged in the 'RFP' and it was never a part of understanding between the parties. Therefore, the action towards encashment of the Bank Guarantee is liable to be held illegal, arbitrary and bad in law.

It is also apparent from the letter dated 01.10.2012 (Annexure-6 to the writ application) that the Corporation had issued the said letter to show cause as to why not Bid Security submitted by the petitioner-company be forfeited and legal /criminal action should be initiated against the petitioner-company. This letter as contained in Annexure- '6' nowhere talks of any proposal of debarment / blacklisting of the petitioner-company. Thus, this Court finds that learned counsel for the petitioner is correct in submitting that the order of permanent debarment has been passed without giving any opportunity of hearing to the petitioner. This Court is also reminded of the judicial pronouncement of the Hon'ble Apex Court in the case of **M/s Kulja Industries Limited v. Chief General Manager, W.T. Project, BSNL and other** reported in **AIR 214 Supreme Court Page 9** wherein it has been held that



there cannot be a permanent debarment / blacklisting because it has got a civil consequence and the debarment must be inconsonance with the status of the breach.

In the present case the petitioner has been permanently debarred that too without any show cause / notice and the petitioner-company has undergone the debarment for more than 5 years by now. The action of the respondent Corporation in passing the order of debarment and blacklisting is unsustainable in law. In result, the impugned order dated 14.02.2013 as contained in Annexure-10 to the I. A. No. 7169 of 2013 is hereby quashed and cancelled. The respondent Corporation is directed to refund the Bid Security amount of Rs. 1.21 Crore with interest thereon at the rate of 6 % per annum from the date of encashment till the date of refund to the petitioner-company.

In the facts of the case there will be no order as to costs.

The writ application as well as I. A. No. 7169 of 2013 are allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J)

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CAV DATE	04.01.2019
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