

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1237 of 2018

In

Civil Writ Jurisdiction Case No.8850 of 2010

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M/s Kumar A. S. Construction, Ashok Nagar, Bhatt Bigha Gaya, through its
Managing Partner Smt. Pramila Singh W/o Sri Anuj Kumar Singh, R/o
Mohalla- Ashok Nagar, Bhatt Bigha, Gaya, P.S.- Rampur, Distt- Gaya.

... .. Appellant

Versus

1. The State of Bihar
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Road Construction Deptt., Government of Bihar, Patna.
4. The Chief Engineer Mechanical South Bihar Sub-Division, Road Construction Department, Govt. of Bihar, Patna.
5. The Superintending Engineer, Magadh Road Circle, Gaya, Road Construction Department, Distt- Gaya.
6. The District Magistrate, Gaya Distt- Gaya.
7. The Executive Engineer, State Highway Division Road Construction Department, Gaya, Distt- Gaya.

... .. Respondents

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Appearance :

For the Appellant : Mr.Ashok Kumar Dubey, Advcoate
Mr. Namta Vijay, Advocate
For the Respondent-State: Mr. Amit Prakash -GA13
Mr. Ravi Bhardwaj, AC to GA-13

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 02-12-2019

I. A. No. 6745 of 2018

The present interlocutory application has been filed
by the appellant for condonation of delay of eight days caused
in filing Letters Patent Appeal No.1237 of 2018.

2. Learned counsel for the appellant submitted



that the Managing Partner of the Firm M/S Kumar A.S. Construction was suffering from illness. She was being treated by a Gynecologist at Gaya between 12.07.2018 and 11.08.2018. She came to Patna on 12.08.2018. Thereafter, she obtained certified copy of judgment under appeal on 13.08.2018. After taking legal opinion, she decided to file letters patent appeal against the judgment dated 20.07.2018. Thereafter, the draft was prepared and the appeal was filed on 28.08.2018. He has further submitted that delay of eight days caused in filing the appeal is neither intentional nor deliberate.

3. Learned counsel for the State does not oppose the prayer of the appellant for condonation of delay caused in filing the appeal.

4. Regard being had to the submissions advanced at the Bar and the pleadings made in the application, delay of eight days caused in filing the appeal is condoned.

5. The interlocutory application stands allowed.

L.P.A. No. 1237 of 2018

Heard learned counsel for the appellant and learned counsel for the State.

2. The present intra-court appeal has been preferred under Clause 10 of the Letters Patent challenging the



judgment dated 20.07.2018 passed by the learned Single Judge in CWJC No.8850 of 2010.

3. The reliefs prayed for by the appellant in the writ petition was for quashing the order dated 23.05.2008 issued by the respondent no.7 whereby the earnest money amounting to Rs.4,64,300/- deposited by the appellant before respondent no.7 at the time of submission of tender document to participate in the tender for construction work of Model Bus Stand at Sikaria More, Gaya under National Slum Development Scheme has been forfeited.

4. The learned Single Judge while dismissing the writ petition held in Paras 5 and 6 of his judgment dated 20.07.2018 as under :-

“Having heard the parties and on a consideration of the materials on record, this Court is not inclined to interfere in the matter. A categorical stand of the respondents to the effect that the petitioner had entered into negotiations with the respondents in December, 2007 and agreed to execute the work at 8% above the Schedule of Rates has not specifically been controverted in the rejoinder. It is also not disputed that in course of such negotiation, the petitioner did not seek to avail the provisions of Rule 103 of the



Public Works Department Code. The petitioner did not respond to the reminders of the respondents to enter into agreement for execution of the work and hence no fault can be found with the respondents in directing forfeiture of the amount of the earnest money of the petitioner. As a matter of fact, the fresh tender issued at the revised rates is indicative of due compliance with Rule 103 of the Public Works Department Code, the tender having been issued after the month of January, before which such revision was not required to be made.

6. In the above circumstances, the writ petition stands dismissed.”

5. Assailing the impugned judgment, learned counsel appearing for the appellant submitted that the learned Single Judge failed to consider that in the notice inviting tender issued on 04.07.2007 for construction of Model Bus Stand at Sikaria More, Gaya, last date of submission of tender document was 25.07.2007 and on the same day, time was fixed to open technical bid, but in spite of all these facts, the work was allotted to the appellant after lapse of more than six months vide letter dated 12.02.2008. He contended that the learned Single Judge also failed to consider that the respondents failed to bring



on the record a chit of paper in support of the statement made in the counter affidavit that the appellant had offered the bid 10% above the schedule rate, but he reduced the offer to 8% above the schedule rate without demure in the month of December, 2007. He contended that even in the month of December, 2007, the work was not allotted to the appellant rather it was allotted on 12.02.2008. According to him, the learned Single Judge ought to have held that in view of delay caused in allotting the work, the respondents should have revised the rate as the cost of construction in the last six months had escalated to a great height.

6. *Per contra*, learned counsel appearing for the State submitted that there is no error in the judgment impugned passed by the learned Single Judge. The learned Single Judge has rightly held that after allotment of work the appellant did not deposit the renaming amount of earnest money. He also failed to enter into an agreement for which he was reminded vide letters dated 27.02.2008 and 28.03.2008. He contended that having heard the parties and perused the material on record, the learned Single Judge has rightly held that the appellant did not respond to the reminders of the respondents to enter into agreement for execution of the work. Hence, no fault can be



found with the action of the respondents in directing forfeiture of amount of earnest money of the appellant.

7. We have heard the parties and perused the record.

8. It would be evident from the record that tender for construction of Model Bus Stand at Sikaria More in Gaya town under RSVY scheme was received on 25.07.2007 from the appellant. The comparative statement of financial bid was made at different levels and the tender was decided in favour of the appellant at the rate of 8 % above the schedule rate after negotiation with him. The allotment of work in favour of the appellant was made on 12.02.2008. Thereafter, the appellant was asked to deposit the earnest money and furnish agreement. Reminders were given to him to furnish agreement vide letters dated 27.02.2008 and 28.03.2018, but he did not turn up for agreement. On account of failure on the part of the appellant to deposit remaining earnest money and furnish agreement, the earnest money deposited by him was forfeited and communication in this regard was sent to him vide letter dated 23.05.2008.

9. In the counter affidavit filed on behalf of respondent nos. 2 to 5 and 7 in paragraph-12, it is stated that the



appellant had given tender on 10% above the schedule rate. The Chief Engineer, South Bihar Wing (Yatayat), RCD, Patna called the appellant for rate negotiation. He happily agreed to work at the rate of 8% above schedule rate in the month of December, 2007 and the work was allotted to him by the Executive Engineer vide letter dated 12.02.2008. The allegation made by the appellant that work had been allotted to him after expiry of six months from the date of tender is not true. In this case six months should have been counted from the date of negotiation of rate and not from the date of tender. It has also been pleaded that the appellant did not ask for rate revision at the time of rate negotiation.

10. Though a reply to the counter affidavit was filed on behalf of respondent nos. 2 to 5 and 7 and the aforestated averments made in paragraph-12 of the counter affidavit have been vaguely denied, nowhere it has been pleaded that the offer made by the appellant was withdrawn before it was accepted. The Indian Contract Act provides that a person can withdraw his offer before its acceptance. Earnest money forfeited as per terms of tender for not entering into contract can not be refunded.

11. In **National Highways Authority of India**



vs. Ganga Enterprises, since reported in **(2003) 7 SCC 410**, the Supreme Court of India held : *“A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture.”*

12. The Supreme Court further observed : *“It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.”*



13. Keeping in mind the facts and circumstances of the case, if the learned Single Judge did not find any fault in the action of the respondents in directing for forfeiting of amount of earnest money of the appellant, we are of the opinion that no illegality can be found with the judgment impugned.

14. The appeal lacks merit. It is dismissed, accordingly.

(Ashwani Kumar Singh, J)

(Prakash Chandra Jaiswal, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	05.12.2019
Transmission Date	NA

