

GAHC010018612021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/55/2021

THE GENERAL MANAGER, CONSTRUCTION AND ANR.
N.F. RAILWAY, MALIGAON, GUWAHATI- 781011.

2: THE CHIEF ENGINEER
CONSTRUCTION-2, N.F. RAILWAY MALIGAON
GUWAHATI- 781011

VERSUS

M/S VASISTHA CONSTRUCTION PVT. LTD.
ZELIEZHU (JV(, A JOINT VENTURE BETWEEN M/S. VASISTHA
CONSTRUCTION PVT. LTD., AND M/S. ZELIEZHU, A PROPRIETORSHIP
FIRM HAVING ITS OFFICE AT BHARALI BHAWAN, 2ND FLOOR, NEAR
HOTEL BILAS, G.S. ROAD, ULUBARI, GUWAHATI- 781007,
KAMRUP(METRO), ASSAM

Advocate for the Petitioner : MR G GOSWAMI

Advocate for the Respondent : MR. R DUBEY

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA

ORDER

Date : 19-04-2023

(Sandeep Mehta, CJ)

This intra-court appeal is preferred by the appellant, General Manager,

Construction, N.F. Railway, Maligaon, Guwahati, and another seeking to assail the legality and validity of the order dated 20.11.2020, passed by the learned Single Judge accepting the writ petition, being WP(C) 7454/2015, filed by the respondent herein and setting aside the action of the appellants in forfeiting the Earnest Money Deposit (EMD) made by the respondent in pursuance to its bid submitted seeking construction works under the Tender Notice bearing No. CON/2014/MAY/03 dated 12.05.2014 issued by the appellant.

The respondent submitted its bid as a joint venture entity with M/s Vasistha Construction Pvt. Ltd. being the lead partner. Along with the bid, three Call Deposits towards EMD were also furnished. On evaluation of the bids, the respondent was declared to be the lowest bidder. Before the contract could be finalised and work order could be issued, information came to be provided to the appellant employer that the lead partner of the joint venture entity had been blacklisted by the Madhya Pradesh Public Works Department till 19.06.2018, which fact was concealed by the joint venture entity while filing its bid. The lead member of the joint venture entity was issued a letter dated 26.12.2014 calling upon it to clarify its stand regarding the aforesaid blacklisting order and the declaration made by it as per the tender clauses.

The respondent filed an affidavit-in-reply taking a stand that the Madhya Pradesh Government had uploaded the order dated 20.05.2013 in their website, whereby Vasistha Construction Pvt. Ltd., i.e. the lead partner of the joint venture entity had been blacklisted. The said firm was the lead constituent of the petitioner's joint venture, but it was not aware of the order of blacklisting. Knowledge about the blacklisting order dawned upon the firm, M/s Vasistha Construction Pvt. Ltd., sometime in August, 2015 whereupon a writ petition, being WP(C) 5920/2015 was filed before the Hon'ble Madhya Pradesh High Court. The Madhya Pradesh High Court, vide order dated 20.06.2016, quashed the order of blacklisting. It was also projected in the affidavit-in-opposition that the joint venture partner was not aware of such blacklisting.

In the writ petition [WP(C) 7454/2015], the writ petitioner raised numerous grounds, amongst which those relevant to the controversy raised in this appeal, are reproduced herein-below for the sake of brevity:

(1) That Clauses (i) and (j) of the declaration appended to the tender documents, whereby the bidder was required to give a declaration to the effect that it had not been previously blacklisted, did not authorise the respondents to forfeit the EMD without putting the bidder to notice and, thus, the proposed action of forfeiture was vitiated on account of non-adherence to principles of natural justice.

(2) That the petitioner and its constituents were not aware of the blacklisting of the lead partner of the joint venture entity. No sooner this fact came to the knowledge of the blacklisted lead partner, M/s Vasistha Construction Pvt. Ltd., a writ petition was filed before the Madhya Pradesh High Court and the order of blacklisting was quashed by the Madhya Pradesh High Court vide order dated 20.06.2016. It was urged that the order of the Madhya Pradesh High Court quashing the order of blacklisting would have the effect of it being effaced from record and, hence, the same could not have been considered to have an adverse effect against the bidder.

However, the argument advanced on behalf of the writ petitioner (respondent herein) regarding its lead partner not being aware of the blacklisting did not receive imprimatur of the learned Single Judge. In paragraph 11 of the impugned order, the learned Single Judge observed thus:

“11. The plea urged by the learned counsel for the petitioner that the petitioner was not aware that its lead joint venture partner, namely, Vasishtha Construction Pvt. Ltd. was not aware of the black-listing though appears to be attractive, but as per paragraph 15.4 of guidelines and conditions of joint venture, as quoted herein before, each member of the joint venture was required to give its declaration, as such, the fact remains that when information about its black-listing was available in official website of Public Works Department, Govt. of Madhya Pradesh, the purported declaration submitted by the petitioner as per bid documents, specifically, clause (i) and (j) of declaration, that the constituents of the petitioner were not black-listed must be held to be reckless and without verifying facts and, as such, the declaration is deemed to be false.”

It was concluded by the learned Single Judge that the bid documents, particularly, the declaration made in respect of Clauses (i) and (j) of the tender conditions established that the petitioner had made a reckless, unverified and false declaration. However, considering the fact that the order of blacklisting was subsequently quashed by the Madhya Pradesh High Court vide order dated 20.06.2016, it was held that the order of blacklisting must be deemed to be *non-est*, as if such order never existed. With the above observations, the proposed action of forfeiture of the EMD was reversed by the order dated 20.11.2020, which is assailed in this intra-court appeal.

Learned counsel Mr. G. Goswami, representing the appellant urged that from a bare perusal of the findings recorded by the learned Single Judge at paragraph 11 of the impugned order, it is established beyond all manner of doubt that the declaration given by the appellant in Clauses (i) and (j) of the bid documents that it was never blacklisted was a false declaration. Mr. Goswami submitted that having arrived at such conclusion, the learned Single Bench was not justified in causing interference forfeiture of EMD, which action was an automatic consequence flowing from the breach of the tender conditions. He submitted that merely because the blacklisting order was subsequently quashed, that would not in any manner nullify the effect of the false declaration because the facts stated in the declaration have to be considered with reference to the date on which such declaration was made. As, the false declaration was admittedly made on 04.07.2014 and submitted along with the bid on which date the order of blacklisting was in force, there was no occasion for the writ court to have quashed the action of forfeiture of the EMD, which was the deemed consequence of making false declaration (*supra*). Thus, he implored the court to accept the appeal, set aside the impugned order and restore the action taken by the appellant employer in proceeding to forfeit the EMD furnished by the respondent with its bid.

E-converso, learned counsel Mr. R. Dubey, representing the respondent

vehemently and fervently urged that the factum of blacklisting was not known to the lead partner of the joint venture entity, because copy of such order was never provided to the said firm (M/s Vasistha Construction Pvt. Ltd.) by the Madhya Pradesh Public Works Department. It is only during the process of cancellation of the successful lowest bid in the current tender that the order of blacklisting came to knowledge and, soon thereafter the writ petition was filed in the Madhya Pradesh High Court. He further contended that the impugned action of forfeiture of the EMD was resorted to without following the principles of natural justice and, hence, the same is liable to be quashed. Further, relying on the observations made by the learned Single Bench that the effect of blacklisting would be *non-est* and such order of blacklisting would be deemed to have never existed pursuant to the Madhya Pradesh High Court's order dated 20.06.2016, Mr. Dubey urged that as the High Court, while exercising its high prerogative writ jurisdiction had quashed the order of blacklisting, it was rightly held by the learned Single Judge that the order of blacklisting would be deemed to be *non-est* from the date of blacklisting and consequently it would have the effect as if the joint venture's constituent was never blacklisted.

We have heard the rival submissions and have gone through the impugned order and the material placed on record.

The arguments advanced by the respondent's counsel regarding non-adherence to the principles of natural justice in the impugned action is absolutely unfounded, because it is the admitted case of the appellant that before proposing forfeiture of the EMD, the employer, i.e. the appellant herein had put the joint venture firm to notice seeking its explanation. On the aspect of making a false declaration in the bid documents the tender conditions, particularly, Clauses (j)2 thereof clearly stipulated that if the individual firm or partner of the firm was banned by the Ministry of Railways or any other Ministry/Govt. department from doing business and the ban is still in force, the security deposit and the Performance Guarantee will be forfeited in full. Thus, the effect of making a wrong/false declaration on this aspect was automatic

forfeiture of the EMD. The plea taken by the learned counsel for the respondent that its constituents of the joint venture were not aware of the blacklisting of the lead partner is also unacceptable on the face of the record, because the order of blacklisting was uploaded on the website of the Public Works Department, Government of Madhya Pradesh. The appellant herein got information of this fact from the respondent vide letter dated 26.12.2014. As the order of blacklisting was uploaded on the website of the Madhya Pradesh Public Works Department, the plea regarding ignorance of such blacklisting order is devoid of merit. Otherwise also, the learned Single Judge has concluded at paragraph 11 of the impugned order reproduced (supra) that the declaration made by the respondent was false. Thus, the plea regarding lack of knowledge about the blacklisting order is untenable on the face of the record.

Having held so, we are compelled to observe that the view taken by the learned Single Judge in the impugned order that the order of blacklisting stood nullified from the date of blacklisting on the ground that the Madhya Pradesh High Court had quashed the blacklisting order, cannot be approved.

The mandate of Clause (i) and (j) of the tender conditions which require the bidder to make a declaration regarding blacklisting would be nullified if this view taken by the learned Single Judge were to be affirmed. There is no doubt in our mind that the relevant date for considering the correctness or otherwise of the declaration would be the date of declaration and any subsequent event would not dilute the requirement thereof. Thus, merely because the Madhya Pradesh High Court subsequently quashed the order of blacklisting of one of the constituents of the joint venture entity, that by itself would not nullify the effect of the patently false declaration made by the joint venture entity in the bid documents and the consequence of making such false declaration would definitely ensue.

As a result of the above discussion, the impugned order dated 20.11.2020 passed

by the learned Single Judge in WP(C) 7454/2015, is hereby reversed. The writ appeal is allowed in the above terms.

No order as to costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant