

Sunita Singh Vs. South Eastern Railway Through Its General Manager and Ors

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Court : Jharkhand

Decided On : Dec-03-2014

Appellant : Sunita Singh

Respondent : South Eastern Railway Through Its General Manager and Ors

Judgement :

1 IN THE HIGH COURT OF JHARKHAND AT RANCHI L.P.A. No. 366 of 2014 Sr. Divisional Commercial Manager, S.E. Railway, Chakradharpur, District West Singhbhum Jharkhand Appellant Versus 1. Sunita Singh 2. South Eastern Railway through its General Manager, Garden Reach, Kolkata.

3. Divisional Rail Manager, Eastern Railway, Chakradharpur.

4. The Divisional Manager (Commercial), South Eastern Railway Chakradharpur.

5. The Station Manager (Gar), South Eastern Railway Tatanagar. Respondents With L.P.A. No. 383 of 2014 connected with I.A. No.5726 of 2014 Sunita Singh Appellant Versus 1. South Eastern Railway through its General Manager, Garden Reach, Kolkata.

2. Divisional Rail Manager, Eastern Railway, Chakradharpur.

3. The Sr. Divisional Commercial Manager, S.E. Railway, Chakradharpur.

4. The Divisional Manager (Commercial), South Eastern Railway Chakradharpur.

5. The Station Manager (Gar), South Eastern Railway Tatanagar.
Respondents ----- CORAM: HONBLE MR. JUSTICE VIRENDER SINGH, CHIEF
JUSTICE HON'BLE MR. JUSTICE D.N. PATEL ----- For the Appellant(s) : Mr.
V.P.Singh, Senior Advocate (383/14) Mrs. Amrita Kumari, Advocate (383/14) Mrs.
Rashmi Kumari, Advocate (383/14) Mr. Mahesh Tewari, Advocate (366/14) For the
Respondent(s):Mr. Mahesh Tewari, Advocate (383/14) Mr. V.P.Singh, Senior
Advocate (366/14) Mrs. Amrita Kumari, Advocate (366/14) Mrs. Rashmi Kumari,
Advocate (366/14) ----- 2 04/Dated:

3. d December, 2014 Per Virender Singh, C.J.: With the consent of learned
counsel for both the sides, we have taken up both the appeals for their final
disposal.

2. Appellant Sunita Singh in L.P.A. No. 383 of 2014 (hereinafter to be referred to
as the petitioner only) through the medium of W.P.(C) No. 3368 of 2014 threw a
challenge to a letter dated 19th of June, 2014, whereby she was directed to
deposit bank guarantee equal to one years license fee by 26 th of June, 2014
failing which the Letter of Acceptance dated 16th of May, 2014 issued by Senior
Divisional Commercial Manager, S.E.Railway, Chakradharpur, Respondent No.3
herein (for short South Eastern Railway), would stand cancelled, with a further
prayer directing the respondents to allot her the contract/work of operation of
Scooter/Motorcycle/Cycle Stand and Auto/Taxi/Car Parking Stand at Tatanagar
Railway Station. She also sought quashment of re-advertisement of the said
parking slot issued by the respondents.

3. It would be apt to have the brief facts of the case - Pursuant to the tender notice
No. Com 75/Car Parking/Cycle Stand/TATA/14 dated 11.02.2014, the petitioner
applied quoting the tender value at 3 Rs.3,97,92,777/- as a license fee for three
years as this contract was to be allotted for three years. The petitioner deposited
security amount of Rs.17,84,290/- and submitted Solvency Certificate dated
21.02.2014 issued in her favour by Corporation Bank. The offer submitted by her
was accepted by the respondents, as such Letter of Acceptance was sent to her in
which she was required to furnish the following details :- i. Quarterly advance

license fee : Rs.33,16,065=00 ii. Security deposit equivalent to six months' license fee : Rs.66,32,130=00 iii. Bank Guarantee equivalent to one year license fee : Rs.1,32,64,260=00 4. The quarterly advance license fee was to be deposited within seven days from the receipt of the letter. She represented the respondents for extending the time for depositing the quarterly advance license fee, resultantly the time was extended. She, after having been given time for depositing quarterly advance license fee as indicated in condition No.i, made a request to the respondents for extension of time with regard to condition No.iii also i.e. Bank Guarantee equivalent to one year license fee: Rs.1,32,64,260=00. Acceding to her request, a communication was sent to her vide letter dated 19 th June, 2014 that if she failed to submit bank guarantee by 26 th of 4 June, 2014, the Letter of Acceptance stood cancelled. The petitioner, however, vide letter dated 24th June, 2014 sent a communication to Respondent No.3 in reference to his letter dated 19th June, 2014, stating therein that she was in the process of arranging a bank guarantee of Rs.1,32,64,260/- for which she has mortgaged her land and flat and had also deposited 25% of the bank guarantee amount with the bank. She further stated in the said letter that since the bank guarantee was of higher value, the matter was to be taken up in Regional Branch which might take approximately one month more. Showing her willingness to execute agreement, she stated that she was ready to deposit one week's license fee for permitting her to operate the stand on temporary basis and that if she failed to deposit the bank guarantee, the contract may be cancelled and even the amount already deposited with the respondents may also be forfeited. A letter was also sent by the concerned official of the bank (Bank of India), who had to issue the bank guarantee to the writ petitioner, to Respondent No.3 stating therein that the bank was in the process to issue the bank guarantee for which the sanctioning authority was Zonal Office, Jamshedpur, therefore, the entire process could take 10-15 days time. The respondents however, did not accede to the request of the petitioner and by cancelling the Letter of Acceptance went 5 ahead with re-advertisement of the aforesaid contract. This gave cause to the petitioner to knock at the door of the Writ Court asking for the reliefs as indicated in the opening part of the judgment.

5. The learned Writ Court, after entering into a detailed discussion with regard to the factual aspect of the matter, has come to a categoric finding that there was no

fault with the decision taken by the respondents in cancelling the Letter of Acceptance dated 16 th of May, 2014 as the writ petitioner could not fulfill all the mandatory conditions mentioned in the said Letter of Acceptance. However, at the same time, held that the petitioner vide its letter dated 24 th of June, 2014 had shown her willingness to execute the agreement and offered deposit of one weeks license fee for permitting her to operate the stand on temporary basis, the provisions under Clause 12 or Clause 17 of the Terms and Conditions including instructions to Tenderers could not have been invoked by the respondents by forfeiting the earnest money deposited by the petitioner with the respondents with regard to the contract for which Letter of Acceptance was also issued to her, therefore applying the principles of equity and fair play, the petitioner was held entitled for refund of earnest money deposited by her. It is in this factual backdrop, the learned Writ Court directed the respondents to refund the amount of Rs.17,84,290/- (earnest money) lying with them to the petitioner or adjust the said amount, if she chose to participate in the tender process re-advertised by the respondents. Writ petitioner is aggrieved of the said judgment and prays for all the reliefs as asked for in the main writ petition whereas South Eastern Railway is also aggrieved of the release of the earnest money in favour of the writ petitioner. Hence, the present two appeals viz. L.P.A. No.366 of 2014 filed by South Eastern Railway and L.P.A. No. 383 of 2014 filed by the writ petitioner.

6. Heard Mr. V.P.Singh, learned Senior Advocate assisted by Amrita Kumari and Mrs. Rashmi Kumari appearing for writ petitioner-Sunita Singh and Mr. Mahesh Tewari, Advocate appearing for South Eastern Railway. Perused the entire Writ Court record.

7. At the very outset, it has been brought to our notice by Mr. Mahesh Tewari that pursuant to the re-advertisement issued by South Eastern Railway for allotment of the aforesaid contract in which the writ petitioner also participated and earnest money already deposited by her with regard to the earlier contract which was the subject matter of the writ petition, adjusted by the respondent-Railway, the petitioner could not get the said contract and this fact has been brought to the notice of the Court by filing a counter affidavit in L.P.A. No. 383 of 2014.

8. Mr. V.P.Singh, learned Senior Advocate, while admitting the statement of Mr. Mahesh Tewari, Advocate as correct, states that this aspect would not change the entire complexion of the case as projected in the writ petition as it is only one of the reliefs i.e. allotment of the contract in favour of the writ petitioner, which, now, will not be available to her. He fairly submits that no doubt much water has flown by now as the same contract has been allotted to someone else, the writ petitioner being not the successful bidder, but the apprehension in the mind of the writ petitioner is that respondents would forfeit the entire earnest money deposited by the writ petitioner vis--vis the earlier contract on the strength of terms and conditions attracting Clause 12 and Clause 17 of Terms and Conditions including instructions to Tenderers and to that extent only, L.P.A. No. 366 of 2014 has been preferred by the South Eastern Railway.

9. Mr. Singh submits that if one looks at the bonafide of the writ petitioner as projected in the letter dated 24 th June, 2014 addressed to Respondent No.3 and another communication sent by Bank of India to him, all this speaks volumes of the willingness of the writ petitioner to execute the agreement and not to run away from that as one of the conditions indicated in the Letter of Acceptance dated 16 th of 8 May, 2014 apparently was a very harsh condition on which the writ petitioner immediately started working and even requested the respondents to give her some more time which request was acceded to also for a fixed period i.e. till 26.06.2014. Learned Senior Counsel submitted that before the expiry of the time limit i.e. 26.06.2014, the writ petitioner in fact had placed her cards very fairly before the Respondent No.3 seeking some more time or even offered her willingness to execute the agreement by depositing one weeks license fee accepting all the default clauses even of forfeiture of the amount already deposited with the Railway.

10. Strengthening the arguments, learned Senior Counsel further submitted that if one goes by the Letter of Acceptance dated 16th of May, 2014 according to which the agreement was to be executed within 15 days along with fulfillment of all the three details as indicated in the said letter which included bank guarantee in original, the respondents themselves extended the time upto 26 th of June, 2014, in this eventuality they themselves waived the condition stipulated in the Letter of

Acceptance. In this factual backdrop, according to learned Senior Counsel, there appears to be no justification with the respondent-Railway for forfeiting the earnest money deposited by the writ petitioner.

11. Virtually, the learned Senior Counsel has projected the case of the writ petitioner as if he is countering the case of the respondent-Railway as set up in L.P.A. No. 366 of 2014, certainly in apprehension of the earnest money being forfeited and fairly so, otherwise what appears to the Court is that so far as his own appeal (L.P.A. No. 383 of 2014) is concerned, perhaps he is on slippery footing, the contract having been already allotted to some other contractor being successful bidder in which the writ petitioner also participated pursuant to the direction of the learned Writ Court and her earlier earnest money adjusted for the purposes of bidding in the second contract.

12. Mr. Mahesh Tewari, Advocate appearing for respondent-South Eastern Railway in L.P.A. No. 383 of 2014 and for appellant in L.P.A. No. 366 of 2014 submitted that Clause 16 of the Tender Document provides that the tenderer shall keep the offer open for a period of 120 days from the date of opening of tender within which period the tenderer cannot withdraw his offer and Clause 12 provides that the earnest money deposited by the successful tenderer will be retained towards security deposit for due fulfillment of the contract, but shall be forfeited, if the contractor fails to execute the agreement or to start the work within a reasonable time, to be determined by the railway administration, after notification of the acceptance of his tender. Similarly, Clause 17 also provides that if a contractor refuses to execute the contract document, the acceptance of his/her bid shall be treated as cancelled and the Railway shall be entitled to forfeit the full amount of earnest money and to recover the liquidated damages for such default.

13. Mr. Tewari submitted that admittedly the petitioner was issued letter of acceptance on 16.05.2014 but within the stipulated period of 15 days, she failed to submit the bank guarantee and that the South Eastern Railway took a lenient view in the matter and extended the time period up to 26.06.2014, therefore, in terms of letter dated 19.06.2014, the acceptance letter dated 16.05.2014 stood cancelled. According to Mr. Tewari, the petitioner, therefore was not entitled to the refund of

the earnest money as directed by the learned Writ Court observing that provisions under Clause 12 or Clause 17 of the Terms and Conditions could not have been invoked by the respondents. Mr. Tewari, thus submits that the impugned judgment, to that extent, deserves to be set aside, otherwise the petitioner, in the present set of circumstances, when the contract has been allotted to some other party being the successful bidder and the petitioner having participated in the fresh tendering process, cannot ask for allotment of the same contract.

14. Admittedly, the petitioner, having participated in 11 the fresh tendering process pursuant to the re-advertisement of the parking slot issued by the respondents and being unsuccessful, cannot at least base his claim for allotment of the said contract. Therefore, L.P.A. No.383 of 2014 warrants dismissal. However, the issue now remains with regard to the forfeiture of the earnest money which aspect has been discussed by the learned Writ Court in detail referring to Clause 12 and 17 of the terms and conditions and ultimately a finding returned that the provisions of these clauses could not be invoked by the South Eastern Railway as the petitioner had never refused to sign the agreement rather, shown her willingness to execute the agreement whereas the provisions of these clauses could be made applicable only where the tenderer refuses to execute the agreement or fails to execute the agreement or start the work within a reasonable time.

15. We are also of the view that hyper-technical approach to the provisions of these clauses cannot be adopted in the peculiar facts of the present case when the South Eastern Railway itself had extended the time up to 26 th of June, 2014 for the purposes of acceptance of bank guarantee and that before the expiry of the said period, the petitioner vide her letter dated 24.06.2014 had shown her willingness to execute the agreement. In this factual backdrop, forfeiting the earnest money deposited by the petitioner vis--vis the earlier contract would not only be against the principles of equity, fair play and good conscience, but a harsh decision on the face of it. Therefore, on that rationale, we do not find any infirmity in the approach adopted by the learned Writ Court for refund of the earnest money to the petitioner. The adjustment of the said amount in the second tender process was a temporary adjustment and has now no relevance. Viewed thus, we are not inclined to accept the arguments of Mr. Tewari for setting aside the impugned

judgment of the learned Writ Court to that extent as such, L.P.A. No.366 of 2014 also warrants dismissal.

16. However, what appears to us is that it is because of the delay on the part of the petitioner only that the initial contract which was allotted to her and letter of acceptance also sent for furnishing certain details, has been delayed at her end, although the fixed period on asking was also extended, but to no effect, resulting into further delay and then issuance of re-advertisement of the said parking slot. Therefore, the petitioner has to be slapped with some reasonable befitting costs which we fix as Rs.50,000/- (Rupees Fifty Thousand Only) to be deducted from the earnest money to be refunded to her by South Eastern 13 Railway. Ordered accordingly.

17. But for the costs to be paid by the appellant-writ petitioner as indicated hereinabove, both the appeals on hand stand dismissed.

18. I.A. No. 5726 of 2014 in L.P.A. No. 383 of 2014 also stands disposed of accordingly. (Virender Singh, C.J.) (D.N. Patel, J.) Birendra/

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