

Ms Atri Construction Vs. The State of Jharkhand and Ors

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Court : Jharkhand

Decided On : Mar-26-2015

Appellant : Ms Atri Construction

Respondent : The State of Jharkhand and Ors

Judgement :

1 IN THE HIGH COURT OF JHARKHAND AT RANCHI W. P. (C) No. 6983 of 2012 M/s Atri Construction, Office at Chhota Pachgarh, PO Sahebganj, PS Jirwabari, Distt. Sahebganj, through its proprietor Shivmuni Yadav, S/O Raj Narayan Yadav, R/O Chhota Pachgarh, PO Sahebganj, PS Jirwabari, Dist. Sahebganj Petitioner Versus 1. The State of Jharkhand 2. The Chief Engineer, Rural Development Special Division, APF Building, PO & PS Dhurwa, Dist. Ranchi 3. The Executive Engineer, Rural Development Special Division, PO, PS & Dist. Sahebganj 4. The Deputy Commissioner, Sahebganj, PO+PS+Dist. Sahebganj 5. M/s Tiwari Construction, through its proprietor Ganesh Prasad Tiwari, R/O Krishna Nagar, PO & PS Krishna Nagar, Dist. Sahebganj ... Respondents CORAM : HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR For the Petitioner : Mr. Vishal Kumar Tiwary, Advocate : Mr. Atul Kumar, Advocate For Respondent State : Mr. Rajesh Kumar, G.P.V Mr. Anil Kumar, J.C. to A.G. For Respondent No. 5 : Mr. Rajiv Ranjan Tiwary, Advocate Mr. Prashant Kr. Singh, Advocate 15/ 26.03.2015 Aggrieved by order dated 01.11.2012 whereby, the allotment of work was cancelled and seeking a direction upon the respondents for executing the agreement in favour of the petitioner, the present writ petition has been filed.

2. The facts disclosed in the writ petition are that, pursuant to eTender notice dated 18.08.2012, two bidders participated in the tender process. The technical bid was opened on 05.09.2012 and vide letter dated 05.10.2012, the petitioner was informed by the Chief Engineer, Rural Development Special Division, Sahebganj that the work has been awarded to it. Letters dated 10.10.2012 and 15.10.2012 were issued for executing the agreement and the petitioner was directed to execute work on or before 18.10.2012 however, on 17.10.2012, after inspecting the work place, the petitioner informed the respondents about waterlogging at the work place. The site was inspected by the Assistant Engineer and the Junior Engineer and they gave a report to the Executive Engineer and, the petitioner submitted its response on 26.10.2012 however, vide order contained in letter dated 01.11.2012, the work order dated 05.10.2012 was cancelled. It is stated that letter dated 01.11.2012 was forwarded to the Chief Engineer and the Chief Engineer vide order dated 06.11.2012 extended the time for executing the agreement by 10.11.2012 and the petitioner accordingly, deposited the security deposit on 07.11.2012 however, in the meantime, the work was allotted to the respondent no.5 on 07.11.2012 itself. The petitioner unaware of the allotment of work to the respondent no.5, requested the Executive Engineer vide letters dated 09.11.2012 and 10.11.2012 for executing the agreement. However, the agreement was not executed by the respondents with the petitioner M/s Atri Construction. Aggrieved, the petitioner has approached this Court.

3. A counteraffidavit has been filed on behalf of the respondent Rural Works Department stating that as per the 3 eTender notice, 2 bidders namely, M/s Atri Construction and one M/s Tiwari Construction submitted their bids and both quoted the same price, i.e., 10% below the scheduled rate. In view of letter dated 18.09.2012, the Chief Engineer is vested with power both to cancel or allot the tender. The work order was issued to the petitioner on 05.10.2012, in view of its seniority in registration and it was required to execute agreement within 21 days however, it failed to execute the agreement by 01.11.2012. Vide letter dated 10.10.2012, the petitioner was directed to deposit the balance security money within 3 days however, the same was not deposited by the petitioner and a reminder was issued to the petitioner on 18.10.2012. It is stated that neither the agreement was executed nor the security money was deposited and the petitioner in turn, wrote letter to the

respondent Executive Engineer stating that the worksite is not fit for work and it would execute the agreement only after the site would be fit for commencing the work. In the counteraffidavit filed on behalf of the respondent State of Jharkhand, it is stated that for constructing the district combined agricultural office building at Sahebganj, vide letter dated 03.01.2012, administrative approval for the said construction for Rs.1,52,75,500/ was accorded and an amount of Rs.40 lacs was allocated in the first phase. The said amount of Rs.40 lacs was transferred in the treasury account vide order dated 30.03.2012. It is further stated that vide letter dated 14.05.2012, the Executive 4 Engineer, Rural Development Special Division was designated as the Executing Agency for construction of District Combined Agricultural Office building at Sahebganj and he was directed to complete the work. 4. Heard learned counsel for the parties and perused the documents on record.

5. Mr. V.K. Tiwary, the learned counsel appearing for the petitioner challenging the authority of the Deputy Commissioner to cancel the work allotment in favour of the petitioner by the Chief Engineer submits that in the counteraffidavit filed on behalf of the respondent State of Jharkhand, it has been admitted by the respondents that the Chief Engineer is the authority vested with the power to award or cancel the agreement and therefore, letter dated 01.11.2012 issued by the Deputy Commissioner is without jurisdiction and thus, the work order dated 05.10.2012 in favour of the petitioner could not have cancelled by the Deputy Commissioner. It is further submitted that on the request of the petitioner, the Chief Engineer extended the time for executing the agreement on or before 10.11.2012 however, in the meantime, the work was allotted in favour of the respondent no.5, hurriedly, which indicates malafide intention of the respondents in awarding the work in favour of the respondent no.5. The learned counsel for the petitioner submits that the time for executing the agreement was extended till 10.10.2012 and therefore, the earnest money 5 cannot be forfeited. The learned counsel for the petitioner has relied on judgments in Union of India & Ors. Vs. Tania Construction Pvt. Ltd., reported in 2012(1) JLJR (SC) 240 and in DTC Securities Ltd. Vs. Jharkhand State Mineral Development Corporation & Ors., reported in 2013(1) JLJR 367. 6. As against the above, Mr. Rajesh Kumar, the learned G.P.V appearing for the respondent State of Jharkhand submits that, the petitioner failed to execute

agreement within the scheduled time and therefore, a decision was taken to award the work in favour of the respondent no.5. Defending the decision forfeiting the earnest money deposit, the learned counsel for the respondentState of Jharkhand submits that in terms of the Tender document, the earnest money deposited by a tenderer is liable to be forfeited when the tenderer fails to execute the agreement. It is further submitted that in view of various correspondences from the Department, there cannot be any doubt that time is the essence of the contract. Since the petitioner failed to execute the agreement and thus, failed to commence the work within scheduled time, work order was rightly cancelled. 7. Mr. Rajiv Ranjan Tiwary, the learned counsel appearing for the respondent no.5 reiterates the stand taken by the respondentState of Jharkhand and submits that after the work in question was allotted in favour of the respondent no.5, it has commenced the work and the work upto the 2 nd Floor is almost 6 complete. Since, bids submitted by the respondent no.5 and the petitionerCompany were for the same price, by allotting work to respondent no.5, the respondentState of Jharkhand has suffered no revenue loss. Objecting to the prayer made in the writ petition, the learned counsel for the respondent no.5 submits that, the decision to award or not to award the contract is exclusively within the domain of the employer/respondentState of Jharkhand and the Court cannot substitute its decision in place of the decision of the employer.

8. Having carefully considered the rival submissions raised on behalf of the parties and after perusing the documents on record, I am of the opinion that the present writ petition lacks merit for the reasons stated hereinafter. From the materials brought on record, it appears that vide letter dated 05.10.2012, a decision was taken to allot the work contained in eTender notice dated 18.08.2012, to the petitionerCompany. A copy of the said letter was communicated to the petitionerCompany, is apparent from a perusal of the said letter. Another letter dated 10.10.2012 was issued to the petitionerCompany in this connection requiring the petitionerCompany to execute the agreement. The petitionerCompany which was required to execute agreement on or before 18.10.2012 however, on 17.10.2012, raised an objection as to the suitability of the work place for commencing the work and it, vide letter dated 26.10.2012, intimated the Executive Engineer 7 that it would execute the agreement only after the work

place becomes suitable for commencement of work. In the meantime, letter dated 15.10.2012 was also issued to the petitioner directing the petitioner to execute the agreement. The petitioner was required to furnish balance security deposit within 3 days however, the petitioner could furnish the balance amount only on 07.11.2012. In the meantime, vide order dated 01.11.2012, the work order dated 05.10.2012 was cancelled and a decision was taken to allot the work in favour of respondent no.5M/s. Tiwari Construction. From the materials on record, it thus appears that as on 01.11.2012, no agreement was executed by the petitioner and thus, the petitioner cannot contend that there was a concluded contract between the parties. It further appears that instead of depositing the balance security deposit on or before 18.10.2012, the petitioner could furnish the balance amount only on 07.11.2012, that is, the date on which the work was already allotted to the respondent no.5. In the counteraffidavit, the respondentState has pleaded as under:

12. That the Deputy Commissioner, Sahibganj in the month of May, 2012 vide order no.13/ Krishi dated 14.05.2012 had selected the Executive Engineer, Rural Development Special Division, Sahibganj as Executing Agency of District Combine Agriculture Office Building, Sahibganj to complete this work in three months and in connection of the same the whole amount of installment of 8 Rs.40,00,000/ has been transferred in Treasury, Account of Executive Engineer, Rural Development Special Division, Sahibganj for the construction of District Combined Agriculture Office Building, Sahibganj, by Project Officer, Rajamahar Messo Area, Sahibganj, vide his memo no.389/ Messo dated 23.07.2012. 9. From the facts disclosed in the affidavits filed on behalf of the respondents, I find substance in the submission of the learned counsel for the respondentState of Jharkhand that in view of the fact that had the work in question been not completed within time, the fund would have lapsed causing serious loss to the Department and thus, time was essence of the contract. The learned counsel for the petitioner has submitted that the Chief Engineer had, in fact, extended time for execution of agreement, and the petitioner was required to execute agreement on or before 10.11.2012. As noticed above, a decision to cancel the work order in favour of the petitioner and to allot the work in question in favour of respondent no.5 was already taken on 01.11.2012. It is well settled that every error in the administrative decision cannot be a ground for

interference by the Writ Court. In the matters of award of tenders, the Writ Court can interfere only for compelling reasons and in the public interest. In the present case, the work has been allotted to the respondent no.5 on the same rate and the work has progressed substantially. There is no public interest involved in the present writ petition, inviting interference of this Court with the decision dated 01.11.2012. In *Assn. of Registration Plates v. Union of India*, reported in (2005) 1 SCC 679, the Hon'ble Supreme Court has observed as under: 10. though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. 10. Insofar as, the challenge to the authority of Deputy Commissioner for cancelling work order dated 05.10.2012 is concerned, from the affidavits filed on behalf of the respondent State of Jharkhand, I find that the State of Jharkhand has endorsed the decision taken by the Deputy Commissioner. The reliance on P.W.D. Code and the admission by the respondents that it is the Chief Engineer who is empowered to award or cancel the contract, is misplaced. The Chief Engineer is only a delegatee who exercises power of the State Government. The fact that the Chief Engineer is described as Employer in the agreement is also thus, irrelevant. The letters written by the Chief Engineer and the Additional Secretary lost relevance in the face of the counteraffidavit filed on behalf of the respondent State of Jharkhand. In view of the specific stand taken by the respondent State of Jharkhand, it is not open to the petitioner to throw a challenge to the authority of the Deputy Commissioner in ordering cancellation of work order dated 05.10.2012. The judgments cited by the learned counsel for the petitioner are not relevant in the facts of the present case. In view of the terms of the Tender and the fact that the petitioner failed to execute the agreement within 21 days, challenge to forfeiture of earnest money also fails. In the result, the writ petition is dismissed. Accordingly, I.A. No.2270 of 2013, which has been filed for disposing of the writ petition in the light of the letter dated 15.03.2013, stands dismissed. (Shree Chandrashekhar, J.) R.K./A.F.R.