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Court : Orissa

Decided On : Apr-30-2009

Reported in : 108(2009)CLT308

Judge : I.M. Quddusi and; B.P. Ray, JJ.

Appellant : Nirvik Printers Private Limited and ors.

Respondent : Orissa Primary Education Programme Authority and ors.

Disposition : Petition allowed

Judgement :

B.P. Ray, J.

1. In this writ application, the Petitioners have assailed and prayed to quash the order of the Opp. Party No. 1 State Project Director, Orissa Primary Education Programme Authority communicated in Letter No. 1973/MC/08, dated 10.3.2008, copy of which has been appended to the writ application as Annexure-, forfeiting the Petitioners' earnest money deposit of Rs.4,800 furnished in connection with order Nos. 319(3)/MC/08, dated 10.1.2008 and 441(3)/MC/08, dated 15.1.2008 for printing and supply of hand books for Village Education Committee (VEC) Training and blacklisting the Petitioner No. 1 - press/firm by debarring it from participating in

any tender to the Orissa Primary Education Programme Authority, (in short, 'OPEPA').

2. The Petitioner No. 1 is a printing press & the Petitioner No. 2 happens to be its Director. The case of the Petitioner is that by availing huge loan from Orissa State Financial Corporation, the Petitioner company was set up. The Opp. Party Nos.2 & 3 are the Additional Directors of the Opp. Party No. 1-OPEPA. The Opp. Party No. 4 is the Chief Secretary, Government of Orissa.

3. In the month of October, 2007, the Opp. Party No. 1 issued a notice in Oriya Daily (Annexure-2) inviting tender for printing and supply of handbooks for VEC Training. Annexure-2/A specified, inter alia, the quality of cover paper to be 130 GSM (Sky Blue) paper. The Petitioners submitted tender paper on 3.12.2007. The tender having been found to be the lowest, the Petitioner No. 1 was selected for printing and supply of handbooks. By letter dated 18.12.2007, the Petitioner No. 1 informed Opp. Party No. 1 that paper as specified for cover was not available for which the Petitioners were not in a position to execute the work. By letter dated 10.1.2008, the Financial Advisor-cum-Chief Accounts Officer of Opp. Party No. 1 wrote a letter (Annexure-4) directing the Petitioner No. 1 to execute the agreement within 7 days and to furnish performance security of Rs. 12,000. In the letter, it was stated that the Petitioners' bid dated 3.12.2007 for printing and supply of handbooks for VEC Training for contract lump-sum price of Rs. 2,40,000 only @ Rs 4.00 per book was accepted. The Petitioner No. 1 was also impressed upon that in case the Petitioner No. 1 failed to execute the agreement and deposit the aforesaid performance security within 7 days from the date of issue of order, the same will automatically stand cancelled and also it was requested to print the cover page of book in black colour on sky blue paper. On receipt of such letter, Petitioner No. 1 by letter dated 11.1.2008 (Annexure-5) again expressed its inability to accept the job due to non-availability of cover paper as per specification. Thereafter, by letter dated 15.1.2008 (Annexure-6) issued on behalf of Opp. Party No. 1, the Petitioner No. 1 was informed that in partial modification to the Office letter, Annexure 4, the contract lump-sum price of Rs.2,40,000 only has been approved Rs.4.00 per book on the basis of 0.25 paise per cover page & 0.03 paise for inner page for a book of 100 pages approximately. It was further

intimated that the cost of the book might increase or decrease as per the actual number of pages in the final printing. Other terms and conditions were expressly stated to remain unchanged. In the said letter, Petitioner No. 1 was requested to submit the agreement paper within 7 days from the date of receipt of the order and then proceed with the work. Thereafter also by letter dated 18.1.2008 (Annexure 7), Petitioner No. 1 again informed that since the paper and colour specified for printing of the books were not available, it will not be possible on the part of the Petitioner No. 1 to execute the work. However, Opp. Party No. 1 published re-tender notice (Annexure-8) changing the specification of cover page from 130 GSM (Sky Blue) paper to 220 GSM Art Paper. As per the notice, Petitioner No. 1 participated in the tender on 10.3.2008 by submitting a letter of participation (Annexure-9) and furnishing Demand Draft for Rs.10,000 towards E.M.D. (Annexure-10). However, the Petitioner was not allowed to participate in the re-tender. Instead the letter under challenge forfeiting the EMD and debarring the Petitioner from participating in any tender was issued under Annexure-1. These facts are not disputed.

4. The. Petitioners averred in the writ application that the Opp. Party No. 1 could not have forfeited the EMD and black listed the Petitioner No. 1 by invoking clause (vi) of Item (K) of the tender paper without giving an opportunity to the Petitioners of being heard in the matter. It was averred in the application that the letter indicating blacklisting of the Petitioner No. 1, vide Annexure-1, was communicated to the various Departments of the Government as a result of which the Petitioner was prevented from participating in tenders which some of the departments had invited. Due to such action of the Opp. Party No. 1, the Petitioner is unable to repay the huge outstanding loan payable to the Orissa State Financial Corporation.

5. In the counter affidavit filed on behalf of Opp. Party Nos. 1 to 3, it has been averred that the Petitioners did not intimate about the non-availability of 130 GSM (Sky Blue) paper either at the time of submission of tender document or at the time of opening of the tender paper and that the Petitioners should have intimated the same before finalization of the tender evaluation and withdrawn from the tender competition. As the letter under Annexure-3 of the Petitioner intimating non-

availability of paper was submitted after finalization of tender process, there was no scope to entertain the representation. It is admitted in the counter affidavit that the letter under Annexure 4 was issued by Opp. Party No. 1 as a formality generally followed in the process of tender and that the Opp. Party No. 1 had no other alternative than to issue order directing execution of agreement and deposit of security. The Petitioners should have shown their capability to execute the work before participating in the tender. After participation and selection, such a letter was quite irrelevant and does not deserve consideration. As regards the letter under Annexure-6, it has been averred that in partial modification to the earlier letter under Annexure-4, the letter under Annexure-6 was issued only to confirm that the rate has been approved @ Rs.4.00 per book on the basis of 0.25 paise per cover page and 0.03 paise per Inner page for a book of 100 pages approximately. The cost of the book might increase or decrease as per the actual number of pages in the final printing. The other terms and conditions mentioned in Annexure 4 were kept unchanged. It has also been averred that the Petitioners willfully and deliberately violated the process of printing and supply for which the handbooks could not be supplied to the field level functionaries which hampered the interest of the Project. The matter was placed before the Standing Purchase Committee and as per the decision of the Committee, taken in the meeting held on 8.2.2008, in accordance with the clause (vi) of item (K) of the tender document, the Petitioners-Company was rightly blacklisted. A copy of minutes of the meeting held on 8.2.2008 has been annexed to the counter affidavit as Annexure-B/1. It was further explained that in the re-tender, the specification of cover page was not changed because of the non-availability of the cover page of earlier specification, but it was changed with an intention to provide better quality paper for cover page. The Petitioner No. 1 was not allowed to participate in the re-tender as the Company had already been blacklisted by Order Dated 10.3.2008. It has also been pointed out in the counter affidavit that during the pendency of the writ application, the matter was placed before the Standing Purchase Committee for consideration of the Petitioners' representation dated 17.3.2008 Annexure-C/1 to the counter affidavit to withdraw the order of blacklisting. Taking into consideration the submissions of the Petitioners and its financial plight, the Committee decided on 17.5.2008 to restrict the period of black listing to 6 months from the date of

issuance of the order under Annexure-f & the Petitioner No. 1 was accordingly intimated by Letter No. 5639 dated 31.5.2008, copy of which has been annexed to the counter affidavit as Annexure D/1.

6. In the rejoinder to the counter affidavit, the Petitioners while reiterating the stands taken in the writ application, have averred that as the Opp. Party No. 1 was well aware of non-availability of specified paper, in the re-tender the quality of paper was changed to 220 GSM Art Paper.

7. In course of hearing, it was strenuously contended by Learned Counsel appearing for the Petitioners that Opp. Party No. 1 and the Officers of the OPEPA were well aware of non-availability of specific paper in the market. The Petitioners also intimated regarding the same well ahead of issuance of work order. Proceedings of the meeting of the Standing Purchase Committee dated 8.2.2008 under Annexure-B/1 to the counter affidavit clearly show that the decision to forfeit the Petitioners' EMD and blacklist the Company was unilaterally taken, without considering the Petitioners' plea that the specific paper was not available in the market and without giving an opportunity to the Petitioner of being heard in the matter. The action of the Opp. Party No. 1 in changing the specification of the paper in the re-tender fortifies the Petitioners' stand that the specific paper was not available in the market. In such circumstances, the decision of the Standing Purchase Committee and the order in the letter under challenge are liable to be quashed as arbitrary, illegal and mala fide.

8. Learned Counsel for the Opp. Party Nos. 1 to 3 submitted that as the Petitioners expressed their inability to proceed with the job in spite of acceptance of their offer, there was no other way out but to cancel the tender in order to proceed with the work by calling for a second tender. It was further submitted that as per the condition under clause (vi) of Item (K) of the tender document, if the selected firm/printer fails to execute the agreement or deposit the required performance security within the prescribed date after being intimated, its EMD is liable to be forfeited and the selected firm/printer is liable to be black listed. In such circumstances, the action of Opp. Party No. 1 in issuance of Annexure-1 is not liable to be questioned.

9. It is not disputed that before issuance of work order, the Petitioners intimated that they were not in a position to execute the work due to non-availability of the specific paper in the market. Change of specification of paper in course of re-tender by the Opp. Party No. 1 substantiates the averment that paper as per the specification in the tender for which the Petitioner No. 1 was found to be successful was not available in the market. Be that as it may, Learned Counsel for the Petitioners have rightly placed reliance on the decision of the Hon'ble Supreme Court in the case of Erusian Equipments and Chemicals Ltd. v. State of West Bengal & another reported in : AIR 1975 SC 266 to urge that blacklisting of a firm amounts to penalty involving severe consequences and before blacklisting, the Petitioner should have been given opportunity to represent his case, in the above cited decision, it was held:

Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

10. Admittedly in the present case, the decision by the Standing Purchase Committee forfeiting the EMD and blacklisting the Petitioner No. 1 was taken without issuance of any show cause and without giving any opportunity of being heard. The decision was communicated also by the letter under Annexure-1, to different Departments of the Govt. Thereby the Petitioners were certainly put to disadvantageous position in spite of the fact that before issuance of the work order, they had brought to the notice of Opp. Party No. 1, the fact of non-availability of paper under specification which prevented the Petitioners from executing the work. Changing of the specification of the paper in the re-tender shows that the contention raised on behalf of the Petitioners that Opp. Party Nos. 1 to 3 were aware of non-availability of the paper as specified in the 1st tender notice is not unfounded. The proceeding of the Standing Purchase Committee is altogether silent regarding the Petitioners' representation that paper under specification was not available in the market. Therefore, we have no hesitation to

hold that forfeiture of EMD & blacklisting of Petitioner No. 1, being violative of principles of natural justice, is arbitrary & illegal.

We, therefore, quash the order in Annexure-1 and direct the Opp. Parties to refund the EMD to the Petitioners within a period of one month from the date of receipt of this order.

The Writ Petition is allowed. No order as to costs.

I.M. Quddusi, A.C.J.

I agree.

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