



IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WRIT APPEAL No.268 of 2022 (IN
W.P.(C) NO. 6414 OF 2021)

1. Assam Power Distribution Company Limited, having its registered office at Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam and represented by its Managing Director.
2. The Managing Director, Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.
3. The Chief Manager (RE), Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.

.....Appellants

-Versus-

Premier Energies Ltd., a Public Limited Company having its registered office at SY No. 54/part, above G. Pulla Reddy Sweets, Vikrampur, Karkhana Main Road, Secunderabad, Pin-500009 Telengana and

represented by its authorized representative
Sri ravi Prakash Khadria.

.....Respondents

**WRIT APPEAL No.269 of 2022 (IN
W.P.(C) NO. 6417 OF 2021)**

1. Assam Power Distribution Company Limited, having its registered office at Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam and represented by its Managing Director.
2. The Managing Director, Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.
3. The Chief Manager (RE), Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.

.....Appellants

-Versus-

Premier Energies Ltd., a Public Limited Company having its registered office at SY No. 54/part, above G. Pulla Reddy Sweets, Vikrampur, Karkhana Main Road, Secunderabad, Pin-500009 Telengana and represented by its authorized representative Sri ravi Prakash Khadria.

.....Respondents

**WRIT APPEAL No.270 of 2022 (IN
W.P.(C) NO.6418 OF 2021)**

1. Assam Power Distribution Company Limited, having its registered office at Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam and represented by its Managing Director.
2. The Managing Director, Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.
3. The Chief Manager (RE), Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.

.....Appellants

-Versus-

Premier Energies Ltd., a Public Limited Company having its registered office at SY No. 54/part, above G. Pulla Reddy Sweets, Vikrampur, Karkhana Main Road, Secunderabad, Pin-500009 Telengana and represented by its authorized representative Sri ravi Prakash Khadria.

.....Respondents

WRIT APPEAL No.271 of 2022 (IN
W.P.(C) NO. 6381 OF 2021)

1. Assam Power Distribution Company Limited, having its registered office at Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam and represented by its Managing Director.
2. The Managing Director, Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan

Bazar, Guwahati-781001, District-Kamrup (M), Assam.

3. The Chief Manager (RE), Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.

.....Appellants

-Versus-

Premier Energies Ltd., a Public Limited Company having its registered office at SY No. 54/part, above G. Pulla Reddy Sweets, Vikrampur, Karkhana Main Road, Secunderabad, Pin-500009 Telengana and represented by its authorized representative Sri ravi Prakash Khadria.

.....Respondents

WRIT APPEAL No.272 of 2022 (IN
W.P.(C) NO.6415 OF 2021)

1. Assam Power Distribution Company Limited, having its registered office at Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam and represented by its Managing Director.
2. The Managing Director, Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.
3. The Chief Manager (RE), Assam Power Distribution Co. Ltd., Bijulee Bhawan, Paltan Bazar, Guwahati-781001, District-Kamrup (M), Assam.

.....Appellants

-Versus-

Premier Energies Ltd., a Public Limited Company having its registered office at SY No. 54/part, above G. Pulla Reddy Sweets, Vikrampur, Karkhana Main Road, Secunderabad, Pin-500009 Telengana and represented by its authorized representative Sri ravi Prakash Khadria.

.....Respondents

- B E F O R E -

**HON'BLE THE CHIEF JUSTICE (ACTING) MR. N. KOTISWAR SINGH
HON'BLE MR. JUSTICE SOUMITRA SAIKIA**

Advocate for the appellants : Dr. A. K. Saraf, Senior Advocate
Mr. R. Dubey, Advocate.

Advocate for the respondents : Mr. K. P. Pathak, Standing counsel, APDCL.

:: JUDGMENT AND ORDER::

Dated: 02.02.2023

(Soumitra Saikia, J)

Heard Dr. A. K. Saraf, learned senior counsel assisted by Mr. R. Dubey, learned counsel for the appellants. Also heard Mr. P.N. Goswami, learned Additional Advocate General appearing for the State of Assam assisted by Mr. K. P. Pathak, learned counsel for the respondents.

2. Being aggrieved by the Judgment and order dated 29.06.2022 passed by the learned Single Judge, allowing the writ petitions filed by the respondent herein, the Assam Power Distribution Company Limited (APDCL) is an appeal impugning the Judgment and order passed by the learned Single Judge.

3. The facts leading to the dispute between the contesting parties resulting in the writ petition filed by the respondent relate to an Invitation For Bids (IFB) issued by the appellant— Assam Power Distribution Company Limited (hereinafter referred to as APDCL). The APDCL invited bids by way of the Invitation For Bids (IFB) dated 08.09.2021 for installation of *"Off grid rural electrification works in district of Assam through standalone Solar PV System on turnkey mode under DDUGJY New Scheme."* The APDCL having been entrusted as the Project Implementing Agency (PIA) by the Rural Electrification Corporation Limited (REC), Government of India for execution of the Rural Electrification works in Assam through Standalone Solar PV System under Pradhan Mantri Sahaj Bijlee Har Ghar Yojana (SAUBHAGYA). The execution of the project is funded through financial assistance received by the Government of Assam from Rural Electrification Corporation Limited (REC). The ownership of

the project shall remain vested in the Government of Assam. The project is to be executed by APDCL by awarding it to be the successful bidder through competitive e-bidding process on turnkey basis and all payments under the project shall be made from the financial assistance received by the Government of Assam. Clause-2 of the Invitation For Bids (IFB) shows the total number of package viz-a-viz the districts along with tender processing fees and Earnest Money Deposit (EMD) against each package. The Invitation For Bids (IFB) will be published through inter-alia the website and bidding documents including technical specifications is to be downloaded from the e-tendering portal of the Assam Government as well as the APDCL website. In terms of the Invitation For Bids (IFB) the bidders are to submit their bids in e-tendering portal of the Assam Government using their own digital signature certificate. In terms of the Invitation For Bids (IFB) a bidder may submit to a maximum 5 (five) number of packages separately in the same tendering process either individually as a bidder or as a partner of a consortium. The tendering processing fees and the Refundable bid securities (EMD) complete in all aspects as per the Bid Data Sheet (BDS) are to be submitted along with the bid proposal. It was a single stage bid formed by e-bidding for price bids. As per the

information provided in the Bid Data Sheet (BDS) the validity of the bid was 180 days from the date of opening of the Techno-Commercial bid and the work completion period was on or before 31.12.2021.

4. The respondent considering itself to be eligible to participate in the bidding process submitted its bid for as many as 5 (five) numbers of packages and participated in that bidding process.

The respondent submitted bids for the following packages:-

Sl.No.	Package No.	District
1	Package No-5	Goalpara
2	Package No-8	Barpeta
3	Package No-9	Barpeta
4	Package No-10	Barpeta
5	Package No-11	Barpeta

5. As per the Invitation For Bids (IFB) the scope of the works includes:-

"The scope of work includes site survey, planning, design, engineering, assembly manufacturing, testing, supply, loading, transportation, unloading, insurance, delivery at site, handling, storage, installation, testing, commission and documentation of all items/material required to complete the Electrification works which inter-alia include installation of Solar PV standalone system and providing service connection with house wiring and for extending 5 (five) years Comprehensive Maintenance Contract (CMC) service to all beneficiaries/consumers spread all over the State. The above scope of work is indicative and the detailed scope of work is given in the Bidding Documents. "

6. The respondent emerged as the successful bidder i.e. the L-1 bidder in respect of the 5 (five) packages, namely, *package No.5, package No.8, package No.9, package No.10 and package No.11* for which it had submitted its bids. Being the L-1 bidder the respondent was issued the Letters of Awards (LOAs) by the appellant, APDCL for all the 5 (five) packages. All the Letters of

Awards (LOAs) were issued on 12.11.2021. The respondent were asked to confirm the acceptance of the award within 3 (three) days from the date of issue of the Letters Of Awards (LOAs). According to the respondent the terms and conditions of payment as contained in the bid documents were altered by the appellant, APDCL, while awarding the Letters of Awards (LOAs). According to the respondent the Letter of Awards (LOAs) issued by the APDCL contained certain conditions which were altered from the terms and conditions originally specified in the Invitation For Bids (IFB) in terms of which the respondent had submitted its bids and was short-listed as the L-1 bidder. According to the respondent the terms and conditions regarding the release of payment have been altered as compared to the terms and conditions available in the Invitation For Bids (IFB), which was published and in response to which the respondent had submitted its bids and had participated in the bidding process. The respondent, thereafter, by an e-mail dated 17.11.2021 intimated the appellant APDCL requesting them to extend the supply date to 31.03.2022. The appellant-APDCL thereafter by communication dated 25.11.2021 intimated the respondent that the Letters of Awards (LOAs) awarded to the respondent in respect of packages being, *package No.5, package No.8, package No.9, package No.10 and package*

No.11 against the said contract work was terminated with immediate effect due to non furnishing of unconditional acceptance of the Letters of Awards (LOAs) within the stipulated time.

7. Being aggrieved by the termination of the Letters of Awards (LOAs) by the appellant, the respondent challenged the said termination of the Letter of Awards (LOAs) by approaching this court by filing writ petitions. Five (5) separate writ petitions were filed by the respondent in respect of the five (5) different packages challenging the termination of the respective Letters of Awards (LOAs). The learned Single Judge upon consideration of the materials came to the conclusion that the action of the appellant, APDCL in forfeiting the bid securities (EMDs) deposited by the respondent was held to be unfair and arbitrary and that the same was liable to be set aside and it was ordered accordingly. By a common Judgment and Order, the learned Single Judge held that the action of encashment of the bank guarantees which were deposited by the respondent towards bid securities, were held to be arbitrary and unfair. The writ petitions were allowed and the APDCL was directed to refund the amounts of bid securities (EMDs) deposited by the respondent which were

forfeited by the appellant. The said exercise was directed to be completed within a period of 15 (fifteen) days from the date of the order of the learned Single Judge.

8. Aggrieved, the present appeals are filed by the APDCL assailing the Judgment and Order dated-29.06.2022 passed by the learned Single Judge in the said writ petitions. It is submitted that the Writ Appeal No. 270/2022 arising out of writ petition, W.P.(C)/6418/2021 is in connection with Package No.5 while the Writ Appeal No. 271/2022 arising out of writ petition, W.P.(C)/6381/2021 is in connection with Package No.8, Writ Appeal No. 268/2022 arising out of writ petition, W.P.(C)/6414/2021 is in connection with Package No.9, Writ Appeal No. 272/2022 arising out of writ petition, W.P.(C)/6415/2021 is in connection with Package No.10 and Writ Appeal No. 269/2022 arising out of writ petition, W.P.(C)/6417/2021 is in connection with Package No.11. The appeal is preferred by the appellants on the following grounds:-

"A. For that the Hon'ble Single Judge has proceeded to cause interference in the matter and directed the appellant to refund the amount of the bank guarantees on the premise that the actions of the appellant amounted to a violation of the rights guaranteed under Article 14 of the Constitution of India. In this regard, the Hon'ble Single Judge failed to give due consideration to the settled position of law as laid down by

the Hon'ble Apex Court that in such commercial and contractual matters, even if there has been any violation of the rights under Article 14 or the freedom under Article 19 (1) (g), the proper remedy for a party would lie before a Civil Court.

B. For that the Hon'ble Single Judge failed to appreciate that the foundation of the claim of the respondent arises from the termination of its Letter of Award and the subsequent forfeiture of the Earnest Money submitted by it in the form of a bank guarantee. The claim that such termination and forfeiture of Earnest Money Deposit is de hors the terms and conditions of the tender document is a purely contractual claim and as such the same cannot be enforced under Article 226 of the Constitution of India. A writ petition for the enforcement of a purely contractual right is not maintainable and as such, the same ought to have been dismissed by this Hon'ble Court. The extraordinary powers conferred upon a High Court under Article 226 of the Constitution of India cannot be allowed to be invoked to enforce a right which solely arises out of the terms and conditions of a contract/offer i.e. a purely contractual right.

C. For that the Hon'ble Single Judge failed to appreciate that the bid security submitted by the respondent was in form of an unconditional bank guarantee and now it is no longer res integra that the contract of guarantee is a complete and separate contract by itself. In the present case, the respondent has neither produced a copy of the bank guarantee nor has it impleaded the bank which was a necessary party to the proceedings. In fact, on the ground of non-joinder of a necessary party itself, the writ petition ought to have been dismissed.

D. For that the Hon'ble Single Judge failed to appreciate that the law pertaining to the interference by Hon'ble Court in matters relating to encashment of bank guarantees is well-settled. The Hon'ble Court may only interfere in the encashment of a bank guarantee if (i) there is egregious fraud that is established, (ii) irretrievable damage is caused to any

of the parties and (iii) there are special equities in favour of any of the parties. In the instant case, the respondent has not made a single whisper in the writ petition regarding commission of any fraud by APDCL. Moreover, mere mention of fraud itself would not have sufficed since such fraud has to be established before a Court of Competent Civil Jurisdiction where evidence can be led and rebutted. The respondent also has not claimed that any irretrievable damage would be caused to it on account of the encashment of the bank guarantee. Therefore, there were absolutely no grounds for interfering with the encashment of the bank guarantee by the Hon'ble Court.

E. For that in view of the grounds taken herein above, the impugned Judgment & Order dated 29.06.2022 passed in W.P. (C) No. 6414/2021 is liable to be set aside or quashed."

9. Before this Court, it is strenuously urged by the counsel appearing for the APDCL that pursuant to the cancellation of the Letter of Awards (LOAs) issued to the respondent, the appellant was compelled to float a fresh tender for execution of the work pertaining to *package No.5, package No.8, package No.9, package No.10 and package No.11, which* was awarded to the respondent and who in turn had failed to execute the same. The learned counsel for the appellant strenuously urged before this Court that the grounds on which the respondent failed to execute the works allotted, are flimsy and therefore it brings to the fore the lack of bonafides on the part of the respondent company. It is urged that the respondent company had no intention of executing

the work that was awarded to it by virtue of it being the L-1 bidder. Therefore, the appellant was justified in forfeiting the EMDs submitted by the respondent and which is as per the terms of the contract. It is the further submission of the learned counsel for the appellant that non execution of the works allotted after being short-listed as a successful bidder entails forfeiture of EMD, which is stipulated in the IFB itself. Referring to Clause-12.6 (b), the learned counsel for the appellant submits that the bid security may be forfeited in case a successful bidder fails to sign the contract agreement within the specified time limit. It is urged that vide the Letters of Awards (LOAs) dated 12.11.2021, the respondent was requested to confirm the acceptance within 3 (three) days from the date of issue of the Letter of Award (LOA). It was further provided in the LOAs' that the respondent will be required to submit the duplicate copy of the LOAs' duly signed and stamped on each page as a token of their acknowledgment. Further the respondent was also required to execute a contract agreement with the appellant, APDCL within 7 (seven) days from the date of award of his contract.

10. Under such circumstances instead of complying with the specifications contained in the Letter of Awards (LOAs) dated

12.11.2021, the respondent in response to the Letter of Awards (LOAs) vide their e-mail dated 17.11.2021 requested for extension of supply date upto 31.03.2022. The learned counsel for the appellant submits that in their reply dated 17.11.2021 the respondent besides requesting for extension of the supply date upto 31.03.2022 made a counter offer to the appellant to accept Lithium Cells Batteries in place of the batteries specified in the contract. Under such circumstances, it is apparent that the respondent had no intention of executing the contract awarded. Under such circumstances, the appellant was justified in forfeiting the EMDs as the same is specifically provided for under Clause 12.6 (b) of the IFB.

11. The learned counsel for the appellant in support of his contentions relies on the Judgment of the Apex Court in *Arun Kumar Agrawal Vs Union of India and Others* reported in (2013) 7 SCC 1. The learned counsel for the appellant has pressed the Judgment into service to support his contention that in commercial or business matters, Court cannot sit in Judgment over decisions taken by the State or its instrumentalities as these decisions are taken after evaluating and assessing the monetary and financial implications unless the decision is violative of

statutory provisions or is perverse or is taken for extraneous considerations or improper motives. The appellant further reiterates his submissions made before the learned single judge and refers to the following Judgment relied upon before the learned Single Judge:-

"Hindustan Steelworks Construction Limited Vs Tarapore & Co. and another, reported in (1996) 5 SCC 34, and Dwarikesh Sugar Industries Limited Vs Prem Heavy Engineering Works (P) Limited, reported in (1997) 6 SCC 450.

Kerala State Electricity Board and another Vs Kurien E. Kalathil and Others, reported in (2000) 6 SCC 293, and National Highways Authority of India Vs Ganga Enterprises and another, reported in (2003) 7 SCC 410.

Jagadish Mandal Vs State of Orissa and others, reported in (2007) 14 SCC 517 and Bharat Coking Coal Limited and others Vs AMR Dev Prabha and others reported in (2020) 16 SCC 759."

12. Per contra Dr. Saraf, learned senior counsel vehemently disputes the contentions of the learned counsel for the appellant.

13. The learned senior counsel submits that once the bids are submitted in pursuance to a NITs/IFBs and the said bids are accepted by the employer/authority, who had floated the NITs/IFBs, there is no question of altering any of the bid conditions unilaterally without there being any opportunity afforded to the successful bidder to respond to such changes proposed to be made to the terms and conditions of the bid. The learned senior counsel submits that any bidder will respond to an IFB only after satisfying itself in respect of the specific terms and conditions as published through the IFB. In the present case, the respondent upon due satisfaction of the terms and conditions published in the IFB and having considered itself eligible and being desirous of participating in the tender process, had submitted the bids as per the specifications duly supported by all relevant documents as well as by furnishing the EMDs and bank guarantees as required. The learned senior counsel urged that in the event there is a violation of the any conditions of the contract, the same has to be decided on the basis of the conduct of the parties to the contract and with reference to the terms and conditions published in the IFB. The learned senior counsel referring to the General Conditions of Contract (GCC) submits that Clause 21 provides for settlement of disputes in the event such

disputes arise between the employer and the contractor in connection with or arising out of the contract. He further submits that under Clause-22 of the GCC there is an arbitration clause. The learned senior counsel submits that if the employer/ the appellant was of the view that the respondent contractor had violated the provisions of Clause -12.1, then the appellant ought to have confronted the respondent. However, in response to the e-mail dated 17.11.2021 by the respondent, the appellant vide their communication dated 25.11.2021 simply terminated the Letter of Award allotted to the respondent with immediate effect in respect of all the packages namely, *package No.5, package No.8, package No.9, package No.10 and package No.11* simply by showing that the respondent did not furnish unconditional acceptance of the LOA within the stipulated time. The learned senior counsel referring to Clause-12.6 of the Instructions To the Bidders (ITB) disputed the interpretation sought to be made by the appellants. The learned senior counsel submits that under Clause-12.6 (b) (i), it is specified that the Bid Security will be forfeited in case of a successful bidder if the bidder fails within the specified time limit to sign the contract agreement in accordance with the bidding document. The learned senior counsel submits that the change of conditions enclosed to the

LOA dated 12.11.2021 cannot be considered to be a part of the bidding document as the same were unilaterally altered by the appellant. Therefore, the EMDs furnished by the respondent could not have been forfeited by the appellant by virtue of Clause-12.6 as projected by the appellant. The learned senior counsel strenuously urged that the forfeiture of the EMDs is completely illegal, unauthorized and there is no power specified under the IFB under which the appellant could have forfeited the EMDs furnished by the respondent. It is the submission of the learned senior counsel that there can be no occasion of any bidder to make financial commitments in any such commercial bids unless there is a clear intention of executing the contract if short-listed as the successful bidder and awarded with the contract. However, upon the contract being awarded to any short-listed bidder, it is only the terms and conditions published through the IFB that will bind the bidder in respect of the execution of the works allotted to it. Such unilateral change of terms and conditions by the appellant that too in the LOA issued to the successful bidder is completely arbitrary and opposed to the well established principles of Law relating to contracts. The learned senior counsel submits that the learned Single Judge had correctly allowed the writ petition and issued the consequential directions to the respondent to refund

the earnest money deposits forfeited. There is no infirmity in the order of the learned Single Judge and the present appeal being frivolous and vexatious should be dismissed and cost be imposed on the appellants.

14. The learned senior counsel for the respondent relies upon the following Judgments in support of his contentions:-

"ABL International Limited and another Vs Export Credit Guarantee Corporation of India Limited and another, reported in (2004) 3 SCC 553.

Kumari Shrilekha Vidyarthi and others Vs State of U.P and others reported in (1991) 1 SCC 212

Harbanslal Sahnia and another Vs Indian Oil Corporation Limited, reported in (2003) 2 SCC 107.

Union of India and others Vs Tania Construction Private Limited, reported in (2011) 5 SCC 697."

15. Learned counsels for the parties have been extensively heard. Pleadings on record have been perused. The Judgments of the Apex Court relied upon by the learned counsels in support of their contentions have also been duly noted.

16. The learned Single Judge has elaborately dealt with the terms and conditions of the IFB as well as the contentions raised by the contesting parties. Before us an additional affidavit was permitted to be filed by the appellant to bring on record the terms and conditions which were enclosed in the Letter of Acceptance dated 12.11.2021. The perusal of the terms and conditions in the LOA brought on record by the additional affidavit viz-a-viz the terms and conditions as specified in the IFB make it abundantly clear that there was indeed a change of the terms and conditions by the appellant to the terms and conditions which were earlier published in the IFB. The altered terms and conditions were brought to the notice of the respondent for the first time only when the Letter of Awards (LOAs) was issued. It is not disputed that this altered terms and conditions were enclosed to the Letter of Awards (LOAs) dated 12.11.2021 issued to the respondent. It is also not in dispute that these altered conditions were issued to the respondent for the first time only when the LOA was issued. There is no pleading or any material brought before us by the appellant to contend that these altered tender conditions were duly incorporated in the original IFB during the process of the tender evaluation after having intimated all the intending bidders including the respondent. There is also no

material to suggest that these altered conditions were under consideration by the tender evaluation committee during the process of tender evaluation. These tender conditions were altered only after the respondent was short-listed as the L-1 bidder and while issuing the LOAs. There is no explanation as to why these tender conditions were unilaterally altered by the appellant after completion of the bid evaluations and without intimating the respondent prior incorporating such changes.

17. The contention of the appellants that notwithstanding the alteration of the terms and conditions, the respondent cannot be stated to have been pre-judiced in view of its communication dated 17.11.2021 by e-mail, where it had requested for extension of the supply bid up to 31.03.2022, while offering to supply of alternative Lithium Battery Cells as specified in the said communication for the reasons specified therein, cannot be accepted in as much as in the said communication itself there was a request made to the appellant APDCL to withdraw the altered clauses in the LOA and to send the revised LOA. That apart, the appellant, APDCL did not accept the request for supply of alternative Lithium Battery cells. Consequently, the contention raised by the appellant that pursuant to the issuance of the LOA

the conditions in the IFB were mutually altered by and between the appellant and the respondent as the employer and the successful bidder cannot be accepted. While it is true that in commercial and business contract there are several financial and economic considerations which are required to be taken into consideration, however, before us as well as before the learned Single Judge no justifiable reasons have been furnished by the appellant to support their contention that the alteration of the earlier published terms and conditions in the IFB were necessitated and the same were altered unilaterally.

18. The law in this regard is clear. Ordinarily writ Court should loathe to enter into contractual disputes between the contesting parties as it may entail financial losses in the State or to the instrumentalities of the Government like the appellant, APDCL. However, the disputes between the contesting parties in the present proceedings does not relate to the cancellation of the contract. It is not disputed by the appellant that pursuant to the termination of the LOA issued to the respondent authority, a fresh tender was floated and the works have already been executed. But the issue in the present proceeding is really within a very short campus—as to the powers of the employer namely the

appellant, APDCL to forfeit the EMDs. Clause 12.6 which is referred to and relied upon by the APDCL categorically provides that EMDs will be forfeited if the successful bidder fails to sign the contract agreement within the specified time limit.

" 12.6 The bid security may be forfeited

(a) If the Bidder withdraws its bid during the period of bid validity specified by the Bidder in the Bid Form ; or

(b) In the case of a successful Bidder, if the Bidder fails within the specified time limit

(i) to sign the Contract Agreement, in accordance with bidding document.

(ii) to furnish the required performance security (ies), in accordance with bidding document.

(emphasis supplied)

19. We have perused the entire contract documents enclosed to the pleadings and have failed to locate any such powers which permits for forfeiture of EMDs other than Clause 12.6 of the IFB. No such clause has also been pointed to us by the appellants. Under the circumstances once the bids are accepted by the employer there can be no alteration for the tender conditions

without the consent of the bidder. The purpose of publishing the various tender conditions and elaborately is to enable all intending bidders the scope of the work, the period of completion, the various criteria required to be eligible to be considered as a Responsive bidder as well as the consequences in case any bidder fails to comply the offer extended by such a bidder upon being short-listed as the successful bidder.

20. While Article-14 may not be always applicable in commercial and business contracts, however, the principal of fairplay is always applicable and more particularly when one of the contracting parties is the State or its instrumentality. The State or its instrumentality cannot be seen to act in an unfair and arbitrary manner. Where the State or its instrumentality is one of the contracting parties, they cannot be permitted to behave like an individual contractor motivated solely by profits. If such actions on behalf of the State or its instrumentalities are permitted, then it will certainly be offending to the principal of fairplay as propounded under Article 14 of the Constitution of India. State or its instrumentalities cannot be permitted to act in an arbitrary or an unfair manner even when it relates to matters of commercial contract and business. Natural justice is an important aspect while

reviewing Administrative orders providing effective natural justice to effected parties before a decision is taken, it is necessary to maintain Rule of law. Natural justice is the sworn enemy of intolerant authority. Any attempt by authority to circumvent the requirement of providing effective hearing before reaching a conclusion cannot pass the muster¹. In our considered view the appellant could not furnish adequate reasons for altering the terms and conditions of the IFB while issuing the Letters of Awards (LOAs) to the respondent.

Under Clause 12.6 forfeiture of the EMDs can only be resorted to by the appellant if the contractor/bidders does not execute the work upon its award in accordance with the terms and conditions of the contract. No other clause or provision is noticeable to us which can permit such forfeiture of the EMDs as resorted to by the appellant. The altered terms and conditions which were communicate to the respondent through the LOAs. In our considered view was not permissible under the terms and conditions of the IFB as the appellant altered the terms and conditions unilaterally.

¹ (2021) SCC Online SC 411

21. In view of our discussions above, the Judgments relied upon by the appellant need not be referred to in as much as there is no quarrel with the proposition that in contractual matters the scope of judicial review is very limited. However, where there is arbitrariness and more particularly when the State or its instrumentality is one of the parties to the contract the power of judicial review under Article 226 of the Constitution of India cannot be excluded. The termination of the work orders as have been done by the appellant by altering the terms and conditions of the IFB while issuing Letters of Awards (LOAs) to the respondent must be held to be arbitrary.

22. We find that the learned Single Judge has elaborately dealt with the contentions raised by the parties and has returned a finding holding that the forfeiture of the EMDs by the appellant which were furnished by the respondent are illegal and the same have been correctly set aside. We find no infirmity in the Judgment and Order of the learned Single Judge interfering with and setting aside the forfeiture of the bid securities (EMDs). We accordingly uphold the Judgment and Order of the learned Single Judge and sustained the directions issued by the learned Single

Judge. The appeal is debarred of merit and the same is accordingly dismissed.

23. No order as to cost.

JUDGE

CHIEF JUSTICE(ACTING)

Comparing Assistant