IN THE HIGH COURT OF JUDICATURE AT MADRAS

CAV ON:22.12.2014

DATED: 06 /01/2015

CORAM

THE HONOURABLE MR.JUSTICE C.S.KARNAN

W.P.No.13268 of 2013
and
M.P.Nos.2 & 3 of 2013

M/s.R.P.P - Infra Projects Limited,
Represented by its Managing Director Mr.P.Arulsundaram,
SF.454, Raghupathynaickkenpalayam,
Poondurai Road,
Erode - 638 002.

... Petitioner

Vs.

1.M/s.TamilNadu Generation and Distribution
Corporation Ltd., (TANGEDCO),
Represented by its Chief Engineer,
Materials Management,
4th Floor, NPKRR Maaligai, No.144, Anna Salai,
Chennai - 2.

2.M/s.Indian Overseas Bank,
Represented by its chief Manager,
Surampatti,
No.72, Perundurai Road,
Erode - 638 011.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari or any other writ, order or direction in the nature of writ calling for the entire records of the 1st respondent in Lr.No.CE/MM/SE/MMI/EES/A5/F.M(RAPDRP).27/12-13/D.268/13, dated 26.04.2013 addressed to the 2nd respondent and quash the same since the same is arbitrary and beyond jurisdiction.

For Petitioner s : Mr.P.J.Rishikesh
For Respondents : Mr.P.Gunaraj for R1
Mr.F.B.Benjamin George for R2

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ORDER

The short facts of the case are as follows:-

The petitioner submits that the petitioner's Company is a leading Contractor having successfully undertaken various major projects in Civil construction and other allied works both in India and abroad. The 1st respondent herein had floated a tender dated 29.07.2012 for execution of distribution of strengthening works under R-APDRP Part B scheme in 7 towns in Erode Region of TANGEDCO. The last date of submission of bid was 29.09.2012 and the validity of the bid was 180 days i.e., to end by 28.03.2013.

2. The petitioner further submits that under the bid document, liberty was given to the tenderer to have a JV Partner who would possess requisite eligibility and experience. Accordingly, the petitioner entered into a consortium agreement dated 12.09.2012 with one M/s.Ubitech Private Limited, Faridabad, Haryana 121001 and the said consortium was called as M/s.RPP-Unitech JV. The said RPP-Ubitech JV gave a power of attorney dated 12.09.2012 to the petitioner company to represent the consortium in the tenders. Accordingly, the petitioner submitted the bids on 29.09.2012, along with EMD in the form of Bank Guarantee dated 28.09.2012 for value of Rs.2,35,00,000/-. The said BG was to expire on 27.06.2013. The said BG was drawn from the 2nd respondent herein bearing No.73/2012. This being so, the 1st respondent addressed a letter dated 12.11.2012 seeking for two particular documents, A.Documentary evidence for having executed turnkey contract during last seven years for a minimum of 25 Kms length of 11Kv/higher voltage UG cable network (BQR-3(b) and B. Guaranteed technical particulars consisting of "Maximum total loss at 50% and 100% load"for 11 Kv, 16,25,40,63 KVA and 22Kv, 16,25,40,63 KVA distribution Transformers. The said documentary proof was to be submitted by 15.11.2012.

3. He further submits that on receipt of the above referred letter, this petitioner by its undated letter provided the requisite documents before the date as stipulated by the 1st respondent and the petitioner submitted all documents satisfying the tender conditions and was eagerly waiting to be declared technically qualified and was waiting to be called for price bid meeting. However, to the shock and surprise of this petitioner, the 1st respondent without no reason whatsoever, tried to invoke the BG by writing a letter to the 2nd respondent. Immediately, on learning the petitioner approached the 1st respondent and was informed by the 1st respondent that there was ambiguity in the experience certificate issued by Uttar Haryana Bijli

Vitran Nigam Limited. On this ground the 1st respondent wanted to invoke the BG which was held by the 2nd respondent.

4. On knowing this, the petitioner engaged in talks with the 1st respondent and requested the 1st respondent by its letter dated 28.12.2012 for further time to provide clarification on the experience from Uttar Haryana Bijli Vitran Nigam Limited. Understanding this, the 1st respondent also issued a letter dated 29.12.2012 to the 2nd respondent asking the bank to keep the invocation of BG in abeyance and this petitioner approached M/s.Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) to provide the clarification as requested by the 1st respondent. M/s.Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) issued another confirmation letter this time issued by General Manager of UHBVNL, ascertaining the experience as submitted by the petitioner in its bid. The said confirmation letter cum certificate of experience dated 31.12.2012 was obtained and the same was immediately handed over to the 1st respondent in person on the same day itself.

5. He further submits that there was no response whatsoever from the 1st respondent, this petitioner addressed a letter dated 21.02.2013 to the 1st respondent along with UHBVNL certificate dated 31.12.2012. Inspite of this letter, there was no response whatsoever from the 1st respondent. He stated that thereafter this petitioner learnt that the 1st respondent confirmed and awarded the tender to some other third party. This being so, he stated that therefore this petitioner was eagerly waiting to get back the EMD which was submitted in the form of BG during the submission of the bid. This being so, to the shock and surprise the 1st respondent with malafide intentions by its letter dated 26.04.2013 addressed to the 2nd respondent illegally invoked the bank guarantee No.73/12 dated 28.09.2012 and demanded the proceeds in the form of Demand Draft in favour of Chief Financial Controller/TANGEDCO, Chennai - 2 and he states that aggrieved by such invocation of the bank guarantee by the 1st respondent, this petitioner is filing this writ petition.

6. The 1st respondent has filed a counter statement and refuted the above writ petition and the respondent submitted that a person approaching this Court invoking the extraordinary jurisdiction should approach only with clean hands and bonafide reasons. Here is a classic case where the petitioner after submitting a false document in its tender bid is not attempting to avoid for future of their bank guarantee whereas their respondent is legally entitled to invoke the bank guarantee under the tender conditions.

7. The only grievance according to the writ petitioner is the forfeiture of his Earnest Money Deposit (EMD) issued through a Bank guarantee in favour of this respondent, towards due honoring of the tender commitments, and the present writ petition is an open attempt to recover the monies, which cannot be permitted under the guise of a

writ petition.

8. The petitioner has woefully failed to plead violation of any provisions of the Constitution of India, which would attract any indulgence of this Court, much less a writ being issued in favour of the petitioner. In fact, the petitioner had also failed to plead that there is no other efficacious remedy available to them, except to invoke the constitutional remedy. The petitioner is seeking issuance of a writ in a contractual matter much against the salient provisions set out in the subject Tender document, towards this Courts have taken a consistent view that the scope of indulgence in contractual matters is limited and there lies only a civil remedy.

9. The petitioner has failed to plead any manifest injustice saddled on him, with the invocation of the bank guarantee, which this respondent is legally entitled to invoke, due to the illegal attempts of petitioner to receive unlawful gains. Hence, no equity lies in favour of the petitioner to deserve any interference of this Court. In a catena of judgments, it has been time and again reiterated that the Court exercising writ jurisdiction would not probe into the facts pleaded by rival parties, requiring a roving enquiry on the issue and the competent civil court is the appropriate forum. More so, in contractual matters, when bank guarantee is invoked. The petitioner has failed to exhaust the statutory remedy provided in the Tender Contract set out in Vol.I.Sec.II Cl.37 and 38 under the Tamil Nadu Transparency in Tender Act 1998, wherein an appeal can be preferred against any orders passed by this respondent. Without prejudice to the above legal contentions, this respondent proceeds to narrate the factual aspects touching upon the issue in hand. TANGEDCO, the first respondent herein invited tender bids for execution of distribution strengthening works under " Restructured Accelerated Power Development and Reforms Programme (R-APDRP) in the towns of Erode region on a total turnkey basis vide tender specification CE (MM) Specn. No.M(R-APDRP).27/2012-1 3. Since, the petitioner did not have the requisite technical qualification, he had chosen to form a consortium with M/s.Ubitech Private Limited, and made a bid for the said tender, by placing their bid prior to 05.09.2012, being the last date of the acceptance of their bids. Along with the bid, the petitioner had enclosed several documents and along with it a bank guarantee No.73/12 for Rs.2.35 Crores issued by the Second Respondent in favour of the first respondent as Earnest Money Deposit (EMD) valid up to 27.06.2013. For due compliance of the Tender documents, the petitioner should furnish along with the Tender bid, a certificate issued by the specified competent authority to prove their credentials as having adequate technical experience, knowledge and successful erection and commissioning of similar projects elsewhere. It is needless to mention that the said certificate to be appended to the Tender document should confirm to conditions set out in Vol.1 Sec.1(d) of the Tender documents. The petitioner had provided a certificate dated 08.11.2011 allegedly issued by M/s.Uttar

Haryana Bijli Vitran Nigam Ltd.., in favour of the consortium partner M/s.Ubitech Private Limited, Faridabad, Haryana, which is the subject matter of the present dispute.

10. The following clauses set out as part of the Tender documents provided to the petitioner are relevant for considering the issue at hand. (i) In Vol.I Sec.I (c)

Cl.8 The Earnest Money Deposit made by the Tenderer will be forfeited if,

a. He withdraws his tender or backs out after acceptance;

b. He withdraws his tender before the expiry of validity period stipulated in the specification or fails to remit the Security Deposit;

c.He violates any of the provisions of these regulations contained herein;

d.He revises any of the items quoted during the validity period;

e.The BQR evidences are found to be fradulent/non-genuine, in addition to black listing in future contract with TANGEDCO.

[ii] In Vol.Sec.1 (d)

8.(c) In the event of the information, furnished by the bidders, found to be false at any stage of tendering, TANGEDCO as its discretion may take action against such bidders and may forfeit the Bid security and disqualify the offer of such bidders and black list the firm. In the event of information furnished by bidder is found to be false during the execution stage, then TANGEDCO as its liberty may take action to cancel the works awarded besides forfeiting the security deposit BG executed against the contract and may black list the firm and recover the losses and levy liquidated damages.

[iii] Vol.I Sec.II states

Cl.40.3 All the intending Tenderers are informed that in the event of documents furnished with the offer being found to be bogus or the documents containing false particulars, the EMD paid by such tenderers will be forfeited in addition to blacklisting them for future orders/contracts in Tamil Nadu Generation and Distribution Corporation Limited.

[iv] Vol.I Sec.II under the head of Corrupt or Fraudulent Practices

Cl.44.1 The Tamilnadu Generation and Distribution Corporation Ltd. and the State require that bidders/ suppliers/ contractors observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, TANGEDCO:

(a) defines for the purposes of this provision, the terms set forth below as follows:

(i)"corrupt practice" means behavior on the part of officials in the public or private sectors by which they improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed, and it includes the offering, giving, receiving or soliciting of anything of value to influence the action of any such official in the procurement process or in contract execution; and

(ii)"fradulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Employer, and includes collusive practice among bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive the Employer of the benefits of free and open competition.

C. The Tender bids were taken for consideration and it was noticed that the Petitioner Company though claimed to posses adequate technical qualifications, but failed to substantiate the same, with any documentary evidences. Hence, this Respondent vide their letter dt. 12.11.2012 called upon the Petitioner to furnish documentary evidences by 15.11.2012 to validate their past technical capabilities for having executed projects similar to the subject Tender. Thereafter, the Petitioner furnished a certificate dt. 08.11.2012 purportedly issued by M/s.Uttar Haryana Bijli Vitran Nigam Ltd., Haryana which stated that M/s.Ubitech Pvt. Ltd., the consortium partner of the Petitioner had completed work of supply, erection, testing and commissioning of 33 KV HT U/G cable work for an approx. distance of 27.5 Kms and the same was running satisfactorily for the past 2 years, along with it a Work order dt. 25.05.2008 allegedly issued by M/s.Uttar Haryana Bijli Vitran Nigam Ltd. was also appended. Immediately, on 16.11.2012, this Respondent issued a fax letter to the concerned authority who had issued the Impugned certificate dt. 08.11.2012, to confirm the issuance of the said Impugned certificate in favour of M/s.Ubitech Pvt. Ltd. Haryana. To the rude shock and surprise, Vide fax reply dt. 16.11.2012, the same authority of M/s.Uttar Haryana Bijli Vitran Nigam Ltd., which had allegedly issued the Impugned certificate dt. 08.11.2012, had confirmed that the Impugned certificate dt. 08.11.2012 was neither issued by them nor under their signatures. Hence, this Respondent concluded that the Impugned certificate dt. 08.11.2012 is fake, collusively and fraudulently obtained in order to receive favourable attention and thereby influence the Tender/procurement process.

D. In view of the fraud committed by the Petitioner, this Respondent decided to invoke the bank guarantee issued by the Petitioner, pursuant to gross violation/breach of terms of the Tender bid setout in Vol.I Sec.I [c] Cl.8[e], Vol.I Sec.I[d] Cl.8.[c] and Vol.I Sec.II Cl.40.3. Hence, on 19.12.2012, at the 33rd meeting of the Board of Directors of this Respondent, it was decided to invoke the bank guarantee furnished by the Petitioner with a value of Rs.2.35 Crores issued by the Second Respondent. Hence vide letter dt. 26.12.2012, the Second Respondent was informed of the invocation of the Bank guarantee and was directed to remit the proceeds of the Bank guarantee of Rs.2.35 Crores by way of a Demand Draft in favour of this Respondent. It was rather unfortunate to note that the Second Respondent abdicating their responsibility as a Public Sector Bank has been constantly in touch with the Petitioner, furnishing them with whatever information/documents they were possessed with in order to frustrate the claims of this Respondent. In fact, the Second Respondent showed extreme reluctance to act as per the Bank guarantee and remit the guarantee amounts and was openly colluding with the Petitioner and acting against the interest of this Respondent.

[E] On coming to know of the invocation of the bank guarantee, the Petitioner approached this Respondent vide letter dt. 28.12.2012 (received on 29.12.2012) and sought time to clarify the Impugned certificate dt. 08.11.2012 from the concerned authorities of M/s.Uttar Haryana Bijli Vitran Nigam Ltd., Haryana. This Respondent took a conscious decision to keep the invocation of the Bank Guarantee pending, due to their own internal reasons and addressed a letter dt. 29.12.2012 to the Second Respondent. It would be highly mischievous to state that this Respondent had issued the letter dt. 29.12.2012 pursuant to the representation of the Petitioner dt. 28.12.2012 and thereby attempting to receive any sympathetic consideration.

[F] However, after a long gap, the Petitioner vide their letter dt.21.02.2012 addressed to this Respondent enclosing in it a letter dt.31.12.2012 purportedly issued by M/s.Uttar Haryana Bijli Vitran Nigam Ltd., which according to the Petitioner confirms the Tehnical qualification of the Petitioner Company. On a careful reading of the letter dt.31.12.2012 issued by M/s.Uttar Haryana Bijli Vitran Nigam Ltd., it can easily be inferred that it no where refers to the disputed Impugned Certificate dt.08.11.2012 nor confirms the existence or the veracity of the Impugned Certificate dt.08.11.2012. It is rather shocking to note that the Petitioner and their consortia are able procure certificates after certificates suiting their whims and fancies in order to influence the tender process and achieve pecuniary gains. Even the delay in submitting the certificate, dated 31.12.2012 after a lapse of more than 50 days is not explained.

[G] It is significant to mention here that after due Tender process, the Petitioner stood disqualified due to the above reasons and the Tender was awarded to M/s.NCC Ltd., Hyderabad. It is rather bizarre to note that the Petitioner has not chosen to challenge their disqualification from the Tender, but are strangely challenging the invocation of their Bank guarantee, since they are well aware of the qualification of the Impugned Certificate dt.08.11.2012, which has failed in the test of veracity. This Respondent once again invoked the Bank Guarantee and caused a letter dt.26.04.2013 addressed to the Second Respondent directing them to send the proceeds of the Bank Guarantee of Rs.2.35 Crores to them without any more delay. From the start since the Second Respondent was in tandem with the Petitioner, lost no time in immediately passing on the Impugned letter dt.26.04.2012, enabling the Petitioner to approach this Court. The Second Respondent failed to exhibit any responsibility or trustworthiness whatsoever as a decent public sector bank and has chosen to render help to an entity which had fraudulently attempted to gain technical expertise with fake certificates, much to the chagrin of this Respondent.

11. At this juncture, this Respondent proceeds to deal with the various averments stated in the affidavit filed in support of the Writ Petition in the same seriatim.

[i] Averments in Paragraphs 1 to 7 are matters of record, and hence not traversed.

[ii] Averments in Paragraph 8, 10 are denied as untrue and are made in order to invoke unwarranted sympathy of this Court. As stated elsewhere, the Petitioner has been bold enough to furnish a fake certificate of Technical expertise dt. 08.11.2012, the authenticity of which remains to be established by them till this day. The Petitioner has woefully failed to salvage whatever pride he could, by producing another letter dt. 31.12.2012, since even this letter does not in any way prove the genuineness of the earlier certificate dt.08.11.2012 nor the complexity of the Petitioner and his consortia in the entire sordid episode.

[iii] Averments in Paragraphs 9, 11 and 12 are admitted as setout elsewhere in the counter affidavit, except to the fact that the letter of this Respondent dt. 29.12.2012 is in no way connected to the letter of the Petitioner dt. 28.12.2012.

[iv] Allegations against this Respondent leveled in Paragraph 13 are stoutly denied as false. Since the Petitioner could not substantiate the genuineness of the Impugned certificate dt.08.11.2011 despite opportunity provided to them, this Respondent was left with no recourse but to enforce the remedies and reliefs available to them under the Tender Bid Documents, in order to send a strong message to future unethical and fraudulent Tender bidders and to deter them from indulging in such shameful acts.

12. This Respondent is legally advised to submit that the various grounds set out in the affidavit filed in support of this Writ Petition are all wholly untenable, false and unavailable to the Petitioner. In fact, the alleged grounds are all factual grounds/aspects which cannot be gone into in a Writ Proceedings. Moreoever, the entire sworn affidavit and grounds setout therein are economical on truth and are unworthy of any consideration since it has suppressed the vital element of fraud perpetuated by the Petitioner and his consortia. In any event, the alleged factual grounds are mere repetition of the facts narrated in the preceding paragraphs, which has been adequately met by this Respondent. Hence this Respondent Corporation reserves their right to file appropriate additional counter affidavit, if need be, at a future date for a

further appreciation.

13. This Respondent submits that, by the breach of Vol.I Section.I [c] Cl.8[e], Vol.I Sec.I [d] Cl.8.[c] of the Tender conditions, they have become legally entitled to appropriate the EMD given by the Petitioner. The Petitioner by submitting its Tender bid pursuant to the tender shall be deemed to have acknowledged and confirmed that they will suffer loss and damage on account of any act amounting to breach, contravention or for any other default by them during the currency of Bid validity as specified in the Tender document.

14. It is further submitted that the deposit of EMD, and its forfeiture in the event specified in the tender document, is common practice to all Government tenders and in fact is more or less a standard condition in all the tenders invited by this Respondent. It is essential to mention that the very purpose of stipulating forfeiture of the EMD is to ensure scrupulous adherence and sanctity to the Tender conditions setout thereto. EMD amounts are specified and forfeiture attached to it, only to make sure that only serious and financially sound tenderers participate and avoid speculators and fly by night operators. Further, the said stipulation is a clause to avoid unruly elements entering the tendering process and frustrate the whole process of tender by dishonest means. If the said forfeiture condition is not enforced strictly and the recalcitrant tenderers permitted to go Scot free, it would only lead to anarchy and unreliable persons would develop boldness to furnish false and fake certificates to influence their Tender capabilities, thereby rendering the entire Tender process farcical.

15. Hence, it becomes all the more important that the parties to the tendering process strictly abide by the terms of the tender and this can be ensured only by enforcing the provision made in the tender document for forfeiture of EMD. The Petitioner has not made out a case of special equities in favour of themselves or of an irreparable injury due to the exercise of the forfeiture clause by the Respondent. The Petitioner having committed breach of the solemn covenant of the tender document, cannot claim any transgression or violation of any right, much less a constitutional right and on this score alone, the Writ Petitioner is liable to be dismissed.

16. The Respondent is legally advised to submit that it has been consistently held that the power of a statutory body like the Respondent to enter into contracts similar to the contract in hand is in order to discharge their functions, for which they are available for. Any dispute arising out of the terms of such contracts or alleged breach have to be settled by the principles of the law of contract and not by invoking the special constitutional jurisdiction of this Court under Article 226 of the Constitution of India.

17. Hence, on a careful consideration of the above, it can be seen that the Respondent have exercised their maximum restraint from back listing the Petitioner, and have shown extreme leniency by invoking the minimum right available to them in a given situation of breach of a salient provision set out in the Tender document.

18. He states that the Bank Guarantee issued by the petitioner through the second respondent to the first respondent is valid upto 27.06.2013. Hence ends of Justice requires a direction to extend the bank guarantee pending disposal of the above Writ Petition.

19. He states that the Hon'ble Supreme Court had repeatedly held that Bank guarantee is an issue of contractual matters and no interim order should be issued to invoke the Bank Guarantee. For the reason set out above, it is prayed that this Court may be pleased to vacate the interim stay granted already in M.P.No.3 of 2013 in W.P.No.13268 of 2013 dated.29.04.2013 and thus render justice.

20. In the above circumstances, it is therefore prayed that this Court may be pleased to dismiss the above Writ Petition as devoid of merits.

21. The learned counsel further submitted that the petitioner entered into a consortium agreement dated 12.09.2012 with one M/s.Ubitech Private Limited, Faridabad, Haryana and the said consortium called as M/s.RPP Ubitech JV. The said company executed a power of attorney to and in favour of the petitioner to represent the consortium in the tender. Accordingly the petitioner submitted the bids 27.09.2012 along with EMD in the form of a bank guarantee dated 28.09.2012 for a value of Rs.2,35,00,000/-. The said bank guarantee was to expire on 27.06.2013. The said bank guarantee was drawn from the 2nd respondent herein namely Indian Overseas Bank. The bank guarantee bearing No.73/12, dated 28.09.2012. Under the circumstances the 1st respondent sent a letter dated 12.11.2012 seeking for two particular documents namely: No.1-documentary evidence for haing expected turn key contract during the last seven years for a minimum of 25 kilometers length of 11KV/Higher voltage/UG cable net work (BQR-3(b) and B. The 2nd document namely to guarantee the technical particulars consisting of maximum total loss at 50% and 100% load for 11KV, 16,25,40,63 KVA and 22KV, 16,25,40,63 KVA distribution Transformers. The said documentary proof was to be submitted by 15.11.2012. The same was complied with.

22. The very competent counsel further submits that all the tender conditions were fulfilled. However, the 1st respondent without any reason tried to invoke the bank guarantee by writing a letter to the Indian Overseas Bank. Immediately, the petitioner approached the 1st petitioner and he was informed that the petitioner had submitted an certificate that was not crystal clear, which was issued by Uttar Haryana Bijli Vitran Nigam Limited. On this ground the 1st respondent

wanted to invoke the bank guarantee which was held by the 2nd respondent. Further the petitioner sought further time to provide clarification on the experience certificate. Accordingly, another confirmation certificate had been obtained from the same firm and submitted to the 1st respondent. Thereafter, the 1st respondent awarded the tender to a 3rd party and the 1st respondent without prior information the 1st respondent sent a letter to the 2nd respondent and invokes the bank guarantee and also demanded the proceeds in the form of a demand draft in favour of the 1st respondent.

23. The highly competent counsel further submits that the petitioner submitted his tender along with necessary experience certificate and EMD by way of bank guarantee. However, the petitioner's firm is a highly reputed company and they are eligible to get the tender but the same was granted to a 3rd party. The 1st respondent without prior notice and enquiry, they themselves invoked the bank guarantee and attempted to receive a demand draft in their favour. Further, there is no inquiry or clarification from the petitioner and they have come to a conclusion Suo moto that the petitioner had submitted an ambiguous experience certificate. The veracity of the certificate, so far not found by the 1st respondent, as such the 1st respondent's decision was arbitrary and illegal. The petitioner is financially suffering for more than two years since the bank guarantee stands in the name of the 1st respondent. Further, regarding the experience certificate there was no comprehensive enquiry in the presence of an issuing authority and the petitioner. Therefore, the impugned order is not suitable for execution.

24. The highly competent counsel Mr.P.Gunaraj, appearing for the 1st respondent submits that the petitioner had submitted a ambiguous certificate for obtaining the tender for their unlawful gains, as such the petitioner has violated the tender conditions, hence the bank guarantee has to be forfeited. Further, more if the petitioner withdraws his tender or backs out after acceptance or he withdraws his tender before the expiry of the validity period in the specification or fails to remit the security deposit. In the instant case, the certificate issued by the petitioner is found not genuine and fraudulent, hence the earnest money deposit has to be forfeited since the experience certificate is a bogus one, further the petitioner has furnished false particulars in order to obtain the tender fraudulently for their personal gain. The petitioner made a misrepresentation to the 1st respondent, therefore the bank guarantee submitted by the 1st petitioner is to be forfeited. The very competent counsel further submits that the 1st respondent had issued a fax letter to the concerned authority namely M/s.Uttar Haryana Bijli Vitran Nigam Limited, who had issued letter dated 08.11.2012 in favour of Uttar Haryana Bijli Vitran Nigam Limited. The said company replied that they had not issued any certificate neither signed in the same. Therefore, the 1st respondent has come to a

strong opinion that the experience certificate is a bogus one and had been fraudulently fabricated. Therefore, the 1st respondent board had conducted a meeting and it was decided to invoke the bank guarantee furnished by the petitioner. As such, the 1st respondent had followed all legal formalities and procedure, thereafter, the impugned order was passed which is appropriate for execution. There is no lapse on the side of the 1st respondent for passing the impugned order, since the petitioner had violated the tender conditions. Hence, the learned counsel entreats this Court to dismiss the above writ petition.

25. The highly competent counsel Mr.F.Benjamin George, appearing for the 2nd respondent submits that the 2nd respondent had issued a bank guarantee dated 28.09.2012 for a value of Rs.2,35,00,000/- to and in favour of the 1st respondent herein. The bank guarantee to be treated as earnest money deposit for participating in tender offer by the petitioner company. The 1st respondent had sent a communication dated 26.04.2013 to the 2nd respondent herein and requested the bank to invoke the bank guarantee and the proceeds in favour of a demand draft drawn in favour of the 1st respondent. Further, the petitioner is not seeking any relief against the 2nd respondent herein.

26. From the above discussions this Court is of the view that:

(1) There is no specific tender condition if the petitioner submits in adequate particulars or ambiguous certificates as such the earnest money deposit to be considered forfeited, but the 1st respondent mentioned in their counter statement that the earnest money deposit made by the tenderer will be forfeited if (a) He withdraws his tender or backs out after acceptance; (b) He withdraws his tender before the expiry of validity period stipulated in the specifications or fails to remit the security deposit; (c) He violates any of the provisions of these regulations contained herein; (d) He revises any of the items quoted during the validity period; (e) The BQR evidences are found to be fraudulent/genuine in addition to black listing in further contracts with M/s.Tamil Nadu Generation and Distribution Corporation Limited. In the above fixed conditions are not applicable in the instant case. Therefore, the impugned order passed by the 1st respondent is not suitable to proceed with any further.

(2) The petitioner has submitted a tender application along with an experience certificate including other necessary particulars along with a bank guarantee as Earnest Money Deposit for obtaining tender from the 1st respondent herein. The 1st respondent is not satisfied with the particulars furnished by the petitioner herein. As such the petitioner had not been issued with the tender and the tender issued to the 3rd party. Therefore, the petitioner is entitled to get back his bank guarantee (EMD) since the respondent will not be put into any irreparable loss or hardship. At the same time if the bank guarantee is not returned to the petitioner, the petitioner will be put into hardship;

(3) The 1st respondent had not issued prior notice or show cause notice to the petitioner as well as the issuing authority namely M/s. Uttar Haryana Bijli Vitran Nigam Limited, for comprehensive inquiry to determine the veracity of the said certificate but the 1st respondent had issued a fax communication to the said company and received a reply from the said company. On the basis of the said reply the decision has been taken by the 1st respondent is not sustainable under law since the petitioner was in the darkness;

(4) The 1st respondent had conducted a board meeting and decided to invoke the bank guarantee furnished by the petitioner, this kind of decision is prejudiced to the petitioner and also in violation of his fundamental rights. Before, taking this decision a show cause notice must be given to the petitioner. This was not done, as such there is a short coming on the side of the 1st respondent. Therefore, the impugned order is an arbitrary one and unfit for execution.

27. On considering the facts and circumstances of the case and arguments advanced by the learned counsel on all sides and on perusing the typed set of papers and this Court view as in 1 to 4, the above writ petition is allowed. Consequently, the entire records of the 1st respondent in Lr.No.CE/MM/SE/MMI/EES/A5/F.M(RAPDRP).27/12-13/D.268/13, dated 26.04.2013 addressed to the 2nd respondent is quashed. The petitioner is at liberty to seek back his bank guarantee. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To
1.The Chief Engineer
M/s.TamilNadu Generation and Distribution
Corporation Ltd., (TANGEDCO),
Materials Management,
4th Floor, NPKRR Maaligai, No.144, Anna Salai,
Chennai – 2.

2.The Chief Manager,
M/s.Indian Overseas Bank,
Surampatti,
No.72, Perundurai Road,
Erode - 638 011.

+1 cc to Mr.P.J.Rishikesh Advocate sr.454

+1 cc to Mr.P.Gunaraj Advocate sr.294
+1 cc to Mr.F.B.Benjamin George sr.388

W.P.No13268 of 2013
and
M.P.Nos.1 to 3 of 2013

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