

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

RESERVED ON : 08-03-2016

PRONOUNCED ON : 22.03.2016

CORAM :

The Honourable Mr. Justice R. SUBBIAH

Writ Petition No. 30685 of 2015
and
M.P. No. 1 of 2015

M/s. Perumal Enterprises
represented by its Proprietor
Mr. Perumal
No.14, Sivakami Street, Devi Nagar
RCC Post, Avadi
Chennai - 600 109 ... Petitioner

Versus

The General Manager
Engine Factory
HVF, Avadi
Chennai - 600 054 ... Respondent

Writ Petition filed under Article 226 of The Constitution of India praying for issuing a Writ of Certiorarified Mandamus calling for the records of the order passed by the respondent dated 07.07.2015, quash the same and consequently direct the respondent to refund the earnest money deposit, being a sum of Rs.4,00,840/- with interest at the rate of 12% per annum.

For Petitioner : Mr. S. Shahul Hameed

For Respondent : Mr. Su. Chidambaram
Assistant Central Government Standing Counsel

ORDER

The petitioner calls in question the order dated 07.07.2015 passed by the respondent, by which the respondent forfeited the earnest money deposit of Rs.4,00,840/- made by the petitioner at the time of submission of his tender application.

2. The petitioner is a service contractor supplying labour to various organisations. During the course of the business of the petitioner, the respondent flouted a tender inviting applications for employing labourers on contract basis for material handling, removal of industrial waste, removal of oil spillage and up keeping of all shops and office of the respondent organisation. The petitioner company, on going through the terms and conditions of the tender and finding that they possess all the essential qualifications contained in the tender notification, submitted their tender document. Along with the tender document,

the petitioner deposited Rs.4,00,840/- as required in the tender notification. In the tender application, the petitioner quoted Rs.26/- per man day for supply of 94 labourers. The tenders received were opened by the respondent on 30.04.2015. According to the petitioner, it is the usual practice to issue work order after the tender is accepted. However, in this case, before issuing such work order, the petitioner was called upon for negotiation on 18.06.2015 requiring the petitioner to bring down the rate quoted by them from Rs.26/- per manday to Rs.25/- per manday. As the petitioner thought that the rate sought to be reduced by the respondent is not viable especially taking into account the petitioner also has remitted 10% of the amount quoted by them as earnest money deposit, the petitioner refused to accept the contract and decided to withdraw the bid. Accordingly, the petitioner sent a letter dated 26.06.2015 to the respondent expressing their inability to accept the contract. By another letter dated 14.07.2015, the petitioner requested the respondent to refund the earnest money deposit remitted by him. The respondent, instead of returning the earnest money deposit, has passed an order dated 07.07.2015 stating that the earnest money deposit made by the petitioner is forfeited. Challenging the same, the petitioner has come forward with this writ petition.

3. The learned counsel appearing for the petitioner would vehemently contend that the bid submitted by the petitioner has not been accepted by the respondent. Unless and until the work order has been issued by the respondent, it cannot be said that the bid of the petitioner is accepted. It is not the case of the respondent that after the tender was awarded in favour of the petitioner, they have refused to accept the contract. The offer made by the petitioner has not been accepted by the respondent and therefore the question of forfeiting the earnest money deposit does not arise. It is evident that the petitioner was called for negotiation of price and the rate sought to be reduced down by the respondent has not been accepted by the petitioner as unviable. When there is no concluded contract between the petitioner and the respondent, the respondent is not justified in forfeiting the earnest money deposit made. Further, there is no clause in the tender notification which empowers the respondent to forfeit the earnest money deposit. As the respondent has unauthorisedly forfeited the earnest money deposit made by the petitioner, they are entitled for refund of the amount with interest. Therefore, the learned counsel for the petitioner prayed for allowing this writ petition.

4. On the contrary, the learned Assistant Central Government Standing counsel appearing for the respondent, relying on the counter affidavit of the respondent, would contend that on 11.03.2015, the Tender Purchase Committee attached to the office of the respondent has issued a tender on Open Tender Enquiry (OTL) basis - 2 Bid system with 50% option clause in order to get a comparative bid. The tender notification was widely published in newspapers. A total of 10 firms, including the petitioner, have submitted their bid. The technical bid was opened on 04.05.2015 and the price bid was opened on 01.06.2015. On scrutiny of the applications, it was found that the petitioner has quoted profit element of Rs.26/- per man day which is excluding wages etc., As

the price quoted by the petitioner appeared to be high, the committee called upon the petitioner for a negotiation. At the time of such negotiation, the committee also scrutinised the documents submitted by the petitioner relating to financial stability and decided to get the performance of the petitioner verified from whom the petitioner has been supplying contract labourers. After negotiation, the petitioner has also agreed to bring down the rate from Rs.26/- per man day to Rs.25/- per man day by writing a letter dated 18.06.2015. Thereafter, the committee subjectively satisfied to award the contract in favour of the petitioner with the revised profit element of Rs.25/- per man day. In the meantime, the petitioner written the letter dated Nil, received on 26.06.2015 expressing their intention to withdraw their bid as the reduced rate at which they were asked to supply the labourers is unviable. Thereafter, on 30.06.2015, the committee discussed the issue as regards the refusal on the part of the petitioner to accept the contract. However, the petitioner refused to accept the contract and therefore the committee decided to issue a re-tender notification for supply of the labourers and also to forfeit the earnest money deposit paid by the petitioner. According to the learned Assistant Central Government Standing Counsel for the respondent, as per clause 46 of the tender notice, the tender process and subsequent supply order will be governed on the basis of Ordinance Factory Board Procurement Manual 2010. As per the Regulations contained in Page Nos. 23 of 1998, No.4.9.2.6 relating to forfeiture of earnest money deposit, it is categorically stated that the earnest money will be liable to be forfeited if the bidder withdraws or amends impairs or derogates from the tender in any respect within the validity period of his tender. It is also stated that no separate order is required for forfeiture of earnest money deposit which follows on default and should be credited at once to the government account. Therefore, as per the above Regulations, the committee decided to forfeit the earnest money remitted by the petitioner and it was duly communicated to the petitioner. Therefore, the learned counsel for the respondent would justify the forfeiture of earnest money deposit made by the petitioner and prayed for dismissal of the writ petition.

5. I heard the learned counsel for both sides and perused the materials placed on record. The submission of the counsel for the petitioner is two fold, one is even before issuing the work order, the petitioner withdrew the bid and secondly there is no clause incorporated in the tender notification to forfeit the earnest money deposit. According to the counsel for the petitioner, in such circumstances, the forfeiture of earnest money deposit made by the petitioner is unjustified. On the contrary, the learned Assistant Central Government Standing Counsel appearing for the respondent would contend that the bids were opened and the petitioner was called upon to negotiate the rates. The petitioner also accepted to reduce the rate quoted by them from Rs.26/- per man day to Rs.25/- per man day, meaning thereby the contract is concluded. When the respondent was about to place work order, the petitioner hastily withdrew the bid. In this regard, in order to make good the amount to be incurred by the respondent for flouting a new tender, the forfeiture of earnest money deposit of the petitioner is warranted. Further, as per

clause 46 of the tender condition, which is governed by the Ordinance Factory Board Procurement Manual 2010, the counsel for the respondent would contend that when the petitioner, after accepting the offer made by reducing the price bid, withdraws the bid, it would amount to amending or derogating the terms of the contract in which event, forfeiting the earnest money deposit made by the petitioner is inevitable.

6. Upon considering the rival submissions made, I am of the considered opinion that the question as to whether the petitioner has withdrew the bid before the contract was concluded or not and consequently whether the respondent is entitled to forfeit the earnest money deposit made by the petitioner cannot be decided by this Court. When there are disputed question of facts, this Court, in exercise of jurisdiction under Article 226 of The Constitution of India, cannot adjudicate the issues. In such event, this Court cannot re-appreciate the material evidence by conducting a roving enquiry. However, it is made clear that if there is any alternative remedy available under law, it is open to the petitioner to resort to such remedy to ventilate his grievance. But, the grievance expressed by the petitioner cannot be adjudicated by this Court in this writ petition.

7. In the result, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

rsh

To

The General Manager
Engine Factory
HVF, Avadi
Chennai - 600 054

सत्यमेव जयते

WEB COPY

WP No. 30685 of 2015

SV (CO)
kk 6/4