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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 7532/2012 & CM APPL. 2767/2011**

M/S. PRABHATAM ADVERTISING PVT. LTD. Petitioner

**Through Mr. Gaurav Mitra with Mr. Varun
Arora and Ms. Rashmita Roy
Chowdhury, Advocates**

versus

GOVERNMENT OF NCT OF DELHI & ORS. Respondents

Through Mr. Satyakam, ASC (Civil), GNCTD.

Reserved on : 9th May, 2016

% Date of Decision : 11th July, 2016

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

1. Petitioner by way of present writ petition challenges the forfeiture of the bid security of Rs. 25 lakhs by the respondent authority on account of the failure by the petitioner to enter into a Concession Agreement within the stipulated time in spite of being declared L1 bidder and Letter of Acceptance being issued in his favour vide letter dated 15th March, 2011.
2. Mr. Gaurav Mitra, learned counsel for the petitioner submitted that it was inequitable and illegal for the respondent authority to forfeit the bid security since the Concession Agreement to be entered into for five years was in contravention of the Outdoor Advertisement Policy dated 10th

September, 2007 of the government itself. He contended that the Outdoor Advertisement Policy dated 10th September, 2007 stipulated that the Concession Agreement in relation to Bus Shelter (category 3) could only be for a maximum period of three years. He submitted that as the tender document was in direct contravention of the Outdoor Advertisement Policy dated 10th September, 2007, it was illegal for the respondent authority to insist on entering into a Concession Agreement.

3. Mr. Mitra emphasized that the respondent authority did not deal with the issue of contravention of the Outdoor Advertisement Policy dated 10th September, 2007 while passing the impugned communication dated 31st October, 2012. He further submitted that the respondent authority did not give any reasons for rejecting the petitioner's aforesaid argument. Thus, according to him, there was total non-application of mind by the respondent authority while passing the impugned order.

4. Mr. Mitra also submitted that in the present case though the bid security had been classified as a genuine pre-estimate of compensation and damages, yet it was in the nature of a penalty. He stated that the respondent authority on petitioner's failure to enter into a Concession Agreement had awarded the contract for three out of the five zones to L2 bidder and annulled the remaining two zones without going for a re-tender. Thus, according to him, no damage/loss was suffered by the respondent in the present case.

5. Mr. Mitra submitted that it is a well established principle of law that when an amount stipulated in a contract was in a nature of a penalty and not a genuine pre-estimate of damages, loss had to be proved. In support of his submission, he relied upon Section 74 of the Indian Contract Act, 1872

which reads as under:-

"74. Compensation of breach of contract where penalty stipulated for - When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss or proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

6. Mr. Mitra also relied upon the judgments of Delhi High Court in ***Madhucon Projects Ltd. Vs. National Highways Authority of India and Ors., MANU/DE/0852/2011, IVRCL Infrastructures and Projects Ltd. Vs. National Highways Authority of India, MANU/DE/0854/2011, and Gayatri-DLF Consortium and Ors. Vs. National Highways Authority of India and Anr., MANU/DE/0853/2011.***

7. Per contra, Mr. Satyakam, learned additional standing counsel for respondents submitted that present petition was barred by principles of res-judicata and estoppel. He contended that the show cause notice dated 10th February, 2012 was limited to restraining the petitioner from participating in any bidding process in any project of government of National Capital Territory of Delhi, popularly known as blacklisting and did not seek to reopen the issue of forfeiture, which had attained finality.

8. Mr. Satyakam stated that though the petition refers to the earlier writ petition being W.P.(C) 2767/2011 and the order passed therein, yet petitioner in the present writ petition has portrayed as if the issue of forfeiture had to be decided afresh by the respondent authority.

9. In rejoinder, Mr. Gaurav Mitra, learned counsel for petitioner stated that there was no question of res-judicata or abuse of process of court as the petitioner had withdrawn the earlier writ petition being W.P.(C) 2767/2011 challenging the forfeiture on the assumption that the respondents would withdraw the order of forfeiture. According to him, since respondents did not withdraw the forfeiture order, the petitioner had filed its submissions in its reply to the Show Cause Notice as well as oral arguments. Thereafter, the respondent had passed the impugned order dated 31st October, 2012 specifically upholding the forfeiture of bid security. Thus, he submitted that the impugned order dated 31st October, 2012 had given rise to a new cause of action and the same was in no way defeated by the disposal of the earlier W.P.(C) 2767/2011.

10. Keeping in view the aforesaid submissions and contentions advanced by learned counsel for the parties, it is first essential to marshal out the facts.

11. From the pleadings and documents on record, it transpires that the respondent authority had constructed 750 modern Bus Queue Shelters (hereinafter referred to as "BQS") at different locations in Delhi. In February, 2011, the respondent authority invited bids for marketing, operation and maintenance of these BQS by private entities for a period of five years. The BQS were divided into five zones and the bidding process was undertaken simultaneously with each zone being treated as an individual and distinct project.

12. Since the petitioner submitted the highest bids, it was declared as the successful bidder in all the zones and a letter of acceptance was issued to it on 15th March, 2011.

13. As a token of acknowledgement, the successful bidder was required to return a copy of the letter of acceptance duly signed by its authorised signatory to the respondent authority within three days from the date of issuance of the letter of acceptance. The same was returned by the petitioner duly executed on 11th April, 2011.

14. The petitioner was thereafter required to execute the Concession Agreement as well as furnish two performance guarantees equivalent to three months total monthly payment payable to the Transport Department for the five zones.

15. Instead of signing the Concession Agreement, the petitioner vide its letter dated 14th March, 2011 asked the respondent authority to give to the petitioner 33% rebate on the monthly licence fee as well as to permit it to furnish one bank guarantee for single quarter and to grant at least two months time for conducting site inspection and mobilizing additional logistic support for obtaining, maintaining and marketing of BQS.

16. The respondent authority vide its letter dated 7th April, 2011 declined to make changes in the Concession Agreement on the ground that the changes sought were financial in nature and were against the spirit of open, transparent and competitive bidding process which had already concluded. The respondent authority also asked the petitioner to sign the Concession Agreement latest by 13th April, 2011, failing which the respondent authority would proceed to forfeit the petitioner's bank guarantee and initiate process for blacklisting.

17. On 11th April, 2011, the petitioner informed the respondent authority that the petitioner had received a legal notice dated 12th April, 2011 from an NGO Shristi stating that the contract awarded to it was in violation of the

Outdoor Advertisement Policy, as the contract period stipulated therein was five years and not three years.

18. Respondent authority vide its letter dated 15th April, 2011 informed the petitioner that the agreement had been drafted in terms of the applicable law and there was no illegality attached to it. It also pointed out that though the letter written by the petitioner was dated 11th April, 2011, the notice from the NGO annexed to the said letter was dated 12th April, 2011!

19. Respondent once again requested the petitioner to sign the agreement latest by 20th April 2011, otherwise the Department would forfeit the bank guarantee and blacklist the company in terms of the bid document.

20. Since there was no response from the petitioner, respondent authority vide its letter dated 25th April, 2011 annulled the letter of acceptance dated 15th March, 2011 for all the zones and forfeited the petitioner's bid security (EMD) amounting to Rs. 25 lacs. The respondent authority in the said letter clarified that the forfeiture of Earnest Money Deposit was without prejudice to any other right that it may take including but not limited to blacklisting the petitioner company from participating in any prospective bid process.

21. On 27th April, 2011, the petitioner filed a writ petition being W.P.(C) 2767/2011 challenging the encashment of the bank guarantee dated 2nd February, 2011 as well as sought directions to the respondents to delete the various provisions in the bid document which according to it were in violation of the Outdoor Advertising Policy dated 10th September, 2007. The prayers in the said writ petition are reproduced hereinbelow:-

"a. That this Hon'ble Court may restrain the Respondents 1 to 3 from taking any further action as contemplated by the Respondents No. 1 document dated 17th January, 2011 till the time the Respondents clarify the position with regard to the

apparent violations of the policy dated 10th September, 2007 and till the Respondents 1 - 3 perform their contractual obligation under the tender document.

b. To call for records pertaining to the said document dated 17th January 2011 and to direct the respondents to delete the various violative provisions in their contract/the said document 17th January 2011 and in case the terms of the said document dated 17th January 2011 are found to be violative of the policy dated 10th September 2007 then in that case the Respondents may be called upon to restart the process afresh by releasing the tender afresh and giving the petitioners an equal opportunity to bid again.

c. To stay the operation of the letter dated 25th April 2011 of the respondents and to stay encashment of the bank guarantee 02.02.2011 and for that purpose to restrain the respondent No. 4 from releasing the amount of bank guarantee and to restrain respondent No. 1-3 from invoking the same.

d. to grant liberty to the Petitioners to avail their further remedies as may be available to them and as may be advised against the Respondents No. 1 to 3 in case the allegation/obligations raised by the said society are found true and correct and in case the Respondents are able to carry out their illegal threats.

e. Restrain the Respondent from taking any course or steps against the Petitioners to either in form of encashment of bank guarantee dated 02.02.2011 and/or to threaten the Petitioner in any manner by way of threatening to blacklist the Petitioner or in other manner or in other ways."

(emphasis supplied)

22. On 28th April, 2011, the petitioner withdrew the aforesaid writ petition with an assurance to the Division Bench of this Court that it would perform the contract. The order dated 28th April, 2011 is reproduced hereinbelow:-

"After arguing at length, learned counsel for the petitioner seeks to withdraw the writ petition and the application so as to approach the respondent/authorities assuring that the petitioner will perform the contract. Dismissed as withdrawn."

(emphasis supplied)

23. It is pertinent to mention that on 27th April, 2011 the respondent authority had issued instruction to petitioner's banker forfeiting the bid security amount furnished by the petitioner. Vide letter dated 2nd May, 2011 the petitioner's banker sent a banker's cheque of Rs. 25 lacs in favour of the respondent and the same was realized by the Accounts Branch of the Transport Department.

24. On 31st May, 2011, the respondent authority restrained the petitioner and its directors from participating in any bidding process in any project of Government of NCT of Delhi.

25. Thereafter the petitioner filed another writ petition being W.P.(C) 7154/2011 challenging its blacklisting primarily on the ground that the same was in violation of principles of natural justice as no opportunity of hearing had been given. In the said writ petition it was averred that after encashing the bank guarantee for Rs. 25 lacs, the impugned action to blacklist the petitioner and its directors was arbitrary and illegal. The prayer clause in W.P.(C) 7154/2011 is reproduced hereinbelow:-

"a) Issuance of writ of mandamus, certiorari or any other appropriate writ for setting aside letter dated 31st May 2011 issued by the Respondent No. 2 to the Petitioners thereby restraining the Petitioner and all its Directors from participating in any bidding process in any project of the Respondent No. 1 for a period of 3 years.

b) *further to declare the said impugned letter as illegal and for further restraining the respondents from black listing the petitioner and its directors in respect of the various tenders floated by the Respondent and further restraining the Respondents from rejecting any bids of the Petitioner which are outside the terms of the bid or on the basis of the impugned letter dated 31st May, 2011 and/or on any grounds which are arbitrary, illegal and irrational.*

c) *Further restraining the Respondent and passing an interim order in favour of the Plaintiff that the bid submitted by the Petitioner in respect of the new NIT dated 6th September, 2011 for 242 newly constructed Modern Stainless Steel Bus Queue Shelters, shall not be rejected/refused on the grounds of the impugned letter dated 31st May, 2011 which shall stand cancel as there was no Notice prior to such letter by the Respondents for restricting the participation of the Petitioner.*

d) *Any other relief as this Hon'ble court may deems fit and proper may also be granted."*

(emphasis supplied)

26. However, in the said writ petition it was admitted by the petitioner that it had executed a similar contract dated 6th May, 2011 with regard to other BQS containing similar clauses.

27. Vide letter dated 10th February, 2012 the blacklisting order was withdrawn and a show cause notice limited to blacklisting was issued to the petitioner. The relevant portion of the show cause notice is reproduced hereinbelow:-

"Now, the undersigned hereby show cause you as to why not M/s. Prabhatam Advertising Private Limited and all of its Directors should not be restrained in any bidding process in any project of Government of National Capital Territory of Delhi for a period of three years. Your reply, if any, should reach to undersigned by 23.02.2012 failing which it would be

presumed that you have nothing to say and appropriate decision will be taken without any further opportunity."

(emphasis supplied)

28. In view of the subsequent issuance of the show cause notice dated 10th February, 2012, learned counsel for the petitioner admitted that its writ petition being W.P.(C) 7154/2011 had become infructuous as its grievance had stood redressed.

29. After giving an opportunity of hearing, though the respondent authority in the impugned order dated 31st October, 2012 asserted that the reasons given by the petitioner for non-signing the Concession Agreement were bizarre and frivolous, yet it withdrew the show cause notice limited to blacklisting on the ground that the bid security amount had already been forfeited.

30. From the aforesaid facts it is apparent that the present petition is an abuse of process of Court as the issue of forfeiture had stood settled and had attained finality vide order dated 28th April, 2011 passed by the respondent authority as well as by virtue of dismissal of the writ petition W.P.(C) 2767/2011.

31. What was impugned in the subsequent writ petition, that is, W.P.(C) 7154/2011 was the order of blacklisting of the petitioner and its directors. Further, the show cause notice dated 10th February, 2012 was confined to the issue of blacklisting.

32. Moreover, as by the impugned order dated 31st October, 2012 the show cause notice dated 10th February, 2012 was withdrawn, this Court deprecates the conduct of the petitioner in re-litigating. In fact, the present writ petition has been filed with malafide intent to rake up a settled issue of

forfeiture of earnest money deposit. In *N.D. Qureshi Vs. Union of India, 2008 (13) DRJ 547*, a Division Bench of this Court of which the present Bench was a party has observed as under:-

“12. Moreover, from the above narrated facts, it would be apparent that the petitioner has been re-litigating for a considerable number of years. In our view on the principle of res judicata and re-litigation the petitioner is even barred from raising new pleas for the same old relief. The Hon’ble Supreme Court in K.K.Modi Vs. K.N.Modi and others, reported in (1998) 3 SCC 573 has held that it is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. This re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the court. The Hon’ble Supreme Court has further held that if a spurious claim is made in a case, it may also amount to an abuse of process of the court. In our view, frivolous or vexatious proceedings amount to an abuse of the process of the court especially where the proceedings are absolutely groundless-like in the present case.”

(emphasis supplied)

33. Consequently, present writ petition and pending application are dismissed with costs of Rs. 50,000/- to be paid to respondent authority within two weeks. Respondent authority is also directed to take into account the petitioner's conduct in indulging in frivolous litigation while awarding future contracts to it.

MANMOHAN, J

JULY 11, 2016

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