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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 7188 of 2013.

M/s Southern Cargo & Logistics  
A registered partnership firm,  
registered under the Indian  
Partnership Act, 1932,  
through its authorized representative  
having its office at 28/28, Kempana  
Layout, 1<sup>st</sup> Main Road, Seshadripuram  
Bangalore-560020 ..Petitioner.

Versus.

- (1) The Chief Commercial Manager,  
Western Railway Station,  
Building, 2<sup>nd</sup> Floor, Churchgate,  
Mumbai 400 020.
- (2) The Deputy Chief Commercial,  
Manager, the Chief Commercial  
Manager Office, Western Railway,  
Station Building, 2<sup>nd</sup> Floor,  
Churchgate, Mumbai 400 020. ..Respondents.

Mr. Karan Bhosale a/with Abhay Arora i/by Devika Nigade for  
the petitioner.

Ms Rohini Wagh i/by Suresh Kumar for the Respondents.

**CORAM: NARESH H. PATIL &  
SMT. BHARATI H.DANGRE, JJ.  
RESERVED ON : 19<sup>th</sup> June, 2017.  
PRONOUNCED ON : 29<sup>th</sup> June, 2017.**

**ORDER : (PER SMT. BHARATI H. DANGRE, J).**

1) The petitioner, a partnership concern, dealing in business of cargo and logistics, has approached this Court seeking a direction to quash and set aside the letter dated 19/24<sup>th</sup> April, 2013 addressed by respondent no.2 to the petitioner, thereby informing the petitioner that the amount of Earnest Money Deposit (EMD) and guarantee amount tendered by the petitioner along with the offer is being forfeited in terms of Clause 13 of the terms and conditions of the tender document. According to the petitioner, the said action of the respondents is patently illegal and according to the petitioner the offer submitted by him was never a conditional offer resulting into forfeiture of his EMD and guarantee amount, as sought to be construed by the respondents.

2) For appropriate adjudication of the matter in hand, it

is necessary to refer to the essential chronology of events leading to the present adjudication:

i) The respondents are the officials of the Western Railway and respondent No.1 floated a tender for leasing of Parcel Vans (VPs) of 23 tonnes capacity on the round trip basis on payment of lump sum rates for loading and unloading of parcels by the specified trains for a period of three years. The First Tender was published vide tender notice No.2/2012-13 and the trains in which the Parcel Vans were to be loaded, were mentioned in the tender document and it covered two trains namely Porbunder Howrah Express and Kaviguru Express. The Tender Notice specified the salient feature of the scheme and enumerated that VPs will be on round trip basis for a period of three years and it was also specified that only leaseholders who are registered under category "A" with Railways of originating or destination station of the train can participate in the tender process. The closing date and time of the tender was specified as 18/12/2012 at 15:00 hours and the tender opening date and time was specified as 18/12/2012 at

15:30 hours. The tender document was accompanied by Instructions to Tenderers and also terms and conditions of the tender for leasing of the Parcel Vans (VP) on round trip basis. Condition no.1 and 6 of the terms and conditions of tender read as follows:-

“1. Leasing of Parcel Van for transportation of parcels is normally between originating and terminating points of the assigned train and the VPs will be leased out on round trip basis only.

6. The Tenderer should offer per round trip lump sum rate in the enclosed format of the tender form according to the frequency of the train for the subject work. The tenderer, while submitting tender, shall be required to give the following information in the tender form, failing which his tender will not be considered.”

ii) By virtue of condition no.11 of the terms of the tender form, the tenderer was required to remit Earnest Money Deposit (EMD) and guarantee amount separately for each train along with the offer. It is also stipulated that the tenderer shall hold an offer open for a period of 90 days from the date fixed for opening the same and extend the validity for another 30 days in case specially asked upon to do so in writing. Clause 12 (a)

deals with refund of EMD and guarantee amount, which read as under:

“12.(a) The Earnest Money and Guarantee amount will be refunded to the unsuccessful tenderer (s) after finalization of the tender. ...”

The Clause 13 of the terms and conditions of the tender is reproduced below:-

**“13. Forfeiture of EMD and guarantee amount (for commencing contract in time:**

The EMD and guarantee amount (for commencing contract in time ) will be liable for forfeiture without any prejudice to any other rights or remedies, if-

(a) The tenderer withdraws the offer before finalization of the tender process by the administration.

(b) The party fails to execute the contract (documents (Agreement within 15 days after the receipt of the acceptance letter issued by the Railways.

(c) The party fails to commence loading within 15 days after receipt of order to that effect.

(d) The Railway will not accept tender wherein conditional offer has been given and the offer will be outrightly rejected.”

3) The present case in hand revolves around the applicability and interpretation of Clause 13 (d) quoted above.

4) It is not in dispute that the petitioner participated in the tender process initiated in pursuance of the Tender Notice No.2/2012-2013. The petitioner submitted his offer in respect of train No. 12949/12950, Kaviguru Express which runs weekly from Porbunder to Shalimar and back to Porbunder. The petitioner in response to the tender notice has submitted his offer for attachment and detachment from Ahmedabad which was a station enroute from Porbunder to Shalimar. According to the petitioner, this request was made by him on account of the fact that there was not sufficient load arrangement at Porbunder and Ahmedabad was on the same route. It is also not in dispute that the petitioner addressed a communication dated 13<sup>th</sup> February, 2013 to respondent no.2 by which communication he sought to withdraw the said condition of operating VP from Ahmedabad instead of Porbunder. He expressed his willingness to operate the said VP from Porbunder to Shalimar and intimated that the said condition

mentioned in his offer is withdrawn by him. According to the petitioner, no acceptance or rejection in respect of the said communication was received by him.

5) It is not in dispute that in the month of April, 2013, Second Tender was floated vide Tender Notice No.1/2013-14 in respect of the same work by the respondent-railway and the petitioner participated in the tender process which was for lease of VP vans for four trains including the train for which the petitioner had offered his bid in the First Tender process.

We have heard Shri Karan Bhosale for the petitioner and Ms. Rohini Wagh for the Respondents at length.

6) The sole issue involved in the matter ultimately rests on the interpretation of Clause 13 (d) of the terms and conditions of the tender for leasing of parcel van on round trip basis. Clause 13 provides for forfeiture of EMD and guarantee amount on certain contingencies. We are concerned with the contingency mentioned in Clause (d) which reads as follows:

“(d) The Railway will not accept tender wherein conditional offer has been given and the offer will be out rightly rejected.”

7) The Counsel for railway has argued that the petitioner's offer wherein condition is stipulated that he would require attachment and detachment from Ahmadabad station enroute from Porbunder to Shalimar was a conditional offer. It is argued that as per Clause 13 of the terms and conditions the said offer is liable to be rejected being a conditional offer and it has been so rejected and therefore there is forfeiture of EMD and guarantee amount of the petitioner. The Counsel for the petitioner did not dispute that he had stipulated the condition permitting him to attach and detach the parcel vans at Ahmadabad as a part of his bid when he submitted his bid in response to the first tender notice No.2/2012-13. The contention of the petitioner is, however, that it was not a conditional bid but he has only stipulated a contingency and it was open for the railway either to accept or reject it. According to the petitioner, the railways did not communicate anything to him approximately for a period of about two months from

submission of his bid and it was on 13<sup>th</sup> February, 2013 he intimated the respondents-railway that he is ready to operate the VP from Porbunder to Shalimar and to Porbunder and the special condition mentioned by him in the tender form is withdrawn. According to the petitioner, the railway did not act on the said communication for approximately two months and by communication dated 19/24<sup>th</sup> April, 2013 it was communicated to the petitioner that the request made by him vide his letter dated 13<sup>th</sup> February, 2013 cannot be accepted.

8) A close reading of the entire tender document and the terms and conditions of the tender disclose that the tender which was floated by the Western Railway was for leasing a Parcel Van of 23 tonnes capacity on round trip basis on payment of lump sum rates for loading and unloading of parcels. One of the condition of the tender was that the applicant who is a registered leaseholder under category "A" with Railways of originating or destination station of the train can only participate in the tender process. Further, detail scrutiny of the terms and conditions of the tender would reveal

that the leaseholder shall be solely responsible for canvassing, acceptance, booking, handling, documentation and delivery of parcels / packages both at originating and destination stations by virtue of clause 19 (b). Further, by virtue of clause 19 (e) loading of parcels at originating station and unloading them at the destination stations is the responsibility of the leaseholder. A perusal of Clause 23 of the terms and conditions of the tender reveal that the parcel van is to be padlocked by the leaseholder and that the leaseholder shall padlock the Parcel Van five minutes before the scheduled departure of the train. By virtue of Clause 24, a liability is fastened on the railway to carry the parcel van from originating station to destination station with the leaseholders padlock.

The whole scope of the work which is tendered appears to be loading of the parcel vans by padlocking them at the originating station before the scheduled departure of the train and it is a leaseholders responsibility to load the parcels in the said van after completing the acceptance, booking, handling, documentation of the parcels to be transported in the

parcel van and the scope of the work covers the unloading of those parcels van at the destination station and continues till delivery of packages at the destination station. Thus, the essential condition of the tender floated by the respondent was the loading of the parcel van at originating station and unloading of the packages at the destination station and Railway was responsible for carrying the parcel van between the two points. It can thus be seen that the essential stipulation of the tender was detaching the parcel van with the parcels at the originating station and unloading of the parcel van at the destination station. This condition being the essential condition of the tender, the Railways did not permit any conditional offer which was at variance with its essential condition considering the scope of the work. Reading of Clause 13 (d) in the background of the essential conditions of the tender would give rise to an irresistible conclusion that is worth consideration the railway and the respondents railway would outrightly reject such a conditional offer.

9)           The Counsel for the petitioner attempted to argue

that by virtue of Clause 13 (d) it was mandatory for the Railway to “reject” (outrightly) the offer. However, since the Railway has failed to do so, Clause 13 (d) is not attracted.

We are of the view that such a construction of Clause (d) would render the said clause nugatory and if the construction of the petitioner of the said clause is to be accepted, then it would mean that even an offer which is a conditional offer will have to be first given consideration by the railway and then on its consideration the offer will have to be (outrightly) rejected later on by some express act. However, since the round trip of the VP is an essential condition of the tender for leasing of parcel vans, an offer given by the petitioner that he would be permitted to load the parcels at a point at Ahmadabad which was enroute between Porbunder and Shalimar is against the essential condition of the tender which was essentially for leasing of parcel vans on round trip basis on payment of lump sum rates for loading and unloading of parcels. Thus, one of the essential term of the tender was leasing of VP at the originating station and detaching of the van at the destination station by unloading the parcels.

10) The petitioner though initially had given an offer for attachment and detachment from Ahmadabad as a part of his original bid, however, subsequently realized that the same cannot be permitted taking into consideration the work which is sought to be offered by the tender and therefore made a request, after two months for withdrawal of the said condition and showed his willingness to operate the VP from Porbunder to Shalimar by his communication dated 13<sup>th</sup> February, 2013. The Railway by its communication dated 19/24<sup>th</sup> April, 2013 communicated to the petitioner that the said request cannot be accepted and the railway also invited the attention of the petitioner to Clause 13 (d) of the tender document and it was intimated to the petitioner that in view of the said clause, EMD and guarantee amount is forfeited.

11) The Clause 13 (d) of the tender document therefore has to be construed and given an effective interpretation in the light of all other terms and conditions of the tender document to mean that the railway will not accept any tender which is

not in consonance with the scope of the work and such an offer is liable to be rejected and accordingly the railways have rightly communicated to the petitioner by the impugned communication that his request to withdraw the conditional offer cannot be accepted and rather his EMD and guarantee amount is liable to be forfeited in view of conditional offer given by him.

12) The Hon'ble Apex Court in the case of Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors reported in 1991 (3) SCC 273 has classified conditions in tender to be of two types namely essential condition of eligibility and other conditions which are mere ancillary and subsidiary to the main object to be achieved by the essential conditions. In the former, the Authority issuing the tender may be required to enforce the said condition rigidly. The condition contained in Clause 13 (d) is one such condition which is an essential condition of the contract and the respondents have treated the condition as an essential one and made the said condition sacrosanct and stipulated that the railway will not accept the tender where the

conditional offer is given and it is outrightly liable to be rejected. We do not find that the said condition suffers from any arbitrariness or unreasonableness. However, we are not called upon to deal with the justness or otherwise of the said said issue since the said condition is not a subject matter of challenge before us.

13) Though the petitioner has vehemently argued that the respondents ought to have intimated to him about his first offer in response to the tender notice and instead of doing so the railways had floated the second tender, what is disclosed from the reply of the railways is that the petitioner participated in the second tender process and was not successful and the tender was allotted to the highest bidder namely M/s Calcutta Roadline Pvt. Ltd., on 18<sup>th</sup> June, 2013.

14) The action of the respondents in inviting tender is a purely contractual affair and the interference in the terms and conditions of a tender notice is no more res integra and it is settled proposition of law that the tender conditions are not

liable to be interfered by this Court in exercise of its writ jurisdiction unless and until the tender conditions are palpably arbitrary, malicious or against the public interest. However, we need not to go into said issue since the petitioner has not posed any challenge to condition 13 (d) of the tender document and the same is not subject to our judicial scrutiny. We do not feel that any ground has been made by the petitioner to grant the relief in favour of the petitioner namely quashing of the impugned order intimating to the petitioner that his EMD and guarantee is liable to be forfeited in terms of Clause 13 (d) of the tender document. We see no scope for interference in the decision communicated to the petitioner in exercise of writ jurisdiction and as such the petitioner is not entitled for any relief sought by him and the writ petition deserves to be rejected and the same is accordingly rejected.

**(SMT. BHARATI H. DANGRE,J) (NARESH H.PATIL,J)**