

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

% Judgment Reserved on: 08.03.2017
Judgment delivered on: 10.03.2017

+ W.P(C) 7935/2015

SIMPLEX INFRASTRUCTURES LIMITED Appellant

versus

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA & ANR.** Respondents

Advocates who appeared in this case:

For the Appellant : Mr Sanjeev Sen, Sr.Adv. with Mr Rakesh Sinha,
Mr Samrat Sengupta, Mr Dev Roy and
Mr Soumyajit Nath.

For the Respondent : Ms Gunjan Sinha Jain with Mr Mukesh Kumar for
NHAI.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. The petitioner, a company engaged in the business of civil and infrastructure construction had participated in a tender floated by the respondent No.1 on 09.01.2015 for development of four lane Islampur Bypass of 10.31 kms length at NH-31 in the State of West Bengal under NHDP Phase-II. The bid of the petitioner was rejected vide order dated 28.07.2015 passed by respondent No.1 and the pre bid security deposit of

the petitioner was forfeited and appropriated as damages. The petitioner therefore, has prayed for the following reliefs in the instant writ petition:-

- a) Quashing of the letter dated 28.07.2015 whereby the Respondent No.1 has rejected the petitioner's bid and forfeited the pre bid security for an amount of Rs.2.41 crore submitted in the form of a BG issued by respondent no.2;*
- b) Quashing the basis of concluding that the petitioner's bid is non-responsive, on the basis that the petitioner is debarred, ignoring the explanation and order of the Hon'ble High Court of Guwahati at Guwahati.*
- c) A direction in the nature of mandamus declaring clause 2.20.5 of RFP as illegal, unconscionable, null and void;*
- d) For a direction to the Respondent No.1 to reimburse the pre bid security which has been forfeited and interest accumulated against the aforesaid amount;*

2. A tender was floated by respondent No.1 on 09.01.2015 which required a participant, as per clause 2.1.6 of the RPF, to deposit bid security in the form of Bank Guarantee to the tune of Rs.2.41 crores. The petitioner participated in the tender and deposited the bid security in the form of bank guarantee for the aforesaid amount, which was extended from time to time.

3. The bid was submitted on 07.07.2015 (08.07.2015 being the last date). On the same day i.e. 08.07.2015, the petitioner received a show cause notice dated 08.07.2015 asking it to explain as to why the fact of

the petitioner having been debarred by the office order issued by the Chief Engineer, PWD, Assam from participating in the tender for all future works under PWD, Assam, for a period of two years, was not disclosed.

4. This show cause notice was purportedly given to the petitioner in view of Clause 2.6.2 (a) which authorized the respondent No.1 to reject any bid and appropriate the bid security if at any time a material misrepresentation was made or uncovered and Clause 2.20.5, authorizing the forfeiture and appropriation of the bid amount in cases of submission of non responsive bid; bidder engaging in a corrupt, fraudulent, coercive, undesirable or restrictive practice as specified in Section 4 of the RFP or bidder withdrawing its bid during the period of bid validity or in case of selected bidder failing within the specified time limit to sign the agreement and furnish the performance guarantee.

5. The relevant provisions of the RFP referred to above are being extracted for proper appreciation and completeness:-

“2.6.2 The Authority reserves the right to reject any bid and appropriate the bid security if:

a) At any time, a material misrepresentation is made or uncovered

2.20.5 The Bid security shall be forfeited and appropriated by the Authority as damages payable to the Authority for, inter-alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority under the bidding documents and/or under the Agreement, or otherwise, under the following conditions:

- (a) If a bidder submits a non-responsive bid as defined in 3.1.6;*
- (b) If a bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Section 4 of this RPF;*
- (c) If a bidder withdraws its bids during the period of bid validity as specified in this RFP and as extended by mutual consent of the respective bidder (s) and the authority;*
- (d) In case of selected bidder, if it fails within the specified time limit – (i) to sign and return the duplicate copy of LOA; (ii) To sign the Agreement; or (iii) to furnish the performance security within the period prescribed thereof in the Agreement; or*
- (e) In case the selected bidder, having signed the Agreement, commits any breach thereof prior to furnishing the performance security.”*

6. Section 4.3 (b) defines fraudulent practice:-

- (b) “fraudulent practice” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the bidding process;*

7. It has been submitted on behalf of the petitioner that no sooner it received the show cause notice, a reply was sent to the respondent No.1

vide letter dated 09.07.2015 explaining that at the time of submission of the technical bid, the petitioner company had no idea about such an order of debarment and no communication in that regard was received by the company till 11 AM on 08.07.2015. In support of the above contention, the petitioner also intimated respondent No.1 the RTI reply revealing that the letter of debarment dated 27.04.2015 was received on 08.07.2015 by the office of joint venture of the petitioner, which was forwarded to the petitioner's office on 09.07.2015.

8. It was further pointed out by the learned senior counsel appearing for the petitioner that shortly after receiving such letter of debarment, High Court, Guwahati was moved for setting aside such order of debarment and an order was passed by the Guwahati High Court directing the petitioner and its joint venture partner to represent before the concerned department till 25.07.2015. The High Court further directed that the order of debarment be not given effect to till the representation was disposed of. This order of the High Court of Guwahati also was communicated to the respondent with a request to consider the case of the petitioner as an eligible bidder.

9. Despite this, the petitioner submits, the respondent No.1 vide letter dated 28.07.2015 rejected the bid of the petitioner in terms of clauses 2.6.2 and 2.20.5(b) read with clauses 4.1 and 4.3(b) as per terms of the RFP and forfeited and appropriated the bid security as damages payable to it for time, cost and effort of the respondent in processing the bid. Simultaneously the DCB Bank was also requested to encash the bank guarantee submitted by the petitioner and to remit the amount through RTGS in the current account of respondent No.1 at Canara Bank, New Delhi.

10. The aforesaid act of the respondent in rejecting the bid and forfeiting the bid amount towards damages has been challenged on several grounds including arbitrariness and high handedness in dealing with a bidder. However, during the course of arguments, the petitioner limited its prayer only to setting aside the order of forfeiture of the bid amount and direction for refunding the same to it and not the rejection of its bid.

11. What has been stressed upon by the petitioner is that without affording any opportunity to the petitioner of being heard and without

taking into account the fact that the order of debarment in the first instance was not known to the petitioner when the technical bid was submitted and that such order of debarment was under temporary suspension by the order of High Court of Guwahati, the order of forfeiture of the bid amount was absolutely unjustified, arbitrary and unsustainable in the eyes of law. It was also argued that no loss was suffered by the respondent No.1 as the bid of the petitioner was rejected at the threshold and that the petitioner was agreeable for forfeiture of an amount of Rs.30,000/- towards tender document fee and Rs.1295/- towards tender processing fee.

12. Reference was made to **Lanco Infratech Ltd vs. National Highways Authority of India & Anr, 2016 SCC Online Del.828** and **Ashoka Buildcon Limited & Anr vs. National Highways Authority of India & Ors.** [W.P(C) No.76/2015 in which judgment was delivered on 06.03.2017].

13. In Lanco Infratech Ltd (Supra) a Bench of this Court had the occasion to deal with a similar clause in the RFP regarding forfeiture and it was held that the power to forfeit the bid was not compulsorily to be

invoked and a reasonable exercise of that power was warranted. In the aforesaid case, the forfeiture was of 5% of the bid security on the ground of the bid being non responsive. However, the bid of the petitioner, in that case, was held to be responsive and forfeiture was found to have been effected without any quantification of the damage suffered. The Division Bench but did not have the occasion to examine the enforceability of the forfeiture clause especially in view of the provisions of Section 74 of the Indian Contract Act, 1872.

14. In *Ashoka Buildcon Limited & Anr (Supra)* a Division Bench of this Court took note of the fact that Ministry of Road Transport, Government of India by its communication dated 11.09.2015 had directed amendment of the model documents for RFQ and RFP and had deleted the clause of the RFP which provided for forfeiture of the bid security if the bid was non-responsive and held the forfeiture clause to be penal in nature and unsustainable. The Division Bench, in that instance, holding the forfeiture clause to be penal in nature, directed the respondent, NHAI to return the encashed bank guarantee to the petitioner. Another Division Bench of this Court in *Madhucon Capital Projects Ltd vs. National Highways Authority of India & Ors.*, the Court did not permit the

forfeiture of the 5% of the bid security amount on the count of the bid being non-responsive, on the ground of it being penal in nature which could not have been given effect to.

15. The learned counsel appearing for the respondent, on the other hand, submitted that in the aforementioned cases, the forfeiture was on account of the bid of the petitioner, respectively, being not responsive, where the Courts found the bids to be substantially responsive, whereas in the present case, the forfeiture clause has been invoked under Clause 2.20.5(b) read with Sections 4.1 and 4.3(b) of the RFP respectively. It was further submitted that withholding of the information of debarment by the petitioner was an unethical act and fraudulent practice which has clearly been defined to mean any misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts.

16. It was further submitted on behalf of the respondent that Section 74 of the Indian Contract Act, 1872 makes an Indian contract different from the contract under the English common law which makes a distinction between the stipulations provided for payment of liquidated damages and stipulations in the nature of penalty. Under the Indian law, there is no

distinction between any stipulation regarding damages or penalty. Once the bid document defines the circumstances under which bid security amount could be forfeited, there would be no necessity of quantifying the damages. That apart, it was submitted that the forfeiture in the present case was because of the petitioner indulging in a fraudulent practice, which is very different from rejection of a bid and forfeiture on account of the bid being non responsive, leading to damages suffered by the agency floating the tender, in terms of cost of processing and time, which may require quantification.

17. A reference has been made to **Patel Engineering Limited vs. Union of India and Anr**, (2012) 11 SCC 257 which gave freedom to the Governments in terms of enforcing the terms of the contract.

18. In **Fateh Chand vs. Balkishan Dass**, AIR 1963 SC 1405, the Supreme Court examined the provisions of Section 74 of the Indian Contract Act with regard to the measure of damages and stipulation by way of penalty.

“8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:-

“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 is 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.”

The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

9.xxxxx xxxxxx xxxxxx xxxxxx xxxxx

10. *Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of*

the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however, no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the, aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression “the contract contains any other stipulation by way of penalty” comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an

amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.”

(Emphasis Supplied)

19. In the aforesaid case, the damages awarded by the High Court to the plaintiff was set aside in the absence of any evidence regarding any loss suffered by the plaintiff. Thus it is very clear that stipulation by way of penalty in a contract has to be enforced in terms of Section 74 of the Indian Contract Act and the Courts have the jurisdiction to see whether any damages have been suffered or not. Quantification of the damage may not be necessary but such penalty clause cannot be enforced blindly. The other aspect is that the relevant clause in the RFP permitting forfeiture of the pre bid security postulates that the authority has suffered a loss and damage on account of the default or misrepresentation of the bidder during the bid validity period. For this to apply, there must be a valid bid. The bid, in the present case, has been rendered invalid at the threshold for non disclosure of the fact of debarment. The bid, therefore, was shut out without being considered for further processing.

20. We also deem it necessary to highlight a few other aspects. Clause 2.20.4 which precedes 2.20.5 clearly states that the authority shall be

entitled to forfeit and appropriate the bid security as damages inter-alia in any of the events specified in clause 2.20.5. The bidder, by submitting its bid pursuant to the RFP, shall be deemed to have acknowledged and confirmed that the authority will suffer loss and damage on account of withdrawal of its bid or for any other default by the bidder during the period of bid validity as specified in the RFP. This makes it clear that the element of damage is inherent in the right to forfeiture.

21. We are at a loss to fathom that rejection of the bid of the petitioner has caused the respondent a loss to the tune of Rs.2.41 crore. For the aforesaid reason, we hold the forfeiture of the pre bid security of the petitioner in its entirety to be unjust, unwarranted and aimed at unjust enrichment of respondent No.1.

22. The other aspect which requires to be highlighted is the definition of fraudulent practice as provided under Section 4.3(b):-

“Fraudulent practice” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the bidding process”

23. Any misrepresentation or suppression of a fact or disclosure of incomplete fact, would, in isolation be not considered a fraudulent practice but only when it is resorted to in order to influence the bidding

process. The bid of the petitioner was forfeited in the first instance, at the threshold on the receipt of an information that an authority under the PWD in Assam had debarred the petitioner for two years. There was no occasion for the petitioner, in the event of the technical bid of the petitioner not being accepted, to have influenced the bidding process. In that view of the matter, even if the fact of debarment not having been communicated to the respondent No.1 be taken as an intentional non-disclosure, it would, per se, not be a fraudulent practice as defined under the RPF. In the present case, the situation is absolutely different. The petitioner did not even know of the order of debarment when the technical bid was submitted, which contention has prima facie been proved in view of the RTI reply to the query sought by the petitioner.

24. Forfeiture of the entire bid security amount is penal in nature and absolutely unreasonable. No loss has been suffered by the respondent with respect to time and the processing of the bid.

25. The petitioner has categorically submitted that it is ready for parting with an amount of Rs.30,000/- as against tender document fee and Rs.1295/- as against the tender processing fee. We are of the opinion that the forfeiture of the entire bid security amount by the respondent is not

sustainable in the eyes of law in terms of Section 74 of the Indian Contract Act which permits the party complaining the breach to recover reasonable compensation.

26. We, therefore, set aside the order dated 28th July, 2015 to the extent the respondent No.1 has invoked the forfeiture clause and has forfeited the entire pre bid security. The NHAI is directed to refund the pre bid security amount to the petitioner within a period of four weeks.

27. The writ petition is allowed to the extent indicated above.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

MARCH 10, 2017

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