IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No. 6517 of 2016 (O/M)
Date of decision : 30.5.2018

KIOCL Ltd. .... Petitioner

Versus

Haryana State Industrial and Infrastructure Development Corporation Ltd. (HSIIDC) through its Managing Director and others
.... Respondents

CORAM : HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Ms. Anju Arora and Ms. Amrita Singh, Advocates,
for petitioner.

Mr. Lokesh Sinhal, Advocate,
for respondents No. 1 and 2.

Mr. B.S. Bardhan, Advocate,
for respondent No. 3.

1. Whether the Reporters of local newspaper may be allowed to see the judgment ?
2. To be referred to the Reporter or not.
3. Whether the judgment should be reported in the digest ?

-.- -.-

KULDIP SINGH J.

Impugned in present revision is order dated 23.9.2016 (Annexure-P-15), passed by learned Additional District Judge, Panchkula, affirming order dated 24.6.2016, passed by learned Additional Civil Judge (Senior Division), Panchkula, vide which an application filed by plaintiff-present petition under Order XXXIX Rules 1 and 2 read with Section 151 CPC, 1908, was dismissed.

Plaintiff-petitioner KIOCL Ltd. is a Government of India Enterprise, incorporated under Companies Act, 1956, and is engaged in mining activities at Kudremukh. Defendant HSIIDC is a Haryana Government Enterprise. Defendant No. 1 invited competitive bidding for development and operation of Khanak Stone Mining Project, District Bhiwani, Haryana. Last date for submitting of bid was 16.12.2015. Plaintiff petitioner KIOCL Ltd. and Rungta Projects Ltd. formed a consortium for purpose of bid. Plaintiff was fulfilling the financial eligibility criteria and Rungta Projects Limited was fulfilling technical eligibility criteria. Plaintiff was the lead member in said consortium. Consortium of KIOCL Rungta Projects Limited submitted bid on 14.12.2015 to defendants No. 1 and 2. Technical bids were opened on 18.12.2015. While submitting bid, plaintiff had submitted a bank guarantee to tune of Rs. 15 crores, issued on 7.11.2015 by IDBI Bank Ltd., Bangalore (defendant No. 3) in favour of HSIIDC towards EMD. Bid was valid for 180 days i.e. upto 15.6.2016. After opening of price bid, defendant No. 2 did not inform plaintiff about status of the bid. After five months, defendants No. 1 and 2 wrote a letter dated 16.5.2016 to plaintiff, stating that they are unable to award contract/allocate work in view of decision rendered by Punjab and Haryana High Court in CWP No. 26240 of 2015, in which interim orders were issued on 17.12.2015, allowing the bid to be evaluated. However, work order shall not be given till further orders. Next date of hearing was 19.1.2016. Defendants No. 1 and 2 further requested that as validity of bid expires on 15.6.2016, therefore, validity of bid may be extended for three months i.e. upto 16.9.2016. Plaintiff, vide letter dated 13.6.2016, replied that since uncertainty hovering over placement of letter of intent/letter of award, plaintiff conveyed their unacceptance to extend bid validity for a period of three months i.e. upto 16.9.2016, as requested by defendant No. 2. On 13.6.2016, plaintiff came to know that through letter of award dated 13.6.2016, that on 18.1.2016 when bid was opened, they were shortlisted as

L-1 as successful bidder and selected bidder with reference to bidding process. Vide letter dated 13.6.2016, defendant No. 2 imposed a condition that letter of award is subject to final decision of this Court in CWP No. 26240 of 2015, titled as *Jaswinder Singh Bal Versus State of Haryana*. Defendants No. 1 and 2 concealed material fact from plaintiff regarding said civil writ petition and interim orders were revealed for the first time, vide letter dated 16.5.2016. Condition in letter of award that it is subject to final decision of CWP No. 26240 of 2015 is not acceptable and it amounts to modification/deviation of terms of agreement. Bid validity period expired on 15.6.2016 and plaintiff did not extend same for next three months. Defendant No. 2, vide letter dated 15.6.2016, informed plaintiff that they cannot withdraw from contract as per Clause 7.16.2 as specified in Clause 7.3 and withdrawal of bid may result in bidders forfeiture of its EMD in pursuance to Clause 7.8 h (i). Plaintiff relied, vide letter dated 17.6.2016, that bid has not been withdrawn and that conditional letter of award is not acceptable. Plaintiff requested defendant No. 2 to return bank guarantee, which is not being done. Therefore, prayer is made for restraining from encashing bank guarantee and further directing defendant No. 3 Bank not to issue bank guarantee to defendants No. 1 and 2.

Stand of defendants No. 1 and 2 is that under Clause 7.16.2, no bid shall be withdrawn in the interval between bid submission deadline and expiration of bid validity period specified in Clause 7.3. Withdrawal of a bid may result in bidders forfeiture of its EMD. Plaintiff was issued letter of award dated 13.6.2016 in prescribed time. Instead of complying with terms and conditions of letter of award, plaintiff backed out. Therefore, EMD of Rs. 15 crores in the shape of bank guarantee stands forfeited.

Submission of bid by plaintiff and orders passed in CWP No. 26240 of 2015 were not disputed. It was also not disputed that plaintiff did not extend validity. Defendants claim their right to forfeit EMD of Rs. 15 crores in the shape of bank guarantee. Alongwith said suit, an application under Order XXXIX Rules 1 and 2 CPC, 1908, was filed which was dismissed by trial Court and order was upheld in appeal.

I have heard learned counsels for parties and have also carefully gone through file.

Undisputed facts, which emerged from pleadings are that bid submitted by plaintiff was valid till 15.6.2016 , meaning thereby that till said date, defendants No. 1 and 2 could accept bid and issue letter of award. Admittedly, defendants No. 1 and 2 made a request to plaintiff to extend validity of bid in view of filing of civil writ petition before this Court. However, plaintiff did not agree to same. Said issue is not of much importance in view of fact that on 13.6.2016 i.e. before expiry of period of term of bid on 15.6.2016, defendants No. 1 and 2 issued letter of award with condition that letter of award is subject to final decision of CWP No. 26240 of 2015, titled as *Jaswinder Singh Bal Versus State of Haryana*. Said condition is not acceptable to plaintiff, who claimed that it amounts to alter of terms and conditions and for this reason, they are no more interested in said bid.

The learned counsel for respondents No. 1 and 2 has pointed out that, vide order dated 31.5.2016, a Division Bench of this Court had allowed allotment of work to plaintiff subject to final decision of civil writ petition. Said order dated 31.5.2016 is reproduced as under :-

' On behalf of the State it is submitted that only the work in Chapter 8 as referred to in the aforesaid affidavit dated 22.1.2016 has been allotted to M/s KIOCL-Rungta Projects Ltd. and that was allotted after opening the bids and finding the bid of M/s KIOCL-Rungta Projects Ltd. to be the lowest. It is submitted that stay would affect the work of the project for the mining of minerals.

The stay granted by this Court on 17.12.2015 to the effect that the work order shall not be given till further orders is modified and the work order may be allotted to the lowest bidder i.e. M/s KIOCL-Rungta Projects Ltd. which shall, however, be subject to final decision of writ petition.

List for hearing on 2.8.2016.'

Letter of award dated 13.6.2016 shows that plaintiff was required to submit letter of acceptance within seven days of letter of award and at Serial No. 8, following condition was imposed :-

'8. This Letter of Award is subject to the final decision of the Hon'ble Punjab and Haryana High Court in the case CWP No. 26240/2015- Jaswinder Singh Bal V/s State of Haryana.'

Now, plea of plaintiff is that since that award was conditional subject to decision of civil writ petition, filed before this Court, therefore, they did not accept said award and did not issue letter of acceptance. Consequently, they wrote letter dated 14.6.2016 (Annexure-P-8), stating that conditional letter of award is not acceptable to them. However, defendants No. 1 and 2 maintained, vide letter dated 15.6.2016 (Annexure-P-9), that they cannot withdraw from said award and their guarantee is liable to be forfeited.

It may be necessary to go through terms and conditions of bid. Under Clause 7.3 of bid, validity of bid was for 180 days, but it could be extended by period of 30 days. Under Clause 7.8, EMD in form of bank guarantee was to be issued for at least six months beyond validity of bid from last date of submission of bid. Under Clause 7.8 (h), defendants No. 1 and 2 reserve their right to forfeit EMD of bidder without any notice of proof for damages to bidder on the occurrence of any one or more of following events/circumstances :-

'i. If the bidder withdraws its offer during the validity period after submission of Price offer; or

ii. If any clarification sought by HSIIDC is not replied/answered by the bidder within 10 days from the date of issue of such letter; or

iii. If any of the claims/statements/declarations of the bidder is found to be inconsistent, incorrect or in case of any material misrepresentation of facts; or

iv. In case the bidder submits wrong, forged, bogus/or false certificates and if this comes to the notice of HSIIDC at any time during the tender process then the EMD of such bidder shall be forfeited.

v. If the Successful Bidder fails to sign the Mining Services Agreement and submit the Performance Guarantee as well as security deposit in accordance with Clause 7.9 and Clause 7.10, within 15 (Fifteen) days from date of issue of Letter of Intent, then EMD of the Successful Bidder shall be forfeited.'

One of such circumstances is 'if bidder withdraws offer during validity of bid period after submitting price offer'.

The learned counsel for respondents has relied upon authorities of Supreme Court of India in *U.P. State Sugar Corporation Versus Sumac International Ltd.*, (1997) 1 Supreme Court Cases, 568, *U.P. Cooperative Federation Ltd. Versus Singh Constultants and Engineers (P) Ltd.*, (1988) 1 Supreme Court Cases, 174, and *M/s Adani Agri Fresh Ltd. Versus Mahaboob Sharif and others*, 2016 AIR (SC) 92 and has pressed that respondents No. 1 and 2 can encash bank guarantee.

I am of the view that in normal circumstances, no such injunction can be issued. However, from admitted act of respondents No. 1 and 2 themselves, it has come out that they have made conditional letter of award hovering uncertainty over award of work. Such a condition was rejected by plaintiff. Therefore, present cases stand at different footings.

Now, moot question involved is that as to whether plaintiff could withdraw from offer on the ground that letter of award is conditional one or as to whether defendants after making a letter of award subject to order to be passed in CWP No. 26240 of 2015, could forfeit bank guarantee ?

I am of the view that if letter of award is unconditional and plaintiff withdraws from said bid, his bank guarantee is undoubtedly liable to be forfeited. However, in present case while issuing letter of award dated 13.6.2016, a condition was imposed that award is subject to final decision of Punjab and Haryana High Court in CWP No. 26240 of 2015, titled as *Jaswinder Singh Bal Versus State of Haryana.* Present plaintiff was not party to said litigation. Therefore, as a result of said condition, a shadow was casted on letter of award as to whether plaintiff will be able to execute said work awarded vide letter of award. In case, conditional offer is made, prima facie, plaintiff could either accept the same or reject the same. I am of the view that huge amount of Rs. 15 crores is offered as EMD in the form of bank guarantee and if bank guarantee is encashed by defendants, it will cause irreparable loss to plaintiff. Since huge amount is involved, said loss can also be called irreparable loss. Plaintiff has got a prima facie case to be contested before trial Court. Balance of convenience is also in favour of plaintiff. As such, impugned order dated 23.9.2016 (Annexure-P-15), passed by learned Additional District Judge, Panchkula, and impugned order dated 24.6.2016, passed by learned Additional Civil Judge (Senior Division), Panchkula, are set aside. Application filed by plaintiff-present petitioner under Order XXXIX Rules 1 and 2 read with Section 151 CPC, 1908, is allowed and defendants No. 1 and 2 are restrained from encashing bank guarantee submitted by plaintiff in the shape of Rs. 15 crores as EMD and defendant No. 3 bank is directed not to release said bank guarantee in favour of defendants No. 1 and 2 till disposal of suit. Consequently, revision is allowed. However, it is directed that observations made above are strictly for the purpose of disposal of application under Order XXXIX Rules 1 and 2 read with Section 151 CPC, 1908, and shall not be construed as comments on the merits of the case. Since main case has been allowed, pending application, if any, also stands disposed of.

(KULDIP SINGH)
JUDGE

30.5.2018
sjks

Whether speaking / reasoned : Yes / No
Whether Reportable : Yes / No