IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 24.09.2019
CORAM
THE HONOURABLE Mr.JUSTICE V.BHARATHIDASAN
W.P. 18691 of 2008
and
M.P. 2 of 2008

M/s. Subhash Projects & Marketing Limited,
represented by its Manager – Legal,
P.Periyasamy,
Regional Office,
Subhash House, 8/2, Ulsoor Road,
Bangalore-560 042. ... Petitioner

Vs

1. The State of Tamil Nadu,
represented by its Secretary to Government,
Department of Municipal Administration, Fort St. George,
Chennai-600 009.

2. The Coimbatore City Municipal Corporation,
represented by its Commissioner,
Big Bazaar Street, Town Hall,
Coimbatore-641 001.

3. Industrial Development Bank of India,
IDBI House, No.58, First Floor,
Mission Road,
Bangalore-560 027. ... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the proceedings of the 2nd respondent in R.O.C.No.9190/06/MD'man (JN) dated 11.04.2008 and the order passed by the 1st respondent in G.O.Ms. No.140, Municipal Administration and Water Supply dated 29.07.2008 and quash the said proceedings of the 2nd and 1st respondents dated 11.04.2008 and 29.07.2008 respectively and consequently forbear the 2nd respondent from forfeiting the bid security furnished by the petitioner by invoking the Bank Guarantee as proposed by the letter of the 2nd respondent dated 08.05.2008 followed by their letter bearing R.O.C.No.09190/2002/JN2, dated 30.07.2008.

For Petitioner : Mr.A.Jenasenan

For Respondents : Mr.K.S.Suresh, Govt. Advocate for R1

Mr.R.Sivakumar for R2

Mr. S.R.Sundar for R3

O R D E R

This Writ Petition has been filed challenging the letter of acceptance issued by the 2nd respondent Coimbatore City Municipal Corporation accepting the financial bid offered by the petitioner for providing clear water at Coimbatore City, and the consequential order passed by the 1st respondent/appellate authority dismissing the appeal filed by the petitioner.

2. The brief facts leading to the filing of this Writ Petition is as follows :-

The 2nd respondent Coimbatore City Municipal Corporation called for tenders for providing clear water to R.K.Puram at Coimbatore. The above work has been described as Providing Clear water gravity main (of size 1000 mm to 1500 mm PSC/MS Pipes) from Clear water tunnel exit upto the proposed MSR at Ramakrishnapuram including delivery arrangements. The petitioner company engaged in execution of various turnkey projects in water, power, environment and other infrastructure segments. The tenders were called for on 02.09.2007, and the last date for receiving the bid was fixed as 26.09.2007. The tenderers were called to submit two bids viz., financial and technical bids in two separate covers. Totally seven bids were received, and the technical bids were evaluated by the Scrutinising Committee, and out of seven bids, six bidders including the petitioner's bid was qualified. Thereafter, the financial bids were also opened on 06.02.2008, and after evaluation, the financial bid offered by the petitioner was the lowest, and the same was accepted by the competent authority. Thereafter, the letter of acceptance was issued to the petitioner on 11.04.2008, thereby accepting the financial bid without any price escalation charges, and also requesting the petitioner to furnish security deposit of Rs.2,49,61,422/- within 21 days from the date of receipt of letter of acceptance and sign the contract, failing which, action will be taken as per para 33.3 of the tender condition. Being aggrieved with the condition that, no price escalation is permitted in the tender, the petitioner has filed an appeal before the 1st respondent under Sec.11 of the Tamil Nadu Transparency in Tender Act, 1998 (hereinafter called as

'Act'), and the 1st respondent dismissed the appeal by an order dated 29.07.2008. Challenging the same, the present Writ Petition has been filed on the ground that, as period of execution of contract is likely to exceed 18 months, therefore, the price escalation clause as contemplated under Rule 14(8) of Tamil Nadu Transparency in Tender Rules, 2000 (hereinafter called as "Rules"), is required to be included in the tender document, without including the price escalation clause, the 2nd respondent has issued a letter of acceptance in total violation of mandatory requirements under the Rules.

3. The respondents 1 and 2 have filed a counter affidavit stating that the 2nd respondent corporation has issued a tender notice for execution of civil contract, and the petitioner was the successful bidder. On the acceptance of the petitioner's offer, the contract between the parties has validly concluded, thereafter, the letter of acceptance dated 11.04.2008 was also issued to the petitioner. After receiving the letter of acceptance in breach of contract, the petitioner did not come forward to sign the agreement. Therefore, as per the tender conditions, the Earnest Money Deposit was forfeited.

4. The 2nd respondent is the competent authority to decide the period of contract, had validly fixed the contract period as 18 months, and the petitioner has to execute the work within 18 months. The price variation as contemplated under Rule 14(8) of the Rules, is not applicable to the present tender, and any request for price escalation clause is not acceptable, which is against the tender condition as well as the relevant provisions of the Act and Rules. The petitioner is not entitled to make any unilateral alternation in the tender conditions or incorporate any note in the tender document by way of annexure. The price adjustment clause was not included in the tender documents, because the period of execution is only 18 months. The petitioner knowingfully well about the tender conditions has made the offer, and the same was accepted by the 2nd respondent. Now, it is not open to him to claim that the price escalation clause should be included. As per clause 32 of the tender documents, the petitioner ought to furnish the security deposit and sign the agreement, which was kept ready by the 2nd respondent Corporation. Further, under clause 33 of the tender conditions, the failure of the successful bidder to sign the agreement, and make deposit shall be constituted as breach of contract, and make himself liable for forfeiture of the Earnest Money deposit. Clause 33.1 of the tender clause provides that within 21 days from the date of receipt of letter of acceptance, the successful bidder shall execute appropriate agreement, but the petitioner has failed to comply with the above tender conditions. Hence, the Earnest Money Deposit is liable to be forfeited.

5. Mr.A.Jenasenan, learned counsel appearing for the petitioner would contend that even before finalising the tender, the petitioner has made a request to the respondents to provide a clause for price variation as there was a huge hike in steel and cement price, but without considering his request, the letter of acceptance has been issued to the petitioner without any price escalation clause. Further, considering the nature of work, the execution period will likely to exceed more than 18 months, and under Rule 14(8) of the Rules, the respondents should necessarily provide price escalation clause in the tender condition.

6. That apart, pending finalisation of the tender, the Government has issued an order in G.O. Ms. No. 60, Public Works Department dated 14.03.2008, thereby reducing the contract period from 18 months to 12 months for providing price adjustment. Since the above G.O. has been issued on 14.03.2008 before the acceptance of the petitioner's tender, the respondents ought to have considered the above said Government Order, and ought to have included the price variation clause.

7. Per contra, the learned counsel appearing for the respondents would contend that it is a tender for providing clear water to Coimbatore City, and the execution period was fixed at 18 months. Under Rule 14(8) of the Rules, if the execution period is less than 18 months, there is no necessity to provide price escalation clause. The petitioner is fully aware of the above said fact, submitted his tender, which was also accepted by the respondents. Now, after receipt of letter of acceptance, it is not open to the petitioner to challenge the same on the ground that there is no price escalation clause. As per the conditions stipulated in the tender document, if the petitioner fails to pay the security deposit and execute the agreement, it will be treated as a breach of contract, and the Earnest Money deposit is liable to be forfeited. The learned counsel has further submitted that it is only a letter of acceptance issued by the 2nd respondent, against which, no appeal lies before the 1st respondent under Sec.11 of the Act and the appeal itself is not maintainable under law.

8. I have considered the rival submissions made by the learned counsel appearing for the petitioner as well as learned counsel appearing for the respondents and perused the records carefully.

9. The tender was called for by the 2nd respondent for providing drinking water to Coimbatore City, and the contract period was fixed as 18 months. Under Rule 14(8) of the Rules, if contract period exceeds 18 months, the price escalation clause should be included in the tender document. The

petitioner fully aware of the above tender condition and submitted his tender. The petitioner was the lowest tender, and his bid was accepted by the 2nd respondent corporation, and a letter of acceptance was also issued to the petitioner on 11.04.2008. As per clause 33.1 of the tender document, within 21 days from the date of letter of acceptance, the successful bidder shall pay the security deposit, and as per clause 33.2 of the tender document, the failure on the part of the successful bidder in complying with the requirements of sub-clause 33.1 shall constitute a breach of contract, a cause for annulment of the award, forfeiture of the Earnest Money Deposit and empower the tender inviting authority to take any action under the contract.

10. It is a contention of the petitioner that even though the contract period is fixed as 18 months, considering the nature of work, it is likely to exceed 18 months, and as per Rule 14(8) of the Rules, a price escalation clause should be included in the tender document, and the petitioner is entitled to claim price variation. The next contention is that during the pendency of finalisation of the tender, the Government has issued a G.O., thereby reducing the contract period from 18 months to 12 months under Rule 14(8) of the Rules. Hence, the petitioner is entitled for the price variation.

11. A perusal of the tender document, it is clear that the contract period is fixed as 18 months, and under Rule 14 (8) of the Rules, the petitioner is not entitled for price escalation. The petitioner well aware of the fact that there is no price escalation clause, has made an offer and submitted his tender, it was also accepted by the tender inviting authority, and the letter of acceptance was also issued. Now, it is not open to the petitioner to make a complaint that the exclusion of price escalation is not valid. The 1st respondent appellate authority after considering all the relevant conditions in the tender document has rightly come to the conclusion that, the exclusion of price escalation clause is valid and dismissed the appeal. I find no illegality or infirmity in the order passed by the 1st respondent.

12. So far as the applicability of G.O. Ms. No.63, dated 13.03.2008 is concerned, the 1st respondent appellate authority has stated that the G.O. is only prospective, and it is applicable to those tenders invited after the date of issuance of Government Order. Since this tender was invited much earlier, the petitioner was not entitled to claim the benefit under the said G.O. At this juncture, the learned counsel appearing for the petitioner would contend that, the G.O. came into force on 14.03.2008 before accepting the petitioner's offer, and the issuance of letter of acceptance,

the 1st respondent has failed to consider the same. In the said circumstances, the petitioner may be given an opportunity to make a fresh representation before the authority seeking for the benefit under the above said G.O. Considering the above said facts and circumstances, it is open to the petitioner to submit a fresh representation before the authority claiming benefit under G.O.Ms.No.63, P.W.D., dated 14.03.2008, and if any such representation is made, it is for the authority to consider the same and pass suitable orders on merits.

13. With the above direction, the Writ Petition stands dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government,
State of Tamil Nadu,
Department of Municipal
Administration,
Fort St. George,
Chennai-600 009.

2. The Commissioner,
Coimbatore City Municipal
Corporation,
Big Bazaar Street, Town Hall,
Coimbatore-641 001.

3. Industrial Development Bank of India,
IDBI House, No.58, First Floor,
Mission Road,
Bangalore-560 027.

+1 cc to Government Pleader Sr.No. 82314
+1cc to Mr.R.Sivakumar , Advocate SR.No. 82126
+1cc to Mr.A.Jenasenan , Advocate SR.No. 82044
+1cc to Mr.K.Moorthy , Advocate SR.No. 81834

W.P. 18691 of 2008
and
M.P. 2 of 2008

A.SK(17/12/2019)