

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 04.12.2019
CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.No.25840 of 2004
&
W.P.M.P.No.31402 of 2004

V.K.Bhat

.. Petitioner

Vs.

Union of India,
rep. by the Executive Engineer (Civil)
Prasar Bharati,
Civil Construction Wing,
All India Radio,
14, Taluk Office Road,
Saidapet,
Chennai - 600 015.

.. Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India seeking issuance of certiorarified mandamus to call for the entire records leading to the issue of the order dated 20.08.2004 bearing No.5(17)E/2004-05/1181 and letter dated 20.08.2004 bearing No.3(6)AVD/AC/2004-05/1180 on the file of the respondent and quash the same and direct the respondent to enhance the rate of tender commensurate to the cost escalation of material and labour and execute the contract and issue a fresh work permit or in the alternative to refund forthwith the Earnest Money Deposit and Performance Guarantee Amount with 18% interest p.a. to the Petitioner.

For Petitioner : Mr.K.Sridhar

For Respondent : Mr.J.Madanagopal Rao,
Senior Central Government Standing Counsel

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ORDER

Heard Mr.K.Sridhar, learned counsel for the petitioner and Mr.J.Madanagopal Rao, learned Senior Central Government Standing Counsel for the respondent.

2. This writ petition has been filed challenging the order dated 20.08.2004 and the letter dated 20.08.2004 of the respondent forfeiting the earnest money deposit amount as well

as the performance guarantee executed by the petitioner in favour of the respondent for getting a contract from the respondent for construction of security fencing around the Transmitter site at HPT, AIR Avadi Chennai.

3. According to the petitioner, he is a class-I Civil Contractor. According to him, the respondent had called for tender on 06.11.2013 for the construction of security fencing around the Transmitter site at HPT, AIR Avadi, Chennai. According to him, he submitted his tender for a sum of Rs.1,51,59,196/- on 10.11.2003 which was also the due date for its opening along with an earnest money deposit of Rs.3,50,000/-. According to the petitioner, one of the terms of the tender was that it has to be accepted within 60 days from the date of opening of the tender. In the affidavit, the petitioner has stated that the respondent by letter dated 01.01.2004 accepted his tender subject to the condition that he should execute an irrevocable performance guarantee for a sum of Rs.7,57,960/- within 15 days of the receipt of the said letter. According to the petitioner, as per the said letter dated 01.01.2004, the petitioner had executed the performance guarantee with Union Bank of India, Asif Nagar Branch, Hyderabad on 12.01.2004.

4. It is the case of the petitioner that the tender has to be accepted within 60 days from the date of opening of the tender failing which the offer lapses. According to the petitioner, the respondent by letter dated 19.01.2004 has informed the petitioner that his tender has been accepted and requested him to complete the formal agreement. It is the case of the petitioner that the site was not handed over to him. It is also his case that since the cost of the steel had escalated by nearly 65%, he requested the respondent to enhance the rate. But according to the petitioner, the respondent had issued a show cause notice on 16.04.2004 stating that due to the delay in starting the work, the work under the tender could not be completed within the stipulated day and called upon the petitioner to show cause as to why action should not be initiated against him as contemplated under Clause 3 of the tender conditions as well as the relevant sub clauses found therein.

5. According to the petitioner, without a formal contract entered into between the parties, the respondent has forfeited the earnest money deposit as well as the performance guarantee executed by the petitioner, without acceding to his request for escalation of price, in view of the escalation in cost of steel. It is the case of the petitioner that the impugned order dated 20.08.2004 forfeiting the earnest money deposit as well as the performance guarantee amount is arbitrary, illegal and violative

of the fundamental rights guaranteed under Article 14, 19(1)(g) and 21 of the Constitution of India. It is his case that in the absence of any contract between the parties, the respondent have no power to forfeit the earnest money deposit and the performance guarantee.

6. A counter affidavit has also been filed by the respondent denying the allegations of the petitioner. According to them, a contract was awarded to the petitioner on 01.01.2004 itself, as seen from the letter dated 01.01.2004 issued by the Executive Engineer (Civil) to the petitioner. It is the case of the respondent that after the acceptance of the bid, the petitioner has also executed the performance guarantee for a sum of Rs.7,57,960/- on 12.01.2004. According to them, having accepted the tender condition and having agreed to perform the work as per the tender conditions, within a period of 18 months from the date of acceptance, the respondent is entitled to forfeit the earnest money deposit as well as the performance guarantee, since the petitioner has not performed the contract awarded to him and he has not come forward to enter into a formal contract with the respondent.

7. Further it is the case of the respondent that as per the tender conditions, the petitioner is not entitled for any escalation in the price as requested by him. It is their case that the question of enhancement of rates quoted by the petitioner even before commencing the work is beyond the scope of terms and conditions of the tender. According to them, they have rightly forfeited the earnest money deposit as well as the performance guarantee in view of the breach of terms and conditions of the tender committed by the petitioner.

8. Admittedly in the case on hand, the respondent has sent a letter dated 01.01.2004 to the petitioner which is reproduced hereunder:

" Sir,

Your tender for the above mentioned work has been accepted by the Chief Engineer (C)-II, CCW, AIR, New Delhi subject to the following conditions:

1) You are directed to produce an irrevocable performance guarantee for an amount of Rs.7,57,960/- (Rupees seven lakhs fifty seven thousand nine hundred and sixty only) being 5% of the tendered amount of Rs.1,51,59,196/- in any of the prescribed form (Government security or Fixed Deposit receipt or Guarantee Bond of any scheduled bank or State Bank of India)

2) The guarantee will be valid upto 60 days after the stipulated date of completion (upto 30.9.2005)

3) The above guarantee shall be executed within 15 days of the receipt of this letter without fail.

4) If the above guarantee is not produced within the prescribed period of 15 days, E.M.D. of the above work will be forfeited.

Early action is requested.

Yours faithfully,

U.RAJU
EXECUTIVE ENGINEER (CIVIL)

NSR/
"

9. As seen from the aforesaid letter, the respondent has informed the petitioner that the tender has been accepted subject to the fulfilment of certain conditions. The receipt of the letter dated 01.01.2004 has not been disputed by the petitioner. The only contention raised by the petitioner is that the respondent has not accepted the tender on 01.01.2004 as the said letter has not been signed by the Chief Executive Engineer (Civil) on behalf of the President of India as per Article 299 of the Constitution of India. But admittedly, the petitioner has acted upon the letter dated 01.01.2004 and has executed the irrevocable Performance Guarantee as requested by the respondent for a sum of Rs.7,57,960/- on 12.01.2004. It is the case of the petitioner that only on 19.01.2004, the respondent accepted the tender of the petitioner as only by letter dated 19.01.2004 addressed to him, the Chief Executive Engineer (Civil) has signed the letter of acceptance on behalf of the President of India. Therefore, according to the petitioner, 60 days validity period of the tender expires on 09.01.2004 itself and therefore, the letter of acceptance given by the respondent on 19.01.2004 is beyond the said period of 60 days. Therefore, according to him, the said letter dated 19.01.2004 issued by the respondent is not binding on the petitioner. According to the petitioner, when there is no formal contract between the parties, the respondent is not empowered to forfeit the Earnest money Deposit as well as the Performance Guarantee.

10. The contention of the learned counsel for the petitioner cannot be accepted, since the petitioner has accepted the letter dated 01.01.2004 of the respondent and acted upon the same by executing an irrevocable performance guarantee for a sum of Rs.7,57,960/- in favour of the respondent on 12.01.2004. This will clearly indicate that the respondent has accepted the bid of the petitioner on 01.01.2004 itself.

11. Any prudent bidder who desires to withdraw from the bid would not have complied with the conditions imposed under the acceptance letter dated 01.01.2004. Admittedly, the petitioner is the only bidder who was directed by the respondent to furnish an irrevocable performance guarantee for a sum of Rs.7,57,960/- on 01.01.2004. This being the case, it can be conclusively established that the petitioner has accepted the offer of the respondent who has awarded the contract to the petitioner. The petitioner who has accepted the offer of the respondent and has also complied with the conditions imposed for commencement of the project, cannot now wriggle out of the tender conditions.

12. In the case on hand, the tender was submitted by the petitioner on 10.11.2003 and the acceptance letter was issued by the respondent on 01.01.2004 within the 60 days validity period for the bid.

13. Even the letter dated 19.01.2004 issued by the respondent which the petitioner claims to be the actual acceptance letter of the respondent has been signed by the same Executive Engineer (Civil) by name U.Raju who signed the letter dated 01.01.2004. The petitioner is fully aware as seen from the records that the Executive Engineer (Civil) who signed the letter of acceptance dated 01.01.2004 is having the authority to issue the letter of acceptance. Infact, the letter of acceptance dated 01.01.2004 issued by the respondent has been duly acknowledged by the petitioner on 03.01.2004.

14. The petitioner has wriggled out of the contract on the ground of escalation of prices. There is no communication whatsoever sent by the petitioner within 60 days validity period i.e., between 10.11.2003 being the date of submission of the tender and 09.01.2004 which is the expiry date for the validity of the bid. The petitioner has neither withdrawn his bid within 60 days from the acceptance of bid by the respondent on 01.01.2004 nor has informed the respondent within the validity period seeking for escalation of price. As seen from the records available before this Court, the first communication made by the petitioner to the respondent informing about the escalation of price is only on 04.05.2004 i.e., after more than four months from the date of acceptance of the bid by the respondent on 01.01.2004.

15. Even as seen from the letter dated 19.01.2004 of the respondent, the petitioner was called upon to contact the Assistant Engineer (C) - I, CCW, AIR, Chennai -15 and also JE (C), CCW, AIR, Avadi Chennai for further instructions for the execution of the work. Despite the letter dated 19.01.2004, admittedly the petitioner has not approached the authorities indicated in the letter of the respondent dated 19.01.2004. Show

cause notices were also issued on 16.04.2004, 01.06.2004, 09.07.2004 and 21.07.2004 by the respondent calling upon the petitioner as to why action should not be taken against him for breach of contract committed by him. Even in the reply sent by the petitioner to the show cause notice, he has not stated that he is withdrawing from the contract.

16. All along it is the case of the petitioner as seen from the records placed before this Court that only due to escalation in price, he has been unable to commence the work. Only for the first time on 09.08.2004, while seeking release of the earnest money deposit and the performance guarantee, the petitioner has indicated that the tender was accepted by the respondent only on 19.01.2004. This will clearly indicate that only to unlawfully wriggle out of the contract, the petitioner has deliberately indicated that the letter of acceptance as 19.01.2004 instead of 01.01.2004 which is the actual date of acceptance of the bid by the respondent.

17. It is the categorical stand of the respondent that the bid of the petitioner was accepted on 01.01.2004 itself. Whereas the petitioner has taken a stand in this writ petition that the bid was accepted only on 19.01.2004. According to him, since the bid was accepted beyond the validity period of 60 days, he is entitled to withdraw from the bid and he is entitled for refund of the earnest money deposit as well as the performance guarantee.

18. When there are disputed questions of fact, a writ court exercising powers under Article 226 of the Constitution of India cannot adjudicate the same. It is only a civil court which can decide whether the letter of acceptance was issued on 01.01.2004 or on 19.01.2004. For effective adjudication of the dispute as in the case on hand, it requires oral evidence, when the respondent has taken a categorical stand that the letter of acceptance was issued on 01.01.2004 itself which is also supported by the production of the letter dated 01.01.2004. Further the petitioner has also complied with the conditions imposed under the letter of acceptance dated 01.01.2004 by executing a performance guarantee for a sum of Rs.7,57,960/- on 12.01.2004 in favour of the respondent. The defence raised by the petitioner that the letter of acceptance was issued only on 19.01.2004 cannot be adjudicated in a writ proceedings as prima facie it is found that the letter of acceptance of the bid was issued by the respondent on 01.01.2004 itself within the validity period of 60 days. If at all, the petitioner has any remedy, his remedy is only before the Civil Court and not before this court exercising powers under Article 226 of the Constitution of India.

19. Admittedly, the tender conditions permit forfeiture of the earnest money deposit as well as the performance guarantee in case of breach of contract committed by successful bidder. Having committed breach of contract, the respondent has enforced the tender condition by forfeiting the earnest money deposit and the performance guarantee. There is no provision for escalation of price under the tender. As per the contract, the petitioner will have to complete the work within 18 months from the date of commencement of the contract. Even before the expiry of the period of contract, the petitioner has asked for escalation of price which is not permissible as seen from the tender conditions. This will clearly indicate that the petitioner has committed breach of contract.

20. This Court is of the considered view that the respondent has rightly forfeited the earnest money deposit as well as the performance guarantee.

21. For the foregoing reasons, this Court is of the considered view that there is no merit in this writ petition. Accordingly, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

The Union of India,
rep. by the Executive Engineer (Civil)
Prasar Bharati,
Civil Construction Wing,
All India Radio, 14, Taluk Office Road,
Saidapet, Chennai - 600 015.

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W.P.No.25840 of 2004

GP(CO)
CSR:20/01/2020