IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 12.07.2019

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition Nos.1670 and 1671 of 2010
and
M.P.No.1 of 2010 in W.P.No.1671 of 2010

M/s.Hasbi Traders
represented by its Proprietor
Mr.Sheik Dawood
.. Petitioner in both W.Ps.

Versus

1. The Chief Engineer / Distribution
Chennai South Region
Tamil Nadu Electricity Board
802, Anna Salai, Chennai - 600 002.

2. The Superintending Engineer
General Construction Circle I
A-10, Thiru-vi-ka Industrial Estate
Guindy, Chennai -32.
.. Respondents in both W.Ps.

Writ Petitions have been filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the 2nd respondent passed in Lr.No.SE/GCC/CNI/ EAMM/HD/F.TS(s)38/D176/09 dated 13.02.2009 and Letter No.CE/ D/CSR/EE/P/RSO/F.SP.No.TS(s)38/08-09/D36/09 dated 25.04.2009 respectively and quash the same and further directing the respondents to refund the Earnest Money Deposit amount of Rs.1,20,000/- to the petitioner.

For Petitioner in both W.Ps. : M/s.Mahamandra Rajalakshmi For M/s.V.Anand

For Respondents in both W.Ps. : Mr.Abdul Saleem

COMMON ORDER

The petitioner has prayed for issuance of a Writ of Certiorari calling for the records of the 2nd respondent passed in Lr.No.SE/GCC/CNI/EAMM/HD/F.TS(s)38/D176/09 dated 13.02.2009 and Letter No.CE/D/CSR/EE/P/RSO/F.SP.No.TS(s) 38/08-09/D36/09 dated 25.04.2009 respectively and quash the same and further directing the respondents to refund the Earnest Money Deposit amount of Rs.1,20,000/- to the petitioner.

2. The case of the petitioner is that he submitted tender papers for Lot-3 on 12.11.2008 for the purchase of ferrous, non-ferrous scraps and other scrap materials from the respondents. One of the main terms and conditions of the tender is that the bidder has to pay an Earnest Money Deposit of 5% of the value of the articles of the tender and further condition is that the period of validity of the prices is 120 days from the date of opening of the tender and if necessary, the same may be extended for further period of 60 days and accordingly, the petitioner has deposited Rs.1,20,000/- as Earnest Money Deposit amount in favour of the respondents, while submitting the tender. The date of opening of the tender papers was 12.11.2008 and the petitioner did not receive any communication from the respondents indicating about the result and the outcome of the tender.

3. Further case of the petitioner is that the second respondent by letter No.CED/CSR/EEP/RSO/F.TS(s)38/08-09/D.93/08, dated 23.12.2008 asked the petitioner for highest quotation rates for the scrap materials in Lot No.3 and called for discussion on 05.01.2009 and also indicated that failure to attend the meeting would be construed that the petitioner is not agreeable for the price. The prices of iron and steel products fell sharply after the submission of tender papers. Hence, the petitioner by letter dated 03.01.2009, stating the inhospitable market condition, replied that the prices cannot be increased by a fresh quote. Since there was no response from the respondents, the petitioner by letter dated 14.03.2009 informed that the validity period expired on 12.03.2009 and there is no extension of the validity period by the second respondent and hence, he clearly and categorically indicated that the offer submitted by him is withdrawn and sought for refund of Earnest Money Deposit amount of Rs.1,20,000/-. The petitioner also sent another letter dated 01.04.2009, by which, he reminded the letter already sent on 14.03.2009 and sought for refund of EMD amount. But, the second respondent by letter dated 27.04.2009 put up a new case that a sale order has been issued under letter dated 13.02.2009 vide Letter No. SE/GCC/CNI/EAMM/HD/F.TS(s) 38/ D176/09 and hence, Earnest Money Deposited cannot be returned.

4. The petitioner would further contend that since the petitioner did not receive the purchase/sale order cited by the second respondent, he issued a legal notice dated 19.05.2009 through his counsel and by which, he had clearly and categorically indicated that he did not receive the said sale order or purchase order from the second respondent and that the sale order or purchase order has not been communicated within

the validity period ie., before 12.03.2009 and that the validity period has not been extended by the second respondent and that the validity period has been fixed by the respondents in the tender form itself and hence, there cannot be any question of variation or violation of the said terms.

5. It is the further case of the petitioner that suddenly on 26.06.2009, a cover containing purchase order dated 13.02.2009 (ante dated deliberately) was received by him and hence, the petitioner again sent a letter on 23.07.2009 demanding refund of the Earnest Money Deposit and also sent an advanced stamp receipts to the respondents, but without any avail. Since there was no response from the respondents, the petitioner again caused a legal notice dated 30.06.2009 to the respondents reiterating the above facts and requesting for refund of Earnest Money Deposit of Rs.1,20,000/-.

6. It is the contention of the petitioner that the second respondent, vide letter dated 27.07.2009, having admitted that the purchase order/sale order has been communicated to the petitioner properly only after the validity period, the respondents are not entitled to withhold the Earnest Money Deposit amount and compel the petitioner to take the ferrous and non-ferrous scraps and other scrap materials, illegally.

7. It is further averred by the petitioner in his petition that the tender terms and conditions by Clause No.4(e) bars the jurisdiction of the civil courts and the clause bars legal remedy of all sorts to the petitioner and the clause is illegal, draconian and not maintainable at law. Therefore, the petitioner is before this Court with this Writ Petition, raising several grounds, particularly, that the purchase/sale order has been prepared and sent after the validity period, but with ante-date illegally printed; and that the respondents without even responding to the legal notice of the petitioner dated 19.05.2009 cannot illegally issue a purchase/sale order after the validity period; and that the impugned orders suffer from lack of bonafides, as an important document such as copy of the purchase/sale order has been sent in place of the original and prayed that the illegal retaining of the Earnest Money Deposit amount of Rs.1,20,000/- by the respondents should be directed to be refunded.

8. Separate counter affidavits were filed by the second respondent, in both the Writ Petitions, reiterating the same averments and had submitted that the Writ Petition is not maintainable either on law or on facts and that the petitioner being a successful bidder is bound by the tender conditions and hence, estopped from seeking refund of Earnest Money Deposit. Clause-16 of Tender Specification clearly mentioned that the validity for the rate offered should be for 120 days from the

date of opening of tender, if for any unforeseen reasons/ circumstances, the approval of the offer is delayed, the rates quoted should be valid for further period of 60 days i.e., in total, the rates should be valid for 180 days.

9. The second respondent further submitted that the first respondent vide letter dated 23.12.2008 requested the petitioner to attend his Office for negotiation of rates, to which, the petitioner sent a reply vide letter dated 03.01.2009 and stated that he has no interest to quote fresh negotiated rate since the scrap market is very very down and also requested to send the sale order for his old rate (already offered). Therefore, as requested by the petitioner, a sale order for his old rate (already offered) has been issued by the second respondent vide letter dated 13.02.2009 ie., within the validity period of 180 days and requested the petitioner to remit the sale amount of Rs.23,10,900/- in addition to Earnest Money Deposit of Rs.1,20,000/- already paid, within 21 days from the date of receipt of sale confirmation order dated 13.02.2009 and the said sale order was dispatched on 16.02.2009 by post and the copies of sale order were also sent to the first respondent and the Stores Controller/General Construction Circle/Ambattur on 16.02.2009 itself. But the petitioner has not remitted the sale amount as per the sale order of the second respondent till 25.04.2009. But, in the mean time, the petitioner vide his letters dated 14.03.2009 and 01.04.2009 has requested to refund the Earnest Money Deposit amount paid by him for the above tender and informed that the sale order was not received by him. The petitioner had not remitted the balance sale amount as per the sale order/tender conditions. The original sale order was issued well within the validity period as stated earlier. The xerox copy of the sale order dated 13.02.2009 was also sent by Registered Post with Acknowledgment Due on 26.06.2009 for information only to the petitioner against his letter dated 14.03.2009 and 01.04.2009 and the same has been received by the petitioner and acknowledged by him. Therefore, the request of the petitioner vide letter dated 14.03.2009 and 01.04.2009 does not arise and refund of Earnest Money Deposit is not feasible of compliance as per sale order and tender conditions. Due to market fluctuation / poor financial position, the petitioner was not willing to remit above sale price. Hence, as per the sale order condition, the petitioner has to forgo the Earnest Money Deposit paid by him, if not remitted the sale amount within due date. Accordingly, the respondents prayed for dismissal of the above Writ Petition.

10. Heard the learned counsel for the petitioner and the learned counsel for the respondents and perused the materials available on record.

11. The respondent had issued tender specification No.CED/CSR/TS (S) 038/2008-09 for the year 2008-2009 for sale of ferrous and non-ferrous scraps and other scrap materials available at the Central Stores of General Construction Circle, Chennai-58, with specification "as is where is condition". The last date for submission and receipt of the tender is 2.00 p.m on 12.11.2008. The petitioner had submitted the tender papers for Lot-3 on 12.11.2008 and had deposited Earnest Money Deposit of 5% of the offer value as Rs.1,20,000/-. The opening of the tender was on 12.11.2008 and the petitioner did not hear from the respondent about the highest bid, but he received a letter dated 23.12.2008 directing him to appear before the authorities concern regarding the tender application stating that the petitioner has quoted a rate, which was not upto the market condition and that they requested him to appear before the Office on or before 05.01.2009 for negotiation in respect of the value of products as the rate quoted by him was very low. The petitioner immediately sent a letter dated 03.01.2009, which is as follows:-

> "I wish to inform you that the reference with the details as given above. Your letter received with thanks from 03.01.2009. Now, the scrap market is very very down. So, I no interest and I will not quoted for the higher and fresh negotiation rate.
>
> Therefore, I request you to kindly receive the letter and please send the sale order for my old rate or send the refund of EMD as soon as possible."

12. From the above letter, it is clear that the petitioner has informed the authorities regarding his intention to quote only the old rate and if not, the authorities can sent refund of Earnest Money Deposit as soon as possible.

13. It has been alleged by the authorities that on 13.02.2009, they have issued a letter under Registered Post with Acknowledgment Due to the petitioner with letter No. Lr.No.SE/GCC/CNI/EAMM/HD/ F.TS (S)38/D176/09 stating that in the schedule of materials and price, in column "Rates accepted/per Lot" there was no price has been mentioned and it has not been filled. The sale order was issued accepting the bid of the petitioner and the rates quoted by him for sale of Board's Scrap Materials in Lot-3 and directing the petitioner to pay a sum of Rs.23,10,900/- being the sale value to be deposited by the petitioner for the sale of Lot-3. They had also informed that after remitting the amount, the Superintending Engineer, General Construction Circle-I, Chennai, will arrange to issue the release order and if the entire amount is not paid by him as stipulated, the Earnest Money Deposit amount of Rs.1,20,000/- will be forfeited, without further reference from the petitioner

and extension of time will not be entertained.

14. The petitioner had alleged that the said letter dated 13.02.2009 has not been received by him. He once again had sent a letter dated 14.03.2009 reiterating his stand that he has not received the sale order till date and the validity period is only from 12.11.2008 to 12.03.2009 and it expired on that day and he offered to withdraw the tender and sought for refund of Earnest Money Deposit of Rs.1,20,000/- by the respondents herein. Again on 01.04.2009, he sent a letter asking them to refund the Earnest Money Deposit amount immediately. On 27.04.2009, the Chief Engineer, Distribution, Chennai South Region has informed by letter dated 25.04.2009 that the sale order has been issued by the Superintending Engineer/GCC/Chennai, vide letter No. SE/GCC/CNI/EAMM/HD/ F.TS (S)38/ D176/09 dated 13.02.2009 for Lot No.3 and hence, the request for Earnest Money Deposit is not feasible of compliance. The petitioner has sent a legal notice on 19.05.2009 alleging that the validity period is only for 120 days and that the terms and conditions of the tender has expired on 12.03.2009 and he has withdrawn the offer on 14.03.2009 and sought for refund of Earnest Money Deposit with interest and cost of Rs.1,000/- towards the charges of notice. On 30.06.2009, the petitioner has sent another notice stating that the registered letter dated 13.02.2009 was received by the petitioner only on 27.06.2009 and he has denied all the averments and stated that the rate quoted by the petitioner was considered to be very low and the Chief Engineer called him to attend the Office on or before 05.01.2009 for negotiation and the petitioner has addressed a letter dated 03.01.2009 stating that if the Chief Engineer finds that the value offered is very low and if he can not consider the old rate quoted by him, the Chief Engineer can refund the Earnest Money Deposit as soon as possible. The petitioner would further submit that the Chief Engineer has sent a letter stating that he has already issued a sale order on 13.02.2009 itself, hence, question of refund of Earnest Money Deposit does not arise at all.

15. The learned counsel for the petitioner would further submit that the original sale order dated 13.02.2009 was never received by the petitioner and he is entitled to seek refund of Earnest Money Deposit. He would further submit that a copy of the letter dated 13.02.2009 was sent by Registered Post with Acknowledgment Due only on 22.06.2009 confirming the order belatedly beyond the validity period. He also informed that there is absolutely no profit, as the market is at very low and the current market price is only Rs.50/- per kg and hence, his client is unable to take delivery and he again sought for refund of Earnest Money Deposit, by letter dated 23.07.2009.

16. On 27.07.2009, the respondents have rejected the demand of the petitioner stating that the amount of Rs.23,10,900/- was directed to be remitted within 21 days from the date of receipt of letter for Lot No.3, towards the scrap of 30000 Kg ACSR cut bits and the said letter was despatched from the Office on 16.02.2009, but the petitioner has neither remitted the amount within the stipulated time nor turned up to the Office seeking for further time to remit the amount and also the said despatched letter has not been returned unserved to the office. Subsequently, having known that the order had not reached the bidder, a copy of the sale order was once again despatched on 23.06.2009, which was acknowledged by the petitioner on 29.06.2009, in which he has been asked to remit the sale amount immediately.

17. From the typed set of papers filed by the respondents, particularly, the Despatch Register, it could be seen that on 15.02.2009, the sale order has been despatched from the Office by ordinary mode, where Rs.5/- stamp has been affixed and the seal in the Despatch Register also shows that it has been despatched on 16.02.2009. It is further seen that the petitioner denies the said sale order, which has been sent from the Office. The petitioner on 01.04.2009 has informed after the expiry of 120 days period, which gets over on 12.03.2009 seeking for refund. For the letter dated 01.04.2009, after the expiry of 120 days, the respondents have informed that on 13.02.2009 itself, the respondents had sent the sale order informing that refund of Earnest Money Deposit is not feasible as per the sale order and tender condition. The petitioner has not approached the authorities immediately regarding the sale order. Even assuming that the copy of the sale order was sent to the petitioner for information on 23.06.2009 for the letters sent by the petitioner on 14.03.2009 and 01.04.2009, the petitioner has not denied the receipt of the sale order and has not responded, but repeatedly requested the refund of Earnest Money Deposit.

18. As per tender condition, from the day of receipt of sale order, within 21 days, the petitioner has to deposit the remaining amount. As per tender specification, the tenders received will be scrutinized by the authorities concerned and in the said tender, the amount should be quoted both in figures and words separate for each lot and the tenderers should not stipulate their own terms and conditions and their own validity period for the rates quoted by them either in the Department Tender Forms or in separate letter along with tender.

19. According to the tender conditions, the Chief Engineer, Distribution, Chennai South Region, Chennai, reserves right to accept the highest or any tender; to reject any or all the tenders without any reasons therefor whatsoever; to revise or retain the quantities of any or all the items covered by the

specification at any time and release the balance for sale even when the successful bidders are clearing the materials; Under such circumstances, the cost of materials collected in excess will be refunded to the successful tenderers without interest; to reduce the quantities to be sold if necessary during the pendency of the tenderer. As per the terms and conditions of the tender, after opening the tender covers, the highest offer is identified and sale proposals shall be put up for approval of the respective Chief Engineer, and the successful tenderers/bidders are requested to remit the balance amount to the respective circle on receipt of sale confirmation order from Superintending Engineer/ GCC/Chennai.

20. It is also stated in the tender conditions that the successful tenderers should remit the entire amount to the Superintending Engineer, GCC/Chennai-12, within 21 days from the date of receipt of sale order and produce the cash receipt to the Executive Assistant MM to SE/GCC, who will issue the release order and the sale order and release order will be issued to the successful bidder, who has submitted the quotation and no change in name and address of transfer of sale or release order will be entertained. It is also mentioned that if the entire amount is not paid by the successful tenderer within the time stipulated above or the successful tenderer backs out, EMD amount will be forfeited without further reference to him and no plea for non-remittance of the amount in time will be entertained and partial remittance is also not permitted. The terms and conditions of tender also specified that the materials are for sale and delivery Ex.Board's premises under "AS IS WHERE IS CONDITION'. SELECTION OR SEGRAGATION OF MATERIALS will not be permitted and the successful tenderer should make his own arrangement to clear the lots purchased.

21. Regarding validity of the values offered, the tender conditions states as follows:-

a. The rates offered should be valid for 120 days from the date of opening of tender and if for any unforeseen reasons/circumstances of the approval of the offer is delayed, the rates quoted should be valid for further period of 60 days ie., in total, the rates should be valid for 180 days.

b. No tenderer will be allowed to withdraw the offer within the validity of 180 days specified. If the tender is withdrawn by the tenderer before the expiry of the validity period, the EMD paid will be forfeited. The tenderer cannot quote his own validity period and such tender will not be considered and will be totally rejected.

c. ...

d. ..."

22. The petitioner has offered the tender on 12.11.2008 and the validity period of 120 days expired on 12.03.2009. It is seen that the petitioner has not received the sale order within 120 days. Before this 120 days get over, the second respondent, on 23.12.2008 itself, has communicated to the petitioner asking him to quote for higher rate for the scrap materials for Lot No.3 and called for discussion on 05.01.2009. On 03.01.2009, the petitioner has, in his letter addressed to the Chief Engineer, Distribution, Chennai South Region, has clearly stated that he cannot give fresh quotation and he was sticking to his earlier quoted rate and he pleaded if they are not accepting for the value quoted, he opted for withdrawal of the same seeking for return of Earnest Money Deposit. The petitioner, by letter dated 14.03.2009, reminded the respondents and sought for refund of EMD. But, there was no correspondence between the petitioner and the respondents after that. In the mean while, the respondents have stated that they have issued a letter dated 13.02.2009 directing him to pay the amount within 21 days from the date of receipt of the confirmation/sale order .

23. Clause-12 of the tender conditions states that the time limit for payment shall be 21 days from the date of receipt of sale order. Here the sale order was issued on 13.02.2009, which has not been received by the petitioner, as alleged by him. But the Despatch Register shows that the sale order has been already sent to the address of the petitioner on 16.02.2009 itself. The petitioner has waited till 12.03.2009 and by letter dated 14.03.2009 has informed the respondents that the validity period expired and as there is no communication regarding the extension of validity period had clearly intimated that the offer submitted by him is withdrawn and prayed for refund of Earnest Money Deposit. From 14.03.2009, the petitioner has been sending communications, but the respondents have chosen to send a reply only on 27.07.2009 stating that already on 13.02.2009 letter has been issued and despatched, hence, Earnest Money Deposit cannot be returned. The mode of sending the sale order has to be looked into. If it is sent by Registered Post with Acknowledgment Due, there would have been an Acknowledgment Card attached to it and if not served, the same would have been returned to the respondents. But from the Despatch Register, it is seen that the same is sent by ordinary post, so definitely, there will be no proof to show whether the said letter was received by the petitioner, for him to act accordingly. Even after receipt of letter dated 01.04.2009, a reminder to his letter dated 03.01.2009, wherein the petitioner has stated that he is not willing to quote higher rate, but stated that he is ready to withdraw the same, the respondents ought to have sent a communication immediately whether they are accepting the same and not waiting till as alleged by them on 13.02.2009, that too, sending it by ordinary post and no material has been produced before this Court to show that the said tender was approved by

the Chief Engineer as that is the pre-condition for approval of the said tender. Only after the petitioner sending legal notice, the respondents have sent a letter to the petitioner on 26.06.2009, enclosing a copy of the sale order dated 13.02.2009 (ante dated deliberately), as alleged by the petitioner and hence, he sent a letter on 23.07.2009 seeking for refund of Earnest Money Deposit as the validity period has been expired.

24. It could be seen that the petitioner has quoted the price as per the prevailing market condition at the time of participating in the tender. At later point of time, within a month, the respondents have sent a communication to the petitioner directing him to quote higher price for the said Lot No.3. If the value quoted by the petitioner was very low and it is not upto the market price, the respondents could have thereafter given the offer to any other highest bidder or if no such highest bid available, they could have called for re-tender instead of waiting and then issuing the sale order.

25. At that point of time, the market price of the scraps was gone to the lowest of Rs.50/- per Kg. According to the petitioner, for 30000 Kg, the value comes only to Rs.15,00,000/-, but the sale order issued by the respondents would show that the value is Rs.23,10,900/-. As rightly pointed out by the petitioner, he kept communicating to the respondents regarding the refund of Earnest Money Deposit, but the respondents have not conceded to his request or they have acted prudently regarding this issue. Hence, at the first instance, on 03.01.2009, the petitioner has clearly stated that he is agreeing only to the old rate he had quoted, if not, they ought to have refunded the said Earnest Money Deposit. Inspite of knowing the said intention, the respondents have kept quiet and they have taken it lightly and alleged to have despatched the sale order casually by ordinary post affixing 5 rupees stamp and did not communicate further. The Respondents have failed to prove that the sale order has been received by the petitioner and he has not acted prudently to fulfil the tender conditions. When the respondents themselves have accepted in their reply letter dated 27.07.2009 that the purchase order/sale order has been communicated to the petitioner properly only after the validity period, it is clear from their own admission that the sale order was not received by the petitioner. There is no fault on the petitioner for not performing his act of paying the bid money. There was no material produced to show that after the expiry of 120 days, the respondents have invoked clause 3(b) and condition and extended the validity period for enforcing the tender. When the respondents have failed to convince this Court, the petitioner is entitled for refund of Earnest Money Deposit tendered by him.

26. In the result,

(i) W.P.No.1670 of 2010 is allowed and the order of the second respondent passed in Lr.No.SE/GCC/CNI/EAMM/HD/ F.TS(s) 38/D176/09 dated 13.02.2009 is quashed.

(ii) W.P.No.1671 of 2010 is allowed and the order of the second respondent passed in Letter No.CE/D/CSR/EE/P/RSO/ F.SP.No.TS(s)38/08-09/D36/09 dated 25.04.2009 is quashed.

(iii) The respondents are directed to refund the Earnest Money Deposit amount of Rs.1,20,000/- to the petitioner, within a period of eight weeks from the date of receipt of a copy of this order, failing which, the respondents have to pay the said amount with interest at the rate of 6% p.a. from expiry of 8 weeks till the date of realisation.

(iv) Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

mra

To

1. The Chief Engineer / Distribution
Chennai South Region
Tamil Nadu Electricity Board
802, Anna Salai, Chennai - 600 002.

2. The Superintending Engineer
General Construction Circle I
A-10, Thiru-vi-ka Industrial Estate
Guindy, Chennai -32.

Writ Petition Nos.1670 and 1671 of 2010
and
M.P.No.1 of 2010 in W.P.No.1671 of 2010

KS(CO)

RRS(27/08/2019)