

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED :17.03.2021
CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P. Nos.16356 & 16366 of 2020 &
W.M.P.Nos.20426 to 20428 of 2020

M.Premkumar

... Petitioner in both W.Ps.

vs.

- 1.The Chief Executive Officer,
NLC Tamil Nadu Power Limited,
Harbour Estate,
Tuticorin - 628 004,
Tamil Nadu. ... 1st Respondent in both W.Ps.
- 2.The Deputy General Manager / Contract & Purchase,
Office of the Chief Executive Officer,
NLC Tamilnadu Power Ltd., Harbour Estate,
Tuticorin - 628 004,
Tamil Nadu. ... 2nd Respondent in W.P.No.16356 of 2020

Prayer in W.P.No.16356 of 2020: Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari, calling for the records and Quash the order of the 1st Respondent in LR. NO CEO/NTPL/CIVIL/Flyash/PTE/CONT/2463/0755 DATED 31.10.2020 Banning the petitioners company for a period of Six months from participating in any tender issued by NTPL.

Prayer in W.P.No.16366 of 2020: Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari, calling for the records and Quash the order of the 1st Respondent in Lr.No.CEO/NTPL/CIVIL/Flyash/PTE/Cont/2463/0649 dated 29.9.2020 forfeiting the EMD amount of Rupees Ten Lakhs paid by the petitioner's company in Tender No. CEO/NTPL/CIVIL/FLYASH/CONT/PTE/2463/2019-20 F dated 17.12.2019.

For petitioner in both W.Ps. ... Mr.Raj Thilak
For Respondents in both W.Ps. ... Mr.N.Nithyanandam

COMMON ORDER

These writ petitions have been filed (a) challenging the order dated 29.09.2020 passed by the first respondent forfeiting the Earnest Money Deposit of Rs.10,00,000/- paid by the petitioner for participating in the tender under the tender notification dated 17.12.2019 and (b) challenging the order dated 31.10.2020 passed by the first respondent banning the petitioner for a period of six months from participating in any of the tenders called for by the respondents.

2. The case of the petitioner is that he was a successful bidder under the tender notification dated 17.12.2019 called for by the respondents for removal of fly ash. However, it is his case that due to covid-19 pandemic situation, he withdrew from the tender exercising the right of force majeure clause available under the tender conditions. The petitioner has also challenged the ban order imposed on the petitioner under the impugned order preventing the petitioner from participating in future tenders called for by the respondents for a period of six months.

3. However, according to the respondents, due to the sudden withdrawal of the bid by the petitioner, they have suffered huge losses. According to them, under the tender conditions, they are empowered to forfeit the earnest money deposit of the petitioner in case of withdrawal of the bid. It is also their case that they have the right to ban the petitioner for a period of two years in case of withdrawal of the bid. However, under the impugned order, they have banned the petitioner only for a period of six months.

4. Heard Mr.E.Raj Thilak, learned counsel for the petitioner and Mr.N.Nithyanandam, learned counsel for the respondents.

5. The learned counsel for the petitioner drew the attention of this court to the letter dated 12.05.2020 sent by the petitioner to the respondents wherein they have expressed his difficulty in complying with the requirement of the tender due to covid-19 pandemic situation across the globe. Learned counsel for the petitioner also drew the attention of this Court to the reply dated 19.05.2020 received by the petitioner from the respondents calling upon the petitioner to withdraw the petitioner's letter dated 12.05.2020 expressing the petitioner's difficulties in complying with the requirements due to covid-19 pandemic situation.

6. Learned counsel for the petitioner also drew the

attention of this Court to the letter dated 22.05.2020 sent by the petitioner to the respondents requesting for certain alterations in the original terms and conditions imposed upon the petitioner by the respondents. Thereafter, the learned counsel for the petitioner drew the attention of this Court to the reply dated 25.05.2020 received by the petitioner from the respondents to the letter dated 22.05.2020 sent by the petitioner wherein the respondents have rejected the requests of the petitioner for certain modifications of the original terms and conditions for the removal of the fly ash from the respondents' premises. The learned counsel for the petitioner would submit that covid-19 pandemic situation is a force majeure circumstance and hence, applying clause 13.1 of the terms and conditions of the tender, the petitioner is entitled to withdraw his bid and the respondents ought not to have forfeited the earnest money deposit and ought not to have banned the petitioner from participating in future tenders of the respondents for a period of six months.

7. The learned counsel for the petitioner also drew the attention of this Court to clause 13 of the terms and conditions of the tender which is a force majeure clause. In particular, he referred to clause 13.1 and would submit that Epidemic is equivalent to Pandemic and therefore, force majeure clause is applicable to the petitioner. Therefore, according to him, the impugned order has been passed without adhering to the terms and conditions of the tender which enables the petitioner to exercise the force majeure clause due to covid-19 pandemic situation.

8. Per contra learned counsel for the respondents drew the attention of this court to clause 25.3.4 of the terms and conditions of the tender and would submit that if the bidder withdraws / modifies / impairs / derogates his offer on his own after tenders are opened or fails to accept the LOA / fails to submit Security Deposit / CPG, the respondents are empowered to ban the petitioner for a period of two years. According to him, the petitioner having voluntarily withdrawn from the bid, even though he was a successful bidder, clause 25.3.4 of the terms and conditions of the tender gets attracted. Learned counsel for the respondents also drew the attention of this Court to clause 3.6 of the terms and conditions of the tender and would submit that in case of voluntary withdrawal of the bid, the respondents are empowered to forfeit the earnest money deposit. According to him, in the instant case, the petitioner has voluntarily withdrawn the bid causing losses to the respondents and hence, the respondents have rightly forfeited the earnest money deposit paid by him.

Discussion:

9. Admittedly in the case on hand, the petitioner became a successful bidder on 05.03.2020. As seen from the documents filed in support of this writ petition, the first communication sent by the petitioner to the respondents expressing his difficulties in complying with the requirements of the tender is only on 12.05.2020. The petitioner exercised the force majeure clause available under clause 13.1 of the terms and conditions of the contract. The said clause reads as follows:

"13.1 The Conditions such as act of God, civil commotion, strike, lock out, concerted action of workment, sabotage, riots, revolution, war, flood, fire, explosion, earth quake, epidemic, piracy which are beyond the control of the parties shall constitute force majeure."

10. However, according to the respondents, the said clause will not get attracted as according to them, the case of the petitioner will not fall in any of the categories mentioned in clause 13.1. The said clause also does not talk about any pandemic, but it talks about only epidemic.

11. The issue whether the present pandemic situation will apply to epidemic cannot be adjudicated by this Court under Article 226 of the Constitution of India as it is a disputed question of fact. If at all the petitioner is aggrieved by forfeiture of the earnest money deposit and is entitled for refund by exercising the force majeure clause, this court is of the considered view that his only remedy is to approach the civil court.

12. Clause 3.6 of the tender conditions makes it clear that the respondents are empowered to forfeit the earnest money deposit, even if no LOA has been issued in favour of the petitioner and the said clause 3.6 of the tender conditions reads as follows:

"3.6 The Earnest Money Deposit can be encashed, if the bidder withdraw his tender proposals / modifies / changes / alters / impairs / derogates the tender proposal on his own after the Cover-I is opened or within subsistence of validity period of offer or fails to accept the Letter of Award (LOA) issued by NLC Tamilnadu Power Limited (or) fails to submit Security Deposit (or) fails to execute the contract agreement (or) fails to commence the work as per LOA. Such bidders shall be suspended / banned subjected to action deemed fit as per Clause: 25 of the General conditions of the tender enquiry. Unilateral revision or withdrawal of offer by the bidder as above shall also result

rejection of bid without Notice."

Therefore as observed earlier, if the petitioner seeks relief under the force majeure clause available under the terms and conditions of the tender and since there are disputed questions of fact involved, his only remedy is to approach the civil court.

13. Insofar as the ban of the petitioner is concerned, the respondents have banned the petitioner for a period of six months under the impugned order. Clause 25.3.4 makes it clear that if the bidder withdraws / modifies / impairs / derogates his offer on his own after tenders are opened or fails to accept the LOA / fails to submit Security Deposit / CPG, the respondents are empowered to ban the petitioner for a period of two years. In the case on hand, the petitioner has voluntarily withdrawn from the bid despite being a successful bidder. It is the contention of the respondents that they have suffered losses due to the said withdrawal. Exercising the powers, under clause 25.3.4, the respondents have banned the petitioner for a period of six months, even though under clause 25.3.4, they are empowered to ban the petitioner for a maximum period of two years. As seen from the documents filed before this Court, even before passing the impugned order, the respondents have cautioned the petitioner that the withdrawal from the bid may result in banning the petitioner by exercising the clause available under the terms and conditions of the tender.

14. The petitioner's case is that only due to covid-19 pandemic situation, he was unable to execute the contract and had to withdraw from the bid. However, as seen from the communications available on record, even though the petitioner was made a successful bidder as early as on 05.03.2020 itself, the first communication he has sent to the respondents expressing his difficulties for completing the contract is only on 12.05.2020. Between 05.03.2020 and 12.05.2020 admittedly, there was no communication by the petitioner expressing his difficulties for completing the contract. All the aforementioned factors will reveal that the respondents have acted only in accordance with the terms and conditions of the tender.

WEB COPY

15. For the foregoing reasons, there is no merit in both these writ petitions and both these writ petitions are dismissed. However, with regard to the refund of earnest money deposit is concerned, the petitioner if aggrieved is granted liberty to approach the civil court. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS VII)

/true copy/
Sub Asst. Registrar

nl

To

- 1.The Chief Executive Officer,
NLC Tamil Nadu Power Limited,
Harbour Estate,
Tuticorin - 628 004,
Tamil Nadu.
- 2.The Deputy General Manager / Contract & Purchase,
Office of the Chief Executive Officer,
NLC Tamilnadu Power Ltd., Harbour Estate,
Tuticorin - 628 004,
Tamil Nadu.

W.P. Nos.16356 & 16366 of 2020

gpl(co)
aa08/04/2021

सत्यमेव जयते

WEB COPY