

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 1669/2021

M/s Yoglaxmi Traders, a Proprietary concern,
through its proprietor Laxmikant Dashrath Satpute,
Aged about – years, Occupation – Business,
Resident of Ward No.4, Near Nag Mandir, Maheshwari
Layout, Saoner, Tahsil Saoner, District Nagpur.

PETITIONER

-VERSUS-

1. State of Maharashtra,
Through Ministry of Revenue and Forest
Department, Mantralaya, Madam Cama
Road, Mumbai 400 032.
2. The Collector, District Nagpur,
Civil Lines, Nagpur.
3. The Additional Collector,
In-charge of Mining, Civil Lines, Nagpur.
4. The Tahsildar, Saoner,
Tahsil Saoner, District Nagpur.

RESPONDENTS

Shri A.A. Naik, counsel for the petitioner.
Mrs. T.H. Khan, Assistant Government Pleader for the respondents.

CORAM : A. S. CHANDURKAR AND URMILA JOSHI-PHALKE, JJ.
DATE : SEPTEMBER 13, 2022.

JUDGMENT (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and heard the learned counsel for the parties in view of notice for final disposal issued earlier.

2. The challenge raised in this writ petition is to the order dated 25.03.2021 passed by the Additional Collector, Nagpur thereby forfeiting the earnest money deposit that was furnished by the petitioner pursuant to its bid being accepted in the E-Tender process conducted by the respondent nos.3 and 4.

3. The facts giving rise to the present proceedings can be stated as under:-

A notice for E-Tender came to be issued by the Collector, Nagpur inviting bids for various sand ghats in the district for the period from 2020-21 to 2022-23. As per the tender conditions the highest bidder whose bid was accepted was required to deposit 25% of the bid amount within forty eight hours of such acceptance. The remaining three fourth amount was required to be deposited within a period of one month from the date of the auction. The bid of the petitioner was accepted for the sand ghat located at Tahsil Saoner and particularly Ramdongri-B at Kanhan river. The sand stated to be available for the year 2020-21 was 4240 Brass. The bidding process took place on 09.02.2021 and on that day the bid of the petitioner for the aforesaid sand ghat came to be accepted. After the petitioner's bid was accepted on 09.02.2021 and the petitioner deposited 25% of the bid amount being Rs.13,25,000/- the representative of the petitioner visited the concerned sand ghat. On 11.02.2021 a communication was issued on behalf of the petitioner to the Tahsildar in which it was stated that on 10.02.2021 when the petitioner had visited the sand ghat it was found that on account of illegal excavation the quantity of sand had been reduced. A request was therefore made to the Tahsildar to visit the site and inspect the same. On 12.02.2021 the Tahsildar issued a communication to the Circle Officer/ Talathi to inspect the sand ghat at Ramdongri-B and submit a report. The

Circle Officer accordingly on 12.02.2021 visited the sand ghat and inspected the same. He noted in his report that there had been illegal excavation of sand from the said sand ghat.

4. On 17.02.2021 a show cause notice was issued to the petitioner by the Collector in which it was stated that as per Government Resolution dated 03.09.2019 and the terms of the tender notice it was necessary for the petitioner whose bid has been accepted to deposit 25% of the bid amount within forty eight hours. Since the amount of Rupees Forteen Lakhs was not deposited by the petitioner it was asked to show cause why the earnest money deposit should not be forfeited and a fresh auction should not be conducted. On 22.02.2021 the petitioner replied to the said show cause notice and after referring to the report of the Circle Officer sought refund of the earnest amount on the ground that the quantity of sand available at the sand ghat was less than what had been indicated in the tender notice. Thereafter on 19.03.2021 another show cause notice was issued to the petitioner in which it was stated that the difference to the extent of 25% of the bid amount not having been deposited within a period of forty eight hours the amount of earnest money of Rs.13,25,000/- was liable to be forfeited. The petitioner on 22.03.2021 submitted its reply reiterating the earlier stand based on the inspection report of the Circle Officer. The petitioner demanded refund of the earnest money deposit. On 25.03.2021 the Additional Collector

passed an order in which it was stated that the reply submitted by the petitioner to the show cause notices was not found to be satisfactory. It was the duty of a bidder to verify the availability of the sand at a sand ghat prior to submitting its bid. Since the petitioner failed to deposit the difference amount as calculated from the bid amount to the extent of 25%, the earnest money deposit was liable to be forfeited. It was directed that if in the fresh auction a bid for a lower amount than what was quoted by the petitioner was accepted then the petitioner would be liable to pay the difference between that amount. Being aggrieved the petitioner has challenged the aforesaid order.

5. Shri A.A. Naik, learned counsel for the petitioner submitted that the respondent no.2 was not justified in passing the impugned order directing forfeiture of the earnest money deposit. In the tender notice as issued the quantity of sand available at Ramdongri-B was indicated to be 4240 Brass. On the complaint made by the petitioner the Circle Officer had inspected the sand ghat and had submitted his report dated 15.02.2021 in which it was clearly stated that there had been illegal excavation of sand and the quantity available now had been reduced. In the light of this report there was no reason to forfeit the earnest money deposit as the petitioner was justified in not depositing the difference amount from the bid received. It was the responsibility of the respondents to safeguard the sand ghat till its possession was delivered to

the successful bidder for excavation of sand. Since the quantity of sand was found to be reduced even prior to receiving its possession, the petitioner was justified in not depositing the difference in the bid amount. In the reply to the show cause notice this aspect was highlighted. The respondent no.2 failed to consider the report of the Circle Officer indicating the lesser quantity of sand being available. On that ground, the forfeiture of the earnest money deposit was illegal. He further submitted that in these facts an opportunity of hearing ought to have been granted to the petitioner wherein it could have been demonstrated that the petitioner was not at fault for lesser quantity of sand being available at the sand ghat. Placing reliance on the decisions in *Vijay Kumar Gupta Versus State of Maharashtra & Others* [2008(4) Mh.L.J. 370], *Karnataka State Forest Industries Corporation Versus Indian Rocks* [(2009) 1 SCC 150] and *Indsil Hydro Power and Manganese Limited Versus State of Kerala & Others* [(2020) 16 SCC 276], it was submitted that the State Government and its Officers ought to have acted in a fair and transparent manner even while dealing with a private party like the petitioner. This Court under Article 226 of the Constitution of India could examine this aspect even in matters pertaining to contractual obligations. The respondents not having acted fairly and without considering the undisputed position erred in forfeiting the earnest money deposit in a manner contrary to law. It was thus submitted that the impugned order was liable to be set aside.

6. Per contra, Mrs. T.H. Khan, learned Assistant Government Pleader for the respondents opposed aforesaid submissions. She referred to the reply filed on behalf of the respondent no.4 and stated that before participating in the auction it was incumbent upon a bidder to satisfy himself about the aspect of availability of requisite quantity of sand and other details. The petitioner having participated in the auction process was presumed to have knowledge of the prevailing position and it was only by way of an afterthought that a grievance was being raised that the quantity of sand at the sand ghat was less than 4240 Brass. The order forfeiting the earnest money deposit was passed in accordance with Government Resolution dated 03.09.2019 as well as the terms and conditions of the auction notice. Admittedly, the petitioner had failed to deposit the difference in the amount of bid from the amount of earnest money deposit and hence as a consequence the said amount deposited was forfeited. The petitioner was bound by the terms and conditions of the tender notice and it would not be permissible for him to resile from the same. Attention was also invited to Clauses 32 and 41 of the tender notice to support the impugned action. Since the impugned order had been passed after complying with the principles of natural justice there was no reason to interfere with the same in exercise of writ jurisdiction.

7. We have heard the learned counsel for the parties at length and we have perused the documents on record. In the tender notice published it

has been indicated that for the sand ghat at Ramdongri-B 4240 Brass of sand was available for excavation in the current year 2020-21. As per the terms and conditions mentioned in the tender notice the successful bidder was required to deposit 25% of the bid amount within a period of forty eight Office working hours with the Additional Collector/Collector. The balance three fourth amount was required to be deposited within a period of one month of the auction. As per Clause 32 of the conditions after the bid of a bidder was accepted it was not permissible to extend the period of excavation of sand nor was it permissible to change the sand ghat from which the sand was to be excavated. As per Clause 41 thereof it was the responsibility of a bidder to examine the concerned sand ghat and assure himself of the availability of sand. After excavation it was not permissible for a successful bidder to raise a complaint in that regard. As per Clause 3 it is only after a successful bidder deposits 75% of the bid amount within a period of thirty days of the auction that actual possession of the sand ghat would be handed over.

8. From the aforesaid conditions it becomes clear that 25% of the bid amount quoted by the successful bidder was required to be deposited within a period of forty eight working hours from the acceptance of the bid. In the present case, the bid of the petitioner was accepted on 09.02.2021 and hence within a period of forty eight working hours from such acceptance it was necessary for the petitioner to have deposited 25%

of the bid amount. It is an admitted position on record that on 10.02.2021 the petitioner had visited the sand ghat to inspect the same when he noticed reduction in the quantity of sand due to some illegal excavation. Hence immediately on the next day the petitioner on 11.02.2021 raised a grievance before the Tahsildar. On the direction of the Tahsildar, the Circle Officer inspected the said sand ghat on 12.02.2021 and noted that there had been illegal excavation from the sand ghat. This aspect had been highlighted by the petitioner in the reply to the show cause notice dated 17.02.2021 and thereafter on 19.03.2021. It is thereafter that the impugned order forfeiting the earnest money deposit as well as the difference in the bid amount pursuant to re-auction being recovered was passed.

9. According to the petitioner there having been illegal excavation of sand after acceptance of his bid, it was necessary for the respondents to have reduced the bid amount. The petitioner also sought return of the earnest money deposit. The petitioner has sought to rely upon the inspection report prepared by the Circle Officer to support his stand. On the other hand, according to the Authorities it was the responsibility of a bidder to get himself satisfied about the availability of sand at a particular sand ghat. Having participated in the auction process and having succeeded therein it was necessary for the petitioner to have complied with the terms and conditions thereof. The impugned order has directed

forfeiture of the earnest money deposit and also recovery of the difference in the bid amount pursuant to fresh auction.

10. The Hon'ble Supreme Court in its decisions in *Karnataka State Forest Industries Corporation* as well as *Indsil Hydro Power and Manganese Limited* (supra) has observed that even in contractual matters the State and its agencies are duty bound to act in a manner that is fair and transparent. Exercise of writ jurisdiction under Article 226 of the Constitution of India is not excluded in matters pertaining to contract. While the Court in exercise of writ jurisdiction would not enforce the terms of the contract, if it is alleged and pleaded that the action of the State is arbitrary or discriminatory a writ petition would be maintainable. In the light of the aforesaid undisputed position that after acceptance of the petitioner's bid when the site was inspected on 12.02.2021 and it was noticed that the quantity of sand had been reduced than what was indicated in the tender notice, the petitioner expressed his inability to deposit 25% of the bid amount. It is pertinent to note that as per Clause 3 of the tender notice that it is only after a successful bidder deposits the balance 75% amount within thirty days of the conduct of the auction and enters into an agreement that actual possession of the sand ghat is to be handed over latest by a period of seven days. This implies that till the entire bid amount is received by the respondents, possession of the sand ghat is not given to the successful bidder and the same continues with the

respondents. It is in this context that the petitioner's grievance of non-consideration of his reply and absence of grant of an opportunity of hearing by the respondents before passing the impugned order ought to be considered.

We find that in the facts of the present case when the petitioner immediately on the next day of acceptance of his bid had inspected the sand ghat and had noticed illegal excavation resulting in reduction in the amount of sand available had sought inspection of the sand ghat and the Circle Officer having noticed such illegal excavation, it was incumbent upon the Collector to have granted an opportunity of hearing to the petitioner to substantiate its grievance and the Collector also ought to have taken into consideration this aspect before passing the impugned order forfeiting the earnest money deposit. The same not having been done has rendered the impugned order as being the one passed without consideration of relevant aspects. We are therefore inclined to set aside the impugned order and direct re-consideration of the matter pursuant to issuance of the show cause notices dated 17.02.2021 and 19.03.2021 to the petitioner.

11. In the light of aforesaid discussion, the following order is passed:-

- I) The order dated 25.03.2021 passed by the Additional Collector directing forfeiture of the earnest money deposit and payment of difference in the amount of bid pursuant to re-auction is set aside.

- II) The Collector shall re-consider the matter based on the show cause notices dated 17.02.2021 and 19.03.2021 alongwith the reply submitted by the petitioner to both the show cause notices by granting an opportunity of hearing to the petitioner.
- III) To enable such consideration to be undertaken the petitioner through its representative shall appear before the Collector on 22.09.2022. After grant of due opportunity to the petitioner a fresh decision be taken in the light of Government Resolution dated 03.09.2019 as well as the tender conditions as indicated in the tender notice preferably within a period of six weeks from 22.09.2022. The decision taken be communicated to the petitioner.
- IV) It is clarified that the Collector is free to take a decision in accordance with law in the light of the material on record.
12. The writ petition is accordingly disposed of. Rule is made absolute in aforesaid terms. No costs.

(URMILA JOSHI-PHALKE, J.) (A.S. CHANDURKAR, J.)

APTE