



W.P.No.20970 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.10.2022

DELIVERED ON : 17.10.2022

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

W.P.No.20970 of 2017
and W.M.P.Nos.21859 to 21861 of 2017

M/s.Cornerstone Constructions Ltd.,
Rep. by its Managing Director,
No.M-22, 10th Street, M Block,
Anna Nagar East,
Chennai - 600102.

.. Petitioner

Vs.

1. The Government of India,
Rep. by its Secretary to Government,
Ministry of Railways, 256-A, Rail Bhavan,
Raisina Road, New Delhi - 110001.
2. The Railway Board,
Rep. by its Chairman,
256-A, Rail Bhavan, Raisina Road,
New Delhi - 110001.
3. The Indian Railway Welfare Organisation,
Rep. by its Managing Director,
Having its Head Office at
Railway Offices Complex, Sivaji Bridge,
(Behind Shankar Market), New Delhi - 110001.
4. The Director - Technical,
The Indian Railway Welfare Organisation,



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Railway Offices Complex,
Sivaji Bridge, (Behind Shankar Market),
New Delhi - 110001.

5. The General Manager - South Zone,
The Indian Railway Welfare Organisation,
Engineering Construction Office,
Southern Railway, Poonamallee High Road,
Egmore, Chennai - 600008.

.. Respondents

Prayer: Writ Petition has been filed under Article 226 of the Constitution of India seeking a Writ of Certiorarified Mandamus calling for the records of the 4th respondent herein relating to proceeding No.ID No.IRWO/Chennai. II Ph.II/B/Tender dated 30.06.2017 and No.IRWO/Ch.PH II B/Tender dated 11.07.2017 and the notice inviting tender (Limited tender) bearing Volume I & II Doc.No.ID No.IRWO/Tender/Ch. II B/2016-1, issued by the 3rd respondent and quash the same and direct the respondents herein to permit the petitioner to perform the work pursuant to the letter of confirmation which was issued to the petitioner bearing No.IRWO/Chennai-Ph-IIB/Tender dated 18.05.2017 or in the alternative, permit the petitioner also to participate in the limited tender that has been floated by the respondents.

For Petitioner	:	Mr.AR.L.Sundaresan SC for Mrs.AL.Ganthimathi
For Respondents 1 & 2	:	Mr.P.T.Ramkumar
For Respondents 3 & 4	:	No appearance
For Respondent 5	:	Mr.Krishna Srinivasan for M/s.S.Ramasubramaniam & Associates

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ORDER

WEB COPY This writ petition has been filed challenging the proceedings of the fourth respondent dated 30.06.2017 and 11.07.2017 respectively and also the notice inviting tender (Limited Tender) bearing Volume I & II Doc.No.ID No.IRWO/Tender/Ch. II B/2016-1, issued by the 3rd respondent and consequently direct the respondents herein to permit the petitioner to perform the work pursuant to the letter of confirmation issued to the petitioner dated 18.05.2017 or in the alternative, permit the petitioner also to participate in the limited tender that has been floated by the respondents.

2. Though this writ petition has been filed for the above said reliefs, now the learned Senior Counsel appearing for the petitioner has confined his arguments only with regard to refund of the Earnest Money Deposit (EMD) of Rs.8,00,000/- paid by the petitioner at the time of applying to the tender.

3. The brief facts leading to the filing of this writ petition is as follows:

(i) The third respondent invited tender for construction of 161 residential dwelling units in Stilt+3 and Stilt+4 configuration comprising 54 units Type II, 12 units Type-III A, 48 units Type III-B, 32 units Type IV A



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and 15 units of Type IVB and Meditation Halls including all civil, internal and external water supply, sanitary installation, drainage, sewerage, internal and external electrical works, roads, pavements, underground water tanks, pump house, sub-station, boundary wall, gate and guard room etc. at Ambattur Village, Chennai.

(ii) The third respondent has issued Tender notification inviting bids in two packet system. The first packet comprising of pre-qualification bid and EMD and the second packet comprising of Financial Bid. The estimated value of the work was Rs.26.41 crores. The EMD payable was Rs.8,00,000/- and the time of completion was 24 months.

(iii) The minimum condition to be fulfilled by the Contractor as per Clause 1.2 of the Notice Inviting Tender (NIT) was that the contractor should have crossed turn over or equal to the value of the tender for the last four consecutive years ending 31.03.2016 and the tenderer or the lead member of a consortium should have successfully completed at least one building work with all necessary services of value of not less than 45% of the value of the tender or should have completed two works of value of not less than 25% of the value of the tender each in the last four consecutive financial years ending



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31.03.2016.

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(iv) The petitioner participated in the said tender and become successful tenderer. After opening of the financial bid, the petitioner bid was more competitive and was L1 than the other five bidders. The fourth respondent vide proceedings dated 18.05.2017, stated that the competent authority has accepted the petitioner's offer in connection with the above work at a total cost of Rs.26,68,70,501/-. The EMD of Rs.8,00,000/- which was deposited by the petitioner has been retained as part of security and the petitioner was called upon to submit an irrevocable performance Bank Guarantee from a nationalized bank or a commercial scheduled bank equivalent to 5% of the accepted contract value at Rs.1,33,43,525/- within 15 days in terms of Clause 2.18 of Instructions to Tenderers, for the due and proper execution of the contract which should be valid upto Defect liability period i.e. upto 30.11.2020.

(v) The petitioner was also called upon to furnish a standing bank guarantee of Rs.30,00,000/- in favour of the third respondent herein towards 'Material Security' for free supply of IRWO's material.



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WEB COUNCIL

(vi) After receipt of the letter of confirmation of the bid, petitioner visited the office of the 5th respondent and the list of structural drawings of the various types of building was furnished to the petitioner and on scrutiny of the said drawings, the petitioner found that for the structural drawings on the basis of which the construction was to be put up using M20 grade concrete would not be compatible and the minimum grade of M25 grade only has to be used. Since the construction has to be put up in Ambattur Area and Chennai being a coastal zone, minimum M25 Grade concrete is necessary for structural stability as per the IS Code as well as the decision taken by the local authorities and also as per the requirement contained in the National Building Code (Part 6). Further, there was a crunch in getting river sand on account of acute shortage and there there was adequate alternative available as per approved standards. There was also a doubt regarding the impact of GST.

(vii) In connection with the said three matters, the petitioner met the 4th respondent at New Delhi and explained the situation and requested him to ensure that only minimum grade of M25 concrete shall be used and in respect of river sand, alternate approved material as per IS code shall be permitted to be used and a clarification may also be given as to the impact of



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GST. After the meeting with the 4th respondent, the petitioner submitted a detailed representation in this regard to the 5th respondent herein.

(viii) The 4th respondent by letter dated 07.06.2017, called upon the petitioner to submit the performance guarantee within one week and also return one copy of the Acceptance duty signed within one week failing which, it will be treated that the petitioner is not interested in taking up the above work and the EMD will be forfeited.

(ix) In the said letter, the 4th respondent had stated that so far as river sand is concerned, the schedule does not specify river sand and hence sand which meets the specifications laid down can be used. So far as the minimum grade of RCC M25 is concerned, the same will be examined in consultation with the Architect and Structural Designer and final decision will be taken based on their report and the work shall be executed as per the decision to be taken. So far as GST is concerned, the 4th respondent has stated that there was nothing new as GST was also under consideration when the tender was floated.

(x) On receipt of the letter dated 07.06.2017, the petitioner submitted



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a letter dated 14.06.2017, thanking the confirmation relating to river sand or alternative sand which meets specifications and also bringing to the notice of the 4th respondent that M20 grade RCC was specified in the drawings and that the same is not legally permitted for construction in Chennai being a coastal zone and hence minimum M25 grade concrete has to be used for all RCC works and the petitioner also reiterated the request regarding the GST has to be paid by the respondents in addition to the contract rate after adjusting the existing taxes and under such circumstances, the petitioner requested the 4th respondent not to forfeit the EMD as the petitioner was only in the process of getting confirmation of two major issues which directly related to the structural stability.

(xi) While the matter stood thus, the 4th respondent vide his letter dated 30.06.2017, called upon the petitioner to submit the performance guarantee within one week of issue of the said letter, failing which the EMD would be forfeited without further correspondences and that petitioner has not deposited the performance guarantee and was only delaying the project. The letter dated 21.06.2017, was dispatched after the prescribed time schedule and GST was subsuming number of existing taxes.



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(xii) Thereafter, the 4th respondent vide letter dated 11.07.2017, reiterated the stand that petitioner has not submitted the performance guarantee within time and hence the EMD stands forfeited.

(xiii) The petitioner sent a reply dated 19.07.2017, reiterating the request to confirm the issues raised by the petitioner and undertaking to enter into the agreement failing which the petitioner will be constrained to seek redress through Court of Law.

(xiv) When the matter stood thus, the respondents have floated a new limited tender wherein the two issues which remained unconfirmed by the 4th respondent was altered as requested and suggested by the petitioner viz., quantum of M20 Grade of Concrete was reduced drastically and the quantum of M25 Grade of Concrete was substantially increased. In other words, the quantum of the two was swapped heeding to the suggestion of the petitioner that the same were required for structural stability of the building in Chennai area. Similarly with regard to GST, the new tender Clause 2.7.1 provided that GST amount shall be paid as extra to the tenderers as per the provisions of GST Act from time to time.



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(xv) According to the petitioner, the new tender was issued by the respondents as a sealed percentage limited tender and bids were invited only from the participants of the previous tender who were technically qualified. No fresh or qualified tender was processed by the respondents. The petitioner was also not allowed to participate in the said tender process.

(xvi) Hence it is the contention of the petitioner that the proceedings dated 30.06.2017 and 11.07.2017 of the 4th respondent forfeiting the EMD of the petitioner is arbitrary, illegal, unjust and unsustainable in law and further contended that if the limited tender is processed without permitting the petitioner to participate in the same, it will result in grave prejudice and hardship to the petitioner.

4. The fifth respondent has filed a counter affidavit contending as follows:

(i) The third respondent had issued a notice inviting tender (NIT) for the construction of 161 residential dwelling units (4 types of units) in Stilt+3 / Stilt+4 of various types at Ambattur Village, Chennai. The tender was an open tender. The tenderers were required to submit two packets containing the technical bid and the financial bid to the 3rd respondent on or before



(ii) On 18.05.2017, the 4th respondent sent a communication to the petitioner stating that the competent authority has accepted the petitioner's tender for the tender at the total cost of Rs.26,68,70,501/-. The petitioner was required to submit an irrevocable performance guarantee equivalent to 5% of the accepted contract value within 15 days as per Clause 2.18 of the tender document. By its letter dated 31.05.2017, the petitioner acknowledged the acceptance of the offer by enclosing a photocopy of the acceptance letter duly signed and at the same time also sought for clarification on non-availability of sand in Chennai, minimum grade of RCC-M25 to be used and the rate of GST.

(iii) The petitioner did not submit the performance guarantee as



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required by the tender document and as requested by the respondents

acceptance of offer dated 18.05.2017.

(iv) The 4th respondent by letter dated 07.06.2017 has clarified the issues raised by the petitioner that the contractor could use the sand as per specifications laid down in the tender documents. The issue with regard to minimum grade of RCC-M25 the issue would be examined in consultation with the Architect and Structural Designers and a final decision will be taken on the basis of their report and the work can be executed accordingly. With regard to introduction of GST, it was clarified that GST was notified as early as on 08.09.2016 well before the tender was submitted by the petitioner on 10.01.2017. Therefore, the introduction of GST was not a new development and therefore no clarification in this regard was required.

(v) The 4th respondent reiterated its earlier request to the petitioner that the performance guarantee be submitted within a week and also return the duplicate copy of the acceptance duly signed as originally enclosed along with the acceptance dated 18.05.2017 so that the contract can be proceeded with. It was also made clear to the petitioner that if it failed to furnish the performance guarantee, then it would be considered as if the petitioner was



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not interested in taking up the work and the earnest money deposit will stand forfeited.

(vi) In response to the above communication, the petitioner vide letter dated 14.06.2017, once again sought clarifications in respect of the river sand, RCC specifications and GST. The petitioner also stated that forfeiture of earnest money would not arise as the petitioner was only seeking to clarify its doubts on two issues pertaining to the structural stability and the impact of GST on the present contract.

(vii) In the absence of any positive response from the petitioner and upon petitioner's failure to submit the performance guarantee as stipulated under the tender documents, the 4th respondent by its letter dated 30.06.2017, informed the petitioner that the Earnest Money Deposit stood forfeited on account of the petitioner's failure to submit the performance guarantee which has resulted in a delay in the execution of the project.

(viii) In view of the petitioner's failure to submit the performance guarantee and its reluctance in proceeding further with the execution of contract by attempting to seek clarifications of a non-issue, the respondents



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thought it fit to forfeit the earnest money deposited by the petitioner without any further correspondences.

(ix) Thereafter the fifth respondent issued a fresh limited tender calling for fresh bids for execution of the very same project. The respondent invited only those participants who had qualified the technical bid of the previous tender. No new bidder was allowed to participate. The petitioner though was technically qualified, had failed to deposit the performance guarantee and had forfeited the earnest money in view of Clause 1.18 of the tender as the petitioner had delayed the commencement of the project.

(x) The fresh bids invited from the shortlisted tenderers (limited tender) vide letter dated 17.07.2017. These were opened and after scrutiny, the offer has also been awarded to M/s.R.Krishnakurthy & Co., Kilpauk, Chennai. The letter of intent has been issued on 08.09.2017. In view of the same nothing survives in the present writ petition and seeks dismissal of the writ petition.

5. The learned senior counsel appearing for the petitioner would submit that though the writ petition has been filed challenging the tender



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dated 30.06.2017, now in view of the fact that subsequent tender has been allotted to a third party, restricted his submissions only with regard to refund of the EMD.

6. It is the contention of the learned senior counsel that immediately after the deposit of EMD, the petitioner has clarified with the authorities that construction was to be put up only with M25 Grade concrete since the construction is put up in Ambattur area and Chennai being a coastal zone. The above is necessary for structural stability as per the IS Code as well as the decision taken by the Local Authorities and also as per the requirement contained in the National Building Code. The petitioner has also sought a clarification with regard to the crunch in getting river sand and in view of the acute shortage and that there was adequate alternative available as per the approved standards.

7. The learned senior counsel further submitted that in this regard, the petitioner also sent a communication dated 31.05.2017, to the fifth respondent clearly mentioning that the above issue has occurred only after opening of the tender and it is directly connected with the commencement of work and therefore requested the authorities to consider the clarification in



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order to commence the work.

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8. The learned senior counsel appearing for the petitioner further submitted that a reply has been given by the third respondent on 07.06.2017, to the petitioner indicating that the schedule does not specify river sand and therefore sand used on the work should meet the specifications laid down. With regard to the minimum grade of RCC-M25, the third respondent has also stated that final decision will be taken based on the report of the Architect and Structural Designer and the work has to be executed as per the said report. When the petitioner was awaiting positive reply from the respondents, the respondents have insisted the petitioner to submit performance guarantee within 15 days. Subsequently, the contract was terminated and a new limited tender was ordered and the EMD of Rs.8,00,000/- was forfeited by the respondents.

9. Further according to the learned senior counsel the subsequent limited tender has been issued with minimum grade of RCC-M25 concrete. Once the respondents have admitted the suggestions and clarification of the petitioner, they ought not to have forfeited the EMD and issued new contract to a third party.



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WEB COPY 10. The learned senior counsel further contended that the respondents

have not suffered any loss in the process and in fact accepting the clarification sought by the petitioner, they have modified the subsequent tender conditions for using M25 concrete and other alternatives for river sand and also agreed to pay the GST as applicable w.e.f 01.07.2017. After accepting all the queries raised by the writ petitioner, the respondents ought to have granted permission to the petitioner to continue with the contract but on the other hand the respondents have terminated the contract besides forfeiting EMD of Rs.8,00,000/- in spite of no loss whatsoever has been suffered by the third respondent. The learned senior counsel therefore submitted that the petitioner is entitled to refund of the EMD amount of Rs.8,00,000/- along with interest.

11. In support of his submissions the learned senior counsel placed reliance on the following judgment:

(i) Maula Bux Vs. Union of India reported in 1969 (2) SCC 554

12. Whereas the learned counsel appearing for the fifth respondent submitted that notice inviting tender for construction of 161 residential



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dwelling units at Ambattur village, Chennai was issued. According to the learned counsel, Clause 1.4 deals with Pre-Bid Meeting. It is clearly stated that on 15.12.2016 meeting will be held to clarify any points that the prospective tenderer may have regarding the tender. As per Clause 1.5, EMD of Rs.8,00,000/- has to be deposited. In Clause 1.18, it is clearly stipulated that Earnest money of the successful tenderer shall be forfeited in the event of refusal or delay on his part in signing the agreement within 15 days or refusal to start the work on instructions from the General Manager. Clause 2.18 of the contract makes it clear that successful tenderer shall have to furnish the performance guarantee in terms of Clause 2.22 of IRWOs General Conditions of Contract - April, 2015, in the format attached as Annexure 'G' therein, within 15 days from the date of issue of LOI. The learned counsel further submitted that the terms of the contract agreed between the parties clearly states that in the event of default by the tenderer, the entire EMD will be forfeited and accordingly the same has been forfeited in this case.

13. It is the further contention of the learned counsel for the fifth respondent that despite clarification given by the respondents to use alternatives to the river sand and also work has to be started and decision with regard to the grade of cement will be taken later, the petitioner neither



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started the work nor executed the performance guarantee. Therefore as per the terms of the contract EMD has been rightly forfeited. The learned counsel further submitted that now the contract has also been granted to a third party. It is also stated that the EMD was paid as a guarantee that the contract would be fulfilled. Since the contract permits forfeiture of entire EMD, the petitioner is not entitled to seek for refund of the EMD.

14. In support of his submissions, the learned counsel appearing for the fifth respondent relied upon the following judgments of the Hon'ble Supreme Court:

(i) Satish Batra Vs. Sudhir Rawal reported in (2013) 1 SCC 345

(ii) Central Coalfields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622

15. I have heard the learned counsel on either side and also perused the entire materials carefully.

16. Notice Inviting Tender (NIT) has been issued by the 3rd respondent for construction of 161 residential dwelling units at Ambattur village, Chennai. Clause 1.4 deals with Pre-Bid Meeting and the same was



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fixed on 15.12.2016 at 11.30 hours. Clause 1.5 deals with deposit of EMD of Rs.8,00,000/-. Clause 1.18 states that earnest money of the Successful Tenderer shall be forfeited in the event of refusal or delay on his part in signing the Agreement within 15 days or refusal to start the work on instructions from the General Manager. Clause 2.18 of the Instructions to Tenderers makes it very clear that successful tenderer has to furnish performance guarantee within 15 days from the date of issuance of the Letter of Intent.

17. The 4th respondent vide proceedings dated 18.05.2017, has communicated to the petitioner that the petitioner's bid has been accepted by the competent authority. In the above communication, the petitioner was also called upon to submit irrevocable performance bank guarantee from a Nationalized Bank or a Commercial Scheduled Bank equivalent to 5% of the accepted contract value of Rs.1,33,43,525/- within 15 days in terms of Clause 2.18 of the Instructions to Tenderers.

18. In the reply communication sent by the petitioner dated 31.05.2017, the petitioner has acknowledged the letter of acceptance and also enclosed a duplicate copy of acceptance letter duly signed by the writ



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petitioner in token of their acceptance of the work order. In the said communication, the writ petitioner has raised certain clarifications with regard to the fact that there is no river sand available in Chennai and sought to use alternatives. It is also stated that M25 grade concrete has to be used for structural stability and other query has been raised with regard to GST. It is also stated by the petitioner that the above issues have cropped up only after the opening of the tender and therefore requested the respondents to consider the above issues positively and also indicated that on receipt of the respondents response to the above queries, the writ petitioner will submit the performance guarantee.

19. The above queries have been answered by the third respondent vide letter dated 07.06.2017, by indicating that since the schedule does not specify river sand and therefore sand used on the work should meet the specifications laid down. With regard to the minimum grade of RCC-M25, it is stated by the respondents that the same will be examined in consultation with the Architect and Structural Designer and final decision will be taken based on their report and that the work shall be executed as per that report. With regard to GST, it is stated that the GST Bill has been published in the Gazette on 08.09.2016, and the tender was opened only on 11.01.2017 and



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therefore it is not a new development as stated by the petitioner. Therefore, the respondents have once again requested the petitioner to submit the performance guarantee within one week of their letter dated 07.06.2017. In the said letter it is also made clear that in case the petitioner failed to submit the performance guarantee within one week from the date of issue of the said letter, it will be treated that the petitioner is not interested in taking up the above work and the EMD deposited by the petitioner will be forfeited.

20. Again by letter dated 14.06.2017, the writ petitioner had sought some clarification with regard to structural stability and the proposed new GST and indicated that only on hearing from the respondents the petitioner will enter into the contract agreement as per the conditions of the contract.

21. Thereafter, on 30.06.2017, the respondents have issued a communication indicating that as the writ petitioner has not deposited the performance guarantee within the prescribed time schedule they cannot afford to delay the project any further and informed the petitioner that EMD of Rs.8,00,000/- has been forfeited. Again on 11.07.2017, the same has been reiterated by the third respondent.



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22. Now, the point that arise for consideration is whether the writ petitioner is entitled to refund of EMD.

23. It is relevant to note that there is a specific covenant agreed between the parties that if the agreement is not signed or work has not commenced, the EMD will be forfeited. Clause 1.18 of the tender condition stipulate that EMD will be forfeited in the event of refusal or delay on the part of the tenderer in signing the agreement within 15 days or refusal to start the work on instructions from the General Manager.

24. Further, Clause 2.18 of the Instructions to the Tenderers makes it very clear that performance guarantee should be furnished within 15 days from the date of issue of Letter of Intent. Admittedly, the letter of acceptance was also signed by the petitioner as early as on 18.05.2017. It is also seen from the records that despite work order has been issued and acceptance letter has been issued and in spite of signing the same, the petitioner has started making certain queries and the respondents also answered the said queries to the effect that instead of river sand, alternatives can be used, with regard to M25 grade concrete the same will be examined and work can be started. However, in spite of repeated remainders by the respondents to the



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petitioner to furnish the performance guarantee, the writ petitioner has not furnished the performance guarantee. Therefore, when the contract stipulates forfeiture of EMD, it is permissible on the part of the respondents to forfeit the entire EMD. Not only in the tender conditions and in the Instructions to Tenderers but also in the letter of acceptance, the respondents have insisted for furnishing the performance guarantee which has not been furnished by the petitioner, which is contrary to the stipulations contained in the contract.

25. It is also relevant to note that the respondents having clarified that alternative sand can be used and with regard to the structural stability, the same will be examined in consultation with the Architect and Structural Designer, final decision will be taken based on their report and the work can be executed as per that report.

26. Thus, having agreed to examine the structural stability with the Architect and Structural Designer, it is stated in their communication dated 07.06.2017, that final decision in that regard will be based on their report and work shall be executed as per that report. Having accepted to examine the above aspect, no decision whatsoever has been taken by the respondents, however they only insisted upon the petitioner to furnish the performance



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guarantee as per the terms of the contract, which has not been done so by the petitioner within the prescribed time schedule and therefore the entire EMD of Rs.8,00,000/- has been forfeited by the respondents.

27. It is also relevant to note that a new tender has been notified by the respondents and contract has been given to a third party, wherein, specific clause has been made for using M25 grade concrete, which was originally requested by the petitioner. Similarly with regard to the GST, it is also made applicable as per the provisions of the Act. The clarifications sought by the petitioner has been accepted in the later tender conditions and contract has been given to a third party.

28. Therefore, this Court is of the view that though payment of EMD is intended to serve as a proof of bona fide of the tenderer so that if the transaction fails by reason of fault or violation of the tender conditions by the tenderer then the EMD is liable to be forfeited and in case transaction goes forward the EMD will become part of the purchase price. Though EMD is made guaranteeing to undertake the work and execution of the contract as agreed, the fact remains that in this case when the petitioner has sought certain clarifications with regard to the execution of the work, the same has



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been answered, however in the subsequent tender the same conditions have been incorporated.

29. The Hon'ble Supreme Court in *Satish Batra Vs. Sudhir Rawal*

reported in **(2013) 1 SCC 345** has held in paragraph 16 as follows:

"16. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, 'earnest' is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause that militates against the clauses extracted in the agreement dated 29.11.2011."

30. Considering the fact that the respondents have also realised certain facts regarding structural stability and agreed to examine the same they have not undertaken any such exercise immediately but on the other hand they insisted the petitioner for furnishing of performance guarantee.



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WEB COPY 31. Considering the above facts coupled with the specific stipulations contained in the contract the EMD has to be forfeited, however, this Court is of the view that forfeiture of EMD is always subject to the Doctrine of Reasonableness. From the communications referred to above, this Court could envisage that there is no deliberate intention on the part of the petitioner to avoid or delay the contract. In fact, the respondents have also in order to set right the same has also given a clarification, however, they have not given any positive solution with regard to use of M25 grade concrete, whereas, in the subsequent contract the use of M25 grade concrete has been put in the tender condition.

32. Taking note of the same, this Court is of the view that though contract stipulates forfeiture of EMD, as there is no loss established, this Court is of the view that forfeiture of the entire EMD is always subject to Doctrine of Reasonableness. Unless it is established by the respondents that they suffered loss for re-tendering, the entire amount cannot be forfeited by the third respondent.

33. Considering the difficulties faced by both sides, this Court is of



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the view that the respondents cannot retain the entire amount as no loss has been established or legal injury has been established by the respondents.

Taking into consideration the above fact that new tender has been notified and process has commenced, this Court is of the view that for the above process the respondents would have spent about Rs.3,00,000/-. Therefore, the said amount of Rs.3,00,000/- is ordered to be forfeited and the remaining amount of Rs.5,00,000/- has to be refunded to the petitioner within a period of two months from the date of receipt of a copy of this order. With the above directions the writ petition is disposed of. Consequently, the connected miscellaneous petitions are closed. No costs.

17.10.2022

Index : Yes / No

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To

1. The Secretary to Government,
Ministry of Railways,
256-A, Rail Bhavan,
Raisina Road, New Delhi - 110001.
2. The Chairman,
Railway Board,
256-A, Rail Bhavan, Raisina Road,
New Delhi - 110001.
3. The Managing Director,
The Indian Railway Welfare Organisation,
Railway Offices Complex, Sivaji Bridge,



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(Behind Shankar Market), New Delhi - 110001.

4. The Director - Technical,
The Indian Railway Welfare Organisation,
Railway Offices Complex,
Sivaji Bridge, (Behind Shankar Market),
New Delhi - 110001.
5. The General Manager - South Zone,
The Indian Railway Welfare Organisation,
Engineering Construction Office,
Southern Railway, Poonamallee High Road,
Egmore, Chennai - 600008.



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N.SATHISH KUMAR, J.

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PRE DELIVERY ORDER
in W.P.No.20970 of 2017 and
W.M.P.Nos.21859 to 21861 of 2017

RESERVED ON : 11.10.2022

DELIVERED ON : 17.10.2022