



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 04th JULY, 2022

IN THE MATTER OF:

+ **W.P.(C) 9743/2022**

WRITER BUSINESS SERVICES PVT LTD Petitioner

Through: Mr. Rajshekhar Rao, Sr. Advocate
with Mr. Achyuth Ajitkumar, Mr.
Lzafeer Ahmad and Ms. Sonal
Sharda, Advocates

versus

PUNJAB NATIONAL BANK Respondent

Through: Ms. Arti Singh with Mr. Aakashdeep
Singh Roda, Mr. Basant Pal Singh,
Ms. Pooja Singh, Advocates for PNB
and Mr. Sai Krishna Apparao M,
Chief Manager, PNB and Mr. Ashish
Patel, Manager, PNB.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

C.M. Nos. 28905/2022 & 28906/2022 (Exemption)

Allowed, subject to all just exceptions.

W.P.(C) 9743/2022 & C.M. No. 28904/2022

1. The Petitioner has approached this Court under Article 226 of the Constitution of India and seeks to challenge the decision dated 09.06.2022 taken by the Respondent herein by which the bid of the Petitioner herein has been found to be ineligible for Tender No. GSAD/DSC/E-Tender



1818/2022-23 on the ground that the Petitioner has not submitted the Earnest Money Deposit (hereinafter referred to as 'EMD'). The Petitioner also seeks for an appropriate writ, order or direction directing the Respondent herein to accept the original Demand Draft bearing No.839692, dated 07.05.2022 drawn on HDFC Bank in favour of the Respondent, and to consider the Petitioner's technical and commercial bid submissions for Respondent's Tender No. HO: GSAD/DSC/E-Tender1818/2022-23 in accordance with the tender conditions and law.

2. The facts, in brief, leading to the instant writ petition are as under:

- a) It is stated that the Petitioner/company carries on the business of storage, safe-keeping, and maintenance of physical records, including their retrieval based on client requests and other allied services.
- b) It is stated that in April 2022 the Respondent herein issued a tender, bearing No. HO: GSAD/DSC/E-Tender 1818/2022-23, for selection of 'Document Storage Centre Service Providers'. It is stated that the bidding process was to commence on 13.04.2022 from 10:00 Hrs., and the last date and time for receipt of queries from service providers for clarifications was 19.04.2022 up to 17:00 Hrs., The pre-bid meeting was to be held on 21.04.2022 at 11:00 Hrs. and the last date and time for downloading bidding documents, bid preparation and hash submission was 04.05.2022 up to 15:00 Hrs. It is stated that the bid was to be opened on 05.05.2022. It is stated that corrigendums were issued by the Respondent herein on 29.04.2022 and 09.05.2022. It is stated that *vide* corrigendum



dated 09.05.2022, the date of submission and bid opening dates were modified, and the last date for bid submission was extended till 21.05.2022 up to 14:00 Hrs. It is stated that on 20.05.2022, the Petitioner herein uploaded all the relevant bid documents along with a scanned copy of the EMD Demand Draft for Rs.50,000/- on the Respondent's e-procurement portal as directed in the tender document.

- c) It is stated that on 21.05.2022 at around 13:45 Hrs, the Petitioner herein submitted its physical bid submission along with a signed and stamped photocopy of the EMD Demand Draft. It is stated that on 21.05.2022 at around 15:30 Hrs, the bid opening process commenced and the envelope containing the Petitioner's bid was opened. It is stated that the Petitioner's representative was there to hand-over the original Demand Draft, however, the Tender Evaluation Committee of the Respondent refused to accept the same. It is stated that the Petitioner wrote a letter to the Respondent requesting them to allow the representative of the Petitioner to submit the Original Demand Draft, however, no response was forthcoming from the Respondent. It is stated that the Petitioner wrote another letter to the Respondent on 06.06.2022 wherein the Petitioner took a stand that the tender documents did not specify that the original EMD Demand Draft was to be included with the physical bid. It is stated that on 09.06.2022, the Respondent issued an email communication to the Petitioner stating that the Petitioner's bid had been found ineligible as the EMD was not submitted by the



Petitioner in time and that its bid would not be evaluated any further. It is stated that on 13.06.2022, the Petitioner wrote a detailed representation to the Respondent giving all the relevant clauses of the tender document to show that it had not been specified as to how the original Demand Draft was to be submitted. The Petitioner also requested the Respondent to accept its EMD Demand Draft whose copy had been uploaded by the Petitioner. It is stated that on 15.06.2022, the Respondent issued an e-mail stating that the Petitioner's bid was rejected because of non-submission of valid EMD.

- d) It is stated that on 29.06.2022, the Petitioner filed a writ petition bearing Dairy No.1062968/2022 challenging the Respondent's decision dated 09.06.2022 and seeking a direction to the Respondent to consider the technical bid of the Petitioner.
- e) It is stated that on 29.06.2022, notice was issued by the Respondent fixing the commercial bid opening date as 30.06.2022. It is stated that the Petitioner informed the Respondent about the filing of a writ petition and requested them to defer the commercial bid opening by one week.
- f) It is stated that the commercial bids were opened on 30.06.2022 and, therefore, the present petition has been filed by the Petitioner.

3. Mr. Rajshekhar Rao, learned Senior Advocate appearing for the Petitioner, contends that the Petitioner had purchased the Demand Draft on 07.05.2022, which was much prior to the last date of closing the bids and the Petitioner had in fact also enclosed a photocopy of the Demand Draft and



submitted the same in the bank. He further contends that the submission of EMD was not an original condition of the tender document and since the Petitioner had already purchased the draft on 07.05.2022, the bid of the Petitioner could not be disqualified. He states that the Demand Draft was already available and could have been submitted in time. He further submits that the Petitioner has been writing regular representations to the Respondent for acceptance of the Demand Draft which had been purchased by the Petitioner.

4. Learned Counsel for the Petitioner also places reliance on the judgment passed by the Division Bench of this Court in PES Installations Pvt. Ltd. v. Union of India, **2015 SCC OnLine Del 8397**, wherein it has been held that the EMD is required to protect the purchasers against the risk of the bidder's conduct, which would warrant the forfeiture of the EMD. The EMD is to be forfeited in case the bidder withdraws or amends its tender or impairs or derogates the tender in any respect within the period of forfeiture of its tender or, in case, any information/document furnished in the tender is incorrect, false, misleading or forged. Learned Counsel for the Petitioner further states that if the EMD of the Petitioner is accepted today it will not cause prejudice to any party.

5. Heard Mr. Rajshekhar Rao, learned Senior Advocate appearing for the Petitioner, Ms. Arti Singh, learned Counsel for the Respondent, and perused the material on record.

6. The facts, as stated above, demonstrates that the bidding process commenced on 21.05.2022 and the Tender Evaluation Committee, on the very same day, had refused to accept the EMD of the Petitioner in view of the fact that the tender documents of the Petitioner were not complete.



Despite this, the Petitioner chose not to approach this Court. In fact the Petitioner has filed a writ petition, bearing Dairy No.1062968/2022, challenging the Respondent's decision dated 09.06.2022 and seeking a direction to the Respondent to consider the technical bid of the Petitioner. Even as on date, the said writ petition is under defects. The commercial bids have been opened. Learned Counsel appearing for the Respondent informs the Court that the Respondent is in the process of issuing letters to the successful bidders.

7. It is well settled that in matters of tender, the concerned parties must act with alacrity. The Apex Court in State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566, has observed as under:

“24. Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an



important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction. We do not think it necessary to burden this judgment with reference to various decisions of this Court where it has been emphasised time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal. We may only mention in the passing two decisions of this Court one in Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489 : AIR 1979 SC 1628 : (1979) 3 SCR 1014] and the other in Ashok Kumar Mishra v. Collector [(1980) 1 SCC 180 : AIR 1980 SC 112 : (1980) 1 SCR 491] . We may point out that in R.D. Shetty case, even though the State action was held to be unconstitutional as being violative of Article 14 of the Constitution, this Court refused to grant relief to the petitioner on the ground that the writ petition had been filed by the petitioner more than five months after the acceptance of the tender of the fourth respondent and during that period, the fourth respondent had incurred considerable expenditure, aggregating to about Rs 1.25 lakhs, in making arrangements for putting up the restaurant and the snack bar. Of course, this rule of laches or delay is not a rigid rule which can be cast in a strait jacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But, such cases where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the court; ex hypothesi every discretion must be exercised fairly and justly so as to promote justice and not to defeat it.”



8. Relying upon State of M.P. v. Nandlal Jaiswal (supra), the Apex Court in Vetindia Pharmaceuticals Ltd. v. State of U.P., (2021) 1 SCC 804, observed as under:

*“15. That brings us to the question of delay. There is no doubt that the High Court in its discretionary jurisdiction may decline to exercise the discretionary writ jurisdiction on the ground of delay in approaching the court. But it is only a rule of discretion by exercise of self-restraint evolved by the court in exercise of the discretionary equitable jurisdiction and not a mandatory requirement that every delayed petition must be dismissed on the ground of delay. The Limitation Act stricto sensu does not apply to the writ jurisdiction. The discretion vested in the court under Article 226 of the Constitution therefore has to be a judicious exercise of the discretion after considering all pros and cons of the matter, including the nature of the dispute, the explanation for the delay, whether any third-party rights have intervened, etc. The jurisdiction under Article 226 being equitable in nature, questions of proportionality in considering whether the impugned order merits interference or not in exercise of the discretionary jurisdiction will also arise. This Court in *Basanti Prasad v. Bihar School Examination Board* [*Basanti Prasad v. Bihar School Examination Board*, (2009) 6 SCC 791 : (2009) 2 SCC (L&S) 252] , after referring to *Moon Mills Ltd. v. M.R. Meher* [*Moon Mills Ltd. v. M.R. Meher*, AIR 1967 SC 1450] , *Maharashtra SRTC v. Balwant Regular Motor Service* [*Maharashtra SRTC v. Balwant Regular Motor Service*, (1969) 1 SCR 808 : AIR 1969 SC 329] and *State of M.P. v. Nandlal Jaiswal* [*State of M.P. v. Nandlal Jaiswal*, (1986) 4 SCC 566] , held that if the delay is properly explained and no third-party rights are being affected, the writ court under Article 226 of the Constitution may condone the delay, holding as*



follows : (Basanti Prasad case [Basanti Prasad v. Bihar School Examination Board, (2009) 6 SCC 791 : (2009) 2 SCC (L&S) 252] , SCC p. 796, para 18)

“18. In the normal course, we would not have taken exception to the order passed by the High Court. They are justified in saying that a delinquent employee should not be permitted to revive the stale claim and the High Court in exercise of its discretion would not ordinarily assist the tardy and indolent person. This is the traditional view and is well supported by a plethora of decisions of this Court. This Court also has taken the view that there is no inviolable rule, that, whenever there is delay the Court must refuse to entertain a petition. This Court has stated that the writ court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution may condone the delay in filing the petition, if the delay is satisfactorily explained.””

9. The Petitioner had earlier filed a writ petition vide diary No.1062968/2022, wherein the Petitioner had challenged the Respondent's decision dated 09.06.2002 refusing to accept the bid of the Petitioner as the Petitioner has not submitted the EMD as stipulated in the tender document. The Petitioner did not take any steps to process that petition and the same has not even been numbered. Instead of pursuing the petition, the Petitioner has filed a second writ petition challenging the same decision after a considerable delay and this cannot be entertained.

10. In addition to the delay on the part of the Petitioner in filing the instant writ petition, this court deems it fit to refer to relevant clauses of the tender document which are necessary in deciding the instant writ petition. The same have been reproduced as under:



“12. LOCAL CONDITIONS

The Service Provider must acquaint himself with the local conditions, Laws and other factors etc., which may have any effect on the performance of the contract and / or the cost.

16. BID EARNEST MONEY (EMD)

Bidder to submit the EMD of Rs.50,000/- (Rs. Fifty Thousand only) as specified in tender document.

18. CONTENT OF DOCUMENTS TO BE SUBMITTED

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18.2 EMD

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22.5 The Envelope should contain the hard copy of the technical bid should contain the following:-

- (a) EMD*
- (b) Hard Copy of the Technical bid.*

24.6.1 Verification of Bid fee and EMD: First of all, cost of bid (NIL) and EMD of all Service Providers will be verified. If EMD of any Service Provider is not found in order or not found to have been submitted, that Service Provider will be declared ineligible for further participating in the tender process.”

11. A perusal of the abovementioned clauses indicate that the deposit of EMD was a necessary document which had to be filed at the time of filing of



the bid. The Petitioner has been indolent and rather careless in not filing the EMD. Non-filing of the EMD, which is a necessary document for the bidding process, makes the bid document of the Petitioner non-responsive. The Petitioner cannot be allowed to take advantage of his own mistakes and should have exercised presence of mind while submitting its bid.

12. The judgment relied upon by the learned Counsel for the Petitioner in PES Installations Pvt. Ltd (supra) is not applicable to the facts of this case because in that case, notice inviting tender had specified that the EMD was to be submitted in the form of bank guarantee and the bank guarantee was to be valid for 165 days from the date of opening of techno-commercial bid. The bank guarantee which was submitted was not for the requisite period and the bid of the Petitioner therein was rejected. The said judgment was passed on the basis of the facts of that case. In the present case, EMD has not been filed at all, which, according to the clauses referred hereinabove was a necessary document without which the tender has been held as non-responsive. This Court is, therefore, not inclined to exercise its jurisdiction under Article 226 of the Constitution of India to interfere with the bidding process.

13. Accordingly, the instant writ petition is dismissed along with the pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

JULY 04, 2022/Rahul