D/L. 7.
August 23, 2023.
MNS.

WPA No. 22214 of 2022
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CAN 1 of 2023

Ali Reza Khan
Vs.
The Union of India and others

Mr. Anupam Das Adhikari,
Mr. Krishnendu Paul Chowdhury

… for the petitioner.

Mr. Somnath Ghoshal,
Mr. Subha Senapati

…for the Union of India.

Mr. Barnik Ghosh,
Mr. Pourush Bandyopadhyay

…for the respondent nos. 3 to 7.

Mr. Rahul Karmakar,
Mr. Rittick Chowdhury,
Mr. S. K. Poddar

…for the respondent nos. 8 & 9.

Affidavit-in-opposition filed by respondent nos. 8 and 9 and the affidavit-in-reply filed by the petitioner today be kept on record.

Learned counsel for the petitioner contends that the present writ petition challenges the forfeiture of earnest money deposited by the petitioner in respect of a tender floated by the respondent authorities for the purpose of buying scrap materials.

It is contended that the petitioner erroneously submitted a bid of Rs.5,00,786/- instead of Rs.1,61,786/-, as originally intended. After the bid being closed just prior to 5 p.m. that evening, at or around 6.30 p.m., the petitioner sent an e-mail asking for a rectification of such inadvertent mistake committed by the petitioner. However, later that night, the bid was accepted by the respondent authorities.

The petitioner then sought a refund of the earnest money, which has been refused, necessitating the present writ petition.

It is argued that in similar cases, a co-ordinate Bench of this Court as well as other Courts have considered the issue as to whether any damages were made out by the respondent authorities for forfeiting the earnest money deposited. It is contended that in the absence of any damages being pleaded or shown by the respondents, it was *de hors* the authority of the respondents to forfeit the earnest money deposited by the petitioner.

It is further contended that the mistake was entirely bona fide, which is evidenced from the petitioner's immediate communication to the respondent-MSTC Limited, which runs the concerned portal, regarding the intended rectification.

It is further argued by the petitioner that no prudent businessman would have given a bid of such an exorbitant amount, which is evident from a comparison with the other bids submitted by other participants in the tender, which is found out from the documents annexed in the affidavit-in-opposition of MSTC Limited.

Learned counsel places reliance on a judgement of a Division Bench of the Punjab and Haryana High Court reported at 2019 SCC OnLine P&H 1119 (Garg Rice Mills Vs. Food Corporation of India and others). In the said case, it is submitted, it was clearly observed that despite there being an error on the part of the bidder, the Court observed that the forfeiture of the earnest money and retention thereof was nothing but an unjust enrichment. As such, the amount was directed to be refunded.

Learned counsel also places reliance on a Division Bench judgment of the Madras High Court reported at 2015-3-L.W. 125 (The Registrar, Indian Institute of Technology Vs. M/s.

Hameed enterprises and another) for a similar proposition, where it was also held that no prudent businessman would offer the amount of bid too high, which may not be the value of the goods. It is submitted that the same proposition is applicable in the present case as well.

Lastly, learned counsel for the petitioner places reliance on a co-ordinate Bench judgment of this Court in Shree Coal Enterprises India Pvt. Ltd. and another Vs. Coal India Limited and others reported at 2018 SCC OnLine Cal 1652, where, in a similar context, it was observed that the tender issuing authority had not quantified the loss and damage that it suffered. These facts are material, it was observed, for the purpose of considering the quantum of compensation to be paid to the authorities for the cancellation of the contract by the petitioner and the so-called breach of such contract by the petitioner in the said case. The learned Single Judge held that the word “penalty” is very wide and it would be harsh to allow the Coal India Limited, a public authority, to impose a penalty which is in the nature of punishment on a defaulting party to a contract, without any loss and damage suffered by such public authority being established, even at a rudimentary level.

Learned counsel appearing for the MSTC Limited, while controverting the arguments of the petitioner, submits that the modality of submitting bids in the present context is that there is a two-way verification of the bid.

Once the bid is initially submitted, there is a procedure for re-insertion of the quantum of the bid. It is submitted that the petitioner claims to be a registered buyer and, as such, is obviously acquainted with the modalities of submission of bid. Moreover, it is argued that the MSTC Limited, being merely in charge of the portal which conducts the e-auctions, did not have any way out, once the bid was verified and submitted.

It is contended further by the MSTC Limited that the discrepancy between the alleged intended quantum of the bid amount and the amount of actual bid itself shows that the error could not have been inadvertent.

It is submitted that if such endeavour of bidders are permitted by the courts, it would open a flood-gate, which would be detrimental to commercial transactions being conducted in electronic mode.

Learned counsel also places reliance on Clause 3.4 of the tender document, which provides that a bid, once given, cannot be retracted.

Learned counsel for the MSTC Limited also argues that the MSTC Limited was merely instrumental in conducting the e-auction and the money-in-question has been forwarded to the seller. As such, in any event, the MSTC Limited cannot have any liability regarding the claim made in the writ petition.

Learned counsel appearing for the respondent nos. 8 and 9, the sellers, at the outset, objects to the maintainability of the writ petition on the ground of availability of an arbitration clause in the tender document. It is submitted that the disputes sought to be raised squarely fall within the domain of the arbitration clause and the writ court ought not to readily interfere in such a matter.

Learned counsel for the petitioner also bases his argument on Section 22 of the Indian Contract Act, 1872 (1872 Act), which speaks of a contract being not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. It is argued that the said contention is fallacious and not applicable in the present case. It is argued that there was no *bona fide* mistake on the part of the petitioner and that the scope of applicability of Section 22 of the 1872 Act is not there in the present case.

As regards the co-ordinate Bench judgment of this Court, learned counsel argues that the factual matrix in the said case was entirely different from the present one and that the transactions contemplated in the tender floated in the case which was decided by the learned Single Judge was entirely different from the present case, which merely pertains to the purchase and sale of scrap materials.

Learned counsel also argues that the respondent nos. 8 and 9 do not come within the purview of Article 12 of the Constitution of India, not being 'State' within the contemplation of the said Article. The said respondents, it is argued, are merely government companies having autonomy and carrying out their own transactions and business.

Upon hearing learned counsel for the parties, it transpires that the observations made by the Division Benches of the Punjab and

Haryana High Court as well as Madras High Court differ on facts from the present case.

In the Punjab and Haryana High Court judgment, the difference between the actual and intended bid amounts was merely of a zero.

The only ground on which the error was declined to be rectified and the bid revised was that there was no provision in the MTF for downward revision of bids. It was observed by the Division Bench that the authorities apparently failed to perceive the matter from a correct perspective and deal therewith in the right earnest. The "correct perspective" as contemplated by the Division Bench was explained thereafter to be that the petitioner submitted his financial bid, preceded by a calculated and conscious decision, and it was not a case that the petitioner had submitted his financial bid preceded by a calculated and conscious decision and then sought to resile to his suitability or requested for downward revision in his price bid.

Rather, the situation there was where the petitioner actually intended to bid at the rate of Rs.1,790/- per quintal, but owing to a *bona fide* error, one extra zero was added to the reserved price. In the present case, however, such factual aspect is not applicable at all in view of the stark difference between the alleged intended bid and the actual bid submitted by the petitioner.

Insofar as the Madras High Court judgment is concerned, there the offer ranged between Rs.1,24,000/- to Rs. 22,55,848/-. The findings of the learned Single Judge accepting the contention of the writ petitioner was that it was typographical mistake was held to be correct as no prudent businessman would offer the amount of bid too high, which may not be the value of goods. The court further observed that, without going into the question as to whether the appellant was entitled to the EMD amount as it appeared to be the case of revocation of offer and also in view of the fact that the learned counsel for the appellant had not pressed the point strenuously, the court was of the considered opinion that the petitioner was not entitled to any interest on the EMD. The action of the appellant in accepting the bid amount of the writ petitioner was held not to be proper, since the figure quoted was astronomical and certainly much more than the value of the scraps compared with the amount quoted by the other bidders.

In the said case, the offer actually given by the petitioner was of Rs.1,24,22,002/-, which was held to be astronomical and, accordingly, a typographical mistake. It was, in such context, observed that the offer ranged as per the bid history from Rs.1,24,000/- to Rs.22,55,848/-. Hence, the difference between the highest offer and the petitioner's was, in real sense, astronomical. Whereas the highest offer otherwise was Rs.22,55,848/-, the petitioner had erroneously made an offer of Rs. 1,24,22,002/-. However, the difference between the alleged intended bid and the actual bid submitted in the instant case is of about Rs. 4,00,000/-, which cannot by any stretch of imagination be said to be so astronomical that it shocks the conscience of court as it did in the Madras High Court matter.

Lastly, coming to the judgment of the learned Single Judge of this Court in Shree Coal Enterprises India (supra), respondent nos. 8 and 9 are justified in arguing that the fact-situation there was different from the present case. In the present case, the tender related to purchase of scrap material. As opposed to the same, in the case before the learned co-ordinate Bench, it was observed that the first petitioner participated in an auction undertaken by the first respondent and was the successful bidder. Upon being so successful, the first petitioner was allowed one rake coal in such e-auction at the bid price as specified therein. The e-auction was held in terms of the Spot E-auction Scheme, 2007. Thereafter the first petitioner deposited the entire value of the coal on May 5, 2008 with the first respondent. The first petitioner took steps for receiving the delivery of the coal. The Indian Railway Authorities sanctioned movement of the rake to the destination station at Shambhupura (Rajasthan). Thereafter the first petitioner cancelled the initial destination station for another destination. The Railway Authorities, however, did not provide the rake for the new destination station. The new purchaser informed the first petitioner that it would cancel the purchase order. In such circumstance, the first petitioner wrote to the Railway Authorities and the first respondent that, in the event the change of destination station was not permissible, the order should be cancelled and the entire earnest money deposited should be refunded. In such circumstances, the first respondent refused to release the earnest money deposited.

The learned Single Judge, in the facts of the case, observed in paragraph 7 thereof that although Coal India Limited had pleaded that it suffered loss and damages by reason of the cancellation of the contract by the petitioner, it had not quantified the loss and damage that it suffered. It had not stated in the affidavit as to what it did with the coal allotted to the petitioner under the subject contract. Those facts were held to be material for the purpose of considering the quantum of compensation to be paid to Coal India Limited for the cancellation of the contract by the petitioner.

However, the present facts are entirely different. In the judgment cited, as discussed above, the transactions had reached a more matured stage where the contract had been initially entered into but one of the parties subsequently resiled on an extraneous circumstance that the railway authorities did not afford a change of destination station. Moreover, in the said case, the Coal India Limited, in its affidavit, had asserted clearly that it had suffered loss and damages by reason of the cancellation of the contract by the petitioner but had not quantified the loss and damage. The very premise of withholding refund in the said case was apparently loss and damage suffered by the Coal India Limited, which was not established in any manner, that too, at a subsequent stage than the present case, where the contract itself was cancelled by the petitioner.

In the present case however, the forfeiture clause stipulates a scenario which has not yet reached the stage of entering into a contract but is penal to the extent that chance-seekers are deterred from submitting speculative bids.

However, we ought not be so harsh on the petitioner so as to say that the petitioner in the present case was merely a chance-seeker.

The petitioner, in fact, fairly close to the time when the bids were closed, at around 6.30 p.m. in the same evening, had approached the authorities by seeking a rectification of the bid. In spite of such approach by the petitioner, the bid was treated to be accepted and the petitioner was penalized with forfeiture as per the relevant clause.

A perusal of the forfeiture clause is necessary in such context. Clause 6.1 of the tender document provides, *inter alia*, that on final approval, the payment of balance sale value will have to be made in the same procedure as in Clauses 5.2(a) to (f). In the event of payment on accepted bid not being completed within the time specified, the earnest money in addition to the registration fee was to be forfeited without any further notice to the buyer.

In case the earnest money as mentioned above was not deposited within the time specified, it was also observed that the registration fee would be forfeited without any further notice where the bids are not accepted finally the earnest money deposit by the bidder shall be refunded to the buyer.

A perusal of the said clause shows that the same does not put a complete closure to the prospect of refund. In cases where the earnest money is not deposited within the time specified and the registration fee was to be forfeited without any further notice where the bids are not accepted finally, the earnest money deposit by the bidder was to be refunded to the buyer, even as per the said clause.

In the present case, however, such stage has not arrived and the respondents rely on the petitioner having not completed the procedure even after acceptance of the bid.

The *bona fides* of the petitioner may definitely be in question, since the gross difference between the quantum, which was allegedly sought to be bid, that is, Rs. 1,61,786/- and the actual bid amount of Rs.5,00,786/- cannot be said to be a "*bona fide* error".

As such, although the petitioner sought a rectification during the same evening and cannot be said to be a mere chance-seeker or speculator, in the facts of the present case, the error of the petitioner could not have been said to be *bona fide* under any stretch of imagination. The matter, unlike the other cases cited, was not merely restricted to a misplacement or addition of a zero. It was also not a case where one of the digits in the quantum was sought to be offered in thebid was erroneously mentioned. Here the entire quanta are different from each other beyond recognition.

However, the quantum actually bid is not so exorbitant or astronomically different from the entire range of bids as to come within the purview of the judgement of the Madras High Court cited by the petitioner.

Hence, the petitioner could not be said to have made a *bona fide* error. The initial bid submitted by the petitioner appears from the quantum to be a conscious submission of bid which was subsequently sought to be rectified by the petitioner, upon growing wiser.

Clause 3.4 of the tender document, as rightly pointed out by the MSTC Limited, forbids a bid, once given, from being retracted. The petitioner in the present case might have had a second thought, but has to be prevented from altering his bid after the stipulated time of closure of bid was over. It is rightly contended by the respondent that if such an effort is given a premium to by the courts of law, a flood-gate will be opened and the entire sanctity of the bidding process and the closure time would lose relevance.

That apart, in the present case, the petitioner is a registered buyer and has experience in the field of bidding and commercial transactions as per admission made by the petitioner.

The bidding process involved a double-check mode, in so far as the bid amount was to be reinserted by the bidder.

Having availed of such opportunity and procedure, the petitioner cannot subsequently resile, after the stipulated period of closure of the bid, retracting from its original bid and rectify the same.

Hence the provisions of Clause 6.1 are applicable in so far as the payment of the bid was accepted but not completed by the petitioner.

As to the argument of availability of arbitration before the petitioner, the same cannot be said to be an absolute bar since the petitioner, in the present case, has challenged the very principles of imposition of forfeiture by the respondent, which is wider the scope of arbitration as contemplated in the arbitration clause in the tender document.

As far as Article 12 of the Constitution of India is concerned, the respondent authorities definitely come within the purview of the same, being Government company. Hence, such ground of maintainability cannot but be turned down.

In the facts of the case, however, the petitioner is not entitled to refund of the earnest money within the purview of terms of the tender document.

Accordingly, WPA No. 22214 of 2022 is dismissed on contest without any order as to costs.

In view of dismissal of the writ petition, the connected application, being CAN 1 of 2023 is also disposed of.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)