IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.12.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

W.P.Nos.18465 & 18469 of 2022
and
W.M.P.Nos.17812 & 17817 of 2022

MB Power (Madhya Pradesh) Limited,
Rep by its Authorized Signatory, Mr.Tagore Yaragorla,
Having its Office at:
239, Okhla Industrial Estate, Phase-III,
New Delhi-110 020
E-mail: dushyant.meena@hpppl.in

... Petitioner in both petitions

Vs.

1.Tamil Nadu Generation and Distribution Corporation Limited,
Rep by Chief Engineer/Private Power Project (i/c),
Having its Office at:
144, Anna Salai, NPKRR Maaligai,
Chennai 600 002.

2.State Bank of India,
Chief Manager,
Industrial Finance Branch,
15th Floor, Jawahar Vyapar Bhawan,
1, Tolstoy Marg,
New Delhi 110 001.

... Respondents in both petitions

Prayer in W.P.No.18465 of 2022:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the 1st respondent in the impugned letter bearing Lr.No:CE/PPP/SE/PP/EE2/PP/F.04/PPMT/2021/D.223/2022 dated 04.04.2022 addressed to the petitioner and quash the same as the same is illegal not est and void ab initio.

Prayer in W.P.No.18469 of 2022:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records of the 1st respondent in the impugned letter bearing Lr.No:CE/PPP/SE/PP/F.Tender No.1500 MW/D.469/2022 dated 14.07.2022 addressed to the 2nd respondent pertaining to the invocation and encashment of the Bank Guarantee No.1895622BG0000001 dated 10.01.2022 for an amount of INR 8.75 Crore given by the petitioner in favor of the 1st respondent to return the Bank Guarantee No.1895622BG0000001 dated 10.01.2022 to the petitioner.

For Petitioner
in both petitions : Mr.P.S.Raman,
Senior counsel
for Mr.P.J.Rishikesh

For Respondents
in both petitions : Mr.P.Wilson,
Senior counsel,
for Mr.D.R.Arunkumar,
Standing counsel for R1

COMMON ORDER

The writ petition in W.P.No.18465 of 2022 has been filed challenging the letter dated 04.04.2022.

2. The writ petition in W.P.No.18469 of 2022 has been filed challenging the letter dated 14.07.2022 and also for the encashment of Bank Guarantee, which was given by the petitioner in favour of the 1st respondent on 10.01.2022.

3. Mr.P.S.Raman, learned Senior counsel, who is appearing for the petitioner would submit that the 1st respondent had invited the tenders for procurement of 1500 MW Power for medium term (5 years) from various Power Generating Companies vide a Notice Inviting Tender (NIT) dated 21.12.2021. Further, he would submit that the last date for submitting both the technical and financial bids was on 17.01.2022. Thereafter, a corrigendum dated 20.12.2021 was issued, by which the last date for submission of bid was extended up to 31.01.2022 and the date of commencement of supply was with effect from 01.04.2022.

4. Further the learned Senior counsel would submit that the petitioner had submitted their technical and financial bid on 31.01.2022 along with their bid security in the form of Bank Guarantee issued by the State Bank of India for a sum of Rs.8,75,00,000/-. He would further contend that the petitioner had quoted the tariff of Rs.4.66/Kwh and hence, they were declared as L1 Bidders. Thereafter, the 1st respondent vide a letter dated 09.02.2022 called the petitioner for further negotiation. However, the petitioner had not shown any interest for the same. At this juncture, the Letter of Award (LOA) dated 04.04.2022 was issued in favour of the petitioner.

5. The contention of the learned Senior counsel is that the aforesaid impugned LOA was issued contrary to the terms and conditions of the Agreement for Procurement of Power (hereinafter called as "Tender document"). Therefore, the petitioner is not in a position to perform the tender and execute the relevant documents as required under the Tender document. Under these circumstances, the impugned letter

dated 14.07.2022 was also issued by the 1st respondent for the encashment of bank guarantee.

6. The main contention of the learned Senior counsel appearing for the petitioner is that initially the tender was called for the procurement of 1500 MW Power for Medium Term (5 years), whereas the 1st respondent had issued the LOA for Short Term. Further, he had also referred to the Clause 2 of the LOA, which states as follows:

> *"2. M/s.MB Power (Madhya Pradesh) Ltd shall commence the supply under Short Term Open Access from 1st May, 2022 till the Medium Term Open Access becomes operational, as per terms of the Bidding Documents."*

7. By referring the above clause, he would submit that since the LOA was issued against the terms and conditions of the tender document, the 1st respondent is not entitled for encashment of any bank guarantee. Further he would contend that if the 1st respondent is intend to encash the Bank Guarantee, they have to prove the loss sustained by them. However, in the present case, since the petitioner is not inclined to

execute the relevant documents, the 1st respondent shall offer the contract to the next successful bidder and hence, there is no loss for them to invoke the Bank Guarantee. In support of his submission, he referred to the judgment of the Hon'ble Apex Court in ***Kailashnath Associates vs. Delhi Development Authority and another*** reported in ***(2015) 4 SCC 136.***

8. Further, by referring the judgement of the Hon'ble Supreme Court in ***Union of India vs. Vertex Broadcasting Company Private Limited and others*** reported in ***(2015) 16 SCC 198***, he would submit that if there is any variation in LOA contrary to the terms and conditions of the Tender document, the Court can certainly interfere and hence, he requests this Court to allow these writ petitions.

9. Per Contra, Mr.P.Wilson, learned Senior counsel appearing for the 1st respondent would contend that in the present case, the petitioner was the successful L1 Bidder and hence, the 1st respondent had issued the LOA in favour of the petitioner on 04.04.2022 and called upon the

petitioner to execute the relevant documents as provided in Clause 2.19.7(d) of the Tender document. As per the said Clause, the petitioner was supposed to have executed the following:

> i. to sign and return the duplicate copy of LOA;
> ii. To sign the APP; or
> iii. To furnish the Performance Security within the period prescribed therefore in the APP;

10. Further, he would submit that the said the terms and conditions have not been complied with by the petitioner. That apart, even after the issuance of LOA, the 1st respondent had waited for more than 70 days. However, since the petitioner had failed to act upon the said LOA, without any other option, the 1st respondent had intend to invoke the Bank Guarantee by virtue of the letter dated 14.07.2022.

11. He would also submit that there is no variation in LOA, which is contrary to the provisions of terms and conditions of the tender document. The Clause 2 of the LOA only states that the petitioner has to commence the supply under the Short Term Open Access from 01.05.2022 till the Medium Term Open Access become operational as

per the terms of the bidding document. Even the said condition is incorporated in the draft agreement, which forms a part of the tender document. Therefore, it is not that the 1st respondent had variated the terms and conditions of Tender document while issuance of LOA, but it was the understanding between the parties, who are all participated in the tender that the supply shall commenced under the Short Term Open Access from 01.05.2022 till the Medium Term Open Access become operational.

12. Further, he would submit that even if it is assumed that the Short Term Open Access is continued, it does not mean that it will come to an end at the expiry of 3 months as contended by Mr.P.S.Raman, learned Senior counsel, but as per the agreed terms and conditions of the bidding document, it would continue until Medium Term Open Access become operational. Therefore, he would contend that the apprehension expressed by the learned Senior counsel for the petitioner is not acceptable.

13. He would also contend that the petitioner had participated in the tender process and they were declared as L1 Bidder and accordingly, the LOA was issued to the petitioner. Even after the receipt of said LOA, the petitioner had not at all responded or made their opposition in writing to the 1st respondent. Hence, with no other option, the 1st respondent had issued a letter dated 14.07.2022 invoking the bank guarantee in accordance with the terms and conditions of the Tender document. Thus, at this stage, it is not fair on the part of the petitioner to come and say that the 1st respondent had issued the LOA varying the terms and conditions of the tender document.

14. Further, he would contend that what was agreed by both the parties, has been reflected in the LOA issued by the 1st respondent and it is only the petitioner's inability to perform their work and that is the reason why they have not acted upon the said LOA. Therefore, the 1st respondent is certainly entitled to invoke the bank guarantee.

15. Apart from that, he would also submit that the Writ Court will not have any jurisdiction to entertain a petition with regard to the invocation of bank guarantee since the petitioner has alternate remedy to approach the Arbitration, where the appropriate remedy is available for the petitioner. In this regard, he referred to the following judgments:

i) ***Himadri Chemicals Industries Limited vs. Coal Tar Refining Co.*** reported in ***(2007) 8 SCC 110;***

ii) ***Hindustan Steel Workers Construction Limited vs. G.S.Atwal and Co. (Engineers) Private Limited*** reported in ***(1995) 6 SCC 76***;

iii) ***Ansal Engineering Projects Limited vs. Tehri Hydro Development Corporation Limited and another*** reported in ***(1996) 5 SCC 450;***

iv) ***Gujarat Maritime Board vs. Larsen and Toubro Infrastructure Development Projects Limited and another*** reported in ***(2016) 10 SCC 46;***

v) ***State of Maharashtra and another vs. National Construction Company, Bombay and another*** reported in ***(1996) 1 SCC 735;***

vi) ***Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited*** reported in ***(2008) 4 SCC 755;***

vii) ***Chief General Manager (IPC), Madhya Pradesh Power Trading Company Limited and another vs. Narmada Equipments Private Limited*** reported in ***(2014) 14 SCC 548;***

16. In reply, Mr.P.S.Raman, learned Senior counsel, would submit that as contended by Mr.P.Wilson, the parties may be relegated to Arbitration, however he would request that in the meantime, this Court may consider for continuation of the stay granted by this Court with regard to the invocation of bank guarantee till the filing of petition before the Arbitration.

17. I have given due consideration to the submissions made by the Mr.P.S.Raman, learned Senior counsel appearing for the petitioner and Mr.P.Wilson, learned Senior counsel appearing for the 1st respondent and also perused the materials available on record.

18. In the present case, the petitioner was declared as L1 Bidder and accordingly, the LOA dated 04.04.2022 was issued to the petitioner

by the 1st respondent. Thereafter, the petitioner is supposed to have supply power as per the provisions of Clause Nos.2.19.6 and 2.19.7 of the tender document, which states as follows:

> "*2.19.6 The Utility shall be entitled to forfeit and appropriate the Bid Security as Damages inter alia in any of the events specified in Clause 2.19.7 herein below. The Bidder, by submitting its Bid pursuant to this Section B, shall be deemed to have acknowledged and confirmed that the Utility will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this Section B. No relaxation of any kind on Bid Security shall be given to any Bidder.*
>
> *2.19.7 The Bid Security shall be forfeited as Damages without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or under the APP, or otherwise, if,*
>
> *a. a Bidder submits a non-responsive Bid;*
>
> *b. a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this Section B:*
>
> *c. a Bidder withdraws its Bid during the period of Bid validity as specified in this SECTION B and as extended by mutual consent of the respective Bidder(s) and the Utility;*
>
> *d. the Selected Bidder fails within the specified time limit-*
>
> *i. to sign and return the duplicate copy of LOA,*
>
> *ii. to sign the APP, or*

iii. to furnish the Performance Security within the period prescribed therefor in the APP, or

e. the Selected Bidder, having signed the APP, commits any breach thereof prior to furnishing the Performance Security."

19. Upon perusal of the above Clauses, it appears that admittedly the petitioner had not complied with the execution of the documents as referred therein. The reason assigned by the petitioner for such non-execution of the document was that the 1st respondent had issued the LOA by varying the provisions of the terms and conditions of the Tender document.

20. The variation pointed out by the petitioner was that the tender was called for the Medium Term, however the LOA was issued for the Short Term. According to the petitioner, the Short Term means 3 months and the Medium Term is 3 to 5 years, whereas according to the 1st respondent, Short Term is 1 year and the Medium Term is up to 7 years. Therefore, he contended that when the petitioner had participated for the Medium Term i.e., up to 5 years, the respondent had modified the same

and issued the LOA for Short Term. Hence, according to him it is a categorical modification and as held by the Hon'ble Apex Court in ***Vertex*** case (referred supra), if there is any modification of tender condition while issuance of LOA, the Court can interfere.

21. Further, this Court had perused the Clause 2 of LOA, which states that *M/s.MB Power (Madhya Pradesh) Ltd shall commence the supply under Short Term Open Access from 1st May, 2022 till the Medium Term Open Access becomes operational, as per terms of the Bidding Documents.* Further, a similar clause is also available in the draft agreement, which forms a part of the tender documents which means, the parties have already agreed for the said clause. Therefore, the commencement of supply should have been made by the petitioner with the Short Term Open Access from 01.05.2022 till the Medium Term Open Access become operational. Thus, as agreed by both the parties, the LOA was issued for Short Term Open Access till the Medium Term Open Access become operational and it does not mean that the petitioner is not entitled for Medium Term Open Access at all. It was only stated

that until the Medium Term Open Access becomes operational, the petitioner can supply for the Short Term Open Access.

22. In view of the above, this Court does not find any modification in clause 2 of LOA as contended by the learned Senior counsel for the petitioner since the said term is already available in the draft agreement, which forms a part of the tender documents. Even assuming for the sake of argument that the said document was not signed by the petitioner, it is very clear that the ultimate aim of the 1st respondent was to commence the supply in Medium Term Open Access, since as per Clause No.2 of LOA, at no stretch of imagination, one could construed that the said LOA was issued only for Short Term and not for Medium Term. Thus, this Court is of the considered view that the LOA dated 04.04.2022 was issued only with the intention to achieve for the Medium Term and that was the object to be achieved by virtue of Clause No.2 of the LOA.

23. Even after issuance of LOA on 04.04.2022, the petitioner was kept quiet and they had not raised any issues, which shows that the LOA

was issued in accordance with the terms and conditions of the tender documents. Hence, it appears that only the petitioner had changed their mind and they are not inclined to comply with the terms and conditions of the tender document and accordingly, they had failed to execute the relevant documents. Further, it appears that though the petitioner is supposed to have commenced the supply with effect from 01.05.2022, the 1st respondent had waited for a period of 70 days i.e., up to 14.07.2022 and due to the non-commencement of supply by the petitioner, certainly the 1st respondent would have incurred loss and the same has to be compensated.

24. Further, for the purpose of invoking the bank guarantee, it is not necessary to quantify the loss initially. Invoking of Bank Guarantee is meant for the immediate action to recover the loss instantly that is what the parties have agreed too and no Court can travel beyond the scope of agreed terms and conditions of parties and pass orders. The quantification of damages could be made subsequently and if the quantification is lesser than the invocation of bank guarantee, necessarily

the 1st respondent is liable to refund/reimburse the same to the petitioner.

25. Further, in a very judgement of the Hon'ble Apex Court in ***Himadri Chemicals*** (referred supra), it has been held that the Court can interfere with a petition for invocation of bank guarantee under the following situations:

> i) fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; and
>
> ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

26. In such view of the matter, this Court will not normally interfere in a case of invocation of confirmed Bank Guarantee, unless the there is a fraud or irretrievable damage. Further, the said fraud has to be an established fraud. In the present case, no such fraud has been established and also there is no injustice, which could make the petitioner impossible to reimburse himself, since the 1st respondent is a public sector undertaking.

27. For all these reasons, this Court is of the considered view that the present writ petitions are liable to be dismissed.

28. Further, with regard to the submissions of Mr.P.S.Raman, learned Senior counsel for the petitioner for the extension of interim stay, this Court is not inclined to extend the stay, which was granted with regard to the invocation of bank guarantee for a simple reason that as per the terms and conditions of the tender document, the petitioner was supposed to have commenced the supply of power on 01.05.2022 and though the LOA was issued by the 1st respondent on 04.04.2022, till 14.07.2022, the petitioner had not at all responded to the said LOA. Hence, for this attitude of the petitioner and as per the reasons stated above in Para Nos. 24 to 26, this Court is of the view that if the stay is granted till the filing of the Arbitration petition as requested by the petitioner, this Court is wittingly or unwittingly supporting the wrong doing of the petitioners, whereby the genuine cause of the 1st respondent would be unaddressed or unnoticed.

29. In the result, these writ petitions are dismissed. No cost. Consequently, the connected miscellaneous petitions are also closed.

18.12.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
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To

The Chief Engineer/Private Power Project (i/c),
Tamil Nadu Generation and Distribution Corporation Limited,
Having its Office at:
144, Anna Salai, NPKRR Maaligai,
Chennai 600 002.

KRISHNAN RAMASAMY.J.,

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