



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

Date of decision: 08th AUGUST, 2023

IN THE MATTER OF:

+ **W.P.(C) 9736/2023 & CM APPL. 37314/2023**

GANDHARVA INFRASTRUCTURE AND PROJECTS LIMITED

..... Petitioner

Through: Mr. Manoj Kumar Garg and
Mr. Pulkit Atal, Advocates.

versus

UNOIN OF INDIA & ORS.

..... Respondents

Through: Mr. Anurag Ahluwalia, CGSC with
Mr. Kaushal Jeet Kait, GP for
R-1/UoI.
Mr. O.P. Gaggar, Advocate for R-4.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court for the following reliefs:-

“i) Issue a writ of mandamus or any other writ, order or directions to be issued to restrain the Respondent No.3 from forfeiting 100% of the EMD deposited in the form of FDR No. 530401038029902 dated 22.07.20 19 with the Respondent No. 4 Bank against the Tender No. MCF/CMG/BH/ETN- 08/2019-20 dated 09.07.2019; and/or

ii) Issue a Writ of mandamus or any other Writ, order or directions to be issued to the Respondent No.3 to adhere to .the pre-existing clause no. 16 technical bid of the notice inviting tender dated 09.07.20 19;and/or

iii) Pass such other order or orders as may be deemed fit and appropriate under the facts and circumstances of the case. ”



2. Shorn of unnecessary details, the facts leading to the instant writ petition are as follows:-

- i. It is stated that Respondent No.3/Master Control Facility (MCF) issued a Notice Inviting Tender (NIT) dated 09.07.2019 bearing No. MCF/CMG/BH/eTN-08/2019-20 for construction of pre-engineered steel building for LEOP Control Centre (LCC) for Master Control Facility at Bhopal including civil, PH, electrical, air-conditioning and allied works and the estimated cost of the tender was Rs.18.0165 Crores.
- ii. It is stated that the tender document was to be downloaded from 10:30 AM on 10.07.2019 to 11:30 PM on 19.07.2019. The bid clarifications were to be sought from 10:31 AM on 10.07.2019 to 2:30 PM on 20.07.2019. The pre-bid meeting for the said tender was to be held on 23.07.2019 and the last date for replying to the bid clarifications was 24.07.2019 upto 5:00 PM. The last date for receiving the tender was 26.07.2019 upto 2:30 PM. The technical bids were to be opened on 26.07.2019 at 3:00 PM.
- iii. Earnest Money Deposit (EMD) for the sum of Rs.28.02 lakhs was to be deposited by the Petitioner. The Petitioner herein participated in the said tender on 25.07.2019 and deposited a sum of Rs.28,02,000/- towards EMD.
- iv. It is stated that on 05.08.2019, the Petitioner sent a letter to the Respondent No.3 stating that there had been an inadvertent clerical error in the tender as they have not taken into consideration the GST component. The letter further states that



the Petitioner quoted a sum of Rs.16,92,35,282.70/- and they would like to modify the bid to Rs.19,45,87,340.00/- to include the GST component.

- v. Material on record discloses that on 06.08.2019, i.e. on the very next day, Respondent No.3 issued the work order in favour of the Petitioner accepting the offer of the Petitioner at Rs.16,92,35,282.70/- which had been submitted by the Petitioner at the first instance.
- vi. It is stated that even after the work order was received on 06.08.2019, the Petitioner wrote a letter to Respondent No.3 on 08.08.2019 stating that there was some clerical error as they had not included the GST component in the quoted rates and the same had been pointed out by the Petitioner on 05.08.2019..
- vii. It is stated that further letters were sent to Respondent No.3 on 16.08.2019, 12.09.2019, and 01.10.2019.
- viii. Material on record further indicates that on 01.10.2019, the Petitioner submitted a letter reiterating the averments in the letters dated 05.08.2019, 08.08.2019, 16.08.2019, 12.09.2019 requesting the Respondent No.3 to take a decision on the letters submitted by the Petitioner regarding the clerical error crept in the tender. It is further stated that Respondent No.3 is not willing to consider the request of the Petitioner and the EMD of Rs.28,02,000/- should be returned to the Petitioner.
- ix. On 13.11.2019, Respondent No.3 wrote a letter to the Petitioner conveying that due to non fulfilment of contract conditions, the



work order has been cancelled and 100% of the EMD has been forfeited.

- x. The Petitioner thereafter gave a representation dated 14.11.2019 to Respondent No.4/Union Bank of India placing reliance upon Clause 16 of the Notice Inviting Tender and contended that as per the tender, Respondent No.3 has the liberty to forfeit only 50% of the EMD given by the Petitioner and requested Respondent No.4 not to honour any claim more than 50% of the EMD.
- xi. Material on record discloses that on 06.07.2023, Respondent No.3 sent a letter to Respondent No.4/Union Bank of India stating that the entire amount of EMD is being forfeited since the Petitioner has withdrawn from the contract.
- xii. The Petitioner has approached this Court challenging the said decision of Respondent No.3 insisting on forfeiting the 100% of the EMD.

3. Learned Counsel for the Petitioner contends that the Petitioner had in his tender inadvertently omitted to include the GST component. He states that even before the work order was issued, the Petitioner had realised the mistake and had written letter for modifying the rates from Rs.16,92,35,282.70/- to Rs. 19,45,87,340.00/-. He places reliance on an Order dated 07.01.2022 passed by the Apex Court in Civil Appeal No.224/2022, M/s Shrushti Works and Constructions v. State of Maharashtra & Ors., wherein the Apex Court had held that forfeiture of



earnest money deposit on account of inadvertent mistakes in a tender cannot be sustained.

4. Heard learned Counsel for the Petitioner and perused the material on record.

5. The Petitioner participated in the Notice Inviting Tender issued by Respondent No.3 for the purpose for construction of pre-engineered steel building for LEOP Control Centre (LCC) for Master Control Facility at Bhopal including civil, PH, electrical, air conditioning and allied works.

6. Material on record discloses that while uploading the tender, the amount offered by the Petitioner was Rs.16,92,35,282.70/- and the tender was submitted on 25.07.2019. After 10 days, i.e., on 05.08.2019, the Petitioner intimated Respondent No.3 that there have been clerical mistakes while submitting the tender. The letter states that they had quoted a sum of Rs.16,92,35,282.70/- and they would like to modify the same to Rs.19,45,87,340.00/- including the GST component.

7. The work order had been issued on 06.08.2019, i.e., the very next day wherein offer of the Petitioner at Rs.16,92,35,282.70/- had been accepted. The work was to commence immediately and was to be completed within six months' time. The Petitioner was also required to submit an irrevocable performance guarantee amounting to 5% of the tendered amount, i.e., Rs.90,06,249.97/- within 15 days from the date of issue of the work order. The Petitioner places reliance on Clause 16 of the Notice Inviting Tender, which reads as under:-

"16. The tender should be valid for minimum period of 120 days from the due date of receipt of the tender specified in Para 1 above. If any tenderer withdraws the offer within the validity period or makes any



modifications in the terms and conditions of the tender which are not acceptable to the Department, the Government shall without prejudice to any other right or remedy, be at liberty to 'forfeit 50% (Fifty Percent) of the Earnest Money Deposit absolutely. Further, the tenderer shall not be allowed to participate in the re-tendering process of the work"

8. It is the case of the Petitioner that only 50% of the EMD could have been forfeited and, therefore, the decision of Respondent No.3 to forfeit 100% EMD is not in accordance with law.
9. Material on record indicates that the Petitioner withdrew from the tender on 01.10.2019 and claimed return of EMD on the said date. The short question which arises for consideration is as to whether the decision of Respondent No.3 to forfeit 100% of the EMD is sustainable in law even when Respondent No.3 could have forfeited only 50% of the EMD as stipulated in Clause 16 of the Notice Inviting Tender.
10. A perusal of Clause 16 shows that the tender was valid for a minimum period of 120 days. The Petitioner wrote a letter dated 05.08.2019 seeking permission to modify its quoted rates and on the very next day, i.e., 06.08.2019, the work order had been issued. The moment the work order was issued, the offer given by the Petitioner stood accepted on 06.08.2019 and therefore, Clause 16 cannot be said to be applicable in the facts of this case. There can be various reasons to keep the tender valid for about 120 days. The date of opening of the bid can be postponed, there can be changes in the terms of the tender or that the person to whom the tender has been awarded gets disqualified for some reasons and the tender is awarded to some other person. Clause 16 cannot come to the aid of the Petitioner whose



offer has been accepted and the contract was concluded. The Notice Inviting Tender ceases to operate after the tender is accepted.

11. A perusal of the work order shows that only a formal contract was to be drawn between the parties since the offer of the Petitioner stood accepted.

Paragraph 1 of the work order reads as under:-

"1. On behalf of President of India, your tender for the work of "Construction of Pre-Engineered Steel Building for LEOP Control Centre (LCC) for Master Control Facility at Bhopal including Civil, PH, Electrical, Air- Conditioning and allied Works." as submitted in your offer cited (04) above is accepted for Rs.16,92,35,282.78 (Rupees Sixteen Crore Ninety Two Lakh Thirty-Five Thousand Two Hundred Eighty-Two and Paisa Seventy Only) taking into account all the correspondences cited above for the subject work. A copy of the schedule of quantities along with accepted rates is enclosed."

12. The Petitioner had offered a sum of Rs.16,92,35,282.70/- and there is a substantial increase in quoted price from Rs.16,92,35,282.70/- to Rs.19,45,87,340.00/-. The contention of the Petitioner that it is an inadvertent mistake which had been discovered by the Petitioner after 10 days of participating in the tender and one day before the acceptance of the work order, cannot be accepted. The modification of the offer is for a substantial amount of money and the omission of GST component can never be an inadvertent mistake. The question as to whether the mistake was beyond the control of the Petitioner is a question that can only be decided after leading evidence, for which the Petitioner has to file a suit and the writ court would not be a forum to decide that issue.



13. The issue as to whether a tenderer can be permitted to correct any mistake has been succinctly laid down by the Apex Court in West Bengal Electricity Board v. Patel Engineering Co. Ltd. & Ors., (2001) 2 SCC 451, wherein the Apex Court has held as under:-

" 26. Mr Chidambaram, however, submitted that in equity Respondents 1 to 4 would be entitled to relief of correction of mistakes. He invited our attention to para 84 of the American Jurisprudence (2nd Edn., Vol. 64, p. 944). It will be useful to quote the relevant part of that para here:

"As a general rule, equitable relief will be granted to a bidder for a public contract where he has made a material mistake of fact in the bid which he submitted, and where, upon the discovery of that mistake, he acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake particularly when he does so before any formal contract is entered into."

The principle is based on the judgment of the Supreme Court of U.S.A. in Moffett, H. and C. Co. v. Rochester [178 US 373 : 44 L Ed 1108 : 20 S Ct 957 (1899)] . There the plaintiff gave proposals by way of bid for two works of excavation of earth, quoting the unit rate 1.5 Dollar instead of 15 Dollars and 50 cents instead of 70 cents per cubic yard. The City of Rochester which called for tenders, was promptly informed of the mistake by the plaintiff's agent as soon as it was discovered but before entering into a contract. However, the proposal of the plaintiff was accepted by the City of Rochester in regard to one work and the other work was allotted to another bidder. The plaintiff declined to enter into a contract with the City of Rochester which took steps to enforce execution of the contract. The plaintiff filed the suit for correction of proposals to conform to the asserted intention in making them and for execution of the



*contract on corrected rates or alternatively for the rescission of the proposals. It also sought injunction against the officers of the City of Rochester declaring it to be a defaulter, its bond forfeited or enforced. It was found that the price noted was grossly inadequate and far below of what would be the actual cost of the work under the most favourable circumstances. The trial court decreed the suit holding that the proposals of the bidder be rescinded, cancelled and declared null and void, and of no effect and granting the injunction prayed for. But on appeal the decree was reversed by the Circuit Court of Appeals. On further appeal to the Supreme Court of U.S.A., it was observed that both the courts below found that there was a mistake and while the trial court opined it was clear, explicit and undisputed, the Court of Appeal was of the view that it was not a mistake in any legal sense but was a negligent omission arising from an inadequate calculation of the cost of the work and held that the mistake was not sufficient to preclude a claim for relief if the mistake justified it. The Supreme Court relied on the following observation in an earlier judgment of that Court in *Hearne v. New England Marine Ins. Co.* [22 L Ed 395 : 20 Wall 488] :*

“A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified.”

And it was concluded that the last two propositions might be claimed to be pertinent to that case even though the transactions between the parties be considered as a completed contract and held that the action of the City of Rochester in awarding one contract to another bidder and forcing the plaintiff to enter into the second contract after it had declared that there was a mistake in its proposal was inequitable.



27. Exceptions to the above general principle of seeking relief in equity on the ground of mistake, as can be culled out from the same para, are:

(1) Where the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder; but where the offeree of the bid has or is deemed to have knowledge of the mistake, he cannot be permitted to take advantage of such a mistake.

(2) Where the bidder on discovery of the mistake fails to act promptly in informing to the authority concerned and request for rectification, withdrawal or cancellation of bid on the ground of clerical mistake is not made before opening of all the bids.

(3) Where the bidder fails to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offer; however where the mistake is discovered after opening of bids, the bidder may be permitted to withdraw the bid."

14. Applying the law laid down by the Apex Court to the facts of the present case, it cannot be said that a price quoted by the Petitioner excluding GST is an inadvertent mistake. Any person who is exercising extraordinary care and diligence cannot omit the inclusion of the GST component nor has the Petitioner acted promptly because the Petitioner has given the letter 10 days after participating in the tender and exactly one day before the bid was accepted.

15. The bids were opened on 26.07.2023 and the Petitioner sought to give a new offer after opening of the bid, i.e., on 05.08.2019. The Petitioner cannot be permitted to change his offer after the bids were opened.

16. The judgment of the Apex Court as relied on by the Petitioner cannot be accepted because in the said case, in the bidding process, the Appellant



therein gave a final quote of Rs.4,88,55,000/-. However, when the Appellant therein wanted to revise his previous bid but inadvertently submitted a bid for Rs.49,88,55,000/- and realising the error within two minutes, the Appellant revised his bid to Rs.4,98,85,500/- which was not accepted and the EMD was forfeited. The present case is entirely different from the said case.

17. In the present case, the Petitioner participated in the tender on 25.07.2019, the bids were opened on 26.07.2019, and the Petitioner had given its letter giving a new proposal on 05.08.2019. The work order was accepted on 06.08.2019 and the Petitioner finally withdrew from the bid only on 01.10.2019 by which time the offer of the Petitioner was accepted.

18. This Court, therefore, does not find any infirmity with the decision taken by Respondent No.3 forfeiting 100% EMD.

19. The petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

AUGUST 08, 2023

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