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

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Date of Decision: 06.09.2023

% **LPA 623/2023 and C.M. Nos.46314-46315/2023**

**GANDHARVA INFRASTRUCTURE AND PROJECTS LTD
THROUGH DIRECTOR SANTOSH KUMAR BAGLA**

..... Appellant

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

versus

UNION OF INDIA THROUGH SECRETARY & ORS.

..... Respondents

Through: Mr. Anurag Ahluwalia, CGSC with
Mr. Kaushal Jeet Kait & Mr. Parimal
Bhatia, Advocates for Respondent/
UOI.
Mr. O.P. Gaggar & Mr. Sachindra
Karn, Advocates for Respondent
No.4/ UBI.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

SATISH CHANDRA SHARMA, CJ. (ORAL)

1. The present Letters Patent Appeal (“LPA”) is arising out of judgment dated 08.08.2023 passed in W.P.(C.) No. 9736/2023, whereby the learned Single Judge has declined the grant of relief as prayed for in the writ petition which was in respect of refund of Earnest Money Deposit (“EMD”) made by the Appellant/Petitioner against the tender No. MCF/CMG/BH/ETN-08/2019-20 dated 09.07.2019 issued by Respondent No. 3 (“Subject



Tender”).

2. The facts of the case reveal that the Appellant before this Court – a public limited company, incorporated under the Companies Act, 1956, participated in the Subject Tender. The Subject Tender was issued 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. The Appellant submitted its bid on 25.07.2019 and also deposited the EMD of Rs.28,02,000/- vide FDR No.530401038029902 dated 22.07.2019 as required by the Subject Tender.

3. The Appellant’s contention is that after submission of the bid, the Appellant realized that it has committed an inadvertent clerical mistake, whereby the Appellant has not included the GST component in the rates quoted by it in the bid, and in those circumstances, the Appellant approached Respondent No.3 *vide* letter dated 05.08.2019 seeking modification of the tender document which was submitted by the Appellant.

4. The facts on record establish that on 06.08.2019, the Respondent No.3 issued a work order in favor of the Appellant basis the rates quoted by the Appellant in the first instance. The Appellant thereafter issued various e-mails to Respondent No. 3 on 08.08.2019, 16.08.2019, 12.09.2019 & 01.10.2019 stating that it has already sought modification of tender bid and it should be permitted to do so. The Appellant stated that on account of an inadvertent error, it had quoted the rates excluding the GST component, and therefore, it should be permitted to modify its bid.

5. The Appellant kept on making representations in the matter. Even after the work order was accepted, the Appellant made a request to



Respondent No. 3 for release and refund of 100% of the EMD submitted by the appellant.

6. The facts further reveal that the Appellant in its repeated representations and e-mails wanted to modify the bid. It had initially quoted a sum of Rs.16,92,35,282.70/- in its bid and wanted to modify it to Rs.19,45,87,340.00/- and the said request was not accepted by Respondent No.3. The work order was issued by Respondent No. 3 accepting the bid of the Appellant at the price of Rs.16,92,35,282.70/- as submitted by it in the first instance. The contract in question was a time-bound contract, and in those circumstances, on 13.11.2019, Respondent No.3 wrote a letter to the Appellant conveying that on account of non-fulfillment of contract conditions, the work order has been cancelled and 100% EMD has been forfeited.

7. The Appellant – being aggrieved by the aforesaid, again submitted a representation on 14.11.2019 to the Union Bank of India (“UBI”)/Respondent No. 4 referring to Clause 16 of the Notice Inviting Tender (“NIT”) and stated that only 50% EMD can be forfeited and not 100% EMD. The request of the Appellant was not accepted.

8. In those circumstances, the Appellant came up before this Court by filing the underlying writ petition being W.P.(C.) No. 9736/2023. The learned Single Judge has dismissed the said writ petition vide judgment dated 08.08.2023 and the operative portion of the said judgment – as contained in paragraphs 5 to 19, reads as under:

“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."*

9. Learned counsel for the Appellant has vehemently argued before this Court that the Appellant had inadvertently committed a mistake while submitting the bid on 25.07.2019 by quoting the bid price at Rs.16,92,35,282.70/-. However, after realizing the mistake, attempts were made by the Appellant to modify the bid to Rs.19,45,87,340.00/- and it was entitled to modify its bid. He placed heavy reliance upon a judgment in the case of *M/s Shrushti Works and Constructions v. State of Maharashtra & Ors.*, Civil Appeal No.224/2022 decided on 07.01.2022 by the Hon'ble Supreme Court, wherein it was held that forfeiture of EMD on account of inadvertent mistakes in a tender cannot be sustained. He submits that in view of the aforesaid judgment, it should have been permitted to modify its bid and in case it was not permitted to modify the bid, 50% EMD should have been forfeited, and not 100% EMD as has been done. Therefore, he contends that the learned Single Judge has erred in law and facts in dismissing the writ petition.

10. Learned counsel for the Appellant has argued that the Appellant wanted to modify the bid as a mistake has crept in by not including the GST component and it was an inadvertent mistake owing to a clerical error. Therefore, Respondent No. 3 should have permitted it to rectify the mistake which was made inadvertently and the learned Single Judge should have allowed the relief prayed for in the peculiar facts & circumstances of the case.



11. Learned counsel for the Appellant has vehemently argued before this Court that Clause 16 of the NIT makes it very clear that the tender was valid for a minimum period of 120 days, and in case the tenderer withdraws from the offer within the validity period, or makes any modification in the terms & conditions of the tender which are not acceptable to the Department, the Government shall be at liberty to forfeit 50% EMD, and therefore, only 50% EMD should have been forfeited and the decision of Respondent No. 3 to forfeit 100% EMD is not in accordance with law and the learned Single Judge has erred in law & facts in declining the relief prayed for.

12. Heard both learned counsel for the parties and perused the documents on record.

13. The undisputed facts of the case reveal that the Appellant submitted its bid on 25.07.2019. It is true that the Appellant on 05.08.2019, for the first time, made a request for changing the bid amount. On 06.08.2019, a work order was issued in favor of the Appellant accepting the offer of the appellant at Rs.16,92,35,282.70/-. The documents on record also establish that the Appellant submitted an application/offer to withdraw from the tender only on 01.10.2019, meaning that the offer to withdraw from the tender was made by the Appellant only after the acceptance of its bid was communicated to him.

14. In the considered opinion of this Court, once the work order was issued, clause 16 of the NIT is no longer applicable, meaning thereby, the Appellant is not entitled to 50% EMD. Clause 16 of the NIT is certainly applicable during the validity of the tender, however only till the work order has not been issued.



15. In the opinion of this Court, the learned Single Judge has rightly arrived at a conclusion that a work order was issued in the matter and only a formal agreement was required to be executed, and therefore, once the work order was issued, the question of withdrawing from the tender does not arise and the Respondents – keeping in view the terms & conditions of the NIT, were justified in forfeiting 100% EMD.

16. The Appellant before this Court is a public limited company incorporated under the provisions of the Companies Act, 1956 and it is not a case where a layman or novice is participating in the tender process. The Appellant has participated in the tender process with open eyes and the theory canvassed by the Appellant of inadvertent mistake of excluding GST is an afterthought. The learned Single Judge has rightly declined the prayer made before it by relying upon the judgment delivered in the case of ***West Bengal Electricity Board Vs. Patel Engineering Co. Ltd. & Ors.***, (2001) 2 SCC 451.

17. In the present case, the Appellant has withdrawn from the tender after the work order was issued only on 01.10.2019; the Appellant submitted its bid on 25.07.2019; the bids were opened on 26.07.2019; the Appellant submitted a new proposal on 05.08.2019; the work order was issued on 06.08.2019; and therefore, as the Appellant has withdrawn from the tender after the work order was issued. In the considered opinion of this Court, the question of interference with the Impugned Judgment, in the peculiar facts & circumstances of the case, does not arise.

18. This Court is of the considered opinion that the Appellant has participated in the tender process with open eyes and is harping upon the



fact that he has submitted its bid by excluding the GST component and the same was an inadvertent mistake. If the plea canvassed by the Appellant is accepted, in all tenders, persons will be permitted to alter their bid/modify their bid on some pretext or the other.

19. In the considered opinion of this Court, once a bid has been submitted pursuant to a tender, the sanctity of the offer made by the tenderer has to be respected, otherwise, no purpose is going to be served by issuing tenders by the authorities. Once a price has been quoted by a bidder in a tender, it has to be the price which the tendering authority is bound to consider while finalizing the tenders. The Appellant's action is certainly an afterthought, and the learned Single Judge is certainly justified in declining the relief to the Appellant.

20. This Court does not find any reason to interfere with the order passed by the learned Single Judge. The present LPA is, accordingly, dismissed.

SATISH CHANDRA SHARMA, CJ

SANJEEV NARULA, J.

SEPTEMBER 06, 2023

B.S. Rohella