5th January, 2024
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W.P.A 173 of 2024

Security Engineers Private Limited
Vs.
The Electro Medical and allied Industries Ltd. and another

Mr. Vinay Kr. Sharaff
Ms. Priya Sarah Paul
Ms. Sanchita Dey
Mr. Dev Kumar Agarwal
...for the petitioner.

Mr. Prasun Mukherjee
Mr. Deepak Agarwal
...for the respondent no.1.

1. The petitioner challenges the forfeiture of the EMD amount deposited by the petitioner in terms of a tender floated by the respondent-authorities. The petitioner was the successful tenderer. By virtue of the tender, the work contemplated was primarily the installation of CCTVs etc. in hospitals.

2. The petitioner, it is submitted, subsequent to the rates being finalized, learnt from a communication by the respondent authorities that a portion of the work pertaining to a particular work order was to be done in the Covid ward of a particular hospital. Since it was extremely difficult during the pandemic times to get labour to work in the Covid wards, the

petitioner sought to negotiate on the rates, so far as it related to the work within the Covid wards.

3. However, the respondent authorities, in an allegedly unwarranted manner, construed such negotiation attempt to be a repudiation of the contract by the petitioner and went on to forfeit the entire EMD amount contemplated for all the works, awarded or to be awarded, in terms of the entire tender.

4. The petitioner challenges such action on the part of the respondent authorities and seeks a refund of the EMD amount. Learned counsel places reliance on the judgment of a coordinate Bench in *Sushil Kumar Thard* vs. *National Jute Manufacturers Corporation Limited and others* where certain principles were laid down by the learned Single Judge. It was observed there that the Constitutional safeguard of Article 14 would extend to the sphere of contractual matters for regulating the conduct of the State. Such proposition was laid down on the premise of certain judgments of the Supreme Court. It was further held that the fact before the said court revealed that the forfeiture clause in the bid document was unconscionable since the successful bidder would be visited with penal effect of the clause even before signing a formal contract.

5. Fair play and fairness of action was held to be sacrosanct. More importantly, the learned Single Judge held that the right to forfeiture of earnest money cannot survive in the absence of proof of actual loss. The court relied on the judgment of R*ajesh Gupta* vs. *Ram Avtar* reported at *2022 SCC OnLine Del 1482* in such context. The learned Single Judge held that where the public entity has discretion whether to forfeit any part of the earnest money, such discretion must be coupled with a duty to prevent exercise of absolute power by the repository of such power. Forfeiture can never be automatic, it was observed, without giving an opportunity to the concerned party to show-cause.

6. Learned counsel then relies on the judgment of *National Jute Manufacturers Corporation Limited and another* vs. *Sushil Kumar Thard and another,* which was the SLP preferred against the order of the Division Bench which was approached in connection with the judgment of the learned Single Judge discussed above. The Supreme Court dismissed the SLP, thus affirming the order of the learned Single Judge.

7. Learned counsel for the petitioner also relies on *S.R.S Infra Project Pvt. Ltd., Gwalior vs. Gwalior Development Authority, Gwalior and another* reported at *2010 (2) M.P.L.J 142,* where the Madhya

Pradesh High Court observed that in view of the judgment of Supreme Court in the cases cited therein, forfeiture is a last resort and an authority cannot straightaway forfeit the earnest money deposit of the writ petitioner without affording any opportunity of hearing.

8. Learned counsel next cites *Namita Paul vs. Food Corporation of India and others* reported at (*2000) 3 Gauhati Law Reports 259* where a learned Single Judge of the Gauhati High Court observed that mere attempt to negotiate does not tantamount to refusal to perform a contract.

9. Learned counsel next relies on *Kailash Nath Associates vs. Delhi Development Authority* reported at *(2015) 4 SCC 136*. In the said judgment, the Supreme Court held *inter alia* that it would be arbitrary to forfeit earnest money if there is no breach of the contract on the part of the appellant and in the absence of any loss being established by the authorities.

10. Learned counsel also places reliance on *Union of India vs. Vertex Broadcasting Company Private Limited and others* reported at (*2015) 16 SCC 198* for the proposition that the forfeiture of earnest money in the said case was unjust. The refusal of the licensees in the said case was not on their own volition but was prompted by additions to the terms

and conditions of NIT made unilaterally by the Union of India.

11. It was observed that if the licence fee and the earnest money have been forfeited unjustifiably by the Union, award of interest is a measure of recompense for the delayed payment, since interest seeks to offset the decline in the value of money with time.

12. Insofar as the objection of limitation is concerned, learned counsel for the petitioner cites *Sukh Dutt Ratra and another vs. State of Himachal Pradesh and others* reported at (*2022) 7 SCC 508*. In the said judgment, the Supreme Court, while considering the case of acquisition of land from land owners, observed that the State cannot shield itself behind the ground of delay and laches and there cannot be a limitation to doing justice.

13. Learned counsel appearing for the respondent authorities contends at the outset that the present claim is barred by limitation, since the forfeiture took place in the month of August, 2020 whereas the writ petition has been filed after some months of expiry of the limitation period of three years.

14. That apart, it is submitted that a money claim has been made by the petitioner which inherently is not amenable to the writ jurisdiction, since adduction of evidence is required. In the least, it is submitted

that the respondents are required to use affidavit-in-opposition to controvert the factual allegations of the petitioner.

15. Learned counsel further argues that the petitioner made a counter-offer after the contract was entered into between the parties and after the rates were accepted.

16. By placing reliance on Clause 7 of the tender document, learned counsel points out that the rates quoted were to be firm and no variation would be allowed during the period of contract. In similar light, Annexure- A to the bid document also provided that the rates should be valid for the entire tender period and for the entire State of West Bengal as no charges other than the quoted amount would be entertained after finalization of the tender.

17. Thus, the very act of counter-offer made by the petitioner tantamounted to a refusal to comply with the work order issued. Hence, the respondents were fully justified in forfeiting the EMD in terms of the tender clauses.

18. Lastly, learned counsel for the respondents places reliance on certain e-mails, in particular those annexed at pages-57, 59, 60 etc. to argue that the petitioner did not have the manpower or expertise

to carry out the work allotted to them and, as such, the forfeiture was justified on such count as well.

19. Upon a careful consideration of the arguments of the parties, at the outset, it should be clarified that the present case hinges around the issue as to whether the respondents were justified in forfeiting the entire EMD deposited by the petitioner within the contemplation of the contract between the parties and in terms of law.

20. The quantum of EMD and the factum of forfeiture of the same as well as the contract between the parties are admitted and have been annexed to the present writ petition.

21. The present case, insofar as it relates to a money claim, does not require detailed evidence to be adduced, since all the relevant documents are annexed and the questions involved relate to an interpretation of the terms of the tender document and work contract as well as the law governing the field. Hence, there is no reason for the writ court to shirk its duty merely because the magic word “money claim” comes in.

22. On similar logic, no affidavits are required to be directed, since all the relevant materials are already annexed to the writ petition and have been addressed by both parties. However, since no affidavits are invited, it is deemed that none of the

allegations made in the writ petition are admitted by the respondents.

23. Insofar as the question of limitation is concerned, it transpires from the documents annexed to the writ petition that there have been several communications ongoing even after the forfeiture.

24. The petitioner has been repeatedly seeking a revisit by the respondent authorities on such forfeiture. In view of such continuing correspondence, it cannot be said that the straightjacket formula of limitation of three years can be applied to the present case.

25. That apart, borrowing the principle laid down by the Supreme Court in *Sukh Dutt's (supra)* case, there can be no limitation to doing justice as the State cannot shield itself behind the ground of delay and laches in situations such as the present case.

26. Although there is a major distinction between the said case and the present insofar as it related to land losers and the present case pertains to a commercial transaction, the fact remains that the State has a larger bargaining power over the petitioner and that the present case involves the respondent authorities having forfeited an amount of EMD.

27. Thus, the liability of the respondent authorities, if established, to return the said amount to the

petitioner is a continuing liability and does not require any separate claim as its genesis.

28. In such perspective, it cannot be said that the petitioner's claim is a mere money claim for work done by it. The claim pertains to inaction on the part of the respondent authorities in not disbursing and refunding the money forfeited by them unilaterally.

29. Hence, the objection as to limitation cannot be entertained.

30. Insofar as the other issues are concerned, it is clear from the documents on record that the parties agreed to the rates for the work to be done by the petitioner. As such, there cannot be any indecision on such score.

31. However, the act of the petitioner in seeking a negotiation of the rates could not have been construed to be a repudiation of the contract as such. In not a single sentence in the entire communication regarding negotiation of rates did the petitioner utter anything to indicate that it was not willing to perform the contract, irrespective of the consent of the respondents to the revised rates proposed by the petitioner.

32. Moreover, on a more basic premise, the revision of rates sought by the petitioner was not an arbitrary act on the part of the petitioner to resile from its

original stand but an outcome of the principle of *Force Majeure*. The Covid Pandemic affected worldwide activities in the commercial sphere and other domains as well.

33. Hence, it could not be within the contemplation of any of the contracting parties at the juncture when the rates were agreed upon or the tender was participated in that the work of the petitioner would be stalled as it was due to the Pandemic.

34. Moreover, insistence of the respondents that the petitioner does the work in a Covid ward subsequently would obviously entail circumstances which would be entirely *de hors* the contemplation of the original tender terms and the work order.

35. Thus, by application of the doctrine of *Force Majeure*, it cannot be said that the petitioner was altogether unjustified in seeking a revision of rates. Also, on a composite reading of the communications between the parties, it cannot be said that the petitioner ever sought to resile from performance of the contract.

36. Thus, the act of the respondents in unilaterally forfeiting the EMD for the entire tender just because the petitioner sought a negotiation on the revision of rates only regarding the Covid wards is palpably unjust, unreasonable and arbitrary.

37. On a composite reading of the judgments cited by the petitioner as indicated above, it is undoubtedly true that to forfeit the EMD, obviously on the premise that the EMD was security deposit since work order had already been issued to the petitioner, the party seeking to so forfeit has to establish loss within the contemplation of Section 73 of the Contract Act.

38. That apart, the respondents were definitely duty-bound to give an opportunity of hearing to the petitioner by issuing a show-cause before forfeiting the EMD of the petitioner.

39. The reliance sought to be placed by the respondents on alleged inaction and lack of expertise and manpower on the part of the petitioner pertains to a pre-work order period with regard to certain work orders. Even after such communication regarding manpower and the petitioner seeking time on such count, work orders were actually issued to the petitioner, thereby belying the arguments of the respondents that the petitioner was lacking in manpower or expertise.

40. Insofar as the argument of counter-offer after contract is concerned, the same has been dealt with above, since the counter-offer was not a "counter-offer" as such, but a mere attempt on the part of the petitioner to negotiate on the rates due to the

subsequent onset of the Pandemic, that too pertaining only to the Covid wards where the petitioner had to engage labour which would obviously entail a huge increment in costs due to the risk of contagion involved.

41. Such action on the part of the petitioner was fully justified. As a mirror image of the above logic, the action of the respondents in forfeiting the EMD was utterly unjustified. There is no conceivable justification for the respondents to forfeit the EMD of the petitioner for the entire tender.

42. Thus, WPA No. 173 of 2024 is allowed on contest, thereby directing the respondent-authorities to refund to the petitioner the entire amount of EMD which has been forfeited by the respondents within three weeks from date.

43. It is made clear that interest is not being imposed on the respondents since there was a bona fide scope of doubt as to the outcome of the writ petition as certain arguable questions of law were involved herein.

44. Thus, extending the benefit of doubt to the respondents on such count, interest or costs are not being imposed on the petitioner.

45. However, in the event the payment as directed above is not made in favour of the petitioner within three weeks from this date, the respondents shall

be liable to pay interest at the rate of 12 per cent per annum on the awarded amount till the same is paid to the petitioner.

46. There will be no order as to costs.

47. Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)