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W.A.No.2028 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.09.2024

CORAM

THE HON'BLE Mr. JUSTICE S.S.SUNDAR
AND
THE HON'BLE Dr. JUSTICE A.D.MARIA CLETE

W.A.No.2028 of 2022
AND
C.M.P.Nos.15318 & 17949 of 2022

1.The State of Tamil Nadu
Rep. by Secretary to Government
Highways Department
Fort St. George, Secretariat
Chennai 600 009

2.The Project Director
Tamil Nadu Road Sector Project II
TNMB Building, 1st Floor
171 South Kesavaperumal Puram
Off : Greenways Road, R.A. Puram
Chennai 600 028

.. Appellants

Vs.

Sree Venkateswara Road Constructions (P) Ltd.
Rep. by its Managing Director
No.5, Jayaraman Street
Gokulapuram
Chengalpattu 603 001

.. Respondent



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Writ Appeal filed under Clause 15 of the Letters Patent, against the order dated 28.04.2022 passed by the learned Judge in W.P.No.10551 of 2018.

For Appellants : Mr.R.Ramanlaal
Additional Advocate General
Assisted by Mr.T.Arun Kumar
Additional Government Pleader

For Respondent : Ms.AL.Gandhimathi
Senior Counsel
for Mr.AR.Karthik Lakshmanan

J U D G M E N T

(Delivered by S.S.SUNDAR, J.)

This appeal is directed against the order of the learned Single Judge dated 28.04.2022 in a writ petition in W.P.No.10551 of 2018 filed by the respondent, for issuing a writ of certiorarified mandamus to quash the communication dated 19.09.2016 and to direct the appellants to forthwith refund the sum of Rs.1,11,33,000/- which had been paid by the respondent towards Earnest Money Deposit (EMD).



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2. Brief facts that are admitted and required for the disposal of this appeal are as follows :

2.1. The respondent/writ petitioner is a registered contractor under the Highways Department, Government of Tamil Nadu. In the year 2014, the Government of Tamil Nadu invited bids for upgrading Mohanur-Namakkal-Senthamangalam-Rasipuram Road in the State Highways (SH-95) as per the bid notice dated 08.10.2014.

2.2. The bids were to be submitted through e-procurement system on or before 15.00 hrs. on 26.11.2014 and the bids were scheduled to be opened online on 28.11.2014 at 15.30 hrs. The time was extended by a corrigendum dated 19.11.2014, in and by which the online submission of bids was extended up to 15.00 hrs., on 01.12.2014.

2.3. The respondent/writ petitioner though submitted his online bid on 01.12.2014 before 15.00 hrs. along with the bid security guarantee dated 29.11.2014, for a sum of Rs.1,11,33,000/-, the documents which are required to be uploaded on the e-portal was not done by the respondent/writ petitioner within the time, which fact is not in dispute.



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2.4. It is also not in dispute that the contract was awarded in favour of the only person, who submitted his bid in complying with all the requirements.

However, the bank guarantee furnished by the respondent by way of performance guarantee was encashed by the appellants. When the respondent/writ petitioner submitted a letter for refund of EMD of Rs.1,11,33,000/-, the Project Director/2nd appellant, *vide* a communication dated 19.09.2016, informed the respondent/writ petitioner that the Evaluation Committee had forfeited the bid security of the respondent/writ petitioner, since the respondent/writ petitioner had submitted his bid by 3.25 p.m. on 03.12.2014, which is a delay in submission as per the tender conditions.

2.5. On a perusal of the representation requesting refund of EMD and original documents, it is admitted by both sides that the respondent/writ petitioner did not upload the tender documents before the time that was specified. The said representation was rejected by the Project Director/2nd respondent *vide* proceedings dated 19.09.2016, which is impugned in the writ petition.

2.6. The contents of the proceedings dated 19.09.2016 is extracted below for convenience :



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“... However, the earlier letters dt 03.06.15 & 09.12.15 as stated by Sree Venkateswara Road Constructions (P) Ltd., have not been received in this office. Now, on scrutiny of the letters received in the reference 2nd cited, it is found that Sree Venkateswara Road Constructions (P) Ltd., Chengalpattu has accepted that the original Bank Guarantee and other tender related documents pertaining to EPC 07 package has been submitted through post by 3.25 p.m. on 03.12.2014 vide reference 1st cited which is a delay in submission as per tender conditions.

During the tender process, the Evaluation Committee has forfeited the Bid Security of M/s.Sree Venkateswara Road Constructions (P) Ltd., due to the above reasons and same has been approved by the Steering Committee.

Since the Bid Security has been forfeited as per tender conditions and with the approval of respective committees, the contractor is not entitled for the refund of Bid Security.”

3. Challenging the same, the respondent filed a writ petition in W.P.No.10551 of 2018 to quash the proceedings dated 19.09.2016 and to direct the appellants to refund the EMD. The said writ petition was allowed, holding that Clause 19.7 of instructions to bidders (in short “ITB”) cannot be invoked as the respondent's bid was not considered as non-responsive. The order passed in the writ petition is under challenge in this appeal.



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4. The learned Additional Advocate General appearing for the appellants produced before this Court the Bid Evaluation Report which reveals that the appellants have received three online bids, pursuant to the tender notification. Out of these three bids, only one bidder has submitted the originals of bid security, tender fee and uploaded other documents in time and therefore, his bid was accepted. It was indicated that the respondent/writ petitioner submitted the original documents by 3.25 p.m., which is after the deadline of 3.00 p.m. Therefore, it is stated that the appellants could not accept the bid of the respondent/writ petitioner, since as per Clauses 20.1 read with 22.1 of ITB, non-receipt of bid before the deadline will be declared non-responsive.

5. The fact that the only bid of the person who had submitted all documents was accepted, without considering the other bids, is admitted and is evident from the sequence of events. The Bid Evaluation Report submitted by the appellant discloses the following facts :

- (a) Out of three bidders who have submitted their bids *via* online, only one bidder was found to have submitted the originals of bid security, tender fee, etc. and therefore, his bid alone was accepted.
- (b) The World Bank Organisation that finance the project requested the appellant to clarify whether the bid submitted by the respondent can be



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considered for evaluation.

(c) It is seen that the World Bank did not object if the appellants treat the bid of the respondent as responsive. However, referring to the letter given by the respondent for return of refund of EMD and other original documents, the Bid Evaluation Committee informed that as per Clause 19.7 of ITB, the bid security has to be forfeited for the respondent.

(d) Clause 5 of the Bid Evaluation Report titled as 'Clarifications sought and responses received, if any, after bid opening', it is mentioned as under :

“World Bank has been requested to clarify, whether the originals submitted by the bidder M/s.Sree Venkateswara Road Constructions Private Limited, Chengalpattu to be considered for evaluation. The World Bank has replied that, in case the TNRSP wants to treat the bid of M/s.Sree Venkateswara Road Constructions Private Limited responsive, the Bank will not object (Annexure XV). In view of the letter given by M/s.Sree Venkateswara Road Constructions Private Limited, requesting return of his EMD and other original documents for this work. After initiation of evaluation of process, ITB Clause 19.7 is invoked and the Bid Security is to be forfeited for M/s.Sree Venkateswara Road Constructions Private Limited, Chengalpattu.”

(e) Under Clause 6 of the Bid Evaluation Report under the caption 'Preliminary examination of bids', the following is recorded:

“The bidder M/s.Sree Venkateswara Road Constructions Private Limited, Chengalpattu has not furnished the bid security in original within the stipulated time and the bidder M/s.P&C



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Constructions Private Limited, Erode has not furnished the bid security in original. Hence the bids submitted by them are considered as non-responsive as per Clause 19.7 & 20.1 of ITB.”

6. Clause 20.1 of ITB shows that the bid will be declared non-responsive in case of non-receipt of original documents. As per Clause 22.1 of ITB, time limit for submission is 15.00 hrs. IST on 26.11.2014. Therefore, there is no scope for accepting the bid submitted by the respondent. Admittedly, the contract itself was granted in favour of the only person, who has submitted all the documents as per the ITB. However, when the respondent submitted a representation on 03.12.2014 for refund of EMD and return of documents as per the tender conditions, the same was placed before the Project Director/ 2nd respondent and by proceedings dated 21.05.2015, the Project Director/ 2nd respondent, requested the Financial Controller, Tamil Nadu Road Sector Project, to forfeit the bid security of the respondent of Rs.1,11,33,000/-. Subsequently, by a communication dated 22.05.2015, the Principal Secretary-cum-Project Director/2nd respondent sent a communication to the Tamil Nadu Mercantile Bank Ltd. requesting to send the proceeds of the bank guarantee for a sum of Rs.1,11,33,000/-. Therefore, the bank guarantee offered by the respondent by way of performance guarantee was also encashed.

7. It is therefore by a communication dated 19.09.2016, the petitioner



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was once again informed by the Project Director/2nd respondent that the bid security has been forfeited as per tender conditions with the approval of respective committee and the respondent is not entitled for the refund of bid security. The respondent therefore, filed W.P.No.10551 of 2017, challenging the said communication dated 19.09.2016. The Project Director/2nd appellant filed a detailed counter affidavit contending that the bid security can be forfeited in terms of Clause 19.7 of ITB.

8. The learned Single Judge, by order dated 28.04.2022, allowed the said writ petition. The learned Single Judge found that the respondent submitted his bid documents beyond the timeline prescribed in the ITB. Referring to the report of the Evaluation Committee, the learned Single Judge found that the Evaluation Committee specifically held that the bids submitted by the writ petitioner and others were considered as non-responsive as per Clause 20.1 of ITB and that therefore, the bid was confirmed in favour of the successful bidder, who had submitted all the documents. The learned Single Judge further held that Clause 19.7 of ITB cannot be invoked, once the bid was found to be non-responsive and the findings of the Project Director/2nd appellant that the bid of the respondent/writ petitioner was rejected as non-responsive on the ground that the petitioner has withdrawn his bid is erroneous and the appellants have



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wrongly forfeited the bid security quoting the Clause 19.7 of ITB and the recommendations of the Evaluation Committee. The learned Single Judge directed the Project Director/2nd respondent to refund the EMD furnished by the petitioner and to return the original documents submitted by the petitioner, within a period of two months.

9. Aggrieved by the order of the learned Single Judge, this appeal has been filed raising the following grounds :

- i. The dispute relating to contractual issues cannot be agitated under Article 226 of the Constitution of India and in view of the judgment of the Hon'ble Supreme Court in National Highways Authority of India Vs. Ganga Enterprises and Another [(2003)7 SCC 410].
- ii. The bidder is entitled to withdraw his bid before acceptance and such withdrawal will attract forfeiture of bid security as per Clause 19.7 of ITB. The findings of the learned Single Judge that the Bid Evaluation Committee has recommended forfeiture of bid security on account of delayed submission of original security and not on account of respondent's withdrawal from the bid is erroneous as the writ petitioner submitted a letter dated 03.12.2014, withdrawing the bid.
- iii. The writ petitioner had approached this Court with unclean hands and he



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is not entitled for refund of the bid security, especially, when he had withdrawn his bid before acceptance. The learned Additional Advocate General relying upon Clauses 19.7 and 20.1 of ITB submitted that the respondent/writ petitioner is not entitled to refund of EMD.

10. The learned Additional Advocate General relied upon the judgment of the Hon'ble Supreme Court, in *National Highways Authority of India Vs. Ganga Enterprises and Another* [(2003)7 SCC 410], for the following propositions :

- (a) A writ petition is not maintainable, when the dispute relates to contract;
- (b) The bank guarantee given as performance security can be enforced, if the bid is withdrawn within 120 days, as per the terms of the contract;

11. It is well settled that the Court will be slow in entertaining the writ petition, where the dispute relates to contract. However, there are a few exceptions. Where the order is patently illegal on the facts admitted, or an order is passed affecting one's civil right without hearing a person or the order is opposed to public policy, this Court can entertain a writ petition under Article 226 of the Constitution of India.

12. When an order is issued, without assigning any reason or without



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following principles of natural justice, the writ petition will lie, even in respect of contractual matters. If there is any irregularity in the decision making process, the writ petition will always lie. A writ petition can be entertained when alternative remedy is ineffective and the relief is based on facts admitted and settled principles.

13. It is true that in appropriate cases, the performance guarantee can be forfeited, in case the bidder withdraw his bid before its acceptance within a period specified for acceptance of the bid by the tender inviting authority. However, the above judgment has no application to the facts of this case. There is no dispute that the respondent/writ petitioner's bid is not qualified and it could never be accepted, in terms of ITB.

14. The learned Additional Advocate General also relied upon the judgment of the Hon'ble Supreme Court in *State of Haryana and Others Vs Malik Traders [(2011)13 SCC 200]* and *State of Maharashtra and Others Vs A.P.Paper Mills Ltd. [(2006)4 SCC 209]*. In both these cases, the bidders withdrew their bids during its validity period. Therefore, the Hon'ble Supreme Court justified the forfeiture of bid security. The judgments above referred to



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cannot be relied upon by the appellant, having regard to the admitted facts and circumstances where the respondent/writ petitioner's bid was treated as non-responsive and there is no scope for accepting the respondent/writ petitioner's bid.

15. Further, the issue can be considered by applying the well accepted doctrine of mutuality. There may be a situation, where the respondent/writ petitioner file a writ petition challenging the decision of the appellants accepting the only valid bid of the successful bidder on the ground that he has quoted the lowest price. The appellants would certainly rely upon Clauses 22.1 and 23.1 of ITB and reject the bid of the respondent/writ petitioner as non-responsive. The position can also be examined in another situation, by assuming that the tender submitted by the respondent is accepted by the appellants, even though the bid is liable to be rejected on the basis of tender conditions. If the successful bidder, who was the only participant to submit all the documents that are required to satisfy the tender conditions, files a writ petition challenging the decision of the appellant accepting the respondent's bid, the appellants cannot sustain the order before this Court as the respondent's bid could never be considered. As per Clause 23.1 of ITB, the e-procurement system would not allow any late submission of bid. As per Clause 20.1 of ITB,



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the bidder shall upload the bid along with all documents and the bid will be declared non-responsive, in case of non-receipt of the original documents within time. In this case, after accepting the bid of the successful bidder, the appellants has taken advantage of the respondent's letter dated 03.12.2014 to return the EMD and original documents. In paragraph 6 of the Bid Evaluation Report, it is stated in unmistakable language that the writ petitioner had not furnished the bid security in original within the stipulated time and hence, the bid submitted by him was considered as non-responsive. In the impugned order, it is stated that the original bank guarantee and other tender related documents were submitted beyond the prescribed time for submission of bid and hence, the Bid Evaluation Committee had forfeited the bid security of the writ petitioner. The appellants are now taking different stand contrary to what is stated in the impugned order, which is impermissible. In any event, there is no scope for invoking Clause 19.7 of ITB.

16. As regards the admitted facts, this Court has no hesitation in holding that the forfeiture of security deposit cannot be sustained by applying the doctrine of mutuality, and other legal principles. When the offer itself is not valid quite satisfying the terms and conditions of the tender and there is no specific clause in the agreement to forfeit the EMD for being non-responsive,



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there cannot be forfeiture of EMD. This Court finds no merit in this appeal and accordingly, this appeal is dismissed. No costs. Connected C.M.P.s are closed.

[S.S.S.R.,J.] [A.D.M.C.,J.]
30.09.2024

Internet : Yes

Neutral Citation : Yes/No

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S.S.SUNDAR, J.
AND
A.D.MARIA CLETE, J.

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