



W.A.No.2708 of 2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.07.2024

DELIVERED ON : 17.10.2024

CORAM:

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR,

AND

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

W.A.No.2708 of 2022
and CMP.No.22010 of 2022

- 1.The Indian Railway Welfare Organisation,
Rep. By its Managing Director,
Having its Head office at
Railway Offices Complex, Sivaji Bridge,
(Behind Shankar Market), New Delhi-110 001.
- 2.The Director-Technical,
The Indian Railway Welfare Organisation,
Railway Offices Complex,
Sivaji Bridge, (Behind Shankar Market),
New Delhi-110 001.
- 3.The General Manager – South Zone,
The Indian Railway Welfare Organisation,
Engineering Construction Office,
Southern Railway, Poonamallee High Road,
Egmore, Chennai-600 008.

... Appellants



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-VS-

- 1.M/s.Cornerstone Constructions Ltd.,
Rep by its Managing Director,
No.M-22, 10th Street, M Block,
Anna Nagar East,
Chennai-600 102.
- 2.The Government of India,
Rep by its Secretary to Government,
Ministry of Railways, 256-A, Rail Bhavan,
Raisina Road, New Delhi-110 001.
- 3.The Railway Board,
Rep by its Chairman,
256-A, Rail Bhavan,
Raisina Road, New Delhi-110 001.

... Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 17.10.2022 made in W.P.No.20970 of 2017.

For Appellant : Mr.Krishna Srinivasan, Senior Counsel
for Mr.S.Ramasubramanian Associates

For Respondents : Mr.AR.Karthik Lakshmanan for R1

JUDGEMENT

D.KRISHNAKUMAR, J.

This Intra Court appeal has been filed as against the order of the Writ Court dated 17.10.2022 made in W.P.No.20970 of 2017.



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2. The appellants are the respondents 3 to 5 in the writ petition. The first respondent / writ petitioner has filed the writ petition challenging the proceedings of the second appellant dated 30.06.2017 and also the notice inviting tender and for a direction to the appellants to permit the writ petitioner to perform the work pursuant to the letter of confirmation issued to the first respondent / writ petitioner dated 18.05.2017 or in the alternative, permit the writ petitioner to participate in the limited tender that has been floated by the respondents.

3. During the course of hearing the writ petition, the learned Senior Counsel appeared for the writ petitioner/first respondent has submitted that though the writ petition has been filed challenging the tender dated 30.06.2017, in view of the fact that subsequent tender has been allotted to a third party, restricted his submissions only with regard to refund of the Earnest Money Deposit as per the earlier tender. The Writ Court, taking into consideration of the fact that no loss has been established or legal injury has been established by the respondents/appellants,



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entire amount cannot be retained by the respondents and that new tender process has commenced, for which process the respondent have spent about Rs.3,00,000/- and therefore, ordered that the said amount of Rs.3,00,000/- be forfeited and the balance Rs.5,00,000/- has to be refunded to the writ petitioner within a period of two moonths. Aggrieved by the order of the Writ Court, the respondents 3 to 5 in the writ petition have filed this intracourt appeal.

4. Mr.Krishna Srinivasan, learned counsel appearing for the appellants has put forth the following contentions:

(i) The contract granted in favour of the first respondent was cancelled by the appellant on account of its failure to adhere to the “Instructions to Tenderer”, forming part of the tender document and such cancellation was as per the tender conditions.

(ii) The writ petition questioned the termination of the contract awarded to the first respondent by the appellants, more particularly the 3rd appellant, for construction of 161 residential dwelling units with all amenities at Ambattur Village, Chennai on 18.05.2017. Consequent to the award of work, the first respondent was required to submit an irrevocable performance guarantee, as per the condition prescribed under Clause 2.18 of the “Instructions to Tenderer”. The



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tender did not provide for any relaxation of this Clause. Further, the said Clause could not have been modified or waived even while exercising extraordinary jurisdiction under Article 226 of the Constitution of India.

(iii) The Writ Court has exceeded its jurisdiction and proceeded to quantify the damages without any shred of evidence and that too when no pleadings have been submitted in this regard by either party. The Writ Court also proceeded to waive the tender conditions which cannot be done even by the Tender Evaluating Authority or the employer and when the same are required to be implicitly followed without any modification or alteration.

(iv) Despite taking note of Clause 1.18 of the Notice Inviting Tender which clearly stated that EMD shall stand forfeited in the event of refusal or delay on the part of the successful tenders in signing the tender agreement within 15 days or refusing to start the work on instructions from the Managing Director and Clause 2.18 of the Instructions to Bidders which states that the EMD will stand forfeited if the successful tender fails to furnish the Performance Guarantee within 15 days from the date of issue of Letter of Intent, the Writ Court proceeded on the basis that no legal injury has been established by the appellants to direct refund of a portion of the EMD, which stood forfeited on account of the first respondent's failure to submit the bank guarantee.



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The learned Senior Counsel for the appellants, in support of their submissions, has placed reliance on the following decisions:

- (i) Puravankara Projects Ltd. v. Hotel Venus International and Others***
[(2007) 10 SCC 23]
- (ii) Michigan Rubber (India) Limited v. State of Karnataka and Others***
[(2012) 8 SCC 216].

5. The learned counsel appearing for the first respondent / writ petitioner would contend that the appellants have not suffered any loss in the process and in fact, modified the subsequent tender conditions for using M25 concrete and other alternatives for river sand and also agreed to pay GST as applicable w.e.f. 01.07.2017. It is further contended that after accepting all the queries raised by the first respondent / writ petitioner, the appellants ought to have granted permission to the first respondent / writ petitioner to continue with the contract but on the other hand, the appellants have terminated the contract besides forfeiting EMD of Rs.8,00,000/- when no loss whatsoever has been suffered by the third appellant and taking into consideration the said aspect, the Writ Court has



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rightly ordered refund of the amount of Rs.5,00,000/- after forfeiting Rs.3,00,000/- for the amount spent for retender process and therefore, prayed for dismissal of the writ appeal.

6. This Court has considered the rival submissions and also perused the materials available on record.

7. The fact remains that the first respondent / writ petitioner is the successful bidder in the tender notification issued by the third appellant. After getting the letter of confirmation, the first respondent raised an issue with regard to use of M25 concrete instead of river sand for better structural stability. When the matter stood thus, the appellants have floated a new tender inviting participants of the previous tender, who were technically qualified and also forfeited the EMD deposit paid by the first respondent. The first respondent was also not allowed to participate in the subsequent tender process. According to the first respondent, the forfeiture of EMD paid by the first respondent is arbitrary, illegal, unjust and unsustainable in law and further contended that if the new



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tender is processed without permitting the first respondent to participate, it would result in grave prejudice and hardship to the first respondent / writ petitioner.

8. The point for consideration in the present writ appeal is whether the forfeiture of EMD by the appellants is legally sustainable?

9. Clause 1.15 of the Tender Notification stipulates deposit of Earnest Money Deposit of Rs.8,00,000/-. Clause 1.18 of the Notice Inviting Tender reads that ***“Earnest Money of the Successful Tenderer shall be forfeited in the event of refusal or delay on his part in signing the Agreement within 15 days or refusal to start the work on instructions from the General Manager”***. Clause 2.18 of the Instructions to Tenderers reads that ***“The Successful Tenderer shall have to furnish the Performance Guarantee in terms of Clause 2.22 of IRWOs Genral Conditions of Contract – April 2015 in the format attached as Annexure 'G' therein, within 15 days from the date of issue of LOI”***.

10. When the first respondent / writ petitioner was called upon to submit



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Bank Guarantee within 15 days in terms of Clause 2.18 of the Instructions to Tenderer, vide proceedings of the fourth respondent dated 18.05.2017, the first respondent sent his reply dated 31.05.2017 raising clarifications with regard to the fact that there is no river sand available and sought to use alternatives and also stated that M25 grade concrete has to be used for structural stability and therefore requested the appellants to consider the above issues positively and also indicated that on receipt of the response to the above queries, the first respondent/writ petitioner would submit the Performance Guarantee. The third appellant, vide letter dated 07.06.2017, has replied to the first respondent queries and once again requested the first respondent to submit the Performance Guarantee within one week of their letter dated 07.06.2017. It is also clearly stated in the said communication that if the writ petitioner/first respondent failed to submit the Performance Guarantee within one week from the date of issue of the said letter, it would be treated that the writ petitioner is not interested in taking up the work and the EMD deposited by him will stand forfeited. But the writ petitioner without executing Performance Guarantee has once again sought the very same clarifications vide letter dated 14.06.2017. Finally, vide communication dated



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30.06.2017, the appellants has forfeited the EMD.

11. When there is a specific covenant agreed between the parties that if the agreement is not signed or work has not commenced, the EMD will be forfeited, the action of the appellants in forfeiting the EMD after affording sufficient opportunities to the first respondent/writ petitioner to commence the work / execute the Performance Guarantee, cannot be found fault with. Not only in the tender conditions but also in the Instructions to Tenderers as well as in the Letter of Acceptance, the appellants have insisted for furnishing the Performance Guarantee which has not been furnished by the writ petitioner and they acted contrary to the stipulations contained in the contract. There is no specific clause in the terms and conditions of tender to waive / relax the tender conditions, which cannot be done even by the Tender Evaluating Authority or the employer and the terms and conditions of tender are required to be implicitly followed without any modifying or alteration. The Writ Court has passed the order on the ground that no loss or legal injury has been established by the respondents and since the new tender process has commenced, has ordered partial refund of the EMD, which



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cannot be done as the same would amount to diluting, modifying or altering the terms and conditions of tender.

12. The Hon'ble Supreme Court in ***Puravankara Projects Ltd. v. Hotel Venus International and Others [(2007) 10 SCC 23]*** has held as under:

“29..... In essence, it was held that tender terms are contractual and it is the privilege of the Government which invites its tenders and courts did not have jurisdiction to judge as to how the tender terms would have to be framed.

30. By observing that there was implied term which is not there in the tender, and postponing the time by which the bank guarantee has to be furnished, in essence the High Court directed modification of a vital term of the contract.

31. In *New Bihar Biri Leaves Co. v. State of Bihar [(1981) 1 SCC 537]* it was observed at para 48 as follows : (SCC p. 558)

“48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobat* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots law, is now firmly embodied in English common law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (per Scrutton, L.J., *Verschures Creameries Ltd. v. Hull & Netherlands Steamship*



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Co. [(1921) 2 KB 608 (CA)] ; see *Douglas Menzies v. Umphelby* [1908 AC 224] , AC at p. 232; see also *Stroud's Judicial Dictionary*, Vol. I, p. 169, 3rd Edn.).”

32. In *Asstt. Excise Commr. v. Isaac Peter* [(1994) 4 SCC 104] this Court highlighted that the concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract. ***It was stated in no uncertain terms that duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness.*** The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature.”

13. The first respondent / writ petitioner on his own accord, having accepted the contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. It is also well settled that the High Court, in exercise of its jurisdiction under Article under 226 of the Constitution of India cannot interfere in contractual matters. The order of the Writ Court granting partial refund of the EMD to the first respondent / writ petitioner would amount to altering the terms and conditions of the tender and the same is impermissible in



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the light of the aforesaid decision of the Hon'ble Supreme Court. This Court finds much force on the submission made by the learned Senior Counsel for the appellant and therefore, the order of the Writ Court warrants interference.

14. In the light of the reasons assigned above, the Writ Appeal stands allowed and the order of the Writ Court dated 17.10.2022 made in W.P.No.20970 of 2017 is set aside. It is open to the parties to seek their remedy before the appropriate forum, if there is any violation of the terms and conditions of the tender. No costs. Consequently, connected miscellaneous petition is closed.

[D.K.K., J.] [K.B., J.]
17.10.2024

Index : Yes / No
Internet : Yes / No
Jvm

1. The Secretary to Government,
The Government of India,
Ministry of Railways, 256-A, Rail Bhavan,
Raisina Road, New Delhi-110 001.

D.KRISHNAKUMAR, J.



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and
K.KUMARESH BABU, J.

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2.The Chairman,
The Railway Board,
256-A, Rail Bhavan,
Raisina Road, New Delhi-110 001.

Judgment in
W.A.Nos.2708 of 2022

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