
(2014) 11 KL CK 0125

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 27833 of 2014 (D)

C.X. Varghese

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 24-11-2014

Acts Referred:

Citation : (2014) 11 KL CK 0125

Hon'ble Judges : A. Muhamed Mustaque, J

Bench : Single Bench

Advocate : A.P. Subhash, Advocate for the Appellant; C.S. Dias, SC, Santhosh Mathew and Sathish Ninan, Advocate for the Respondent

Judgement

A. Muhamed Mustaque, J.—The petitioner is a Railway Contractor. Pursuant to the open tender for raising of Kanjiramattom - "Raising an extension of plat form No. 1", the petitioner has responded to the tender. Ext. P1 Letter of Acceptance indicates that petitioner has to submit a Performance Guarantee for an amount of Rs. 2,29,345/-. The petitioner has remitted the above amount by way of Ext. P2. As per R2(1) order dated 31.12.2010 issued by the Indian Railway Board revived condition regarding performance guarantee is stipulated. Performance guarantee has to be submitted within 30 days from the date of issue of Letter of Acceptance, and period can be extended to another 30 days by the authority. Thus the petitioner has submitted the performance guarantee within the above time. However by Ext. P4, the petitioner was asked to remit a sum of Rs. 1,56,420/- towards performance guarantee by way of bank guarantee or FD receipt. Admittedly this letter was issued after a period of 60 days. It seems that there was some mistake on the part of Railways in reckoning the amount towards the performance guarantee. The petitioner has also sought a clarification from the 2nd respondent as per Ext. P4. The petitioner also submitted that he is prepared to furnish additional bank guarantee, which was sought in Ext. P4. However the contract was terminated as per Ext. P8 and forfeited the EMD. Challenging the above order, the petitioner has approached this Court.

2. As directed by this Court, the petitioner has filed an affidavit. It is submitted that he is prepared to furnish the balance performance guarantee of Rs. 1,56,420/-. According to the petitioner, he is always willing to proceed with the tender quoted by him in the same rate, terms and conditions as provided in the tender condition.

3. In this matter a detailed counter affidavit has been filed on behalf of respondents 1 and 2. It is submitted that as per Clause 64 of the General Conditions of the contract all disputes and differences of any kind regarding contract shall be referred to Arbitration. It is further submitted that Railway is justified in forfeiting EMD as the petitioner failed to produce the performance guarantee within the time indicated in Ext. P4.

4. The Railway does not dispute the fact that Ext. P1 had only indicated payment of Rs. 2,29,345/-. It is only thereafter noting a mistake on their part, they have issued Ext. P4 directing the petitioner to pay sum of Rs. 1,56,420/-. It was admittedly after the period of 60 days. The Railway has no case that the petitioner has failed to produce the performance guarantee within the time originally granted. It is true that the petitioner is bound by the direction of the Railway in Ext. P4 based on the estimate calculated for the work awarded to the petitioner. However nothing is on the record to indicate that the petitioner ever failed to produce performance guarantee within the time. The lapse on the part of the Railway for calculating the amount cannot be a reason to deny the petitioner an opportunity to perform his part of contract, especially when the petitioner has undertaken that he is ready and willing to perform the contract and he has only sought a clarification by Ext. P5 from the Railway regarding certain other matters. In Ext. P5 also he had undertaken that he was willing to pay the amount.

Therefore, the facts and circumstances clearly establishes the non-performance of the contract is not attributable to the petitioner and forfeiting the EMD is unsustainable. A further re-tender in this process will delay the project and may hamper the interest of the public. Considering the fact that the petitioner is willing to undertake the work and also taking note of the public interest in the matter, the petitioner shall be permitted to undertake the award as per Ext. P1 on the following conditions in addition to other terms and conditions of the contract:

1. The petitioner shall furnish the Performance Guarantee to the tune of Rs. 3,85,765/- on or before 1.12.2014.
2. The petitioner shall undertake the work within four months from 1.12.2014.
3. Ext. P4 is set aside. However it is made clear that if the petitioner fails to furnish the performance guarantee, the Railway is at liberty to take appropriate action against the petitioner.

The writ petition is disposed of as above.