
(2014) 09 MAD CK 0243

In the Madras High Court

Case No : Writ Petition No. 29701 of 2012

Hameed Enterprises

APPELLANT

Vs

The Registrar

RESPONDENT

Date of Decision : 18-09-2014

Acts Referred:

Citation : (2014) 4 LW 903 : (2014) 7 MLJ 840

Hon'ble Judges : N. Paul Vasantha Kumar, J

Bench : Single Bench

Judgement

N. Paul Vasanthakumar, J.—This writ petition is filed by the petitioner challenging the order of the first respondent dated 25.10.2012 forfeiting the pre-bid EMD of Rs. 5 lakhs paid by the petitioner and for a direction to return the said amount with 12% interest.

2. The brief facts necessary for disposal of this writ petitioner are as follows:

(a) Petitioner Enterprises is doing business of dealing in scrap materials for over five years and its name was registered with the second respondent for the purpose of participation in E-Auction conducted by the second respondent.

(b) An advertisement was issued in the website regarding sale of condemned electrical materials lying in the premises of the first respondent under reference No. MS/3/Adyar/11-12-4660(41321). Petitioner participated in the E-Auction conducted on 13.9.2011 by the second respondent, who is the agent of the first respondent. The petitioner paid an advance amount of Rs. 5 lakhs by way of demand draft drawn on Indian Overseas Bank, Chennai, dated 12.9.2011 in favour of the first respondent.

(c) According to the petitioner, while participating in the E-Auction, petitioner quoted the bid amount of Rs. 12,24,202/- for the entire materials. However, while typing the figures, two zeros were added instead of one zero after the figure "2" to make it appear as Rs. 1,22,42,002/- instead of Rs. 12,24,202/-.

The auction commenced at 11 O" Clock on 13.9.2011 and ended around 12.00 noon on the same day. Petitioner having found the typing mistake, immediately gave a representation to both the respondents at 2.00 p.m. on the same day through a letter and stated about the inadvertent error crept in typing the amount and requested the respondents to accept the petitioner's tender for Rs. 12,24,202/- instead of Rs. 1,22,42,002/-.

(d) As there was no response from the first respondent, petitioner requested the first respondent either to accept the tender for Rs. 12,24,202/- or to return the EMD of Rs. 5 lakhs. Since no reply was given with regard to acceptance of the tender or with regard to return of EMD, petitioner sent a reminder seeking return of EMD stating that its bid having not been confirmed it is entitled to get back the EMD.

(e) Petitioner's contention is that the first respondent has not informed as to whether the petitioner's bid was accepted or not. Petitioner having no other option, caused a counsel's notice on 10.10.2012 to both the respondents and called upon them to refund the EMD, which was acknowledged and after receipt of the legal notice, the impugned communication was issued by the first respondent stating that the EMD was forfeited.

(f) The said order is challenged in this writ petition contending that forfeiture of EMD by the first respondent is illegal, arbitrary, and the scrap materials having been sold through subsequent E-auction for Rs. 45.52 lakhs, respondents ought to have returned petitioner's EMD as the genuine error committed by the petitioner was informed promptly.

3. The first respondent has filed counter affidavit contending that the impugned order being a reply notice issued to the counsel notice to the petitioner stating about the forfeiture of the EMD, the same cannot be challenged. Petitioner's offer being the highest, the same was accepted by the respondents, thereby the contract was concluded. Therefore petitioner is not entitled to resile from the contract. In terms of the tender conditions, EMD can be forfeited, if the highest bidder fails to pay the balance amount within seven days. As per Clause 2.0 of the agreement the first respondent is the Principal and the second respondent is the Selling Agent for a period of three years with effect from 12.10.2010 and the petitioner can trace its rights only as per the agreement. E-Auction was conducted on 13.9.2011 and the second respondent informed through the sale information letter on the same day that the pre-bid amount will be forfeited as per the terms and conditions, if the petitioner does not make the balance payment within seven days. As per the auction terms and conditions, if any bid is more than five times of the next lower bid, a confirmation will be sought for by the programme itself. Petitioner's bid was more than five times and the petitioner also reconfirmed the same. It is not the genuine error as alleged by the petitioner. It is further stated that the second auction was conducted and a sum of Rs. 45,52,000/-alone was quoted, thereby a loss has occasioned, apart from meeting incidental expenses and inconvenience due to re-auction, which

has to be compensated by the petitioner. The forfeiture of the EMD is by way of compensation for the breach, which arose under Clause 7(e) of the terms and conditions of the auction. The bid amount quoted by the petitioner was not for a sum of Rs. 12,24,202/- but for a sum of Rs. 1,22,42,002/- as the immediate next bid value stood at Rs. 22,55,848/-.

4. The second respondent has filed a counter affidavit supporting the stand of the first respondent.

5. An additional affidavit was filed by the first respondent stating about the expenses incurred for conducting re-auction. It is stated therein that the total expenses incurred for releasing the advertisement in the Newspapers came to Rs. 79,904/- and voucher for publication of E-Auction Notice in "The Hindu" dated 26.10.2011, is also enclosed.

6. I have considered the rival submissions made by the learned counsel for the respective parties and perused the files.

7. The issue arises for consideration is as to whether the respondents are justified in forfeiting the EMD amount of Rs. 5 lakhs paid by the petitioner for participating in the E-Auction held on 13.9.2011, on the facts and circumstances of this case.

8. It is not in dispute that an advertisement was issued by the second respondent in the website regarding sale of condemned electrical materials lying in the premises of IIT, Chennai, for which E-Auction was conducted on 13.9.2011 by the second respondent, who is none other than the agent of the first respondent. The second respondent is the authorised agent of the first respondent, which is evident from Clause 12.0 of the Selling Agency Agreement dated 12.10.2010 entered between first and second respondents. Thus, the second respondent has no independent power to confirm the bid of the petitioner and its action is subject to the approval of the first respondent/Principal.

9. In the order issued by the second respondent giving direction to deposit an amount of Rs. 1,24,22,000/- within seven days in favour of the Registrar, IIT, Chennai, it is stated that the auction has been provisionally accepted subject to the approval by the Seller, namely first respondent. Till date no scrap of paper, finally approving the bid by the first respondent, was issued. Thus, finality of acceptance of tender has not reached. It is not in dispute that the petitioner had informed on 13.9.2011 itself that the petitioner had wrongly added one "0" in the amount quoted, making a difference of one crore rupees. Whether the said contention is right and merit acceptance can be considered in the following angle.

10. According to the petitioner, no upset price was fixed for the value of condemned electrical materials under auction and a sum of Rs. 5 lakhs was fixed as EMD, considering the reasonable percentage of the market value of the scrap materials. From the file produced by the first respondent it is evident that the valuation was tentatively arrived at by taking the highest and lowest value fixed

and a sum of Rs. 20.75 lakhs was fixed as reserve price. The said fact viz., fixation of upset price/reserve price was admittedly not disclosed in the E-Auction notice issued by the second respondent to the prospective bidders. In the counter affidavit filed in this writ petition fixation of upset price before commencement of E-Auction process and making the same known to the intending participants is not stated. Thus, there is a clear illegality committed by the respondents in conducting E-Auction.

11. It is a well settled principle of law that obligation to act fairly by the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. Whether disclosing the upset price/reserve price while conducting public auction to sell public property was mandatory or not, was considered by the Honourable Supreme Court in several decisions.

(a) In the decision reported in *Tata Cellular Vs. Union of India*, it is pointed out that acceptance of the offer must be unconditional and conditional submission of tender or acceptance of tender cannot be approved, which is one of the parameter to be considered while challenging the validity of the tender, or the matters arising out of the tender proceedings.

(b) In the decision reported in *Anil Kumar Srivastava Vs. State of U.P. and Another*, the importance of fixing reserve price was emphasised, that the public is informed by the fact, that the sale is subject to a reserve, that the auctioneer has agreed to sell for the amount which the bidder is prepared to give only in case that amount is equal to or higher than the reserve price, which puts a limit on the authority of the auctioneer, and the auctioneer cannot accept a price below the upset or reserve price.

(c) In *Rani Aloka Dudhoria and Others Vs. Goutam Dudhoria and Others*, the Hon"ble Supreme Court held that fixation of reserve price of the properties in question before auction sale is mandatory. Though the said judgment was rendered while interpreting the provisions of the Partition Act, 1893, the principle stated therein is applicable for all public auctions.

(d) In the decision reported in *Rakesh Kumar Goel etc. Vs. U.P. State Industrial Development Corporation Ltd. and Others*, by following its earlier decision reported in *Meerut Development Authority Vs. Association of Management Studies and Another*, the Supreme Court held that it was not open to the Government or the Public Authority to dispose of public property below the reserve price, which clearly establishes the fact that fixing of reserve price/upset price is a mandatory requirement for conducting auction of any public property.

(e) In *Ram Kishun and Others Vs. State of U.P. and Others*, it is held that the law requires a proper valuation report, its acceptance by the authority concerned by application of mind, and then fixing of reserve price, as the failure to do so may cause substantial injury, which would amount to material irregularity and ultimately vitiate the subsequent proceedings.

Thus, it is evident that getting a valuation report, arriving at upset price/reserve price before conducting auction of public property by any public authority, and notifying the upset/reserve price to the probable bidders are mandatory requirements to remove arbitrariness and ensure transparency in all the auction proceedings.

12. In the case on hand, admittedly the respondents have not disclosed the upset/reserve price for the auction held on 13.9.2011. Apart from this fact, the acceptance of petitioner's bid by the second respondent was only provisional, subject to confirmation by the first respondent, who is the Principal.

13. Similar issue as to whether conditional/provisional acceptance of the offer, which was not confirmed as per the scheme of things, came up for consideration before me in W.P. No. 23479 of 2009. In the said case the highest offer of the petitioner was accepted by the Temple Authorities subject to the approval/ratification by the Commissioner of HR & CE and before communication of the approval of acceptance of offer by the Commissioner, HR & CE, the highest bidder withdrew the offer. Still, the Temple Authorities forfeited the EMD. The said action was set aside by order dated 19.4.2011 and a direction was issued to refund the forfeited EMD after deducting the expenses incurred for conducting fresh auction. The said order was challenged in W.A. Nos. 1526 and 1527 of 2010 by the Temple Authorities as well as by the Commissioner of HR & CE respectively and the said writ appeals were dismissed by the Division Bench of this Court by judgment dated 6.9.2011 taking note of the safeguard given to the Temple to adjust Rs. 1,50,000/- towards expenses incurred for issuing advertisement for conducting fresh auction.

14. The Hon"ble Supreme Court in the decision reported in Haryana Financial Corporation and Another Vs. Rajesh Gupta, considered similar issue regarding forfeiture of EMD. In the said judgment, after narrating the facts, the Supreme Court held that for the Corporation, which has acted unfairly, and is trying to take advantage of its own wrong, the forfeiture of EMD cannot be ordered. In the said case, the seller failed to disclose to the buyer the material defect in the property, which the seller was aware and the buyer was not aware, which the buyer could not ordinarily discover. In such circumstances, the Supreme Court ordered refund of the forfeited EMD with 18% interest from the date of deposit till payment and the appeal filed by the State Financial Corporation was dismissed with cost of Rs. 50,000/-.

15. The learned counsel for the respondents heavily relied on the terms and conditions mentioned in the E-Auction, which states about the forfeiture of EMD, if the remaining amount of the highest bid is not paid within seven days. The said condition imposed cannot be put against the petitioner, as the respondents have not followed the mandatory procedure of disclosing the upset price before the conduct of E-auction. It is well settled in law that a person accusing another person must be perfect in his duties and if there is failure to do his duty, he cannot accuse others for not obeying the obligation.

16. At this juncture it would be relevant to point out that though the amount quoted by the petitioner, according to the respondents is Rs. 1,22,42,002/-, which according to the petitioner is due to typographical error, the very same scrap materials fetch Rs. 45.52 lakhs in the subsequent auction. Thus, it is a clear proof that the petitioner ought not have bonafidely quoted the amount of Rs. 1,22,42,002/-. Even according to the counter affidavit filed by the first respondent, the second highest bid amount quoted was Rs. 22,55,848/- and there is a huge gap between the two amounts. It is a common knowledge that a businessman might not have offered unreasonably higher price and took the risk of quoting an amount, two and half times more than the actual value of the materials.

17. In fine, the writ petition is allowed with a direction to the first respondent to refund the forfeited EMD amount with 9% interest per annum, after deducting the expenses incurred for the conduct of fresh E-Auction. The first respondent is granted four weeks time to implement this order. No costs.