
(2007) 01 P&H CK 0090
In the Punjab And Haryana At Chandigarh

INFOTECH 2000 India Limited and Others	APPELLANT
Vs	
State of Punjab and Others	RESPONDENT

Date of Decision : 24-01-2007

Acts Referred:

Citation : AIR 2007 P&H 58 : (2007) 146 PLR 420 : (2007) 3 RCR(Civil) 65

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—The challenge in the present writ petition is to the letter of intent dated 25-6-2003, Annexure P-7. The petitioners have also claimed release of bank guarantee dated 5-2-2003 of Rs. 2 crores.

2. Petitioners Nos. 1 and 3 are the Companies within the meaning of the Companies Act, 1956 (hereinafter to be referred as "the company") whereas petitioners Nos. 2 and 4 are the authorised representatives of petitioners Nos. 1 and 3 respectively. A notice inviting tender was published in the month of January, 2003 by respondent No. 2 on behalf of respondent No. 1 inviting bids from the prospective bidders for online lottery system. The bid comprised of technical bid and financial bid. Petitioner No. 1 formed a consortium with petitioner No. 3 and respondent Nos. 4 to 6 and submitted the bid on 7-2-2003. In terms of the tender condition, a bank guarantee for a sum of Rs. 2 crores was furnished towards earnest money.

3. The petitioners along with three other bidders were found to be technically qualified and, thus, became eligible for opening of their respective financial bids. M/s. Jindal Pipes Limited (hereinafter to be referred as "HI") was found to be the highest bidder whereas the consortium led by petitioner No. 1 (hereinafter to be referred as "H2") was the second highest bidder. A letter of intent was issued to HI on 17-2-2003.

4. The petitioners sought release of bank guarantee since tender has been

awarded to the highest bidder but the bank guarantee was not returned to the petitioners though the same was returned to two other unsuccessful bidders. The petitioners relied upon Clause 311 of the terms and conditions of the tender notice, which contemplate that the earnest money will be returned to the unsuccessful bidders and for the successful bidder it will be adjusted towards the total amount of the bid. The bank guarantee was not returned in spite of various communications, which have been attached with the writ petition as Annexure P3/1 to P3/6.

5. In the meantime, H1 bidder filed a writ petition before this Court claiming release of the bank guarantee, inter alia, on the ground that no conclusive contract has come into existence. The State has taken a stand in the said writ petition that a concluded contract has come into existence with H1. During the pendency of the said writ petition filed by H1, the petitioners were approached by the official respondents with a counter offer wherein the petitioners were requested to match the bid of H1 but the same was rejected by the petitioners. Even though the petitioners rejected the offer of the official respondents to match the bid of H1, the respondents unilaterally decided to appoint the petitioners as agent for the online lottery system on the basis of bid submitted by the petitioners on 7-2-2003. It is pleaded that after the issuance of letter of intent to H1, the price bid of the petitioners no longer survive. Therefore, the letter of intent issued to the petitioners on 25-6-2003 is null and void document. It was pleaded by the petitioners that on account of failure to comply with the terms and conditions contained in the said letter of intent, the bank guarantee of Rs. 2 crores cannot be encashed.

6. On behalf of the official respondents, it has been pointed out that in the letter dated 16-4-2003, Annexure P-3/3, the petitioners have sought return of the bank guarantee in the event they were not being considered for selection of agent for Punjab online lottery; The letter shows that the petitioners were interested in the bid to be accepted as the letter of intent had already been issued in favour of the highest bidder on 17-2-2003. It has been pointed out that the petitioners were the second highest bidder who have submitted a bid of Rs. 3040.88 crores for seven years whereas the highest bid submitted by M/s. Jindal Pipes Limited was Rs. 3751 crores for 7 years. Since the highest bidder defaulted in signing the agency agreement and fulfilling other conditions, as such an option was given to the petitioners to match their bid with the amount equal to the highest bidder. On their unwillingness to match the bid with the highest bidder in their letter Annexure P-6, a letter of intent was issued to the petitioners in terms of their bid within the validity period of the offer of five months. The respondents also relied upon arbitration clause in the terms and conditions of the notice inviting tender as well as pleaded that no writ can be issued for invoking bank guarantee as it is an independent contract in itself. It was also pleaded that the writ petition arising out of the contractual obligation is not maintainable and, thus, dismissal of the writ petition was prayed for.

7. Before considering the respective arguments of the parties, the following conditions from the notice inviting tender NIT, Annexure P-1, are relevant:

3.7 Validity of Bids:

The Bid and the information contained therein shall remain in force for five (5) months from the last date fixed for the submission of the Bid and will be irrevocable during this period.

3.11 Earnest money deposit and Bid processing charges:

1. The Bidder shall enclose a bank draft payable at SAS Nagar/Chandigarh in favour of Director, Punjab State Lotteries for Rupees 20.5 million only (Rupees two crores and five lacs only) towards Earnest Money Deposit and Bid Processing Charges. The Government will retain Rs. 0.5 million only (Rs. Five lacs) as Bid Processing Charges from each bidder. The Earnest Money Deposit of Rs. 20 million only (Rupees two crores) will be returned to the unsuccessful Bidders and will be adjusted towards total amount to be received from the successful Bidder as described in Chapter 8. The Bidder may alternatively submit a bank draft of Rs. 0.5 million only (Rs. Five lacs) in favour of Director, Punjab State Lotteries towards Bid Processing Charges and a financial bank guarantee (Pro forma at Annexure-5) from a public sector scheduled bank of Rs. 20 million only (Rupees two crores) in favour of Director, Punjab State Lotteries.

Chapter 8 - Financial Bid

The Bidder is required to state the fixed Agency Fee for each year of the Agency which will be paid by the Bidder to the Government. Such Agency Fee would be payable irrespective of the turnover achieved by the Bidder.

The Bidder is required to provide the Financial Bid in the following format:

Note:

(1) to (5) xx xx xx xx (6) Bidders should note that the Earnest Money Deposit of the successful Bidder after deducting Bid Processing Charges, will be adjusted against the Agency Fee according to the Government in the first year.

xx xx xx xx

8. Learned Counsel for the petitioners has vehemently argued that once the letter of intent has been issued to the highest bidder on 17-2-2003, the petitioners become unsuccessful bidder and, therefore, in terms of Clause 3.11, the earnest money of Rs. 2 crores is to be refunded to the petitioners forthwith. With the issuance of letter of intent to the highest bidder, the offer of the petitioners has come to an end and was not available for acceptance on 25-6-2003. It was argued that when the official respondents made a counter offer to the petitioners to match the bid of the highest bidder, that has the effect of superseding of earlier offer made by the petitioners and having not accepted the counter offer, the offer given by the petitioners was not available for

acceptance. Reliance is placed upon *Moolji Jaitha and Co. Vs. Seth Kirodimal, and Col. D.I. Mac Pherson Vs. M.N. Appanna and Another*, . Still further the official respondents have forfeited the earnest money of the highest bidder H1, therefore, earnest money furnished by the petitioners cannot be forfeited. As in respect of one NIT, the earnest money of two bidders cannot be forfeited. Thus, it is a case of undue enrichment. The forfeiture of earnest money is, in fact, fraud by the State and smacks of arbitrariness. Thus, bank guarantee furnished by the petitioners cannot be encashed since the petitioners were not the highest bidder and stood discharged with the issuance of letter of intent to M/s. Jindal Pipes Limited.

9. The learned Counsel for the petitioner relied upon *Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*, ; *Dresser Rand S.A. Vs. BINDAL Agro Chem Ltd. and K.G. Khosla Compressors Ltd.*, and *Ankit Pipes Pvt. Ltd. v. State of Haryana 2006 (1) PLR 652 : AIR 2006 P & H 554* a Division Bench judgment of this Court. It was also pointed out that against the order of dismissing writ petition of the highest bidder, the matter is pending before the Hon"ble Supreme Court in Civil Appeal No. 4716 of 2006 and, therefore, the matter is sub-judice.

10. On the other hand, Shri Sobti has relied upon judgment of Hon"ble Supreme Court in *National Highway Authority of India Vs. Ganga Enterprises and Another*, wherein it is held that writ petition is not maintainable in a claim arising out of a breach of contract. Still further, reliance is placed upon the finding recorded by a Division Bench pertaining to the same NIT wherein the writ petition of a highest bidder was dismissed holding that the State has a right to encash bank guarantee on failure of the highest bidder to comply with the terms and conditions of the NIT.

11. From the facts stated, it is evident that the last date for submission of bid was 7-2-2003 and in terms of Clause 3.7 of the NIT, the said bid was valid for a period of five months. During this period, a letter of intent was issued to the highest bidder i.e. Jindal Pipes Limited who has offered Rs. 3751 crores. The terms and conditions of the letter of intent was not accepted by the highest bidder but a writ petition was filed before this Court seeking return of the bank guarantee and a prohibition from recovery of the amount thereof. In terms of the letter of intent issued to the highest bidder, the terms and conditions of the NIT were to be complied with within one month. Since the terms and conditions of the NIT were not complied with, the next highest bidder, the present petitioners, were firstly given an offer to match the bid of highest bidder and on their unwillingness to do so, accepted the bid given by the petitioners. A letter of intent was issued on 25-6-2003 i.e. within the validity period.

12. The argument that the letter of intent could not have been issued to the petitioners (H2) after the letter of intent was issued to the highest bidder (H1) is not tenable. The issuance of letter of intent to M/s. Jindal Pipes Limited is an independent transaction though in respect of the same NIT. Admittedly, the highest bidder has not accepted the terms and conditions and filed a writ petition

for return of the bank guarantee. Therefore, the only consequence of failure to complete such concluded contract was forfeiture of earnest money furnished by the said bidder. With the forfeiture of earnest money of the highest bidder, the issue of offer and acceptance of the highest bidder has come to an end. Thereafter, the offer of the petitioners being next highest was available for acceptance by the respondents. On 25-6-2003, the offer of the petitioners was valid in terms of Clause 3.7 of the NIT, therefore, the letter of intent was rightly issued to the petitioners. The argument that with the issuance of letter of intent to M/s. Jindal Pipes Limited, the offer of the petitioners stood discharged has no legal or factual basis. The offer of the petitioners was valid for a period of five months and, therefore, acceptance could be conveyed within the said period.

13. Clause 3.11 deals with the requirement of earnest money and procedure for its return. It was open to the respondents to retain the earnest money of the petitioners for a period of five months i.e. for the period the offer of the petitioners was valid. Clause 3.11 does not contemplate that with the issuance of letter of intent to the highest bidder, the earnest money was required to be refunded forthwith. The decision taken by the State Government to refund the earnest money of two bidders who have given a bid of Rs. 1175 crores and Rs. 1836 crores in the month of February, 2003, itself cannot be said to be arbitrary. The bid of the petitioners was the second highest. It is the stand of the State in the written Statement that the bank guarantees of two other bidders were returned as the amount bidden by them was too low as compared to the highest bidder and the second highest bidder and as such the respondents decided not to consider their bids being too low. The bank guarantee of the petitioners was decided to be retained during the validity period of the bid in order to meet the exigencies and eventualities, which have arisen in the present case. Therefore, with the issuance of letter of intent to the highest bidder, it cannot be canvassed by the petitioners that their bid stood discharged and, thus, was not open for acceptance.

14. The argument that earnest money of the petitioners cannot be forfeited as it will amount to undue enrichment is again devoid of merit. The offer of each of the tenderers is a separate offer though in respect of the same contract. For different reasons, earnest money of one or more bidders can be forfeited. Again, neither any provision of law nor any precedent was brought to the notice of the Court which prohibited the State Government to forfeit the earnest money twice in respect of one tender. The earnest money of the highest bidder was forfeited for not fulfilling the terms and conditions of the agency consequent to the issuance of letter of intent. The petitioners have also faulted in execution of the agreement and to comply with the terms and conditions of the agency agreement and, thus, earnest money could be forfeited. As mentioned above, the offer of each tenderers is an independent offer. The argument that forfeiture of the earnest money is undue enrichment is misconceived. The forfeiture of earnest money of the petitioners as well as of the highest bidder is on account of their failure to perform their contractual obligations. In the cases of breach of

contract, the consequences has to follow from each of the defaulting tenderers. The petitioners cannot take the benefit of forfeiture of earnest money of another independent tenderer. Such action of the State cannot be said to be suffering from arbitrariness or fraud as it is the petitioners who have failed to accept the terms and conditions of the contract in spite of the fact that acceptance was conveyed within the validity period.

15. The argument that the bank guarantee cannot be encashed since the petitioner is not the highest bidder is again not tenable. On failure of the highest bidder to execute the contract, the offer of the petitioner is the next highest valid offer, which was accepted by issuance of a letter of intent within the validity period of the offer.

16. The argument that with counter offer by the official respondents to match the highest bid, the earlier offer has come to an end is again not tenable. The counter offer was made to the petitioners to match the bid of the highest bidder. It was open to the petitioners to accept or reject the same. Having rejected the same, the State Government has rightly accepted the original offer made by the petitioners. The Division Bench decision of Kerala High Court is clearly distinguishable. It has been held that the offer made by the plaintiff to sell coconut oil at the rate of Rs. 33/- per tin was not accepted and there was counter offer of Rs. 33/- by the defendant. The plaintiff filed the suit for damages on the basis of contract price of Rs. 33/-. It was held that there was never a concluded contract. The principles laid down in the aforesaid judgment are not even remotely applicable in the present case. In terms of the notice inviting tender, the offer of the plaintiff was Rs. 3040.88 crores. It is the said offer which was accepted. Similarly, in the case before the Hon"ble Supreme Court there were series of exchange of letters but there was no unequivocal acceptance by the defendant. Even the said judgment provides little assistance to the petitioner.

17. The Judgments in Hindustan Construction Co, Ltd. and Bindal Agro Chem. Ltd."s case AIR 1989 SC 3710 (supra) pertain to the jurisdiction of the Court in the matter of invocation of Bank Guarantee. A Division Bench of this Court in the writ petition filed by M/s. Jindal Pipes Limited (An-nexure P. 5) has held that the State is entitled to encash the bank guarantee on the failure of the petitioner to execute the agreement as required in NIT. Similar is the circumstance in the present case. For the same reason, the respondents are entitled to encash bank guarantee for failure of the petitioners to execute the agreement in terms of the conditions of notice inviting tender, The principles laid down in the Judgments referred to by the learned Counsel for the petitioner are not in dispute. But in terms of the Bank Guarantee itself, the same can be invoked if the petitioner fails to execute agreement, fails to further perform an agreement or withdraws its bid during the validity period, if the acceptance is modified within validity period. Thus, it is apparent that it is the petitioner who has faulted in performance of the obligation in NIT related Bank Guarantee. The judgment of the Division Bench in Dresser Rand S.A. Vs. BINDAL Agro Chem Ltd. and K.G. Khosla Compressors

Ltd., has not been stayed though the matter is pending in appeal. The said judgment is binding on this Court till such time, it is reversed.

18. In view of the above, I do not find any patent illegality or material irregularity in the communication dated 25th June, 2003, Annexure P-7, which may warrant interference in exercise of writ jurisdiction of this Court.

19. Dismissed.

20. At this stage, learned Counsel for the petitioners prays that the Bank Guarantee be not encashed for a period of one month from today.

21. In view of the fact that the Bank Guarantee is alive for a period of three months i.e. till 30-4-2007, I deem it appropriate to grant the relief prayed for by the counsel for the petitioners. The Bank Guarantee be not encashed for a period of one month from today.