
(2010) 12 BOM CK 0038

In the Bombay High Court

Case No : Writ Petition No. 2324 of 2010

Knowledge Infrastructure Systems Pvt. Ltd. and Another	APPELLANT
Vs	
Maharashtra Power Generation Company Limited and Others	RESPONDENT

Date of Decision : 23-12-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 26

Citation : (2011) 3 BomCR 179 : (2011) 113 BOMLR 461

Hon'ble Judges : U.D. Salvi, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : Mukul Rohatagi, Janak Dwarkadas, s, D.D. Madon, Council, Saurabh Kirpal, Manali Singhal, Karan Bharioke, C.D. Mehta and B.C. Mehta, instructed by Dhruve Liladhar and Co, for the Appellant; V. Thorat Dipankar Das and Apurv Harsh, instructed by M.V. Kini and Co. for Respondent No. 1 and C. Nanavatty, instructed by Manadiar and Co., for the Respondent

Final Decision : Allowed

Judgement

B.H. Marlapalle, J.—Heard.

2. Rule.

3. Respondent Nos. 1 and 2 waive service. Respondent No. 3 is a formal party. Respondent No. 1 has filed affidavit-in-reply as well as surrejoinder affidavit and, therefore, the petition has been heard finally with the consent of the parties.

4. In this petition filed under Article 226 of the Constitution the decision of the Respondent No. 1 and as communicated to the Petitioner through the letter dated 27th October, 2010, forfeiting five bank guarantees submitted as earnest money deposit on the ground that the bid submitted by the Petitioners had rendered invalid in terms of the tender, is under challenge and the earnest money deposit is to the extent of Rs. 16,75,00,000/- crore.

5. The Petitioner No. 1 is a company incorporated under the Companies Act, 1956 with Petitioner No. 2 as its shareholder, is engaged in trading of coal

amongst other activities. Respondent No. 1 is a company incorporated under the Companies Act, 1956 and is in the business of generation of electricity in the State of Maharashtra and thus a State instrumentality within the meaning of Article 12 of the Constitution.

6. On 20th March, 2010 Respondent No. 1 published a notification inviting bids for tender for the supply of 3.35 metric tonnes of coal of foreign origin for its plants. In response to the said bid eight parties including the Petitioner had submitted their offers. The Petitioner No. 1 company along with the bid had submitted five bank guarantees for an amount aggregating to Rs. 16,75,00,000/- as bid security for its bid and as required under the tender terms. On 29th May, 2010, the techno-commercial bids of the parties were opened on-line and the bid submitted by the Petitioner company was found to be techno-commercial valid and accepted and the physical support documents were opened on 3rd June, 2010 as scheduled. It appears that two letters dated 22nd July, 2010 in a sealed envelope were submitted by the Petitioner No. 1 company to the Respondent No. 1 on 23rd July, 2010 and were delivered in the mail receiving section at about 10.45 a.m. The first letter offered an unconditional discount of 3.5% on the price offered at all locations/plants under the tender and the second letter stated that since the Respondent No. 1 had allowed various bidders to amend/change/modify their technical documents (even after opening of the technical bids) the Petitioner believed that it should be treated similarly and hence it should be allowed to offer adjustments to its unopened price bid.

7. The bids were opened on 23rd July, 2010 at about 1.00 p.m. and the letters dated 22nd July, 2010 forwarded by the Petitioner company on 23rd July, 2010 at about 11.00 were not before the Bids Opening Committee at that time and thus the unconditional discount offered or adjustment offered so proposed by the Petitioner company were not known to the Committee when the bids were opened. The Petitioner company was not a successful bidder, in any case. However, a show cause notice dated 17th August, 2010 was received by it calling upon the company to explain as to why the bid security amount should not be forfeited in terms of the tender conditions i.e. clause No. 7.1(i) and 12.2 of Section 1 of the tender. The said show cause notice was replied by the Petitioner on 7th September, 2010 pointing out that there was no deviation from the tender conditions and the discount so offered did not in any manner influence the tender committee when the tenders were opened on 23rd July, 2010 at about 1.00 p.m. The Petitioner received yet another letter dated 18th September, 2010 calling upon it to furnish its detailed reply to the show cause notice and such a reply was again submitted on 20th September, 2010. In the meanwhile by letter dated 28th September, 2010 the Petitioner was called upon to extend the bid security/bank guarantees as the case regarding forfeiture of bid security was under process and vide its letter dated 29th September, 2010 the Petitioner company informed the Respondent No. 1 that the bid security was extended till 29th September, 2010. Finally by the impugned order dated 27th October, 2010 the Respondent No. 1 informed the Petitioner company that the earnest money stood

forfeited. The said letter dated 27th October, 2010 reads as under

With reference to the above, it is clarified that, the bidders including you have submitted post bidding documents in response to the additional clarifications called by Mahagenco regarding bid. Mahagenco has never asked for submission of revised prices on any account. The modification in prices cannot be co-related with post bidding correspondence. As such, your statement regarding acceptance of suo-moto post bidding documentation is not in order. The submission of revised price bid was within the validity of offer. As per tender terms, the modification in prices during validity period is ground for forfeiture of Bid Security.

The circular of Railways regarding recommended port for respective TPS was issued in March 2010 much earlier than bid closing date and it is bidders' responsibility to arrange all logistics following all rules, regulations and circulars issued by concerned authorities viz. Railways, ports and offer the price accordingly. Therefore, submission of the revised prices on this account is not relevant and it does not ensure any purpose in view of public interest. In all it is observed that, the reply to the Show Cause Notice vide letter dated 7th September 2010 referred at Sr. No. 3 above, is not relevant.

As such, in terms of tender, your bid had rendered invalid and is declared as invalid and five Nos. of bank guarantees preferred above towards Earnest Money Deposit are forfeits.

8. Mr. Mukul Rohatagi, the learned Senior Counsel appearing for the Petitioners submitted that the invocation of the bid security is ultra vires the tender conditions and contrary to the terms of the bank guarantee. The letters dated 22nd July, 2010 submitted to the Respondent No. 1 company on 23rd July, 2010 at about 11.00 a.m., were with bonafide intention so as to offer discount in view of the circular of the Ministry of Railways issued in June, 2010 and it was in public interest. Such an offer did not in any manner wp-2324-10.doc amount to either a fresh physical bid price or a modification to the bid already submitted. In short Clause 7.7(i) as well as Clause 12.1.2 of the tender bid did not apply. Mr. Rohatagi also submitted that in any case when the bids were opened on 23rd July, 2010 at about 1.00 p.m., these offers of discounting made by the Petitioner company were not before the committee when opened the bids and, therefore, these letters did not in any way influence the decision making so as to accept the successful bidder and the Petitioner is not a successful bidder. The Committee was not aware that any such offer of discount or concession was made by the Petitioner in writing when the bids were opened. He has referred to the additional affidavit filed on behalf of Respondent No. 1 and submitted that these letters dated 22nd July, 2010 were opened for the first time by the concerned official only around 3.00 p.m. On 23rd July, 2010 i.e. much after the bids were opened and the successful bidder was decided. In such a situation the said letters cannot be treated as modified the Petitioners original bid did not amount to a fresh bid sought to be submitted physically. The impugned decision is without application of mind to these facts and is a decision which smacks arbitrary exercise of

powers. The decision impugned is violative of the rights guaranteed under Article 14 of the Constitution. There was no case to issue a show cause notice to the Petitioners and to pass the order of forfeiture of the security deposit. The Respondent No. 1 failed to consider the reply submitted to the show cause notice and applied its mind to the legal position before the impugned order was passed. The decision impugned is in colourable exercise of powers by a State instrumentality and, therefore, is required to be quashed and set aside in a writ petition filed under Article 26 of the Constitution. As per Mr. Rohatagi the Respondent No. 1 failed to act fairly, rationally and in due exercise of its powers in terms of the tender conditions and, therefore, under the powers of judicial review this Court is required to set aside the order dated 27th October, 2010 forfeiting an amount of Rs. 16,75,00,000/-.

9. Affidavit in reply opposing the petition has been filed by the Chief General Manager of the Respondent No. 1 company and by relying upon Clause 7.7 and 12(1) of Section 1 of the tender as well as Clause 2.3 of the bid specification it has been contended that the Petitioners attempted to interfere and derail the tender process by submitting a revised price bid in physical form on 23rd July, 2010 with fraudulent intention. It has been pointed out that the bid was valid upto 25th August, 2010 and the Petitioners have fraudulently submitted the revised price bid in physical form on 23rd July, 2010. The Petitioners have also violated Clause 7.7(i) of the bid specification and, therefore, they are liable for the consequence thereof. It is further contended that once the Petitioners had submitted their price bid online by e-tendering platform there is no occasion for the Petitioners to submit the revised bid in physical form and that they have knowingly and intentionally modified their bid within the bid validity period and, therefore, the bid security is liable to be forfeited as contemplated under the tender terms and, therefore, the impugned order has been passed. It has been further submitted that the Petitioner company has been associated with the Respondent No. 1 since the year 2006 on various contracts and it was aware of the procedure and policy of the Respondent No. 1 in purchase of imported coal. The estimated cost of the tender in question was about 2000 crores and the bid security of Rs. 16.75 crores was less than 1% of the cost of the tender. The attempt on the part of the petitioner company in submitting the price bid in physical form was a calculated risk taken by the Petitioner to derail the tender process and/or to adopt legal proceedings.

10. There is no dispute that the Petitioner is not a successful bidder and the price quoted by the Petitioners was about 20% more than the L1 in 5 tenders. Even the revised price bid purportedly submitted by the Petitioners would not be lower than the L1 bidder.

11. Mr. Thorat, the learned Senior Counsel appearing for the Respondent No. 1 company submitted that the petition was not maintainable and is required to be dismissed as such. As per Mr. Thorat, the dispute between the parties is arising out of a tender bid and whether the forfeiture was permissible or not could be an

issue to be decided in a civil suit and such an issue cannot be adjudicated upon in a Writ Petition under Article 226 of the Constitution. Coming to the merits of the impugned decision Mr. Thorat submitted that Clause 7.7, 12.12 and other clauses have been rightly invoked by the Respondent No. 1 company and the reasons mentioned in the impugned order dated 27th October, 2010 cannot be faulted with on the touch stone of Article 14 of the Constitution. The tender terms provide for such forfeiture in certain eventualities and those have been set out in the show cause notice as well as in the impugned order. The principles of natural justice have been complied with and it cannot be alleged that the decision is arbitrary or against the tender terms.

12. The main issue which falls for consideration is whether the action of the Respondent No. 1 company in forfeiting the security deposit of Rs. 16.75 crores submitted by way of bank guarantee along with the tender deed by the Petitioners is sustainable in the facts and circumstances of this case.

13. It ought to be noted at this stage that there are no disputed questions of fact while adjudicating the legality of the impugned decision of forfeiting the security deposit. In the case of *Tata Cellular Vs. Union of India*, the Supreme Court stated that where decision/action is vitiated by arbitrariness, unfairness, illegality, irrationality or "Wednesbury unreasonableness" it will require judicial intervention and the Courts will set right the decision making process. In the case of *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, , the Supreme Court while dealing with the issue of maintainability of a Writ Petition under Article 226 of the Constitution in the matter of tenders/contracts held in paragraphs 27 and 28 as under:

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to wp-2324-10.doc entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks*.) And this plenary right of the High Court to

issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

In the case of Vijay Kumar Gupta, Sanjay Transport Service, Well Water Suppliers Vs. State of Maharashtra, School Education and Sports Department, Lirin Roadlines Private Limited and The Hon'ble Minister of Sports, Govt. of Maharashtra, Department of Education, Cultural Affairs and Sports, , a Division Bench of this Court on the same issue of maintainability of a writ petition under Article 226 of the Constitution arising from tender bids stated as under:

7. Another fact of fairness in administrative action is whether the action suffers from the vice of arbitrariness. The courts while exercising the powers of judicial review within the prescribed limitation are bound to examine this aspect of executive actions. The executive besides taking decisions effecting its powers are expected to act in consonance with the rule of fair play. Normally, such actions could be examined by the court on the touch-stone of *Wednesbury's* principles. This doctrine has emerged from English Law and has now been accepted in India as well. The judicial pronouncements now, for a considerable time, have applied this principles with all its rigours.

Normally, it will be impermissible for a State to exercise its discretion free of any checks and balances and without any objectivity in their decisions....

14. To deal with the challenge raised by Mr. Thorat on the maintainability of this petition Mr. Rohagati , the learned Senior Counsel in addition to the above cited decisions also relied upon a recent decision in the case of Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others, . The Supreme Court after referring to its earlier decisions including in the case of KBL International Ltd. (supra) stated that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the Court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the party to a suit. In appropriate cases the Court has the jurisdiction to entertain a writ petition even involving the disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of the contractual obligations and/or involves some disputed questions of facts.

In the instant case, the Chief General Manager of Respondent No. 1 company has filed affidavit in sur rejoinder and stated in paragraph 7 as under:

7. ...I say and submit that it appears that at about 11.30 A.M. on 23.07.2010 the Petitioners have submitted a sealed envelope to the Inward Clerk at 3rd Floor, Prakashgad, Bandra (West), Mumbai. I say and submit that since I am the Chief General Manager of MSPGCL in charge of Fuel Management Cell, as such, I had to go to Mantralaya in respect of policy related briefing to the concerned Secretary, Government of Maharashtra on 23.07.2010 at about 10.30 A.M. I was

at Mantralaya till about 11.30 A.M. and bid had to be opened at 1 PM. Therefore, I rushed from Mantralaya to Bandra office by car and I reached almost at about 12.45 P.M. and I immediately rushed to the tender opening hall and I called all the bidders and price bid opening process was immediately commenced. As I said earlier, after opening the e-bid (price), in the presence of all the bidders and completing all procedures, I reached my Chamber only at about 3 P.M. and while I was involved in my file work, one of my clerical Staff brought a sealed envelope addressed to me, which was issued by the Petitioners themselves and on the envelope it was mentioned price bid envelope. I say that since it was containing price bid of an ongoing tender process, therefore, I have drawn the attention of the higher authorities including Directors of E.D. And as per the decision of the Management, the matter was then referred to the opinion of Legal Cell of MSPGCL.....

15. Thus it is not in dispute that when the bids were opened on 23rd July, 2010 at about 1.00 p.m., the letters in ward by the representative of the Petitioners at about 10.45 a.m., on the very same day were not before the bid opening committee and consequently, these letters in no way have influenced the decision making for accepting the successful bidder. Even on other points this petition does not involve any disputed questions of fact and all that we are required to examine is whether as per the bid terms the Respondent No. 1 company would be justified in forfeiting the security deposit amount of Rs. 16.75 crores as per the impugned order dated 27th October, 2010. In the peculiar facts of this case we do not agree with the submissions made by Mr. Thorat that the Petitioners are required to be relegated to the remedy of a civil suit and this petition filed under Article 226 of the Constitution should not be entertained.

16. Some of the relevant clauses of the tender document need to be reproduced as under

7.0 Bid Security (Emd):

7.1 The bidder shall submit the Bid security i.e. unconditional EMD of amounts equal to Rs. 5 Cr./Mmt, separate for each TPS's specified quantity, offered along with its bid.

7.2 Bid security can be submitted in one of the following forms:

(a) Crossed Demand Draft in the name of Maharashtra State Power Generation Co. Ltd., payable at Mumbai drawn on any scheduled bank.

(b) A Bank Guarantee strictly as per the proforma specified in Annexure -I, in favour of Maharashtra State Power Generation Co. Ltd. on behalf of bidder OR any one of the members of the consortium (if the bidder is a consortium two firms) issued by any bank as stipulated in Annexure -XI of this specification.

7.3 The validity of the bank guarantee against Bid security shall be at least for 120 days from the date of Bid opening and the same shall be extended as may be required. Bid security for shorter period shall make the Bid liable for rejection.

7.4

7.5

7.6

7.7 The Bid submitted by a bidder shall be declared wp-2324-10.doc invalid and the Bid security shall be forfeited:

i) If the bidder withdraws/modifies his bid within the bid validity specified in the Bid Specification. OR

ii) The successful bidder fails to submit performance guarantee and/or to execute contract agreement within the prescribed period in accordance with the instructions to the bidder. OR

iii) If the Bidder does not accept the arithmetical calculation of the landed Price for evaluation of the bid. OR

iv) If the bidder being the successful bidder fails to furnish the acceptance of Letter of Award, within the specified time limit. OR

v) If the bidder gives any wrong/false information/documents in the bid.

8.0 Validity of Bids:

Offers/bids should be valid for a period of at least 90 days from the date of their opening. Bids with shorter validity shall be liable for rejection at the discretion of the purchaser.

12.0 Submission of Bids:

12.7 It is mandatory for the bidder to submit the Bids through e-tendering platform and the bidders are required to provide the "Physical Support Documents" duly signed and sealed, within the timelines specified.

12.12 It should be noted that the price Bid can be made only through the e-tendering platform. No physicals price Bids shall be submitted. In case a bidder submits physical price Bids, such Bids shall be summarily rejected.

14.0 Opening of Bids:

a. The techno-commercial Bid opening will be at the specified time in the NIT.

b. The evaluation committee would first check the payment of EMD and tender fee. Any mismatch between the scanned copy of EMD instruments and the physical instrument would be considered as the basis for rejection of the Bid.

c. The evaluation committee will then refer the submitted documents for a detailed scrutiny.

d. The price Bids for only those bidders which meet the qualifying requirements and also which are technically and commercially acceptable, shall be opened at

the notified time and date in the presence of the qualified bidders who choose to be present.

16.0 Acceptance of Bids:

16.1 The purchaser reserves the right to accept/reject any bid in part or in full or all the bids without assigning any reasons thereof.

16.2 The purchaser reserves the right to place order on more than one bidder for any quantity.

17.0 Notification of Award of Contract:

The notification of award of contract shall be communicated to the successful bidder by Letter of Award (LOA) by Registered Post/Air Mail or hand delivery or Fax or Courier as the purchaser deems fit. In case of issuance of LOA by fax the same shall be followed by letter of confirmation by Registered Post/Air Mail. It shall be noted that the contract shall be concluded on notification of award of contract.

19.0 Submission of Performance Guarantee ,Signing of Contract and Return of Bid Security:

19.2 After execution of contract with the successful bidder, the Bid security (EMD) will be returned to respective bidders, with the exception of the successful bidder (s).

19.3 The Bid security (EMD) of the successful bidder will be returned only after furnishing of Security deposit-cum-Performance Guarantee Bond and signing of the Contract.

17. It is thus seen that the bids security forfeiture is provided only under Clause 7.7. The show cause notice dated 17th August, 2010 has purportedly sought to invoke Clause No. 7.7(i) and Clause 12.12 reproduced above. As per Clause 12.12 bids can be made only through the e-mail platform and no physical price bid shall be submitted. In case a bidder submits physical price bids such bids shall be summarily rejected. If it is the case of the Respondent No. 1 company that the letters inwards on 23rd July, 2010 amounted to submission of physical price bids, then the only implication that the Petitioners would suffer is rejection of their bid and, therefore, this clause does not support the decision to forfeit the security deposit amount. It is nowhere provided that if the bid is rejected, bid security amount is liable to be forfeited. On the other hand as per Clause 19.2, after the execution of the contract with the successful bidder the bid security (EMD) will be returned to the respective bidders, with the exception of the successful bidder and in the instant case the contract with L1 has been executed on 7/9/2010. As per clause wp-2324-10.doc 19.3 the bid security (EMD) of the successful bidder will be returned only after furnishing of the Security Deposit-cum-Performance Guarantee Bond and signing of the Contract and, therefore, this clause is not applicable in the instant case as the Petitioner No. 1 is not the

successful bidder. As per Clause 7.7(i) if the bidder withdraws/modifies his bid within the bid validity specified in the Bid Specification, the bid submitted by him shall be declared invalid and the bid security shall be forfeited. On the other hand the reasons set out in the impugned order dated 27th October, 2010 in support of the forfeiture of the bid security read as under

With reference to the above, it is clarified that, the bidders including you have submitted post bidding documents in response to the additional clarifications called by Mahagenco regarding bid. Mahagenco has never asked for submission of revised prices on any account. The modification in prices cannot be co-related with post bidding correspondence. As such, your statement regarding wp-2324-10.doc acceptance of suo-moto post bidding documentation is not in order. The submission of revised price bid was within the validity of offer. As per tender terms, the modification in prices during validity period is ground for forfeiture of Bid Security.

The circular of Railways regarding recommended port for respective TPS was issued in March 2010 much earlier than bid closing date and it is bidders' responsibility to arrange all logistics following all rules, regulations and circulars issued by concerned authorities viz. Railways, ports and offer the price accordingly. Therefore, submission of the revised prices on this account is not relevant and it does not ensure any purpose in view of public interest. In all it is observed that, the reply to the Show Cause Notice vide letter dated 7th September, 2010 referred at Sr. No. 3 above, is not relevant. As such, in terms of tender, your bid had rendered invalid and is declared as invalid and five Nos. of bank guarantees preferred above towards Earnest Money Deposit are forfeited.

In the above reproduced reasonings set out in the impugned order the gist of para 1 is that the Petitioner-company has resorted to modification in prices during the valid period and, therefore, forfeiture of bid security was justified under Clause 7.7(i) of the contract terms. We do not agree with these conclusions and on the face of the facts that when the tenders are opened on 23/7/2010 at about 1.00 p.m., the alleged modification letters in ward by the Petitioner No. 1-company around 11.45 a.m. on that date were not within the knowledge of the Respondent No. 1-company and in the bids so opened, the Petitioner's bid was no where in the reckoning. L1 was already known and it was only after 3 p.m. that the Chief General Manager opened the envelopes in ward by the Petitioner No. 1-company. We, therefore, hold that in these peculiar circumstances, Clause 7.7(i) of the contract terms cannot be invoked so as to penalize Petitioner No. 1-company by forfeiting the security deposit of Rs. wp-2324-10.doc 16.75 crores. We have already dealt with the other grounds taken, relying upon Clause No. 12.12 of the contract terms and even if the bid had rendered invalid, as alleged, there is no provision for forfeiture of the earnest money deposits in such eventualities. The Petitioner's bid was already out of consideration after 1.00 p.m. on 23/7/2010. Viewed in any manner, the decision taken by the Respondent No. 1-company to forfeit five bank guarantees

is unsustainable and the impugned order is illegal, arbitrary and appears to have been passed in colourable exercise of its power by Respondent No. 1-company.

18. Hence, this petition succeeds and the same is hereby allowed. The impugned show cause notice dated 17/8/2010 and the subsequent order dated 27/10/2010 are hereby quashed and set aside. Rule is made absolute accordingly, but with no order as to costs.