

(2022) 12 CHH CK 0032
In the Chhattisgarh High Court
Case No : Writ Petition (C) No. 3545 Of 2022

M/S BST Infratech Limited	Vs	APPELLANT
Chhattisgarh State Power Transmission Company Limited		RESPONDENT

Date of Decision : 13-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 26
Arbitration and Conciliation Act, 1996 — Section 9, 37
Indian Contract Act, 1872 — Section 2, 3, 4

Citation : (2022) 12 CHH CK 0032

Hon'ble Judges : Arup Kumar Goswami, CJ; Sanjay Agrawal, J

Bench : Division Bench

Advocate : Somik Deb, Kshitij Sharma, Rishabh Garg, Abhinav Kardekar,
Gurpreet Kaur

Final Decision : Dismissed

Judgement

Sanjay Agrawal, J

Heard.

1. By way of this petition filed under Article 226 of the Constitution of India, the petitioner is questioning the legality and propriety of the order dated 06.07.2022 (Annexure P/12) passed by the respondents – Chhattisgarh State Power Transmission Company Limited (hereinafter referred to as the CSPTCL) in so far as it relates to termination and debarring the Petitioner for a period of 2 years from participating in future tenders with its Company, i.e. CSPTCL.

2. Learned counsel appearing for the petitioner on 08.09.2022 submitted, as recorded in the order, that the only issue involved in this petition is as to whether the respondents are justified in blacklisting the petitioner for a period of two years or not.

3. Briefly stated the facts of the case are that the Respondent No.1 floated an e-tender Notice No. 1409 dated 29.10.2021, Tender No. TR-21/05 for the works of

"construction of 132/22 KV sub-station at Betar, District Bemetara, sub-station comprising 2 Nos.132/33 KV, 40 KVA Power Transformer, 5 Nos.132 KV bays & 9 Nos. 33 KV bays on turnkey basis". The said work was to be completed within a period of

15 months from the date of handover of the site and the prospective bidder had to deposit an Earnest Money Deposit of Rs.5,00,000/- for participation in the said work. The Petitioner participated in it while forming a Joint Venture and submitted a bid on 22.11.2021 and, the bids were opened on 07.12.2021 wherein the technical bid of the Petitioner was opened successfully. Thereafter, a Letter of Award was issued to the Petitioner on 26.04.2022 (Annexure P/5) by the Respondent – CSPTCL intimating that the contract for the construction of sub-station was awarded to it for a total value of Rs.16,51,85,777.40 and thereafter, three work orders were issued to it on 02.05.2022 (Annexure P/6) for supply, civil works and erection, but the Petitioner did not comply with the terms and conditions mentioned therein and, therefore, no conclusive contract came into existence between the parties.

4. It is pleaded further by the Petitioner that owing to the onset of the third wave of Covid-19 pandemic, break-out of Russia-Ukraine war and other geo-political reasons, the raw material for execution of the works under contract became unavailable leading to supply crisis and it is, therefore, impossible to perform the work. As such, the Petitioner vide letter dated 11.05.2022 (Annexure P/7) informed the Respondents that it had decided to withdraw its bid. However, the Respondents in response to it, invoked clause 7(I) of the tender document, instead of invoking clause 2.3 vide its letter dated 18.05.2022 (Annexure P/8) and threatened the Petitioner to terminate the contract and debar it for a period of 2 years, apart from forfeiting the EMD in case the Petitioner fails to complete the contractual formalities. It is pleaded further that without considering the response of the Petitioner in the light of the said clause 2.3 of the tender document for forfeiting the EMD only, issued another show-cause notice dated 26.05.2022 (Annexure P/10) proposing the action of termination, forfeiture of EMD and debarring the Petitioner for a period of 2 years to have a business with it.

5. In response to the aforesaid show-cause notice, the petitioner vide its reply dated 07.06.2022 (Annexure P/11) reiterated its contention that it cannot be debarred as such, except to forfeit the said EMD only under clause 2.3 of the tender document. It is, therefore, the contention of the Petitioner that the order impugned, dated 06.07.2022 (Annexure P/12) as passed by the Respondents while terminating the contract and debarring the petitioner for a period of 2 years from participating in the future tenders with the Respondents, apart from forfeiting the EMD of Rs.5,00,000/-, under clause 7(I) of the tender document, is liable to be set aside.

6. While contesting the aforesaid claim of the Petitioner, it is stated by the Respondents that after the issuance of the Letter of Award dated 26.04.2022

(Annexure P/5), three work orders were issued to the petitioner on 02.05.2022 (Annexure P/6) and, the Petitioner was, therefore, obliged to initiate the work as per the terms and conditions of the tender document and to complete the contractual formalities as stipulated therein. The Petitioner has, however, failed to do the same and, instead vide its letter dated 11.05.2022 (Annexure P/7), has withdrawn its contractual liabilities which amounted to breach of the contractual terms. The Respondents have, therefore, requested the Petitioner vide letter dated 18.05.2022 (Annexure P/8) to complete the contractual formalities as stipulated in the work order with a direction that in absence of completion of such formalities and initiation of work, actions would be initiated in terms of clause 7 (I) of the tender specifications and work order. It is pleaded further that even upon the issuance of said notice/request letter and despite the issuance of final show-cause notice, dated 26.05.2022 (Annexure P/10) to this effect, the Petitioner has failed to complete the contractual obligations which, therefore, amounted to breach of the terms of the contract. As such, the order impugned dated 06.07.2022 (Annexure P/12) has been passed while invoking clause 7 (I) of the tender specifications and work order debarring the Petitioner from conducting any business with the Respondents' Company, apart from forfeiting the EMD of Rs.5,00,000/-.

7. While referring to clause 26 of the tender document, based upon which Letter of Award was issued, it is pleaded that since it contains an arbitration clause which provides for settlement of disputes between the parties by way of arbitration under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996") and the Petitioner, while invoking the said clause, had filed an application before the Commercial Court under Section 9 of the Act of 1996 seeking interim injunction against the order impugned dated 06.07.2022 (Annexure P/12). However, despite the dismissal of the same by the said Court vide its order dated 04.08.2022 (Annexure P/14), no appeal as provided under Section 37 of the Act of 1996 has been preferred and, instead the instant petition has been filed without availing the said arbitration clause. Therefore, the instant petition as filed deserves to be dismissed in limine.

8. The main contention of the Petitioner, as reflected from a bare perusal of its pleadings, is that the Respondents, in absence of the existence of the conclusive contract, ought to have invoked the clause 2.3 of the tender document alone while forfeiting the said EMD only, instead of invoking clause 7(I), and, therefore, the order impugned as passed on 06.07.2022 (Annexure P/12) deserves to be set aside.

9. The question, which, therefore, arises for determination in this petition, is;

"whether the Respondents' Company was justified in passing the order impugned dated 06.07.2022 (Annexure P/12) under clause 7 (I) of the tender document terminating the contract while debarring the Petitioner to have any business with it in future for a period of 2 years, instead of forfeiting the EMD amount of Rs.5,00,000/- only, under clause 2.3 of the said tender document ?"

10. From perusal of the record, it appears that e-tender notice was issued by the Respondents – CSPTCL on 29.10.2021 for completion of the alleged work and the Petitioner has submitted its bid while depositing a sum of Rs.5,00,000/- on 22.11.2021 as EMD, as per the terms and conditions stipulated in the said tender document and the bid so submitted was found to be opened successfully in his favour. The Letter of Award was, thereafter, issued on 26.04.2022 (Annexure P/5) whereby construction of 132/33 KV sub-station at Betar (District Bemetara) on turnkey basis was awarded as under :-

Sl. No.

Particulars

Amount (Rs.)

1

Prices for Supply of equipment, structures, accessories etc. for Substation.

13,59,18,194.92

2

Prices for Civil Works for substation.

2,37,73,148.48

3

Prices for Erection, testing & commissioning works for substation.

54,94,434.00

Total Value of Order (Rs.)

16,51,85,777.40

and, three work orders were, accordingly, issued on 02.05.2022 (Annexure P/6).

11. It, however, appears that the Petitioner, vide its letter dated 11.05.2022 (Annexure P/7), has withdrawn from the said tender specifications No. TR-21/05 so issued vide Letter of Award dated 26.04.2022 (Annexure P/5) as observed herein above. The Petitioner's letter (Annexure P/7) was treated as an attempt for breach of contract by the Respondents vide letter dated 18.05.2022 (Annexure P/8) as the Petitioner, instead of completion of contractual formalities, has withdrawn the same contrary to the terms and conditions stipulated in the said tender No. TR-21/05. In view thereof, the notice/request letter was issued by the Respondents on 18.05.2022 (Annexure P/8) requesting the Petitioner to complete the contractual formalities, else punitive action as provided in clause 7 (I) of tender specifications may be taken. In response to the said letter, it was stated by the Petitioner vide its reply-cum-notice dated 21.05.2022 (Annexure P/9) that since the agreement has not been signed against the Letter of Award

dated 26.04.2022 (Annexure P/5) and the issuance of three work orders, which were issued on 02.05.2022 (Annexure P/6), therefore, the EMD amount of Rs.5,00,000/- alone would require to be forfeited as per clause 2.3 of the tender document. It is, however, to be noted at this juncture the clause 31 of the tender document which provides the Petitioner, being a successful bidder, to have enter into an agreement with the ED/C.E. (Planning and Project) in the approved contract agreement form latest within 15 days of the receipt of the work order for construction of said work. But, the Petitioner has failed to comply with the said mandatory requirement as provided under the said clause.

12. Be that as it may, it appears further that the Respondents, after considering the aforesaid reply, observed that as per the terms of the tender, it was a concluded contract according to Sections 2, 3 & 4 of the Indian Contract Act, 1872, and therefore, it cannot be said that no agreement has been signed in view of clause 1 of "General Terms of Contract". Accordingly, another show-cause notice was issued on 26.05.2022 (Annexure P/10) directing the Petitioner to complete the contractual formalities within a period of 10 days, else the punitive action as provided under clause 7(I) of the tender document shall be taken. However, the Petitioner has failed to do the same despite issuance of said final show-cause notice. The order impugned (Annexure P/12) has, therefore, been passed terminating the contract while debarring the Petitioner to have future business with the Respondents' Company for a period of 2 years, apart from forfeiting its EMD amount of Rs.5,00,000/-.

13. Now, clause 2.3 of the tender document is to be seen at this juncture in order to ascertain the answer of above mentioned question, which provides as under :-

2.3 FORFEITURE OF EARNEST MONEY:-

The Bid security is required to protect CSPTCL against the risk of Bidder's conduct, which would warrant the Earnest Money's forfeiture, due to following reasons:

- a) If a Bidder withdraws his Bid during the period of Bid validity specified.
- b) In the event of refusal to accept the Letter of Intent placed by CSPTCL within the validity period.
- c) In case of a successful Bidder, if he fails to sign Agreements and fails to furnish Security Deposit as specified in the Tender Specification.

The successful Bidder's Earnest Money will be discharged only after the execution of various Agreements and Security deposit by the Bidder (as specified in this tender Specification).

14. A bare perusal of the aforesaid clause would show that the "Bid Security" is required to be made by the Bidder in order to protect the interest of CSPTCL against the risk of his conduct and the Bidder's conduct would lead to forfeiture

of his "Earnest Money", if he withdraws his bid during the period of Bid Validity as per sub-clause (a) of it and, the "Earnest Money" would liable to be forfeited even after the acceptance of his Bid, if he fails to accept the Letter of Intent placed by CSPTCL within the validity period as provided and also on account of his failure to sign Agreements and to furnish security deposit as specified in the tender specification in view of the terms provided in sub-clauses (b) and (c). It, however, stipulates further, as reflected from its close scrutiny, that the "Earnest Money" so deposited by the successful Bidder would be discharged to him only after the execution of the various agreements and security deposit by him as provided therein. The aforesaid clause, thus, provides in two parts, firstly, when the "Earnest Money" is to be forfeited and, secondly, when it is to be discharged to him, as observed herein.

15. Admittedly, the Petitioner's bid was opened successfully in his favour for performance of the alleged work as provided in tender No. TR-21/05 for the construction of 132/22 KV sub-station at Betar (District Bemetara) on turnkey basis and, despite of that, it failed to get an agreement executed with the Respondents – CSPTCL, as required to be done mandatorily as provided under clause 31 of the tender document, which reads as under :-

31. AGREEMENT:

The successful bidder shall have to enter into an agreement with the ED/C.E. (Planning & Project) in the approved contract agreement form latest within 15 days of the receipt of the work order for construction of 132 KV S/s and Transmission line (hereby referred as project).

16. As per aforesaid clause, it is evident that the petitioner shall have to enter into an agreement with the ED/C.E. (Planning & Project) in the approved contract form latest within 15 days of the receipt of the work order for construction of the said work. But, the Petitioner, who was required to complete the contractual formalities as provided in sub-clauses (b) and (c) of Clause 2.3, has, thus, failed completely to perform the same despite the issuance of Letter of Award, dated 26.04.2022 (Annexure P/5) and the issuance of three work orders in this regard on 02.05.2022 (Annexure P/6) and even failed to perform the same despite the issuance of two notices (Annexure P/8 and Annexure P/10) by the Respondents. The Petitioner has, thus, certainly committed a default as provided in sub-clauses (b) and (c) of Clause 2.3 and would, therefore, be rightly held liable by the Respondents –CSPTCL to face punitive action as provided in clause 7 (I) of the said tender document, which reads as under :-

"7 CONTRACTOR'S DEFAULT LIABILITIES:

The CSPTCL may upon written notice of default to the contractor terminate the contract in circumstances detailed here under:-

(I) If, in the judgment of CSPTCL, the contractor fails to

(i) Complete the contractual formalities within the time specified in the contract

agreement or within the period for which extension has been granted by CSPTCL to the contractor

and / or

(ii) Comply with any of the provisions of this contract.

In such case(s) CSPTCL under the provisions of this contract shall take one or more of the following penal actions:-

(a) Terminate the contract

(b) Forfeiture of security deposit, if available or EMD

(c) Debar the firm for future business with CSPTCL for a period of two years from the date of issue of letter to this effect.

(d) This debarring may be applicable in respect of other Chhattisgarh State Power Companies also as may be decided by their management.

(II)&(III) xxxx xxxx xxxx xxxx xxxx

17. That apart, it is not out of place to take note of the clause 26 of the tender document, which provides the Arbitration clause, reads as under :-

"26. ARBITRATION:

i. xxxx xxxx xxxx xxxx

ii. Where any dispute is not resolved amicably then such dispute shall be referred to & settled by Arbitration under and in accordance with the provisions of Arbitration and Conciliation Act, 1996 and any statutory modification thereof, by three Arbitrators. One to be appointed by each party and the third to be appointed by two arbitrators appointed by the parties at the commencement of Arbitration proceedings and failing agreement between them, in accordance with said Act, the third Arbitrator so appointed shall act as the presiding arbitrator. The award shall be final and binding upon the parties. The venue of Arbitration shall be Raipur.

iii and iv xxxx xxxx xxxx xxxx"

18. The Petitioner had approached the Commercial Court by moving an application under Section 9 of the Act of 1996 seeking injunction against the order impugned dated 06.07.2022 (Annexure P/12). Despite the rejection of the said application, the petitioner did not pursue remedy of appeal and has also not availed alternative remedy as provided in clause 26 mentioned herein above.

19. The work was provided to the Petitioner in Joint Venture with the Company, known as M/s. Annapurna Constructions and Transmissions (P) Limited, who has also been held liable under the order impugned, but the Petitioner, for the reasons best known to it, alone has questioned the same even without impleading the said Company, which is a necessary party, in the instant petition.

20. In view of the above discussion, we do not find any infirmity in the order impugned so as to call for any interference on it.

21. The petition, being devoid of merit, is accordingly dismissed. No order as to costs.