
(2011) 12 AP CK 0046

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 15445, 15839, 15855, 15938, 15939, 18276, 22872 and 24491 of 2011

M/s. Durai Enterprises, Raghavanandha Nagar, Patharakudi village, Patharakudi Post, Karaikudi Taluk, Tamilnadu

APPELLANT

Vs

Tirumala Tirupati Devasthanams, Tirupati and another

RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Citation : (2012) 2 ALD 376 : (2012) 4 ALT 678

Hon'ble Judges : Nagarjuna Reddy, J

Bench : Single Bench

Advocate : M. Chalapathi Rao in W.P. Nos. 15445, 15839, 15855/2011, Sri C. Kodandaram for Sri Challa Gunaranjan in W.P. Nos. 15938, 15939/2011, Sri S. Ramachandra Rao for Sri K.R. Prabhakar in W.P. Nos. 18276/2011, Sri CH. Kanaka Durga in W.P. No. 22872/2011 and Sri E. Manohar for Sri P. Kamalakar in W.P. No.24491/2011, for the Appellant; Y.V. Ravi Prasad, for the Respondent

Judgement

Hon"ble Sri Justice C.V. Nagarjuna Reddy

1. This batch of Writ Petitions raises common questions and hence they are being heard and disposed of together.
2. For convenience, the parties are referred as they are arrayed in W.P.No.18276/2011.
3. In pursuance of tender notification issued by respondent No.2 on 31-1-2011, the petitioners have submitted their tenders for purchase of human hair from respondent No.2. It is the common case of the parties that respondent No.2 has fixed the upset price for each of the six varieties of human hair. It is also not in dispute that all the petitioners have quoted their rates below the upset price so fixed. Condition No.4 of the tender-cum-auction conditions (for short "the tender conditions") prescribes that if the rate quoted by the tenderer is less than the upset price fixed by respondent No.2, such tender shall become invalid. Despite this mandatory condition, the Negotiations Committee constituted by respondent

No.2, has invited the petitioners for negotiations for upward revision of the price. Evidently, negotiations failed leading to passing of the impugned proceedings dated 15-4-2011 by respondent No.4 whereby he has forfeited the earnest money deposits (EMDs) of 45 tenderers who quoted rates less than the upset price fixed by respondent No.2. 25 of these tenderers have filed these Writ Petitions questioning this action of respondent No.4.

4. I have heard Sri S. Ramachandra Rao, Sri E. Manohar and Sri C. Kodandaram, learned Senior Counsel appearing for the petitioners in the respective Writ Petitions and Sri Y.V. Ravi Prasad, learned Standing Counsel for the Tirumala Tirupati Devasthanams (TTD), appearing for the respondents in all these cases.

5. The learned Senior Counsel appearing for the petitioners, advanced the following contentions:

(i) Respondent No.2 has no power or authority to forfeit the EMDs of the petitioners in the absence of any condition stipulated in the tender notification to that effect;

(ii) under condition No.4 of the tender conditions, if a tenderer quotes rate lesser than the upset price fixed by respondent No.2, his tender shall become invalid and hence the question of forfeiture of the EMDs does not arise;

(iii) under condition No.15, soon after finalization of the tender, the tender deposits of the unsuccessful tenderers shall be returned and therefore the petitioners are entitled to get back their EMDs;

(iv) condition No.23, which envisages forfeiture of the EMDs, applies only to cases where condition Nos.10, 11 and 13 of the tender conditions apply, which operate in respect of the successful tenderers only, and that therefore respondent No.2 has no power or authority to forfeit the EMDs of the tenderers whose tenders were rendered invalid;

(v) respondent No.2, having invited the petitioners for negotiations despite the fact that their tenders were rendered invalid by operation of condition No.4 of the tender conditions, cannot forfeit the petitioners' EMDs on the ground that they have quoted rates lesser than the upset price fixed; and

(vi) even though identical conditions were incorporated in respect of previous tenders, respondent No.2 has not resorted to forfeiture of EMDs of the tenderers who quoted rates lesser than the upset price in the past and that respondent No.2 cannot give a different interpretation to the same set of tender conditions in case of the present tender.

6. In support of their submissions, the learned counsel placed reliance on the following Judgments:

The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh, Common Cause, A Registered Society Vs. Union of India and Others, , LIC of India and Another Vs. Consumer Education and Research center and Others, E.P. Royappa Vs. State

of Tamil Nadu and Another, , Yogesh Mehta Vs. Custodian Appointed under the Special Court and Others, Jay Vee Rice and General Mills Vs. State of Haryana and Others, Kunwar Chiranjit Singh Vs. Har Swarup AIR 1926 P.C. 1, The Chairman of The Bankura Municipality Vs. Lalji Raja and Sons, Saurabh Prakash Vs. DLF Universal Ltd., and Maula Bux Vs. Union of India (UOI), .

7. Sri Y.V. Ravi Prasad, learned Standing Counsel for the TTD, strongly opposed the above submissions of the learned Senior Counsel and submitted that since the petitioners and other tenderers have been acting with malice by deliberately quoting less prices than the upset price, respondent No.2 had no other option than enforcing the tender conditions even though a lenient view was taken on the earlier occasions. He has placed reliance on the Judgments of the Supreme Court in Villayati Ram Mittal (Pvt.) Ltd. Vs. Union of India (UOI) and Another, and State of Maharashtra and Others Vs. A.P. Paper Mills Ltd.,

8. I have carefully considered the submissions of the learned counsel for the parties and perused the record.

9. The issue that arises for consideration in these Writ Petitions is whether forfeiture of EMDs is legally sustainable ? For deciding this issue, the tender conditions assume prime importance. However, before discussing the tender conditions, it is useful to refer to the legal position pertaining to EMD and its forfeiture.

10. In Kunwar Chiranjit Singh (7-supra), the Privy Council succinctly explained the nature of the EMD as under:

Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee

11. In Chairman of the Bankura Municipality (8-supra), the Supreme Court referred to and relied on Murray's Oxford Dictionary in explaining the meaning of the word "forfeiture", which is in the following terms:

The fact of losing or becoming liable to deprivation of goods in consequence of a crime, offence, or breach of engagement... "the penalty of the transgression" or a "punishment for an offence"

12. In Maula Bux (10-supra), the Supreme Court while dealing with the nature of earnest money quoted Earl Jowitt in "The Dictionary of English Law" at page 689 as under :

Giving an earnest or earnest-money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds.

13. In the above Judgment, the Supreme Court also quoted with approval the Judgment of the Privy Council in Kunwar Chiranjit Singh (7-supra).

14. In Yogesh Mehta (5-supra), the Supreme Court held that while directing forfeiture of earnest money, the provisions of the Indian Contract Act, 1872 are to be kept in mind and that forfeiture is permissible when the concluded contract has come into being and not prior thereto.

15. The preponderance of judicial opinion as reflected from the above discussed case law is to the effect that while earnest money is part of purchase price, on confirmation of the contract, its forfeiture is resorted to when the transaction fails by reason of the fault or failure of the vendee.

16. Let me now consider the tender conditions relevant for the present purpose, which are reproduced herein below:

Condition No.4: The tender shall become invalid if the rate quoted by the tenderer is less than the upset price fixed by the TTD.

Condition No.11 : After issue of confirmation orders, the successful tenderers should pay the bid amount within 30 days from the date of confirmation orders without any penalty and upto the next 15 days by paying interest at 15% P.A. for the amount due and for the number of days delayed. Otherwise, the tender deposit will be forfeited. Under any circumstances, extension of time will not be allowed for payment of the balance amount. After payment of total bid amount within stipulated time, the stocks will be delivered on priority basis. If the bidder fails to lift the stocks within 30 days from the date of issue of confirmation orders ground rent will be collected @ Rs.1-00 per day per bag which is common for all varieties.

Condition No.13: The bidder/tenderer has to pay 20% cost of the Additional quantity as deposit on the price quoted by him within (7) days from the date of requisition of the tenderer concerned failing which the request for such allotment will be cancelled and the firm will be blacklisted for a period of (5) five years. The balance 80% cost for such Additional quantity has to be paid within 30 days from the date of confirmation orders and to take delivery, failing which 20% amount so paid for allotment of remaining quantities will be forfeited.

Condition No.15: Soon after finalization of the tender, the tender deposits of the unsuccessful tenders will be returned. The tender deposit does not carry any interest.

Condition No.23: For violation of any of the above conditions, the tender deposit will be forfeited.

Condition No.24: The tender rates are subject to upward Auction by the committee once and above the upset price for each variety. The tender will be finalized duly negotiating the rates with all the Tenderers by the negotiation Committee.

17. From the above noted tender conditions, it is evident that the tenders with rates less than the upset price fixed by respondent No.2, will become invalid

(Condition No.4). If the offer is accepted and confirmation orders are given, the tenderer shall pay the balance amount within the stipulated time. After issuing the confirmation orders, the successful tenderer shall pay the total bid amount within 30 days from the date of confirmation orders without any penalty and within next 15 days after payment of penalty at 15% P.A. failing which tender deposit will be forfeited and after payment of the total bid amount in the stipulated time, the stocks will be delivered on priority basis. If the bidder fails to lift the stock within 30 days from the date of issue of the confirmation orders, ground rent will be collected (condition No.11). The bidder/tenderer has to pay 20% cost of the additional quantity as deposit on the price quoted by him within 7 days from the date of requisition of the tenderer concerned, failing which the request of such allotment will be cancelled and the firm will be blacklisted for a period of five years. Similarly, the balance 80% cost of the additional quantity has to be paid within 30 days from the date of confirmation orders and the delivery taken, failing which 20% of the amount so paid for allotment of remaining quantities will be forfeited (condition No.13). After finalization of the tender, the tender deposits of the unsuccessful tenderers will be returned without interest (condition No.15). Under condition No.23 of the tender conditions, if any of the conditions mentioned above condition No.23 in the tender conditions is violated, the tender deposit will be forfeited. Under condition No.24, the tender rates are subject to "upward Auction by the Committee" where the rates quoted are above the upset price and tenders will be finalized duly negotiating the prices by the negotiation committee.

18. In its true sense, condition No.4 of the tender conditions is not in the nature of any mandate to the tenderers, unlike condition Nos.10, 11 and 13. Condition No.4, which announces the policy of respondent No.2 qua the tenders with rates quoted less than the upset price, operates at the threshold, while the rest of the conditions are made applicable after acceptance of the offers of the tenderers and issuance of confirmation orders. The necessity of respondent No.2 dealing with the tenders falling under condition No.4 ceases once it is found that the rates quoted in those tenders are less than the upset price fixed by it. Therefore, the question of any tenderer violating condition No.4 of the tender conditions does not arise. The expression "for violation of any of the above conditions" contained in condition No.23 of the tender conditions, has, therefore, to be construed keeping in view the nature of the conditions and their violations. So construed, in my opinion, condition No.4 is not comprehended by condition No.23 of the tender conditions. In other words, in the absence of any condition which stipulated that no tenderer shall quote rates less than the upset price fixed by respondent No.2, it cannot be said that by quoting rates lesser than the upset price, the tenderers have violated any of the tender conditions, much less condition No.4 of the tender conditions. I am unable to accept the submission of the learned Standing Counsel for the TTD that condition No.4 implicitly prohibits the tenderers from quoting rates lesser than the upset price fixed by respondent No.2. No such meaning can be deciphered from condition No.4 of the tender

conditions even if its language is construed in the most liberal manner.

19. If the tender conditions are carefully examined, it is evident that they are couched in conformity with the settled legal position discussed above. Under condition No.11, the liability of the successful tenderer for payment of the total bid amount will commence on the issuance of confirmation orders which signifies formation of a contract even though a formal contract may not take place at that stage. Condition No.13 envisages forfeiture of 20% of the cost of additional quantity if the balance 80% of such additional quantity is not paid within 30 days from the date of confirmation orders. Under condition No.23, for violation of the conditions mentioned above in the said condition, the tender deposit will be forfeited. The tenor and texture of these conditions would undoubtedly reveal that forfeiture of earnest money deposit or the 20% cost of the additional quantity is envisaged only in cases of the concluded contract i.e., after issuance of confirmation orders accepting the offer of the tenderers.

20. A careful perusal of the two Judgments on which the learned Standing Counsel placed reliance shows that they have turned on their own facts. In *Villayati Ram Mittal Private Limited* (11-supra), there is a specific condition in clause No.6 which stipulated that if the firm revoked its offer during the validity period, the earnest money furnished by the firm shall be forfeited. The tenderer who quoted the lowest rate has revised his offer which was construed as revoking his original offer and his earnest money deposit was forfeited. The Supreme Court has upheld the said action on the construction of clause No.6 of the tender conditions. In *State of Maharashtra* (12-supra), clauses (v) and (vi) of the contract stipulated that once bid was tendered, no changes could be made thereto and no bid could be withdrawn during the 45 days period. It further envisaged that if the tender is withdrawn prior to declaration of the final sale result, the EMD will be forfeited to the Government. As the tenderer withdrew his tender before the expiry of the 45 days, the EMD was forfeited which was upheld by the Supreme Court in view of the specific term of the tender. It needs to be noted that in both the above cases decided by the Supreme Court, validity of the respective clauses in the tender conditions providing for forfeiture of EMD even before formation of contract is not challenged. These Judgments cannot therefore be taken as laying down any proposition that EMD can be forfeited even before formation of the contract. Forfeiture was upheld only on the strength of the tender conditions which provided for such forfeiture.

21. In the cases on hand, as noted above, there is no express bar on any tenderer quoting rates less than the upset price. The only consequence that would ensue in the event of quoting prices less than the upset price is invalidation of the tender. That by itself is a disincentive for the tenderer. The tender conditions do not go farther than invalidating the tenders of those tenderers. In the absence of any condition which stipulated, either in express or implied terms, that a tenderer shall not quote rates less than the upset price, forfeiture of their EMDs only on the ground of quoting the prices less than the

upset price, constitutes patent arbitrariness as such action is not supported by the tender conditions.

22. As regards the submission of the learned Senior Counsel on condition No.15 of the tender conditions, I am in agreement with the submission of the learned Standing Counsel, that the petitioners, whose tenders are invalid, may not straightaway fall under the said condition. But contrary to condition No.4, the petitioners' tenders were not treated as invalid and the Negotiation Committee held negotiations with the petitioners. During negotiations, most of the petitioners have not offered higher rates than that quoted by them. However, the impugned orders show that some of them have submitted their revised offers after the negotiations were closed. In the face of these undisputed facts, where the petitioners' tenders were not treated as invalid, they need to be treated as unsuccessful tenderers rather than tenderers whose tenders were rendered invalid. At any rate, even assuming that condition No.15 of the tender conditions does not apply, in the absence of any power vested with respondent No.2 to forfeit the EMDs only on the ground that the tenderers have quoted rates less than the upset price, it cannot withhold the EMDs of the petitioners.

23. In the light of the findings rendered above, I have no hesitation to hold that forfeiture of the EMDs of the petitioners by respondent Nos.2 to 4 cannot be sustained and the impugned orders are accordingly quashed. The Writ Petitions are allowed. Respondent Nos.2 to 4 are directed to return the EMDs of the petitioners within a period of four weeks from the date of receipt of this order.

24. As a sequel, WPMP Nos.18518, 18981, 19088, 19089, 19090, 19091, 18999, 22014, 27970, 30081 and 30082 of 2011, filed in the respective Writ Petitions, are disposed of as infructuous.