

(2018) 08 BOM CK 0145

In the Bombay High Court

Case No : Writ Petition No. 4164 Of 2018

M/S General Security And Information Services Pvt. Ltd., Thr.
Its Director Dr. Jitenjal J. Sinha

APPELLANT

Vs

Union Of India, Thr. Its Secretary, Ministry Of Railways, New
Delhi And Others

RESPONDENT

Date of Decision : 31-08-2018

Acts Referred:

Citation : (2018) 08 BOM CK 0145

Hon'ble Judges : B.P. DHARMADHIKARI, J;M. G. GIRATKAR, J

Bench : Division Bench

Advocate : S.S. Shingane, N.P. Lambat

Final Decision : Disposed Off

Judgement

B.P. DHARMADHIKARI, J

1. Looking to the nature of controversy and by consent, we have issued Rule, and made it returnable forthwith. We have heard Shri S.S. Shingane,

learned Counsel for the petitioner and Shri N. Lambat, learned Counsel for respondents, accordingly.

2. This Court has issued notice in the matter on 13.07.2018, and parties were directed to maintain status quo in relation to recovery from petitioner.

3. After filing of reply, we have heard parties again on 24.08.2018, and because of some confusion, then prevailing, we accommodated respective counsel by adjourning the matter to today.

4. Only contention of petitioner before this Court is, petitioner cannot be subjected to recovery of amount of Rs. 69,59,262, which represents the

Security Deposit and Performance Guarantee. Petitioner does not challenge the order terminating the contract with him.

5. Learned counsel for the petitioner Company contends that Company does not desire to enter into contract and is also ready and willing to suffer

forfeiture of full earnest money in terms of tender condition. He is relying on paragraph nos. 8 and 9 of NIT for said purpose.

6. He submits that as this amount is not paid, on 01.06.2018, respondents have written to their counter parts elsewhere for adjusting this amount from

bills claimed by the petitioner in ongoing contracts with those establishments.

7. Learned counsel for respondents relies upon the proviso to Clause 8 of NIT to urge that the course of action followed by respondents is as per law.

8. Thus, only question is, if a successful bidder refuses to enter into a formal contract and backs out, whether the earnest money and performance

security deposited by him can be forfeited ?

9. Parties submit that this aspect is squarely covered by Clause 8 of NIT.

10. Clause 8 of NIT reads as under :

8. Execution of Contract Document : The Tenderer whose tender is accepted shall be required to appear in person at the office of the General

Manager/General Manager (Construction), Chief Administrative Officer (Construction), Divisional Railway Manager or concerned Engineer, as the

case may be, or if a firm or corporation, a duly authorized representative shall so appear and execute the contract documents within 7 days after

notice that the contract has been awarded to him. Failure to do so shall constitute a breach of the agreement effected by the acceptance of the

tender in which case the full value of the earnest money accompanying the tender shall stand forfeited without prejudice to any other rights or

remedies.

In the event of any tenderer whose tender is accepted shall refuse to execute the contract document as here in before provided, the Railway may

determine that such tenderer has abandoned the contract and there upon his tender and acceptance thereof shall be treated as cancelled and the

Railway shall be entitled to forfeit the full amount of the Earnest Money and to recover the damages for such default.

11. Thus, a substantive part of Clause 8 contemplates a situation in which there is failure on the part of bidder to enter into and to execute necessary

contract. The consequences of such failure is a breach of agreement and the penalty stipulated is forfeiture of full value of earnest money

accompanying the tender.Â Thus, this amount stands forfeited without prejudice to other rights of the employer â?" respondent.

12. Proviso again envisages same situation, and it empowers respondent Railways to determine the contract by treating the same as 'abandoned' and to cancel the acceptance of tenderer.Â It entitles Railways to forfeit full amount of earnest money and also to recover damages for default.

13. Here respondents have not pointed out that in exercise of powers given to them under said proviso, theyÂ have determined any damages and that their effort is to recover it.Â They are simply forfeiting the amount of security deposit and performance guarantee.Â As that amount is not in deposit and contract has not been entered into, by the impugnedÂ communication dated 03.04.2018, they have called upon petitioner to deposit that amount i.e. total amount of Rs. 69,59,262/Â?.

14. This amount is to beÂ deposited after formal contract is entered intoÂ between the parties.Â As there is no formal contract and petitioner has backed out, the respondents Railways in exercise of powers given to it under proviso to Clause 8 can work out the damages sustained by it and recover it.Â No clause or power permitting it toÂ call upon petitioner to deposit the amount of earnest money orÂ performance security is pointed out to us.

15. The consequential communication dated 01.06.2018, therefore, directs other Railway Establishment to help respondents in recovering that amount from petitioner by deducting it from Petitioners' bill amounts in relation to other contracts.Â As there cannot be any demand for security deposit or for performance security in present matter, the communication dated 03.04.2018, to that extent and further advise issued by respondents to other Railway departments on 01.06.2018, to deduct that amount from bills payable to petitioner is, unsustainable.Â The same is accordingly quashed and set aside.

16. Needless to mention that it is open to respondents to proceed in accordance with the provisions in Clause 8.

17. Writ Petition is thus, partly allowed and disposed of.Â Rule is made absolute in aforesaid terms with no order as to costs.