(2015) 12 CAL CK 0017

In the Calcutta High Court

Case No : W.P. No. 7659 (W) of 2015

Prasanta Ghosh		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision : 21-12-2015

Acts Referred:

Citation : (2015) 12 CAL CK 0017

Hon'ble Judges : Joymalya Bagchi, J.

Bench : Single Bench

Advocate : Kaushik Dey, for the Appellant; Saugata Bhattacharya, for the Respondent

Final Decision : Allowed

Judgement

Joymalya Bagchi, J.—Decision of the tendering authority to forfeit a part of the bid security is under challenge. The respondent/tendering authority had issued a notice inviting tender dated 29.10.2013 for auction of road side standing trees. The relevant terms of the said tender are as follows:

"2. Bid shall remain valid for a period of 30(thirty) days after the date of bid opening. In exceptional circumstances the bidder may be requested to extend the bid validity period by Managing Director, WBHDCL. Bid after submission cannot be modified.

3. All bids must be accompanied by a Bid security (Earnest money) Rs. 3,00,000.00 (Three lac only) in the form of demand draft/BG payable at Kolkata on any nationalized bank or on any scheduled bank in favour of the "Managing Director, West Bengal Highway Development Corporation Limited". Bid security shall be submitted in a separate sealed envelope inside the outer envelope and shall be marked "Bid Security" & also bear the above identification.

4. Bid security (Earnest money) shall be forfeited & credited to government as per govt. Rule in the following cases:--

a. If the Bidder withdraws his Bid during the period of Bid validity.

b. If the successful Bidder fails to deposit full Bid price (highest Bid value) within the stipulated time (as decided by the tendering authority) after issuance of acceptance letter.

5. Bid security of the successful bidder will be returned after the successful Bidder deposits the total offered price or immediately after the Bid validity which is earlier. Bid security (Earnest money) which will be converted or Earnest Money of the successful bidder will be returned after felling the standing trees & removal of the trees duly observing the condition laid in Sl 16 i) to v) & other forest rules as amended time to time.

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12. The successful Bidder shall have to deposit the full additional amount to cover the Bid Security @ 10% of Bid value separately in the form of Bank draft payable at Kolkata on any scheduled Bank drawn in favour of the "Managing Director, West Bengal Highway Development Corporation Limited" positively within 10(ten) days from the date of issue of the letter of acceptances stipulated in acceptance letter. The Earnest Money of the successful bidder will be kept as Security Money till removal of Stumps & roots of the standing trees fully as condition laid as per term & condition in the Auction notice. No interest is payable on Bid security.

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16. Norms of cutting & lifting of the standing trees after auction are as follows:

i. The auctioned trees shall have to be cleared from road side (both left & right) by cutting, uprooting, removal of stumps & roots thoroughly & lifting the same including refilling the area with suitable earth (specification decided by tendering authority) at their own cost. The said work will be started as per schedule as laid in lifting order/work order within 30(thirty) days positively from the date of lifting/work order for the interest of Govt. works as well as public works.

ii. During lifting the purchaser shall have to abide by the provisions of the relevant Indian Forest Acts/different rules as issued by the Forest Deptt. & the West Bengal forest produce transit Rule 1959 & as amended time to time.

iii. the purchaser or his duly authorized agent only will have the authority for lifting logs & other portion of trees. The letter of authority must declare that the purchaser shall be held responsible for any irregularity committed by his authorized agent."

2. In terms of the aforesaid tender, the writ petitioner submitted his bid along with bid security money to the tune of Rs. 3 lac. The price quoted by the petitioner being the highest a provisional acceptance letter was issued by the respondent authority dated 25.11.2013 in his favour whereupon the respondent authority called upon the writ petitioner to submit balance security money (8%

of the bid reserved price to the tune of Rs. 12 lac) within 10(ten) days from the date of issue of the said letter in terms of Clause 12 of NIT, as aforesaid.

3. Writ petitioner failed to make such deposit within the stipulated time. Subsequently, he made a representation for extension of such time to deposit the balance amount of bid security. The respondent authorities did not accede to such prayer and proceeded to issue a fresh tender. Further, the initial bid security of Rs. 3 lac was also forfeited as per tender norms by the impugned letter dated 20.01.2014. Hence, the writ petition.

4. Learned counsel appearing for the petitioner has restricted his submissions to the issue of forfeiture of the initial bid security. He submits that Clause 4 of the notice inviting tender relates to forfeiture of bid security. Such clause does not empower the tendering authority to forfeit the initial deposit of Rs. 3 lac in the event of failure to deposit the remainder of the bid security in terms of Clause 12.

5. On the other hand, learned counsel appearing for the respondent authorities submits that failure to deposit the remainder of the bid security within the stipulated time frame is a breach of the tender conditions and such breach being at the behest of the bidder he cannot escape forfeiture. Tendering authority has ample power to forfeit the initial bid deposit independent of the power conferred under Clause 4. Alternatively, he submits that Clause 4 ought to be interpreted liberally so as to empower the authority to make such forfeiture in order to prevent frivolous bidders from taking the authority for a ride and cause loss to public exchequer by necessitating a fresh tender due to their irresponsible conduct. He relies on various authorities in support of his contentions.

6. It is trite law that forfeiture clause being in the nature of penalty ought to be construed strictly. Clause 4 of the NIT deals with the power of forfeiture in the instant case. It provides that bid security may be forfeited under the following circumstances : -

"a) The bidder has withdrawn his bid during its validity period, or

b) The bidder has failed to pay the full bid price, i.e. the highest bid value within the stipulated time as decided by the tendering authority after issuance of acceptance letter."

7. It is nobody''s case that any of the aforesaid conditions had arisen in the instant case.

8. The bidder has failed to deposit the remainder of the bid security within the time stipulated under clause 12 of NIT. He has not failed to deposit the full bid price within the stipulated time. Bid security was insisted upon the respondent authority under the NIT to ensure that none of the bidders withdrew their offers during validity period and the successful bidder deposited the full bid price within the stipulated time and duly cut and removed the trees in terms of the conditions laid down in clause 16 of the NIT. In fact, clause 5 stipulates that unsuccessful bidders were to be refunded the bid security upon expiring of the bid validity

period.

9. In view of the aforesaid terms in the tender document, I am of the opinion that the power of the tendering authority to forfeit the bid security or part thereof shall arise only if the tenderer fails to pay the full bid price and not when he has failed to pay the remainder of the security in terms of Clause 12 which was to be treated as earnest money/security for cutting and removal of trees in terms of clause 16 of NIT. Admittedly, such earnest money did not constitute part of the full bid price to be deposited by the successful bidder.

10. With regard to the plea of forfeiture by the authority independent of the tender terms, I find that the impugned letter of forfeiture categorically mentions that the forfeiture was made under the tender terms. The authority cannot be permitted to make out a different case from what is made out in the impugned letter of forfeiture. That apart, when NIT categorically provides in clause 4 the circumstances under which forfeiture may be made, I am of the opinion the power of forfeiture is to be exercised strictly in terms of the said clause and not otherwise.

11. The authorities cited on behalf of the respondents are inapplicable in the facts of the instant case. In Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, a concluded contract had come into existence and the forfeited money was a part of the sale price. In the instant case there was no concluded contract as remainder of bid security was not paid and the bid security was not a part of the full bid price which was to be paid by the bidder as sale price for removal of the auctioned trees.

12. Similarly, in Villayati Ram Mittal (Pvt.) Ltd. Vs. Union of India (UOI) and Another, the forfeiture was in terms of clause (6) of the contract whereas in the instant case the terms of tender particularly clause (4) does not justify forfeiture.

13. Accordingly, I hold that the impugned letter dated 20.01.2014 forfeiting the initial bid security is dehors the terms of the tender and the same is quashed. The writ petition is allowed.

14. The respondent authority is directed to refund the initial deposit of Rs. 3 lac within 10(ten) date from the date of communication of this order failing which the said amount shall carry interest at the rate of 10% per annum till the date of actual payment.

15. There shall be no order as to costs.

