
(2023) 07 DEL CK 0103

In the Delhi High Court

Case No : Civil Writ Petition No. 8456 Of 2023, Civil Miscellaneous Application
No. 32233-32234 Of 2023

Saurabh Metals Pvt. Ltd

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 12-07-2023

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2023) 07 DEL CK 0103

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Purti Gupta, Henna George, Vineet Dhanda, Vinay Yadav, Archit Aggarwal, Santosh Kr. Rout, Abhishek Chakraborty

Final Decision : Dismissed

Judgement

Prateek Jalan, J

1. The present writ petition has been filed challenging a communication dated 08.06.2023 issued by the Ministry of Railways, Government of India by which it has communicated its decision to forfeit and encash a performance bank guarantee dated 30.11.2021 for the sum of ₹ 25.20 lakhs. The performance bank guarantee was submitted by the petitioner in support of a bid for supply of 1000 nos. Box N/BG Axle in terms of the specifications stated in the tender documents.

2. The petitioner is a small scale industry registered under the Micro, Small and Medium Enterprises ["MSME"] Development Act, 2006. It participated in the aforesaid tender and was awarded the tender by the Ministry of Railways, Government of India, by a letter of acceptance dated 17.11.2021. The delivery period specified in the letter of acceptance was "D+30 weeks", "D" being the date of the Development Order. It is undisputed that the Development Order in the present case was issued on 29.12.2021, and the period of 30 weeks

therefrom would conclude on 26.07.2022.

3. The contention of the petitioner in the writ petition is that it was unable to supply the axles in terms of the aforesaid contract due to the investment required for manufacturing of axles, in terms of the technical specifications in the tender. The petitioner was earlier in the business of forging and had disclosed that it had not supplied axles previously. Ms. Purti Gupta, learned counsel for the petitioner, submits that the petitioner was not aware of the extent of investment required for manufacturing of axles, particularly with regard to the required heat treatment facility, and such information was also not disclosed in the tender document. She states that the petitioner was unable to invest resources at the required level. The petitioner, in fact, visited the wheel and axle plant of the Indian Railways in Bangalore in June 2022, and was surprised to see its scale and the equipment required for the manufacturing process. It therefore requested the Ministry of Railways to cancel the Development Order.

4. Ms. Gupta relies upon a Scheme dated 06.02.2023 [Vivad se Vishwas I], as revised on 11.04.2023, issued by the Ministry of Finance, Government of India [hereinafter, "the Scheme"] for relief to be granted to MSMEs which have been unable to provide goods and services to the Government of India and public sector undertakings. She submits that, in terms of the aforesaid Scheme, the petitioner, being a small scale industry, was entitled to refund of 95% of the performance security and earnest money deposit forfeited by the procuring agency. According to learned counsel, this creates a special equity in the petitioner's favour, upon which encashment of the bank guarantee in question may be injuncted.

5. Mr. Vineet Dhanda, learned Central Government Standing Counsel, however, submits that relief in terms of the Scheme was denied to the petitioner in view of the fact that it did not meet the eligibility conditions for applicability of the Scheme. He submits that the delivery period in the present case extended until 26.07.2022, whereas one of the eligibility conditions in the Scheme was that the original delivery period/completion period stipulated in the contract must be between 19.02.2020 and 31.03.2022. Mr. Dhanda contends that the petitioner was therefore not eligible for the relief sought.

6. In rejoinder, Ms. Gupta draws my attention to the fact that the Scheme was applicable to eligible tenders where the date of closing of the tender was between 19.02.2020 and 31.03.2022. She submits that in the present case, the tenders were to be submitted by 22.07.2021 and the present case therefore falls within the Scheme parameters.

7. Having heard learned counsel for the parties, I am of the view that no injunction can be granted at this stage against invocation of the performance bank guarantee. A copy of the bank guarantee dated 30.11.2021 has been annexed to the petition. It is unconditional, and the petitioner's banker has undertaken to pay the amount claimed by the respondent upon demand,

notwithstanding any dispute or disputes raised by the petitioner. It is well settled that an injunction against invocation of an unconditional bank guarantee can be granted only in egregious cases of fraud or special equities, giving rise to irretrievable injury. Reference, for example, may be made to the judgment of the Supreme Court in *Standard Chartered Bank vs. Heavy Engineering Corporation Ltd.* (2020) 13 SCC 574; paragraphs 19 to 23.

8. Ms. Gupta submits that special equities in the present case arise out of the terms of the Scheme, by which special concessions were given to MSMEs in the wake of the COVID-19 pandemic. The question therefore at this stage is whether the petitioner, at least prima facie, falls within the ambit of the Scheme.

9. The revised Scheme dated 11.04.2023 contains the following eligibility criteria and provisions for relief thereunder:

"2. The following parameters will determine eligibility for benefits under this scheme:

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Parameter

Eligibility condition

i

Nature of procurement eligible for the relief

Procurement of Goods and Services

ii

Central government procurement entitles to whom this scheme applies

Ministry/ Department/ attached or subordinate office/ autonomous body/ Central Public Sector Enterprise (CPSE)/ Central Public Sector Banks/ Financial Institution etc.

iii

Nature of the supplier/ contractor eligible for the scheme

Registered as a Medium, Small or Micro Enterprises (MSME) as per prevalent scheme of Ministry of MSME on the date of claim by supplier/ contractor.

MSME may be registered for any category of Goods and Services.

iv

Eligible contracts in case of forfeiture of performance security or imposition of Liquidated Damages (LD) or the damages levied under "Risk Purchase" (RP) or debarment action

Where original delivery period/ completion period stipulated in contract was

between 19.02.2020 and 31.03.2022

(both dates are inclusive). Emphasis supplied.

In case of risk purchase, the original delivery period of the main contract (and not the risk purchase contract) should be between 19.02.2020 and 31.03.2022.

V

Eligible tenders in case of forfeiture of Bid security (Earnest Money Deposit) or debarment action

Tenders, where date of closing of the tender was between 19.02.2020 and 31.03.2022 (both dates are inclusive) Emphasis supplied.

3. The following amount shall be refunded by the procuring entities as a relief under this scheme after determining eligibility as per para 2 as above:

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Cause of action

Amount/extent of relief

i.

Performance security forfeited by the procuring entities for failure to execute contracts by the contractors.

95% of the performance security forfeited by the procuring entity.

ii

Imposition of liquidated damages (damages deducted for late deliveries) or the damages levied under the risk purchase.

95% of the Liquidated Damages (LD) deducted or 95% of the risk purchase amount realized by the procuring entities from the MSME.

iii

Bid security (Earnest Money Deposit) forfeited

95% of the Bid security (Earnest Money Deposit) forfeited.

iv

Debarment of the contractor due to default in execution of eligible contracts/ eligible tenders under the scheme

Revocation of debarment by issue of an appropriate order by the procuring entity. The date of revocation shall be the date of such order.

However, in case a firm has been ignored for placement of any contract due to debarment in the interim period (i.e. date of debarment and the date of

revocation under this order), no claim shall be entertained.”

10. As far as performance security is concerned, paragraph 2(iv) of the Scheme requires the original delivery period/completion period to be between 19.02.2020 and 31.03.2022. Admittedly, the present case does not fall within these parameters. I am therefore of the view that the contention of the Government of India in its communication dated 22.05.2023 to this effect cannot be faulted.

11. I am also of the prima facie view that Ms. Gupta’s reliance upon paragraph 2(v) of the scheme is misplaced. The aforesaid clause applies to cases of forfeiture of bid security [earnest money deposited or action for debarment of tender]. In the present case, the bank guarantee in question was submitted under Clause 13 of the “Instructions to Tenderers”, and was to secure performance of the contract. Clause 11 of the Instructions to Tenderers specifically provides that earnest money deposit was not required. The case therefore falls within paragraph 2(iv), which covers “performance security”, rather than paragraph 2(v) of the Scheme.

12. In the absence of the benefit of the Scheme being available to the petitioner, I do not find any ground of fraud or special equities to justify an injunction against the invocation of the bank guarantee. The petitioner’s own case is that it was unaware of the infrastructure required for compliance of its contractual obligations. It is stated in the writ petition that the petitioner submitted a tender for supply of 1000 axles only on account of the fact that a quotation for less than 50% of the tendered quantity was deemed to be unresponsive. I am unable to accept, at least at this stage, that a contracting party, even if it is an MSME, can be absolved of its contractual obligations on such a ground. It is for a party to satisfy itself that it is capable of executing a contract before participating in a tender. In fact, Mr. Dhanda has drawn my attention to a communication dated 03.07.2021 signed by the petitioner, in which the petitioner has stated that it has examined the relevant specifications and is aware of the nature of the stores required, and that it undertakes to supply the stores in accordance with the requirements.

13. Having regard to the aforesaid position, I do not find any ground to injunct the encashment of the subject bank guarantee in the present proceedings under Article 226 of the Constitution.

14. The petition is, therefore, dismissed and the interim order dated 13.06.2023 is vacated. All pending applications are disposed of.

15. The parties are free to avail of all contractual remedies in respect of their respective claims and counter claims, if any.