
(2010) 01 MP CK 0005
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5334 of 2009

S.R.S. Infra Project Pvt. Ltd., Gwalior	APPELLANT
Vs	
Gwalior Development Authority, Gwalior and another	RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Contract Act, 1872 — Section 70, 73, 74

Citation : (2010) 2 MPLJ 142

Hon'ble Judges : S.K. Gangele, J; Piyush Mathur, J

Bench : Division Bench

Advocate : N.K. Gupta, for the Appellant; Raghuendra Dixit, for the Respondent

Final Decision : Allowed

Judgement

Piyush Mathur, J.

Petitioner S.R.S. Infra Project Private Limited has challenged the order of forfeiture of the Earnest Money Deposit (EMD) by the respondent-Gwalior Development Authority (GDA), in relation to a tender invited by the Gwalior Development Authority, for the construction of Madhav Plaza Commercial Complex, situated at Huzarat Road, Gwalior by its Tender Notice dated 30-7-2009, wherein the estimated cost of the project was Rs. 32 crores and the bidders were required to deposit the amount of Rs. 16 lacs as Earnest Money Deposit.

Shri N. K. Gupta, Learned Counsel for the petitioner has demonstrated that S.R.S Infra Project Private Limited is a Company registered under the Companies Act which has submitted its Tender, pursuant to the NTT Dated 30-7-2009 published by the Gwalior Development Authority for construction of Madhav Plaza Commercial Complex and as per the terms and conditions of the Tender Notice (Annexure P/4) the petitioner-Company has submitted the bid in three independent envelopes, as per the procedure prescribed in the Tender Notice, which contains provision for placing the Earnest Money Deposit, Technical bid and

Financial bid in separate envelopes. After opening of the Financial Bid, the Gwalior Development Authority has found that the petitioner-Company did not fulfil the eligibility criteria prescribed in the NIT and in this background of the matter the counsel for the Writ petitioner submits that the Tender of the petitioner-Company could have been straight away rejected without forfeiting the Earnest Money Deposit.

Shri Gupta has further submitted that before ordering for the forfeiture of Earnest Money Deposit, the Gwalior Development Authority or its functionaries have not issued any Show Cause Notice to the petitioner-Company nor an opportunity of hearing has been provided before ordering the forfeiture of Earnest Money Deposit. He submits that as per the procedure prescribed for submission of tender the Financial Bid was required to be opened only when a tenderer is found eligible at the initial stage of consideration of his Technical Bid because that is a pre-qualification stage of the consideration of the eligibility documents of the respective tenderers. He submits that in view of the reasons assigned about lacking of eligibility by petitioner-Company, the tender should have been rejected by the Gwalior Development Authority at the pre-qualification stage itself without opening the third envelop containing the Financial bid.

Shri Raghvendra Dixit, Learned Counsel appearing for the Gwalior Development Authority submitted that there was complete concealment of the fact on behalf of the petitioner-Company about the Management of the Company as also its relationship with its sister concern Tapshya Shiksha Samiti, with a view to mislead the Gwalior Development Authority and since M/s S.F.S Infra Project Private Limited and Tapshya Shiksha Samiti consist of the same Director and their Management vest in the identical hands, therefore, the tenderer was violating the Eligibility Criteria, wherein it was prescribed that joint venture would not be accepted by the Gwalior Development Authority.

Shri Dixit further submitted that when the Financial bid of the tenderer/petitioner was opened, it was found that the company has projected a consolidated turnover of S.R.S. Infra Project Private Limited and the turnover of Tapshya Shiksha Samiti, for fulfilling the criteria of the turnover of Rs. 10 crores, as prescribed in Condition No. 3 of the Tender Notice and on this ground also the Tender Committee of Gwalior Development Authority has rightly rejected the tender of the petitioner-Company. He further submitted that clause 4.4 of the detailed NIT provides for a penalty clause and as such the Authority was well within its competence to have ordered for the forfeiture of the Earnest Money Deposit.

We have heard Shri N. K. Gupta, learned counsel for the Writ petitioner/Company and Shri Raghvendra Dixit, learned Counsel for the Respondent-Gwalior Development Authority on the merits of the matter and have also given our thoughtful consideration to the documents/annexures placed on record by the contesting parties.

The concept of joint venture is understood and applied in the field of contract of issuance of Work Order in view of globalization of the economy and the meaning understood amongst tenderer and the authority revolves around the submission of the tender form collectively by two independent entities working in the similar field or having incidental work but it nowhere provide that the Management of the two different entities could not independently submit a tender, in furtherance of their respective objective of the business. Therefore, it would be difficult for this Court to observe that the case in hand would hit by Clause (1) of the Eligibility Criteria as no joint venture application seems to have been filed by S.R.S. Infra Project Private Limited and Tapshya Shiksha Samiti but only an attempt was made to openly demonstrate that while clubbing the turn over of these two concerns, the applicant/petitioner would be in a position to fulfil the desired turn over clause of Rs. 10 crores. In this view of the matter, it is not understandable as to how Clause (1) of the Eligibility Criteria of the Tender Notice would be attracted for the purpose of treating the application of the tenderer/petitioner to be a joint venture.

A perusal of the findings given in relation to the tender by the Tender Committee/ Board of Directors of Gwalior Development Authority (held on Date 8-10-2009) (Annexure P/I) would demonstrate that the Gwalior Development Authority has opened all the Three Envelops collectively and have not opened the Technical bid first because had a tenderer being found to be lacking Eligibility Criteria at the stage of opening of the Technical bid at a pre-qualifying stage, its Financial bid could have not been opened, however the reasons assigned by Gwalior Development Authority for the cancellation of the tender and forfeiture of the Earnest Money Deposit demonstrate that the Gwalior Development Authority has rejected the tender on both counts i.e. Technical as also the Financial. From this view of the matter, the contention of the learned Counsel for the petitioner-Company appears to be justified that since the Gwalior Development Authority has fixed the stages of screening the Eligibility Criteria, whereafter alone the final stage of opening of the Financial bid would reach therefore, it was required from the Gwalior Development Authority to have rejected the tender of the tenderer at the stage of opening of the Technical bid itself.

The minutes of the Tender Committee Dated 8-10-2009 demonstrate that pursuant to the impugned NIT, the Gwalior Development Authority has received as many as Ten Tenders and the tender of the petitioner-Company was found to be the lowest but since the petitioner was lacking the eligibility, to participate in the tender process, its tender was required to be rejected, but without choosing to consider the bids of the rest of the tenderers the Gwalior Development Authority has straightaway cancelled the tender of the petitioner and ordered for forfeiture of the Earnest Money Deposit, which is a procedure normally not adopted in the matter of consideration of the tender, because if the lowest tenderer lacks some inherent defects or suffer from some defects in its eligibility, its tender is not considered and the tender process is completed by taking into consideration the tender of other tenderer. Therefore the procedure adopted by

Gwalior Development Authority in forfeiting the Earnest Money Deposit appears to be incorrect and illogical, as is evident from a plain reading of the Resolution passed by Gwalior Development Authority. For ready reference relevant extract of Annexure P/I is quoted hereinbelow :

The detailed NIT contains Clause 3.1 and provide for the submission and forfeiture of the Earnest Money Deposit. For ready reference Clause 3.1 is quoted hereinbelow:

Submission of Tender :

1 Earnest money :- No tender will be received without a deposit of earnest money of Rs. 16.00 Lacs which will be returned to the unsuccessful tenders on the rejection of their tenders, or earlier as may be decided by the competent authority and on production of a certificate of Executive Engineer that all tender documents have been returned, and will be retained from the successful tenders as part of the Security Deposit.

Clause 3.1 empowers the Gwalior Development Authority to return the Earnest Money Deposit to the unsuccessful tenderer on the rejection of the tender and it clarifies that the Earnest Money Deposit should be returned only to the unsuccessful tenderer but it nowhere empowers or authorize the Gwalior Development Authority to forfeit the Earnest Money Deposit at the stage of opening of Financial Bid or before the grant of Work Order to a Bidder. The other provisions contained in Clauses 3.2 to 3.4 about the Earnest Money Deposit also nowhere make out any provision about the forfeiture of the Earnest Money Deposit. Therefore, when the petitioner-Company was found lacking in Eligibility Criteria, at the pre-qualifying stage itself, the Gwalior Development Authority was not justified in forfeiting its Earnest Money Deposit, because the Tender of the petitioner-Company could have been rejected at the pre-qualifying stage (Technical bid) and the petitioner could have been prevented or rather ousted from participation in the Financial bid, at the threshold itself. Since Clause 4.4 of Tender Document provide for a penalty, in relation to the misconduct of a Tenderer, who is found to be "Canvassing" or using undue influence for securing Work Order, it could not be said to be applicable, in relation to Earnest Money Deposit, as this Clause nowhere provide for other exigencies.

In contractual matter a tenderer is asked to furnish Earnest Money Deposit, which pre-supposes that the Employer wanted security from the intending tenderer for ensuring compliance of the future obligation for the specified act, in terms of the scheme of section 70 of the Indian Contract Act and a situation of the forfeiture arise only when the tenderer fails to perform the obligation cast upon him in the concluded Contract. A bare perusal of sections 70, 73 and 74 of the Indian Contract Act would demonstrate the scheme and the legislature intendment behind asking for such security.

Sections 70, 73 and 74 are quoted hereinbelow :

Section 70: Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered.

Section 73 : When a contract has been broken the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Section 74: When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

A similar controversy arose in the case of *Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited*, has thoroughly examined the meaning of the word "Earnest" with the application of the provisions of Indian Contract Act, 1872, wherein paragraph No. 21 of the Judgment, the Supreme Court has observed thus:

From a review of the decisions cited above, the following principles emerge regarding "earnest":

- (1) It must be given at the moment at which the contract is concluded.
- (2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.
- (3) It is part of the purchase price when the transaction is carried out.
- (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
- (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

The Supreme Court has further examined this aspect of application of the principle of Contract Act in its subsequent Judgment reported as *Yogesh Mehta*

Vs. Custodian Appointed under the Special Court and Others, where, it has been clearly observed that the forfeiture of Earnest Money would become permissible only when a clear Contract comes into existence and since Gwalior Development Authority has forfeited the Earnest Money Deposit without reaching the stage of issuance of Work Order or by entering into an agreement with the present petitioner, it could not be said that the forfeiture of the Earnest Money Deposit is justified. The Supreme Court has observed in para 32 of its Judgment as follows :-

32. While directing forfeiture of the "earnest money" the provisions of the Contract Act, 1872 are to be kept in mind. Forfeiture is permissible only when a concluded contract has come into being and not prior thereto. (See *Maula Bux vs. Union of India* and *Saurabh Prakash vs. DLF Universal Ltd.*)

The Supreme Court of India while examining the issue of grant of State Largeesse has examined the issue of forfeiture where the Estate Officer has ordered for resumption and forfeiture, wherein the Supreme Court has observed in the case of *Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others*, that the drastic power of forfeiture should be taken as a last resort.

It is apparent from the facts of the present case that the Gwalior Development Authority has straight away forfeited the Earnest Money Deposit of the Writ petitioner which could have not been done as its first action, in view of the Judgment of the Supreme Court which provides for the forfeiture as a last resort. The facts of the present case have also revealed and the Counsel appearing for the Gwalior Development Authority has also failed to demonstrate before us that any hearing was afforded to the Writ petitioner or a Show Cause Notice was ever issued before ordering for forfeiture of the Earnest Money Deposit. Therefore, it would be a clear illustration of violation of principle of natural justice.

The Supreme Court has very emphatically deprecated violation of principle of natural justice in such matter while observing in a Judgment reported as *Jagmohan Singh Vs. State of Punjab and Others*, that the forfeiture of Earnest Money Deposit without issuance of a Show Cause Notice and without there being any justification should not be ordered.

It would not be out of place to mention here that the Gwalior Development Authority has not ordered for forfeiture of the Earnest Money Deposit by treating the same to be a Security Deposit, even when the Earnest Money Deposit sometimes is withheld or converted into the Security Deposit after issuance of the Work Order and since that stage has not reached in the present case, it could not be said or accepted by applying all canons of imagination that the Earnest Money Deposit was forfeited as Security Deposit. The Supreme Court in a case, reported as *Saurabh Prakash Vs. DLF Universal Ltd.*, has clarified the distinction between the Earnest Money Deposit and the Security Deposit and as such it could not be said that by changing the terminology of Earnest Money Deposit or Security Deposit, the Gwalior Development Authority was having any jurisdiction

or justification for forfeiting the Earnest Money Deposit of the Writ petitioner Company.

Therefore, we find that the Order of forfeiture of the Earnest Money Deposit by the Gwalior Development Authority is per-se illegal, without jurisdiction and contrary to the terms of the NIT and more particularly it is in violation of Clause 3.1 of the conditions, prescribed in the detailed NIT.

Consequently, the Resolution passed by the Board of Directors of Gwalior Development Authority (Tender Committee) on Date 8-10-2009 in relation to the Tender Notice Dated 30-7-2009 and the Order of forfeiture of the Earnest Money Deposit of the petitioner-Company is hereby quashed and the Gwalior Development Authority is directed to return the entire amount of Earnest Money Deposit to the petitioner-Company because the forfeiture has been ordered contrary to the Terms, prescribed by the Gwalior Development Authority itself and also by violating the stages of opening of the tender envelops, while screening the eligibility of a tenderer. Therefore, in the peculiar facts and circumstances of the case, we also direct that the Gwalior Development Authority shall pay Interest at the rate of 6 percent per annum on the entire amount of Earnest Money Deposit to the petitioner-Company from Date 8-10-2009 and onwards till the Date of its actual disbursement to the petitioner-Company.

Therefore, the Writ Petition succeeds and is allowed, however, there shall be no order as to costs.