

M/s. Om Gurusai Construction Company Vs. M/s. V.N. Reddy & Ors.

Civil Appeal No. 5375 of 2023 arising out of SLP (Civil) No. 7092 of 2022
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Full judgment text

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K.V. Viswanathan, J.

1. Leave granted.

2. This case brings back to memory the classic words of Justice M. Hidayatullah (as the learned Chief Justice then was) in Mahanth Ram Das vs. Ganga Das, [1961] 3 SCR 763. Though it was in the context of the Code of Civil Procedure, dealing with the powers of a Civil Court, the following passage does repay study for the present facts too:

"Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves on the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians."

3. The question which arises for consideration in this case is, on the facts herein, are we to construe Clause 2.22.0 (ix) of the tender conditions as the law of the Medes and the Persians - rigid and unalterable, even if the justice of the cause warranted otherwise?

4. Clause 2.22.0 (ix) reads as under: - (ix) L-1 shall submit the demand draft/BG or FDR additional performance security in the office of the Executive Engineer, Lower Wardha Project Division, Wardha within 2 days of opening of envelope-2. This duration of 2 days will not be relaxed under any circumstances.

Failure to do so will result in forfeiture of EMD and the contractor/Joint Venture (jointly or individually) shall be debarred from participating in any bid of Water Resources Department/VIDC, Nagpur for two years from date of opening of envelope-2. If L-1 fails to submit to additional performance security within prescribed time period then Executive Engineer ask L-2 in writing and if L-2 bidder agree to do work at the rate quoted by L-1 then L-2 bidder shall be considered for acceptance".

Relevant Facts

5. The facts that give rise to the question are short and interesting. On 18.01.2021, the Executive Engineer, Lower Wardha Project Division, Wardha issued a tender calling upon interested bidders to submit their bid. The work, which was the subject matter of the writ petition before the High Court, was for "construction of land development works (Part-I) of Gadegaon main minor offtaking @ R.D. 4995 M on Nandgaon Dy". Three bidders submitted their bids. The technical bid was opened on 08.02.2021 when the appellant, and the first respondent herein (writ petitioner before the High Court) were found eligible. The financial bid was opened on 12.03.2021 and the appellant's bid was found to be the lowest.

6. Under Clause 2.22.0 (ix), as set-out above, the appellant was to furnish the additional performance security within a period of two working days. It is not disputed that 13.03.2021 was a Saturday and 14.03.2021 was a Sunday and hence two working days would expire only on 16.03.2021. It is also not disputed that there was a nationwide employees strike in the nationalised banks on 15.03.2021 and 16.03.2021.

7. The additional performance security was submitted on 17.03.2021. The tendering authority, after satisfying itself of the existence of the strike, accepted the bid of the appellant and issued work order on

07.05.2021. Thereafter, the work commencement order was issued on 24.05.2021 to the appellant.

Findings of the High Court on Clause 2.22.0 (ix)

8. Aggrieved, the first respondent herein filed a writ petition on 29.04.2021 challenging the work order and the work commencement order. That writ petition has been allowed by the Division Bench of the High Court through the impugned order wherein the High Court has held, with respect to Clause 2.22.0(ix):

- a) that condition prescribed in Clause 2.22.0 (ix) was mandatory since the consequences for non-compliance have also been prescribed;
- b) that Clause 2.22.0 (ix) is an essential condition;
- c) that the period for furnishing the additional performance security was earlier eight days and was consciously reduced to two days with a further condition that the said period would not be relaxed/extended under any circumstances whatsoever;
- d) that the tendering authority had no power under the tender document to relax/extend the time specified in a clause which warrants strict compliance.

9. The High Court also referred to the facts qua another bidder, one M/s Sai Aniruddha Construction, that had submitted its bid for another work, and had furnished the additional performance security with a demand draft dated 15.03.2021 from a scheduled bank. This was to demonstrate that it was possible for a bidder under the same tender notice to furnish the additional performance security deposit on 15.03.2021.

10. On the basis of the above findings, the High Court held that the tender issuing authority could not have accepted the additional performance security from the appellant herein on 17.03.2021, since 17.03.2021 was the third working day from the opening of the financial bid.

On Additional Findings of the High Court

11. After recording the findings above, the High Court considered the events subsequent to the issuance of the work order in favour of the Appellant and found as follows:

- a) the work order in question was issued on 24.05.2021 and the work was to be completed within six months with a period for rectification of deficiency within further 24 months;
- b) that the appellant had on 04.02.2022 issued a communication to the Executive Engineer stating that it could not complete the work as allotted and had sought time till 31.03.2023.

After noticing these facts, the High Court concluded, without any view having been expressed by the tendering authority and without discussing any reason given in the letters seeking extension, that the appellant had not been able to meet the time limit. The High Court further held that the appellant was not justified in not adhering to the time limit. Therefore, the High Court interfered in the matter under Article 226 on the ground that it affects public interest.

12. The High Court should not have ventured into the question with regard to the time limit for completion of work and the extension sought by the appellant since that was a matter which would depend on the facts and circumstances that arise therein. That was for the authorities to decide keeping in mind the myriad facts that would arise there.

Even for deciding about the need for exercise of discretionary jurisdiction, the High Court should not have ventured into this aspect without the full facts having been placed before it. As to, under what circumstances the extension was sought and what view the authority has taken over the same, even we are completely oblivious to.

The High Court should have just confined itself to the examination of the question whether the acceptance of the additional performance security on 17.03.2021 and the consequential issue of the work order was justified in law or not. Having found that it was not justified, it should have stopped there and not ventured into this issue, since full facts were not available on the record.

On alleged breach of Clause 2.22.0 (ix)

13. In this background, the primary question that arises is, whether the High Court was justified in setting aside the work order on the ground that the tendering authority had breached Clause 2.22.0 (ix) by

accepting the additional performance security on 17.03.2021?

14. We have heard Shri Amit K. Pathak, learned counsel for the appellant, Shri Prashant Shrikant Kenjale, learned counsel for the first respondent herein and Shri Uday B. Dube, learned counsel for the tendering authority.

15. The admitted facts are that after the declaration of the appellant being the L1 bidder (successful bidder) on 12.03.2021, the additional performance security was to be submitted within two days of opening of the financial bid. Admittedly, 12.03.2021 being a Friday, 13.03.2021 was a Saturday and 14.03.2021 was a Sunday. Both these days were bank holidays. Even the first respondent herein has no case that the additional performance security could have been given on these days.

16. The High Court, in the impugned order, noticed the communication of the Branch Manager, Bank of Maharashtra - the appellant's Bank, which had not disputed the fact that on 15.03.2021 and 16.03.2021 there was a strike of bank employees due to which there was no banking transaction on these days.

It was also not disputed at the Bar that there was indeed a bank employees strike of the nationalised banks on those two days. The argument was only that scheduled banks were open and one M/s Sai Aniruddh Construction had submitted the additional performance security for another work, under the same tender notice through a scheduled bank.

17. The appellant countered this point in his reply filed before the High Court as well as in the grounds before us in the appeal, by stating that the appellant did not maintain any account in any scheduled bank. It was averred that the appellant was maintaining the account with the Bank of Maharashtra. To reinforce their submission, the appellant had also submitted that, in Form-I of the tender document which stated about the basic information of the bidder, the appellant had mentioned the bank name and the address along with the details of its bank account.

It was further submitted that the Undertaking IV of the tender booklet had stated that, the bidder had to give undertaking in respect of depositing the earnest money deposit and performance security, through the bank account owned by the bidder. It was averred that as such the appellant could not use any other account to perform the bank transaction.

18. The fact that there was a strike among the employees of the nationalised banks is also not in dispute. It is also not disputed that the account of the appellant was in Bank of Maharashtra and it was that account which was disclosed as part of the basic information, furnished with the tender document. It is also not disputed that the bidders have given an undertaking that earnest money deposit and performance security would be paid through the bank account owned by the bidder.

They could not have done it through any other bank. From the records of the Appeal, it is also clear that on a complaint made by the first respondent herein to the Superintending Engineer, the Superintending Engineer had written a letter on 12.04.2021 to the Executive Engineer asking for his comments on the complaint. The complaint was about the appellant submitting the additional performance security beyond the two days stipulated as per Clause 2.22.0 (ix).

This was the only grievance in the complaint of the first respondent herein. On 19.04.2021, the Executive Engineer, in his letter to the Superintending Engineer, mentioned that 13.03.2021 was a Saturday and 14.03.2021 was a Sunday and also confirmed that on 15.03.2021 since all the nationalized banks were nonoperational due to strike, the appellant had made a request to him to extend the time till 17.03.2021.

He further stated that since 15.03.2021 and 16.03.2021 were the days when banks were non-operational due to strike, and since the appellant deposited the additional performance security on 17.03.2021, the deposit seems to be proper and a request was made to accept the tender of the appellant. Not only this, the Branch Manager of the Appellant's Bank, in his letter of 11.05.2021 also does not deny that there was a strike of bank employees on 15.03.2021 and 16.03.2021.

19. This is a case where the appellant has complied with the condition of furnishing the additional performance security at the earliest possible time, that it could possibly comply. That no one can be compelled to perform an impossible task - *Lex non cogit ad impossibilia* - is a well-accepted legal principle.

20. This Court in *Raj Kumar Dey and Others vs. Tarapada Dey and Others*, (1987) 4 SCC 398, while quoting, approving and applying the maxim to the facts of that case, had the following to say:

"6. The other maxim is *lex non cogit ad impossibilia* (Broom's Legal Maxims - page 162) - The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."

21. Applying the same maxim and highlighting its principle, this Court in *HUDA and Another vs. Dr. Babeswar Kanhar and Another* (2005) 1 SCC 191 stated that every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply [Para 5].

22. Closer to the facts of the present case is the judgment in *Rosali V. vs. TAICO Bank and Others* (2009) 17 SCC 690. In that case, an auction was held after 4.00 p.m. when the banks were closed. Order XXI Rule 84 of the Code of Civil Procedure mandates that "on every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold".

In *Rosali* (supra), the 25% bid amount under Order XXI Rule 84 of the CPC was directed to be paid the next day and it was so paid. While accepting it as a valid deposit, this Court quoted the following paragraph from the judgment of the Karnataka High Court in *Dakshayani vs. Branch Manager, Indian Overseas Bank*, AIR 1998 Kant 114:

"4. On that basis if we interpret the law though there is no power in the Court to extend the time fixed by the statute still the expression immediately is capable of taking within its sweep a situation where an act is impossible of performance on the day on which the auction is held as it happened in *Savithramma* case [ILR 1973 Kant 1277] when the bank itself was on strike and no deposit could have been made in the bank or in the event the auction-sale is held after court hours, a receipt order in that regard cannot be obtained for deposit of such an amount. Such amount could be deposited only after obtaining a receipt order. If next day also happens to be a holiday, the day immediately thereafter coming up which is a working day will be the day on which such act will have to be performed. If any other interpretation is given it would stultify the very object of law."

23. In view of the above, we have no hesitation to hold that the deposit of the additional performance security on 17.03.2021 was in due compliance of Clause 2.22.0 (ix) of the tender conditions. There was no breach of that clause.

24. Decision making authorities, like the tendering authority here, could not have turned a blind eye to undisputed ground realities and compelling necessities, like the one that presented itself here. After all, they do not live in ivory towers.

25. In this case, the tendering authority, after due verification, about the non-operation of the banks on 15.03.2021 and 16.03.2021 due to the strike by the bank employees, had accepted the additional performance security on 17.03.2021 and awarded the work to the appellant. It is well settled by a long line of judgments that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents.

It has also been held that the constitutional courts must defer to this understanding and appreciation of the tender documents by the employer unless there is *mala fide* or perversity in the understanding or appreciation. [See *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another*, (2016) 16 SCC 818 and *Uflex Limited Vs. Government of Tamil Nadu and Others*, (2022) 1 SCC 165].

26. In this case, no *mala fide* has been alleged and the interpretation as adopted by the tendering authority cannot be said to be perverse. We also do not find that the decision to accept the additional performance security on 17.03.2021 and the issuance of the work order was arbitrary and irrational.

We also do not find it to be a decision, which no responsible authority acting reasonably and in accordance with law could have reached. On facts, no case of prejudice to public interest by the award of the work has also been made out. In such circumstances, the High Court ought not to have interfered with the acceptance of the tender and the issuance of the work order in the present case.

27. Learned counsel for the first respondent herein, in his written submissions, relied upon the judgment of this Court in Vidarbha Irrigation Development Corporation and Others vs. Anoj Kumar Agarwala and Others, (2020) 17 SCC 577. We have carefully considered the said judgment. In that case, the bank guarantee which ought to have been furnished for forty months was only furnished for six months. The facts of the present case are completely different and, as such, the said judgment is clearly distinguishable.

28. The other judgment relied upon is the judgment in Tata Cellular Vs. Union of India, (1994) 6 SCC 651. On the facts herein, it does not assist the first respondent.

29. We find nothing wrong in the authority having accepted the tender and awarding the work to the appellant.

Other grounds raised by the first respondent

30. By way of amendments made to the writ petition before the High Court, certain additional grievances were raised by the first respondent herein. They were: firstly that the appellant had filed acknowledgment of income-tax returns only for three years and not five years and secondly the old partnership deed and the power of attorney of Shri Devereddy Chinna Guruvi Reddy, father of Shri D. Guru Maheshwar Reddy was filed. It was alleged that the father had expired and the Power of Attorney of a dead person had been filed. These averments have been controverted in the reply filed by the appellant.

31. With regard to the requirement of income-tax return acknowledgements for five years, the answer given was that the firm itself was in existence only for three financial years before. Even otherwise, we have not been shown the specific clause requiring acknowledgement of the income-tax returns for five years. In any case, the tendering authority has awarded the work, after satisfying itself, about the necessary compliances. The High Court has also not found it fit to pronounce on these aspects. Hence, on this ground also, the work order cannot be set aside.

32. With regard to the submission concerning the reconstituted partnership deed and the Power of Attorney of the father, the Appellant has explained it in the counter, by stating:

a) that Shri D. Guru Maheshwar Reddy was always a partner since inception; that his father had died on 05.05.2020 in the middle of the pandemic;

b) that after reaching back from the native place from Andhra in September, 2020 the Partnership was reconstituted and that the reconstituted Partnership Deed was submitted to the office of the Registrar of Partnership Firms, Aurangabad on 23.10.2020.

c) that that due to pandemic and lock down, the certified copy of the reconstituted Partnership Deed has not been issued till the submission of the tender form.

d) that the Partnership Deed submitted contained the name of D. Guru Maheshwar Reddy and he was a partner right from the registration of the firm.

Hence, it was contended that the filing of the earlier Partnership Deed and the Power of Attorney did not vitiate the condition of the tender process warranting disqualification. In view of the explanation and additionally in view of the fact that the tendering authority has found no illegality in the same and further the High Court having not thought it fit to examine this issue, we do not find merit in these additional grounds.

33. Before we part, we would do well to remind ourselves of the words of caution administered by this Court in Jagdish Mandal vs. State of Orissa and Others, (2007) 14 SCC 517. Speaking for the Court, Justice R.V. Raveendran said:

"22. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted.

Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

Whether the process adopted or decision made is so arbitrary and irrational that the court can say:

"the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226."

34. Accordingly, the order impugned is set aside and we direct that Writ Petition No. 1787 of 2021 on the file of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur shall stand dismissed. The Appeal is allowed. No order as to costs.

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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