

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 19th APRIL, 2022

IN THE MATTER OF:

+ **W.P.(C) 6297/2020 & CM APPLs. 22390/2020, 20540/2021 & 20541/2021**

VEENA GARG

..... Petitioner

Through Mr. Akash Nagar, Advocate

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Through Mr. R K Dhawan, Standing Counsel
for DDA

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This writ petition has been filed seeking the following prayers:-

“a) Allow the Present petition;

b) Direct DDA to refund the amount illegally retained by them to the Petitioner along with interest of 18% p.a. from the date of deposit”

2. The facts, in brief, leading to the instant petition are as follows:-

- i. It is stated that on 09.03.2019, the Respondent/DDA had issued notice that e-auction of industrial property on ‘as is where is basis’ would be conducted. The application for e-auction was made available from 01.04.2019 and the last date for submission of the mandatory documents, along with Earnest Money Deposit (EMD) was 21.04.2019.

- ii. The Petitioner herein sought to bid for sub-unit No.128, plot No. B-351, Mangolpuri Industrial Area Phase-1, and consequently, she submitted her online application on 16.04.2019, along with EMD of Rs.10,51,259/- (5% of the reserve price).
- iii. The Petitioner received an e-mail dated 27.04.2019 informing that her bid stood the highest, subject to acceptance of the bid by Department/Corporation. Thereafter, another e-mail dated 01.06.2019 was received by the petitioner with the subject 'Letter of Intent'. The award value was stated to be Rs.3,21,24,000/-.
- iv. As per the Tender Document for E-Auction (2018-19), the Petitioner was expected to deposit 20% of the bid premium and the difference of 5% reserve price at second stage within 7 days from issuance of the Letter of Intent after acceptance of the bid by the competent authority.
- v. It is stated that on account of ill health, the Petitioner failed to deposit 20% of the bid premium as was required. Accordingly, the Petitioner sent a letter dated 10.06.2019 to the Deputy Director (Industrial), DDA, stating that she had only received information about her bid being accepted on the night of 07.06.2019. It is stated that since the petitioner had been hospitalised, she was unable to deposit the requisite amount. The petitioner accordingly sought for an extension of 15 days to deposit the balance amount. In response to this letter dated 10.06.2019, the Deputy Director (Industrial) *vide* letter dated

01.07.2019 rejected the Petitioner's request for grant of extension for a period of 15 days.

- vi. It is stated that the Petitioner has sought for a refund of the 5% EMD that had been deposited by her during the first stage. A legal notice dated 21.09.2019 has also been sent to the Respondent. However, the Petitioner is yet to receive any response with regard to the refund of the EMD.
- vii. Aggrieved by the same, the Petitioner has approached this Court by way of the instant writ petition.

3. Heard Mr. Akash Nagar, learned counsel for the Petitioner, Mr. R. K. Dhawan, learned Standing Counsel for the DDA and perused the material on record.

4. Mr. Akash Nagar, learned Counsel for the Petitioner, contends that the Petitioner only came to know that she was the highest bidder on 07.06.2021, with the Letter of Intent having been issued to her on 01.06.2021 demanding a payment of 20% of the bid premium which was to be paid within 7 days of the issuance of the said Letter.

5. Learned Counsel for the Petitioner states that the Petitioner was ill from 02.06.2019 and had been advised to take bed rest. He contends that she had been admitted in the emergency ward of Satyawadi Raja Harish Chandra Hospital, Narela, Delhi and, therefore, she was precluded from making the payment because of reasons beyond her control. He states that she had written a letter on 10.06.2019, i.e. three days after the due date, explaining her condition and had sought for a concession from the Respondent/DDA to condone the delay and grant an extension of 15 days.

6. Learned Counsel for the Petitioner states that the rejection of the request of extension of time by the DDA is unconstitutional and arbitrary. He states that it is not as if the Petitioner was running away from her liability to make the payment and that the DDA ought to have considered the case sympathetically. He further states that in any event, the Petitioner is entitled to a refund of the 5% of the reserve price and the same cannot be retained by the Respondent/DDA illegally.

7. The learned Counsel for the Petitioner also places reliance on the judgment of the Supreme Court in Kailash Nath Associates v. Delhi Development Authority and Anr., (2015) 4 SCC 136, substantiate his contentions that the earnest money cannot be forfeited in its entirety.

8. To appreciate the rival contentions, it is necessary to peruse the relevant Clauses of the tender document. The relevant Clauses of the tender document read as under:-

“2.2 Earnest Money Deposit: To be able to participate in e-auction, the prescribed EMD amounting to 25% of the bid premium is to be submitted in two stages as follows:-

a) 5% of the Reserve price at first stage by all Bidders i.e. before participation in the e-auction programme.

b) 20% of the Bid premium and difference of 5% reserve price at second stage by successful bidder (H-1 Bidder) within seven days from the issue of LOI after acceptance of their bid by the competent authority.

c) The EMD shall be payable on-line through NEFT/RTGS/E-PAYMENT on DDA's e-auction Portal i.e. www.tenderwizard.com/DDAAUCTION. Detailed instructions to guide the bidder through the e-Payment steps are available on the said portal/website.

d) No offer/bid shall be accepted without successful payment of Earnest Money Deposit.

e) *The Earnest Money Deposit will be adjusted in the payment against the premium of bid Payable to the Authority by the successful Bidder (H-1 Bidder).*

f) *The Earnest Money Deposit paid by the bidders, whose offers have not been accepted shall be returned to them without any interest. The same shall be refunded electronically in the Bank account of the unsuccessful bidders within 15 days of the completion of auction process. The deposit shall not be adjusted against any other scheme.*

g) *Only the Bidders making payments of first stage EMD, will be allowed to participate in the e-Auction process.*

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2.4.3. After the bids are confirmed/accepted by the Competent Authority, a communication shall be sent to the successful bidder and the second stage EMD (20% of the premium offered) to be submitted within 7 days from the Date of issue of LOI through online payment. In case the second stage EMD is not submitted within the stipulated period, the first stage EMD (5% of the reserve price) submitted along the Bid shall be forfeited.

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2.4.7. The bidder, after submission of Bid, shall not be permitted to withdraw, surrender or modify his bid on any ground whatsoever. If he withdraws or surrenders the Bid, the entire amount of earnest money shall be forfeited without prejudice to other rights or remedies available to DDA.

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4. Bids: *One the bid is placed, the bidder cannot reduce or withdraw the bid for whatever reason. If*

done so, EMD amount shall be forfeited.”
(emphasis supplied)

9. A perusal of the Clause 2.4.7 and Clause 4 shows that in order to participate in the e-auction, the 25% of the bid money is to be submitted in two stages:

- a) 5 % of the reserve price has to be deposited before participating in the e-auction programme, i.e. with the bid.
- b) 20% of the bid premium and difference of 5% reserve price already deposited along with the bid had to be deposited by the successful bidder within 7 days of the issuance of letter of intent after acceptance of their bid by the competent authority.

10. The Petitioner had deposited 5% of the reserve price. However, she had failed to deposit 20% of the bid premium which was to be paid with the acceptance of the bid. Clause 2.4.3 states that in case the bidder fails to deposit 20% of the bid premium within 7 days from the issue of Letter of Intent, the first stage of the EMD bid (5% of the reserve price) shall stand forfeited. The Petitioner is now praying for a deviation from the terms stipulated in the tender document. It is well settled law that participating in the tender, a bidder cannot seek for deviation from the tender document which has been accepted by the petitioner on his own accord. It goes against contractual obligations stepped in accepting such a tender, and therefore, violates the principles under Article 14 of the Constitution with respect to other bidders.

11. Clause 2.4.7 and Clause 4 state that once bid is placed, the bidder cannot replace or withdraw the bid. The contention that the Petitioner wants return of the 5% of the reserve price which is actually the Earnest Money

cannot be permitted under Clause 4 and that would be in violation of Clause 2.4.7. It also goes against Clause 2.4.3 wherein it is stated that if the bidder fails to deposit 20% of the bid premium as required under the second stage, then the EMD shall stand forfeited.

12. The ratio of the judgment of the Apex Court in Kailash Nath and Associates (supra), also does not apply to the facts of this case, for the reason that it arose from a suit which had been filed by the bidder and in the case therein, there had been no breach of contract on behalf of the bidder that would warrant forfeiture of the Earnest Money Deposit. Furthermore, in the said judgement, the Supreme Court had observed that there were cases wherein forfeiture of EMD could take place even before an agreement was reached between the bidder and the authority. The relevant paras have been reproduced as under:

"41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (along with which earnest money has to be paid) may well have been rejected. In such cases, Section 74 may not be attracted on its plain language because it applies only "when a contract has been broken".

42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land."

(emphasis supplied)

13. The reliance of the learned Counsel for the Petitioner on Sub-clause (f) of Clause 2.2 is also misplaced. The said Clause applies to the persons who are unsuccessful in the tendering of the bid and cannot apply to the persons whose bids have been accepted. A perusal of the tender document, i.e Clause 2.4.3, shows that persons whose bids have been rejected due to the failure to deposit the amount would result in forfeiture of the 5% of the reserve price which had been filed along with the bid.

14. In view of the above, the instant writ petition has no merits, and, therefore, is dismissed. Pending applications stand disposed of.

SUBRAMONIUM PRASAD, J.

APRIL 19, 2022

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