

(2011) 08 AHC CK 0217**Allahabad High Court****Case No:** Writ C No. 39431 of 2011

Jakir Ali Contractor

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision: Aug. 1, 2011**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151
- Constitution of India, 1950 - Article 226

Citation: (2011) 7 ADJ 688**Hon'ble Judges:** Bharati Sapru, J; Ashok Bhushan, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

Ashok Bhushan, J.

Heard Sri Rahul Chaudhary for the Petitioner, Shri Neeraj Upadhyaya, learned Additional Chief Standing Counsel for State and Sri Sanjay Chaturvedi appearing for Respondents No. 2 to 4.

2. The Petitioner who is a registered contractor, aggrieved by the conditions imposed by the Respondents in the tender notice published in the Newspaper "Dainik Jagaran" dated 02/7/2011 has come up in the writ petition with the following reliefs:

I. to issue a writ, order or direction in the nature of certiorari quashing the condition mentioned in the tender notice dated 02.07.2011 for furnishing 10% of the contract amount as earnest money at the time of the purchase of the tender forms are concerned as contained in Annexure No. 3 to the writ petition;

II. to issue a writ, order or direction in the nature of mandamus commanding the Respondents not to insist the Petitioner to furnish 10% of the contract amount as earnest money at the time of purchase of tender forms;

III. to issue a writ, order or direction in the nature of mandamus commanding the Respondents to accept 2% of the contract amount as earnest money in the form of FDR/NSC at the time of submission of the tender form;

IV. to issue any such other and further writ, order or direction which this Hon"ble Court may deem fit and proper under the facts and circumstances of the case; and
V. to award the cost of the petition in favour of the Petitioner.

3. The Deputy Director (Construction), Rajya Krishi Utpadan Mandi Parishad has issued a short term tender notice on 02/7/2011, inviting tenders from registered and financially viable contractors for the works as mentioned in the tender notice. The notice provided that the tender documents can be obtained by submitting a NSC/FDR/TDR of Dharohar Dhanrashi (Bid Security/Earnest Money) and cost of the tender.

4. The Petitioner"s case in the writ petition is that the amount mentioned in the tender notice as Dharohar Dhanrashi (Bid Security/Earnest Money) is 10% of the total cost of the work which could not have been asked for. Petitioner"s case is that for execution of the contracts the provisions of U.P. Financial Hand Book as well as GPW Form No. 8 is applicable as Rajya Krishi Utpadan Mandi Parishad has not framed separate rules for execution of the contracts. It is submitted that the earnest money only to the extent of 2% of the total cost of the work is required at the time of submission of the tender in accordance with the provisions of the U.P. Financial Hand Book Volume 5 Part-1 Schedule XIX, Para 307 (18). It is further stated that in GPW Form 8, it is provided that the earnest money shall not be more than 2% of the contract amount. Copy of relevant Para of the U.P. Financial Hand Book Volume 5 Part-1 Schedule XIX, Para 307 (18) and GPW Form No. 8 has been annexed along with the writ petition as Annexures-3 and 4 to the writ petition. Petitioner"s case is that the condition of deposit of 10% of the contract amount as earnest money for purchase of tender forms is violative of the provisions of the U.P. Financial Hand Book Volume 5 Part-1 Schedule XIX, Para 307 (18) as well as GPW Form No. 8.

5. Learned Counsel for the Petitioner submits that the Division Bench of this Court in M/s Jal Akash v. State of U.P. and Ors. 2006 (6) ALJ 22, has considered the condition of requiring deposit of 10% of the estimated cost and has held that not more than 2% cost of the contract amount can be demanded as earnest money. He submits that the present controversy is fully covered by the aforesaid judgment.

6. Learned Counsel for the Petitioner has also placed reliance on various interim orders passed by the Division Benches of this Court, which is quoted below. Copy of which has been filed as Annexures-8,9 and 11.

Meanwhile, Respondents shall not insist upon deposit of earnest money more than that prescribed under the Rules.

7. Learned Counsel for the Petitioner has also relied on the Division Bench judgment of this Court passed in Writ Petition No. 24131/2011, M/s Dharmendra Singh Traders and Anr. v. State of U.P. and Ors., decided on 27/4/2011.

8. Shri Neeraj Upadhyay, learned Additional Chief Standing Counsel appearing for the State refuting the submission of the learned Counsel for the Petitioner contended that the requirement of depositing the bid security/earnest money in the impugned tender notice is in accordance with law. He submits that the contractors are required to submit NSC/FDR/TDR of the amount as mentioned in the tender notice as bid security/earnest money to ensure that only those contractors who are financially viable should participate in the tender process. He submits that the Government had experienced that large number of contractors who have no financial capacity submit bids and accept the contract and are not able to complete the work causing loss to the Government, hence the condition has been imposed with the object that only those contractors should participate who have financial viability and have capacity to complete the work.

9. Shri Neeraj Upadhyay, learned Additional Chief Standing Counsel appearing for the State has placed reliance on the Division Bench judgment of this Court reported in M/s Ashok Kumar Chhabra Construction (Pvt.) Ltd v. State of U.P. and Ors. 2008 (9) ADJ 712 decided on 07/11/2008 in which one of us (Hon"ble Ashok Bhushan,J) was a member. He submits that the Division Bench in the aforesaid case had an occasion to consider the Division Bench judgment of M/s Jal Akash (supra) and relying on the subsequent Government Order dated 05/6/2007, has distinguished the earlier Division Bench judgment. It is submitted by Shri Neeraj Upadhyay, learned Additional Chief Standing Counsel that by Government Order dated 05/6/2007 form GPW-8 was cancelled for entering into a contract and has introduced two new forms being Form Nos. PWD-T-1 and PWD-T-2 under which it has been provided that up to the contract of Rs. 40 lacs, 10% and above Rs. 40 lacs 5% bid security/earnest money be deposited along with the submission of the tender. He submits that the Petitioner in the present case is relying on the Form GPW-8 which form was also relied on and considered by the Division Bench in M/s Jal Akash (supra). It is further submitted by Shri Neeraj Upadhyay, learned Additional Chief Standing Counsel that Form GPW-8 had been cancelled by the Government Order dated 05/6/2007 and two new Forms PWD-T1 and PWD-T2 have been introduced by the aforesaid Government Order which was elaborately considered and noticed in the subsequent Division Bench judgment in M/s Ashok Kumar Chhabra Construction (Pvt.) Ltd (supra). He submits that the earlier Division Bench judgment of M/s Jal Akash (supra) is not applicable in the present case in view of the subsequent Government Order dated 05/6/2007 and has rightly been distinguished by the subsequent Division Bench judgment.

10. Shri Neeraj Upadhyay, learned Additional Chief Standing Counsel appearing for the State submits that the Government while inviting tenders can put any condition

which is universally applicable to all contractors to safeguard the Government's interest which cannot be faulted with. He submits that even the amount of bid security/earnest money which is required is not to be deposited in cash, rather NSC/FDR/TDR of the total amount of the work has been asked for which does not put the contractors to any financial hardship.

11. We have considered the submissions of the learned Counsel for the parties and have perused the record.

12. The two main arguments of the learned Counsel for the Petitioner in support of the writ petition are:

1 The impugned short term tender notice dated 02/7/2011, violates the provisions of the U.P. Financial Hand Book Volume v. Part-1 Schedule XIX, Para 307 (18) and Form GPW-8 and,

2 The impugned tender notice is not in accordance with law as laid down by the Division Bench judgment of this Court in M/s Jal Akash (supra).

13. The provisions of the U.P. Financial Hand Book Volume 5 Part-1 Schedule XIX, Para 307 (18) and Form GPW-8 have been annexed as Annexure-3 and 4 to the writ petition. As far as Form No. GPW-8 is concerned the same form is not in existence having been rescinded by the Government Order dated 05/6/2007, by which the new forms PWD-T1 and PWD-T2 have been introduced.

14. The Government Order dated 05/6/2007, is not under challenge in the writ petition. The Petitioner's case, however, in the writ petition is that the Rajya Krishi Utpadan Mandi Parishad entered into a contract in accordance with the provisions of U.P. Financial Hand Book Volume 5 Part-1 Schedule XIX, Para 307 (18) and Form GPW-8. The form of contract which has now been introduced by the Government Order dated 05/6/2007, which has been referred to and relied on in the case of M/s Ashok Kumar Chhabra Construction (Pvt.) Ltd (supra) specifically provides for depositing 10% of the bid security in the contract up to Rs. 40 lacs and 5% of the bid security in the contract upto more than Rs. 40 lacs.

15. Now, comes the submission of the learned Counsel for the Petitioner based on U.P. Financial Hand Book Volume v. Part-1 Schedule XIX (1), which is filed as Annexure-3 to the writ petition. Paragraphs 17 and 18 which have been relied on by the learned Counsel for the Petitioner have already been quoted in extenso in M/s Ashok Kumar Chhabra Construction (Pvt.) Ltd (supra). It is useful to quote paragraphs 17 and 18 of the Financial Handbook as quoted in the judgment which is to be following effect:

17. All tenders must be submitted on the prescribed form which can be obtained on application and payment where this is required. No tender should, as a rule, be considered unless it is accompanied by earnest money which should be as follows:

Amount of tender	Earnest money Rs.
(1) UptoRs. 2,000	50
(2) Above Rs.2000 but not exceeding Rs.5000	100
(3) Above Rs.5000 Ditto Rs.10,000	200
(4) For each additional Rs.5,000 or part there of	a further sum of 100

Contracting officers may fix the amounts of earnest money at rates lower than those prescribed above, if for any particular reason they consider it advisable to do so, but in no case should the earnest money be less than ♣ percent of the estimated value of the work.

Notes.- (1) An Executive Engineer of Public Works Department has the discretion to accept tenders without earnest money for road metal collection costing less than Rs. 5,000; and in the case of works costing less than Rs. 10,000 an Executive Engineer or other officer may, at his discretion, demand earnest money from all tenders or only from the contractor whose tender is accepted.

(2) No earnest money is necessary in the case of tenders received by the Store Purchase Department.

(3) In the Forest Department tenders for works costing less than Rs. 5,000 may in the discretion of the officer calling for the tender, be accepted without earnest money.

(4) The Agricultural Engineer is authorised in case of tenders for the supply and erection of pumping-planes to dispense with the demand for earnest money in individual cases and to dispense with such demand from firms approved and listed by him for this purpose. (Vide G.O. No. 1262/XII-A-392, dated October 30, 1934.

18. Earnest money may be furnished in one of the forms mentioned in paragraph 71 of the Financial Handbook, Volume V, Part 1, as well as in Municipal debentures, Post Trust bond or bonds and/or debentures issued by the State Financial Corporations. The amount of earnest money to be furnished should be stated in the notice calling for tenders, which should also contain a direction that, instead of furnishing cash, tenders should themselves deposit the amount in the Treasury or Sub-Treasury which is convenient to them and attach to their tender the treasury receipt in support of the payment of the earnest money. In special cases, where it would be inconvenient for tenders to deposit earnest money into a Treasury tenders may be permitted to deposit the earnest money with the officer inviting the tender in cash or currency notes up to a limit of Rs. 500, instead of into a Treasury. Such deposits will be treated as Public Works Department deposits, or revenue deposits, as the case may be.

16. A perusal of Clause 17 indicates that no tender should, as a rule, be considered unless it is accompanied by earnest money which should be as mentioned in the relevant paragraphs. There is a provision in Clause 17 for fixing the earnest money at the rates lower than the rate prescribed above, but in no case should the earnest money be less than ♦ percent of the estimated value of the work.

17. The notes given in paragraph 17 further provides no earnest money is necessary in the case of tenders received by the Store Purchase Department. There is a specific provision in the Financial Hand Book regarding lowering of earnest money from one that has been prescribed, but the provisions of paragraph 17 nowhere prohibits fixing of earnest money at any higher rate. It is well settled that in a rule unless the particular procedure is not prohibited the same is always permissible. Had the provision intended that the earnest money can never be more than 2%, there should have been express provision. In this context, following the Full Bench judgment of this Court, the Apex Court in recent pronouncement in the case of Rajendra Prasad Gupta v. Prakash Chandra Mishra and Ors. (2011) 2 SCC 705 laid down following in paragraphs 4 and 5 which are quoted below:

4. We do not agree. Rules of procedure are handmaids of justice. Section 151 of the CPC gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.

5. In Narsingh Das v. Mangal Dubey, ILR (1883) 5 All 163 Mahmood, J, the celebrated Judge of the Allahabad High Court, observed:

Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed.

18. Learned Counsel for the Petitioner has referred to a recent Division Bench judgment of this Court in M/s Dharmendra Singh Traders and Anr. v. State of U.P. and Ors. decided on 27/4/2011.

19. In M/s Dharmendra Singh Traders and Anr. (supra) the Petitioners were not allowed to submit the tender form on acceptance of 2% earnest money as required to be paid under paragraph 18 of Schedule XIX of the U.P. Financial Hand Book Volume 5 Part-1. The Division Bench in the said case also noticed the case of M/s Jal Akash (supra). The Division Bench in the aforesaid case made following observations which fully supports the view which we are taking in the present case.

Therefore, according to us, fixation of earnest money is not static in nature nor it will be made static for years together. It will be dependent upon the circumstances and the decision of the State in this regard, who is the financial guardian. It is also necessary for the State to maintain the standard of work through a contractor and on the basis of earnest money it is necessary to see whether such contractor is financially sound or not. The judgment as referred by the Petitioners i.e. M/s Jal Akash (Supra) is silent on this score.

20. As noticed above, the judgment in M/s Jal Akash (supra) was delivered prior to the issuance of the Government Order dated 05/6/2007, by which Form GPW-8 was rescinded and new forms being Form Nos. PWD-T-1 and PWD-T-2 were introduced.

21. Now, comes the submission of the learned Counsel for the Petitioner based on the judgment of M/s Jal Akash (supra). As noticed above, in M/s Jal Akash (supra) had relied on Form GPW-8 which was prevalent at the time when the judgment was delivered. As noticed above, the Government Order was issued vide Government Order dated 05/6/2007, by which the Form GPW-8 was rescinded and new forms being Form Nos. PWD-T-1 and PWD-T-2 were introduced in which there is now a specific condition for submitting 10% of the bid security/earnest money for the contract upto Rs. 40 lacs and 5% of the bid security/earnest money for the contract above Rs. 40 lacs.

22. In M/s Jal Akash (supra) the division bench has laid down following in paragraph 15 which is to the following effect:

15. We find no clause anywhere which requires a contractor to deposit 10% of the estimated cost of work at the time of filing ""tender-application.

23. From the above, it is clear that the requirement of submission of NSC/ FDR/TDR up to 10% of the value of the contract at the time of submission of tender has been introduced for the purpose and object that only financially viable contractors who have capacity to complete the work should submit their bid which object is also clearly spelled out from the tender notice itself. As observed by the Division Bench in the case of M/s Dharmendra Singh (supra) that State is the financial guardian, who has to see that the standard of work is maintained ensuring that the contractor is financially sound. The requirement of submission of NSC/ FDR/TDR as a bid security/earnest money is towards the aforesaid object; we fail to see any prohibition in the U.P. Financial Hand Book Volume 5 Part-1 Schedule XIX, Para 307 (18) which prohibits the State Government from demanding the bid security.

24. The judgment in the case of M/s Jal Akash (supra) has been elaborately considered by the subsequent Division Bench in the case of M/s Ashok Kumar Chhabra Construction (Pvt.) Ltd (supra) in which the judgment of M/s Jal Akash (supra) was distinguished. It is useful to quote paragraphs 25,26,27,28,29 and 30 of M/s Ashok Kumar Chhabra Construction (Pvt.) Ltd (supra) which is to the following effect:

25. In our opinion the demand of bid security is in addition to the deposit of the earnest money which a prospective contractor has to submit along with the tender bid.

26. It is always open to the State Government in the matter of contracts to provide for such conditions as may be necessary for ensuring that the bids are offered in respect of particular contract by the persons possessed of requisite experience, expertise and other resources for carrying out the contract within stipulated time. With this motive, if the State Government has come out with a policy decision to insist upon bid security of 10% at the time of submission of the tenders. It cannot be said that the State Government has violated any law including the provisions of the Fundamental Rules. There is no quarrel so far as the demand of the earnest money which is in conformity with the Fundamental Rules, quoted above, however, the issue is as to whether in addition thereto the Government can insist upon furnishing of bid security along with the tender bid. Such an issue was neither a subject matter of examination in the case of Jal Akash (supra) nor could have been examined in the said judgment inasmuch as the Government Order imposing such condition dated 5th January 2007 had not seen the light of the day.

27. It appears that in order to over come the legal difficulty qua demand of bid security as pointed out by the Division Bench in the case of Jal Akash (supra) that the State Government had come out with the Government Order dated 5th January, 2007.

28. The power of the State Government to impose such conditions, as may be fair and uniformly applicable in the matter of settling work contract, which do not violate any statutory provision, cannot be interfered with under Article 226 of the Constitution of India. It is always open for the State Government to prescribe additional condition as may be relevant for the purposes of deciding as to who should be permitted to participate in the settlement of contracts in addition to those which may be prescribed under any statutory provision, the only restriction being that the State Government cannot dilute the statutory provisions relating to the award of the contract but the power for prescription of conditions in addition to those prescribed by statutes is not lost nor such prescription of higher/additional condition can be said to be arbitrary or violative of statutory provisions.

29. The clause insisting upon the prospective bidder to submit bid security to the extent of 10% of the total estimated cost of the contract cannot be said to be arbitrary or in violation of any statutory provisions. Such condition appears to have been incorporated by the State Government for the purposes of ensuring that only contractor possessed of the requisite funds and the materials to execute the work contract for which tenders were being invited, alone offer the bid. It is to be kept in mind that the time for completion of the project is one of the important aspect to be considered by the State Government in all such contracts.

30. We therefore, hold that there is no illegality in the decision of the State Government to impose the condition requiring the prospective bidder to furnish bid security at the time of submission of the tender bid itself.

25. Various interim orders relied on by the learned Counsel for the Petitioner which has been filed along with the writ petition, do not lay down any precedent. We are of the view that the judgment in M/s Ashok Kumar Chhabra Construction (Pvt.) Ltd (supra) which had considered and distinguished the case of M/s Jal Akash (supra) is fully applicable in the facts of the present case, and we see no reason to take a different view.

26. In view of the foregoing discussion, we are of the view that the tender notice dated 02/7/2011, requiring deposit of bid security/earnest money in the form of NSC/FDR/TDR for the amount as mentioned in the tender notice does not suffer from any error which may warrant interference by this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India.

27. The Petitioner is not entitled for any relief, the writ petition is dismissed.