

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

High Court Appeal No.447 of 2023

Messrs. Abdullah Engineering Works

v.

K-Electric Ltd. and Another

Appellant: Abdullah Engineering Works,
through its duly authorised
Attorney Mr Habibullah, through
Mr Muhammad Zubair Hashmi,
Advocate

Respondent No.1: K-Electric Ltd. through Legal
Representative through Mr Ayan
Mustafa Memon, Advocate

Respondent No.2: M/s Ayan Shipbreaker through its
Proprietor. Nemo.

Date of hearing: 13.12.2023

Date of decision: 13.12.2023

J U D G M E N T

Jawad A. Sarwana, J.: The Appellant/Plaintiff (“Abdullah Engineering Works” / “AEWorks”), a partnership firm, has challenged the Final Order dated 06.11.2023 passed in Civil Suit No.1079/2023 whereby AEWorks’ oral application for withdrawal of the suit was allowed, the Nazir was directed to return the part-earnest money of Rs.65 million deposited in Court by AEWorks and the fate of the earnest money lying with the Respondent No.1/K-Electric Ltd. (“K-E”) would be determined by K-E.

2. The brief facts are that in April 2023 AEWorks participated in two separate tenders published by K-E and submitted bids in

connection with (i) a Structure Tender (LPO/8C/13/22-23) and (ii) a Cables Tender (LPO/8C/11/22-23). AEWorks submitted earnest money of Rs.40 million in the second (Cables) Tender, but its bid was rejected. However, in the case of the first tender, the Structure Tender, AEWorks submitted the highest bid but did not submit the balance earnest money, which was Rs.110 million at the time.¹ Negotiations followed without success, and the Structure Tender was awarded to the second-highest bidder, Respondent No.2.² However, in June 2023, AEWorks filed suit no.1079/2023 against K-E and Respondent No.2, and obtained an ad-interim order staying the award of the Structure Tender subject to AEWorks depositing a sum of Rs.65 million with the Nazir.

3. The learned Counsel for AEWorks contended that the Appellant is aggrieved by the impugned Order only to the extent that the fate of Rs.45 million (under the Cable Tender) lying with K-E would be decided by K-E and that it should, in fact, be returned to the Appellant. The learned Counsel for K-E, who was on notice under Order 43 Rule 3 CPC, opposed the submission and contended that the Rs.45 million is the subject matter of the Cable Tender, whereas Suit No.1079/2023 pertained to the Structure Tender. Counsel further submitted that during the hearing of arguments at trial of the injunction application (CMA No.9703/2023) before the learned Single Judge, K-E continued to insist that if the trial court intended to grant the stay application then AEWorks must deposit the balance of the full earnest amount of Rs.110 million with the Nazir.³ He argued that AEWorks tried to wriggle out of its commitment with K-E and to recover the earnest money of Rs.65 million deposited with the Nazir, by

¹ AEWorks was requested to deposit earnest money of Rs.115 million, but it paid Rs.110 million through cheque and only 5 million through Pay Order. Therefore, K-E held that AEWork's bid did not conform to the tender. Eventually, K-E allowed AEWorks to participate in the Structure tender and pursued AEWorks to deposit the balance Rs.110 million.

² Apparently, Respondent No.2 fulfilled all formalities, including payments to K-E.

³ AEWorks had deposited only Rs.65 million with the Nazir out of Rs.110 million. Also see footnote 1 above,

submitting to the learned Single Judge that it was not interested in proceeding further with Suit No.1079/2023. In this manner, K-E's Counsel alleged that AEWorks attempted to recover the deposited amount, which was forfeited under Clauses 10, 12 and 15 of the Tender Offer document (Annexure "C-1" on pages 29-37). He added that K-E, too, was aggrieved by the impugned Order as AEWorks succeeded in its objectives as stated above. K-E also had filed HCA No.398/2023, which is pending hearing. Meanwhile, he contended that this appeal, HCA No.447/2023, filed by AEWorks seeking modification of the impugned Order, may be dismissed.

4. We have heard the learned Counsels, reviewed the record as available in the Appeal and read the Impugned Order.

5. It is an admitted position that the two tenders, i.e. the Structure Tender and the Cables Tender, were different and entirely distinct. The earnest money amounts under the two tenders were also different. They could not be co-mingled and pooled without the parties' consent. The impugned Order is silent regarding the Cable Tender. As such, no grounds are available to AEWorks to assert a claim for Rs.45 million under the Cable Tender, which claim is/was not admitted by K-E in the Suit and in this Appeal. In light of the above, we do not find any reason to modify the impugned Order to this extent as pleaded by AEWorks.

6. The Appellant has also pleaded for an order to direct K-E to issue it a Letter of Acceptance ("LOA"). After AEWorks elected to withdraw its Suit No.1079/2023, it cannot ask for such relief in appeal. Further, the Appellant has not pleaded in the appeal that the suit has been wrongly disposed of. The Appellant must face the consequences of its actions before the trial court. Hence, we are not inclined to grant any relief to the Appellant, which it abandoned by withdrawing its suit.

7. The Appellant has neither raised any plea concerning Rs.65 million deposited by the Appellant with the Nazir nor made any submissions in this Appeal. We have perused the record in the appeal file and found no material indicating that after filing Suit No.1079/2023, K-E consented to adjust/collate the earnest money under the Cables Tender (the rejected tender) against/with the Structure Tender. While we note that the subject matter is sub-judiced in K-E's Appeal No.398/2023, the appeal is not before us. Further, K-E, apart from the said appeal, has not initiated any recovery proceedings against AEWorks (Appellant) in connection with its claims towards the Structure Tender and/or the Cables Tender. In the circumstances, we cannot go outside the scope of this appeal. Accordingly, this subject matter may be decided as and when K-E's Appeal No.398/2023 is heard.

8. We are of the confirmed opinion that the learned Single Judge has not fallen into any error while passing the impugned Order, which requires interference.

9. In view of the above, we hold that the impugned Order is proper and based on facts and law. It does not suffer from any illegality that calls for interference. Accordingly, this Appeal is dismissed along with all listed applications, and the impugned Judgment and Decree is hereby confirmed.

10. The parties are left to bear their own costs.

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