
(1997) 09 AP CK 0086
In the Andhra Pradesh High Court
Case No : W.A. No. 953 of 1997

APSRTC, Mushirabad, Hyderabad

APPELLANT

Vs

Sri Aditya Mass Communications Pvt. Ltd., Somajiguda

RESPONDENT

Date of Decision : 04-09-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1998) 1 ALD 286 : (1997) 6 ALT 160

Hon'ble Judges : P.S. Mishra, C.J.; P. Ramakrishnam Raju, J

Bench : Division Bench

Advocate : Mr. K. Harinath, SC for APSRTC, for the Appellant; Mr. P.V.S.S. Rama Rao, for the Respondent

Judgement

P.S. Mishra, CJ.

1. This appeal under Clause 15 of the Letters Patent has been preferred against the judgment of the learned single Judge in a petition under Article 226 of the Constitution of India.

2. According to the petitioner-respondent, he responded to a tender-notice and submitted his tender with the earnest money deposited of Rupees twenty lakhs. Before, however, the tender was opened, he demanded withdrawal of the earnest money deposit referring to clause(14) of the Conditions of Tender. Petitioner-respondent has alleged, he could withdraw his tender before it was opened and since he intended to do so he demanded return of the earnest money deposit. In spite of the demand, it is alleged, appellant has not refunded the earnest money. Learned single Judge has directed for the return of the tender money with interest at 1% per month.

3. Precisely to take notice of the events, we may recall that the petitioner-respondent submitted his tender along with the demand draft of Rs.20 lakhs before 15 hours on 31-10-1996 as contemplated in the tender notice. Some persons, however, approached this Court in W.P.No.21941 of 1996 and obtained

some orders. The order of the Court reached when the tender box had already opened, but the seals of the tender covers of the person who had filed their respective tenders were not opened. At that stage, the petitioner-respondent wrote a letter on 11-11-1996 stating that no reasons were given to him for non-opening of the tenders and he could not keep the huge amount of Rs.20 lakhs with uncertainty and demanded return of the said money without any delay on the ground that the appellant had not adhered to the terms and conditions of the tender. On 14-11-1996, the appellant replied to the said letter of the petitioner-respondent that he had signed the note recording the proceedings which took place on 31-10-1996 and it was incorrect on his part to allege that the appellant had not adhered to the terms and conditions of the tender as they could not open the seals of the tender covers because of the order of the Court. In the said reply, appellant also informed the petitioner-respondent that under clause (6) the earnest money could not carry any interest even if there was any delay in the refund and under clause (15) the successful tenderer would forfeit the earnest money if he backed out after being found to be the highest tenderer. Appellant also informed the petitioner-respondent that he could attend the opening of tenders on 16-11-1996 at 11-30 hours. The petitioner-respondent wrote yet another letter on 15-11-1996 stating that the question of his participation in the opening of the tenders on 16-11-1996 could not arise because he had asked for return of earnest money before the opening of the tenders and as he was not interested in participating, his cover need not be opened. The appellant, however, proceeded with the opening of the sealed covers and found that the petitioner-respondent was the highest bidder. Accordingly, the contract was awarded to the petitioner-respondent vide letter dated 23-11-1996. Petitioner-respondent, however, insisted for the refund of the earnest money in his letter dated 8-12-1996. The appellant replied to the said letter of the petitioner-respondent on 24-12-1996 and informed him that the earnest money stood forfeited.

4. Placing reliance upon the judgments of the Madhya Pradesh High Court in *Rajendra Kumar Verma Vs. State of Madhya Pradesh and Others*, Delhi High Court in *Suraj Besan and Rice Mills Vs. Food Corporation of India*, and Allahabad High Court in *M/s. Shyam Biri Works Pvt. Ltd. Vs. U.P. Forest Corporation and another*, learned single Judge has held that as the petitioner-respondent even withdrew the offer on 11-11-1996 itself, his tender was not available for scrutinising at the time it was opened at 11-00 am. on 16-11-1996. According to the impugned judgment, there could be any acceptance of the offer only when it was alive but not after the petitioner-respondent decided to withdraw the offer. Since the petitioner-respondent withdrew from the offer prior to the scrutiny, he could not be on 16-11-1996 declared the highest bidder and thus as a consequence, there could be no forfeiture of the earnest money deposit. The principle, which learned single Judge has extracted for the above conclusions on the facts of the case, is that of the frustration of the contract when the original terms and conditions thereof are varied for no fault of the tenderer. It is not

possible on the facts of the instant case to say that the appellant varied the original terms and conditions for no fault of the petitioner-respondent. All that happened on account of the order allegedly in W.P.No.21941 of 1996 was that opening of the seals of the tenders, although the tender box was opened as scheduled, was postponed for a later date and thus the schedule of the contract was maintained without undergoing any variation by the appellant herein. Opening of the sealed covers of the tenders having been postponed pursuant to the direction of this Court, a serious contention thus as a question of fact has arisen in the instant case whether the contract stood frustrated for the reason that seals of the tender covers were not opened on the scheduled date and postponed for a later date for the reason of the order of the Court in W.P.No.21941 of 1996 and whether such postponement gave to the petitioner-respondent any occasion to say that the contract stood frustrated before it matured into a contract. The other contention based on the above judgments of the Courts which also has found favour with learned single Judge has been that ever since the contract had not come into force, it was open to the petitioner-respondent to withdraw the offer and he did so before the seals of the covers of the tenders were opened and thus withdrew the offer before the contract matured. As a result of the above acceptance of his bid being the highest tenderer on a date after he had withdrawn the offer, is not valid and thus there could be no forfeiture of the earnest money deposit. It indeed is a question of fact whether there has been any valid withdrawal of the tender by demand of the refund of the earnest money by the letter dated 11-11-1996 of the petitioner-respondent. Learned single Judge has stated in the impugned judgment that before the actual process started, the petitioner-respondent had asked for return of the earnest money deposit and although the petitioner-respondent did not specifically ask for the withdrawal of the tender still it could be inferred that he did seek withdrawal of the tender as no one has asked for return of the earnest money deposit unless there is an intention not to participate in the tender.

5. In Deputy Chief Engineer, Construction, Gauge Conversion South Central Railway and Others Vs. S. Nageswara Rao, a Bench of this Court has recorded as follows :

"One of the settled principles of law is that any obligation which arises out of a contract are ordinarily not dealt with in a proceeding under Article 226 of the Constitution of India. If there is any arbitration agreement, the claimant is entitled to raise demand for arbitration. If there is no arbitration agreement and there is no such statutory obligation for arbitration, the claimant can always institute a civil suit. It would rather be entertaining money claim on behalf of a person who is basing his claim on such statements and evidence which he has to show in a proceeding under Article 226 of the Constitution of India and this Court would be most reluctant to entertain such a petition."

In another decision in Union of India (UOI) and Others Vs. K. Jagan Mohan Rao, a Bench of this Court has said :

"In all such claims arising out of a contract, it is of essence that the Court is satisfied that parties were ad idem and that the claim is proved strictly in accordance with law. If it is a money claim otherwise the basis of the claim has to be established and the matters thus arising either under a contract or otherwise for a money claim are not covered by any public law and/or thus not matters referable to any breach of a public law right. The Court, it is well settled, issue directions in the nature of mandamus only in cases of infringement of public rights and to compel performance of a public duty. Breach in respect of the claims of the petitioner-respondent is not one of such matter."

In Jaganmohan Rao's case (cited supra) the Court has pronounced as above on facts inter alia that the petitioner-respondent therein had moved this Court as his demand to pay Rs.29,24,033/- minus the security amount of Rs.2,15,499/- was not met by the South Central Railway, although according to him, he had executed the work in accordance with the agreement. In W.A.No.1414 of 1996, judgment dated 11-12-1996 this Court has referred to the judgment of the Supreme Court in M/s. Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Bihar and others, and pointed out that a writ of mandamus to refund monies is not ordinarily entertained for the reason that a claim for such a refund could be made in suit against an authority which had illegally retained or refused to pay monies and quoted the observations of the Supreme Court in the said judgment which reads as follows :

".... that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.... that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil Court for claiming the amount and it is open to the state to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.""

However, on the facts of the case, the Supreme Court has observed :

"The writ petition was not a run-of-the-mill case. It was a case where the respondent-State had not acted as this Court had expected a high constitutional authority to act, in furtherance of the order of this Court. That is something that this Court cannot accept- The respondent-State was obliged by this Court's order to refund the writ petitioners, including the appellants, the amounts collected from them in the form of the levy that was held to be illegal. If there was good reason in law for rejecting the refund claim, it should have been stated. Not to have responded to the appellants' refund claim for 11 years and then to have turned it down without reason is to have acted disrespectfully to this Court. Even assuming, therefore, that this was a writ petition only for money, the writ petition fell outside the ordinary stream of writ petitions and, acting upon it, the High Court should have ordered the refund."

Can the instant case of the petitioner-respondent be described as not a run-of-the-mill case? Answer, in our view is "No". It is a case, in our view, in which the petitioner-respondent's claims have to be adjudicated on the basis of the pleadings of the Parties to decide whether there was indeed withdrawal of the tender by the petitioner-respondent or was he in accordance with the tender schedule, the highest bidder who backed out and thus earned the forfeiture of the earnest money deposit. The above, in our view, is an issue, which has to be decided on the basis of the materials and the evidence that the parties may possess, and any decision summarily reached on such issue of far reaching consequence, without proper opportunity to the parties to lead such evidence, which they may think fit and proper and in a proper and regular civil suit or if there is any arbitration agreement, without asking the party to go for arbitration in the event of their being so pleased, will not be proper.

6. We are inclined for the above reasons to interfere with the impugned judgment and to set aside the same.

7. In the result, the appeal is allowed. The impugned judgment is set aside. The writ petition is dismissed, but on the facts of the case, without costs.