

(2008) 04 KAR CK 0012
In the Karnataka High Court
Case No : Writ Appeal No. 417 of 2008

Bandi Ramappa

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 17-04-2008

Acts Referred:

Contract Act, 1872 — Section 5

Karnataka Excise (Lease of the Right of Retail Vend of Liquor) Rules, 1969 — Rule 11 (5), 12 (21), 12A, 8

Citation : (2008) ILR (Kar) 4467 : (2009) 1 KarLJ 687 : (2008) 3 KCCR 1674

Hon'ble Judges : V. Gopala Gowda, J; Arali Nagaraj, J

Bench : Division Bench

Advocate : V. Lakshminarayana, for the Appellant; Gangadhar Sangolli, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. The appellant herein has challenged the order dated 19.2.2008 passed by the learned Single Judge of this Court in W.P. 11067/07 (Excise) declining to interfere with various orders impugned therein passed by the respondents herein and to quash the said orders.

2. Stated in brief the facts are as under:

(a) The Government of Karnataka issued a notification dated 15.6.2005 (Annexure-A) calling for the tenders from the licensed excise contractors in respect of lease of right of Retail vend of Arrack in polythene sachets for the period from 1.7.2005 to 30.6.2006 of the excise year 2005-07. In response thereto the appellant herein submitted his sealed tender (Annexure-B) on dated 26.5.2005 at 2.00 p.m. which date and time was fixed in the said notification as the last date and time for submitting the tenders.

(b) Shortly within a few minutes of submitting his said tender, the appellant noticed that he had quoted in the said tender higher price by mistake calculated

at 5% over and above the Earnest Money Deposit ("EMD" for short) instead of calculating at 5% over and above the monthly rent for the previous year. Therefore, at about 2.20 p.m. on the same day, he submitted a letter (Annexure "C") to the 6th respondent Deputy Commissioner and Sales Conducting Officer, Mangalore, stating that since he quoted the said higher rate by mistake the said tender shall not be considered.

(c) Thereafter the tenders were opened at 2.30 p.m. on 26.5.2005 as scheduled. Though the appellant, by submitting his said letter, requested that the tender that was submitted by him at 2 p.m. shall not be considered, the 6th respondent considered the same and found that the price quoted by the appellant being Rs. 1,95,00,000/- was highest and therefore he announced that the said bid was accepted. Later, at about 2.50 p.m. the appellant submitted another representation before the 6th respondent stating that since he had submitted his earlier letter stating that his tender should not be considered, he would not be in a position to make payment of further amount as per the terms and conditions of the tender. Despite the said letter, 6th respondent proceeded to draw the proceedings in respect of the tender and held that the appellant failed to remit the further amount as per condition No. 18(a) and (b) of the terms and conditions of the tender as mentioned in schedule-C annexed to said notification and therefore the EMD amount of Rs. 1,84,00,000/- was liable to be forfeited to the Government.

(d) Thereafter the 6th respondent submitted his report to the third respondent Commissioner of Excise drawing the entire proceedings as per Annexure-El. On the basis of the said report, the third respondent Commissioner addressed a letter to the Deputy Commissioner, Mangalore, instructing him to proceed to forfeit the EMD amount that was paid by the appellant. Accordingly, the 6th respondent namely, Deputy Commissioner and Sales Conducting Officer, Mangalore, by drawing the proceedings as per Annexure-G dated 1.7.2005 forfeited the EMD amount of Rs. 1,84,00,000/- to the Government. Thereafter the appellant addressed a letter (Annexure-H) to the Commissioner of Excise on 27.6.2005 informing him all the facts and circumstances and requested him to return the EMD amount on the ground that he had withdrawn the proposal before it could be accepted by the 6th respondent.

(e) Thereafter, on 5.7.2005, the appellant addressed another letter (Annexure-H 1) to the 5th respondent - Deputy Commissioner, stating that since he could not personally participate in the auction proceedings he had asked his power of attorney holder to submit the tender and the said power of attorney holder quoted the higher price erroneously calculating on the basis of the EMD instead of calculating the same on the basis of monthly rental for the previous year and therefore the same should not have been considered by the 6th respondent. By submitting so he requested to cancel the said tender and refund the EMD amount. However, the Commissioner refused to grant the prayer of the appellant to refund the EMD amount.

(f) Thereafter, the appellant filed Appeal No. 8920/06 before the Prl. Secretary to the Government of Karnataka Finance Department seeking refund of the EMD amount. The appellant also filed the said Writ Petition No. 11067/07 (Excise) before this Court. The learned Single Judge of this Court, by passing the impugned order, declined to interfere with any of the orders impugned in the said writ petition and consequently dismissed the same observing that since Appeal No. 8920/06 of the appellant was pending before the Government proper direction could be issued to the Prl. Secretary to the Government (Finance Department) to dispose of the said appeal in strict compliance with the provisions of the Excise Act and the Rules after giving sufficient opportunity to the petitioner. Being aggrieved by the impugned order of the learned Single Judge passed in the said writ petition the appellant has preferred the present writ appeal.

3. We have heard the arguments of Sri V. Lakshinarayana, the learned Counsel for the appellant and also Sri Gangadhar Sangolli, the learned Addl. Govt. Advocate for the respondents. The points that arise for our consideration are:

1) Whether the order passed by the learned Single Judge dismissing the Writ Petition No. 11067/2007 of the appellant, declining to interfere with the orders impugned therein is legally justifiable in law?

2) Whether the transactions between the appellant and the first respondent Government through its officers namely respondents-2 to 6 in respect of lease of right of retail vend of arrack for the period 1.7.2005 to 30.6.2006 of the excise year 2006-07 are governed by the provisions applicable to the commercial contracts?

3) Whether the 6th respondent namely Deputy Commissioner and Sales Conducting Officer of the District of Dakshina Kannada was justified in forfeiting the KMD amount of Rs. 1.84 crores deposited by the appellant by drawing the impugned proceedings dated 1.7.2005 as per Annexure-G?

4) Whether the appellant is entitled to the reliefs sought for in W.P. 11067/2007?

Our findings on point Nos. (1) and (3) are in the "negative" and point Nos. (2) and (4) are in the "affirmative" for the following

REASONS

4. Point No. 1: At the outset the learned AGA strongly contended that in view of the fact that the appellant had already preferred an Appeal No. 8920/06 before the Prl. Secretary to the Government, Finance Department, regarding the forfeiture of EMD amount he could not maintain the said writ petition. As against, this Sri V. Lakshminarayan, the learned Counsel for the appellant, contended that though the appellant submitted his representations before the Commissioner of Excise and also to the Prl. Secretary to the Government of Karnataka, Finance Department and the Deputy Commissioner of Dakshina Kannada District, none of them had any mind to consider the request of the appellant and as such, though

the appellant filed the said appeal, he could not get any justice in their hands. Further, there is no alternative remedy provided in the statute and therefore they have statutory obligation to consider the representations and dispose off the same in accordance with law. He further submitted that the impugned order was passed by the 6th respondent, on the instructions given by the third respondent Commissioner, arbitrarily, unreasonably, in gross violation of the mandatory provisions of law and also Article 14 of the Constitution of India and as such the appellant could maintain the writ petition and he is entitled for the reliefs as prayed therein.

5. In support of his above legal contention Sri V. Lakshminarayana, the learned Counsel for the appellant, has placed his reliance on the decision of the Hon''ble Apex Court in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, The facts in the said case were:

The 4th respondent therein had entered into a contract with the State owned Corporation of Kazakhstan for supply of certain quantity of tea, the payment in respect whereof was to be made by the State Corporation by barter of goods mentioned in the schedule to the said agreement within the specified period after the delivery of the same by the said respondent-exporter. One of the clauses of the agreement providing for the mode of payment was amended providing that if the contract of barter of goods could not be finalised for any reason then the said amount was to be paid in US dollars. The 4th respondent therein assigned a part of the export contract to the first appellant. On a direction issued by the Reserve Bank of India to cover the risk arising out of the export of tea made by the appellant, the appellant approached the said Export Credit Guarantee Corporation of India namely the first respondent and got the risk insured with it in respect of payment of consideration involved in the contract of export. The first respondent issued a comprehensive risk policy. The payment of consideration by barter of goods could not be finalised between the appellant and State Corporation and therefore certain part payment was made in US dollars and the said Corporation failed to make further payment of balance amount. Then the appellant made a claim on the first respondent by addressing a letter to it. But the latter repudiated the same on the ground that the appellant had changed the terms of the contract of payment without consultation with the first respondent. Therefore the appellant filed a writ petition praying to quash the letter of the said respondent repudiating the said contract and for a direction to the first respondent to make payment of the dues under the contract of insurance. The learned Single Judge allowed the writ petition but on an appeal, the Bench held that claim of the appellant involving disputed questions of fact could not be adjudicated in a writ proceeding under Article 226 of the Constitution and set aside the judgment of the single judge.

On these facts the Hon''ble Supreme Court, at page 229, held as under:

However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in

mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The court has imposed upon itself certain restrictions in the exercise of the power (see: Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,). and this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

In the instant case the controversy is not based on any disputed facts but it is based on interpretation and proper understanding of the undisputed facts and the relevant provisions of Law and the Terms and Conditions of the Tender. Therefore, following the above decision of Hon"ble Supreme Court we hold that the appellant could maintain his writ petition, and therefore the learned Single Judge is not justified in dismissing the same without considering it on merits. Hence we answer Point No. 1 In the affirmative.

6. Having held that the writ petition filed by the appellant is maintainable, we have now to consider the merits of the case of the appellant by exercising our appellate jurisdiction. It is not in dispute that the tenders by the licensed excise contractors were required to be submitted at or before 2.00 p.m. on 25.6.2005 and 2.30 p.m. on the said date was fixed for opening of the tenders, it is also not in dispute that the appellant herein submitted his tender in sealed condition to the 6th respondent before 2 p.m. on that date and that shortly thereafter at about 2.20 p.m. the appellant submitted his letter (Annexure-C) stating therein that his power of attorney had by mistake quoted in original tender the higher price calculated on the basis of the EMD amount instead of calculating on the basis of the monthly rental for the previous year and, while stating so, he requested the 6th respondent not to consider the said tender. It is also not in dispute that the tenders were opened at 2.30 p.m. on that date and, despite the request made by the appellant not to consider his tender in view of his letter submitted before the 6th respondent at 2.20 p.m., 6th respondent proceeded to draw the tender proceedings by considering the same.

7. Based on the above undisputed facts the learned Counsel for the appellant strongly urged that since the appellant revoked his proposal in the said tender before the same could be accepted by opening the tenders there was no tender in the eye of law for being considered by the 6th respondent as the appellant in the absence of an undertaking that he would not withdraw his tender, the letter written to 6th respondent amounts to withdrawal of his offer given in the tender and further withdrawal of the offer by him is legally permissible u/s 5 of the Indian Contract Act and as such all the further proceedings in respect of his tender and consequent forfeiture of EMU amount of Rs. 1.84 crores were

arbitrary, unreasonable and therefore the same is violative of Article 14 of the Constitution of India As against this, the learned Addl. Govt. Advocate, placing reliance on the decision of High Court of Rajasthan in Bhanwarlal Vs. The State of Rajasthan and Others, submitted that the transaction between the first respondent State through respondents-2 to 6 and the appellant being the statutory contract, the provisions of the Contract Act, 1872, have no application to such contract In support of this contention he has also placed his reliance on the decision of the Hon"ble Supreme Court in the case of National Highway Authority of India Vs. Ganga Enterprises and Another, . In first of these two decisions i.e., Bhanwarlal Vs. The State of Rajasthan and Others, the facts were:

In response to the notification of 30th March, 1972, issued by the State Government inviting tenders, the petitioner submitted his tender form (Ex.R/1) for the Retail Sale of Country Liquor for the group of shops at Jodhpur city. He also deposited along with the tender EMD of Rs. 1,02,000/- as required under the Rules. On 12.2.1975 the petitioner sent a telegram to the Excise Commissioner pointing out that though his tender was the highest the same may not be accepted as it was learnt that the department was contemplating auction of the individual shops and, if the auction was not restrained the tender submitted already should be deemed to have been cancelled, withdrawn and rejected. Despite the said request the department put up for auction of individual shops for city of Jodhpur. As no tender was forthcoming nothing came out of it. The petitioner again sent a telegram on 28.2.1975 to the Excise Commissioner stating that their tender should be withdrawn and asked for refund of money. In the meanwhile respondent-2 addressed a letter dated 1.3.1975 (Ex.7) and informed the petitioner that their tender had been accepted and required them to deposit the part of the security amount within 5 days and the balance of the security amount by 15.3.1975.

It was on these facts the High Court of Rajasthan held at para 8 as under:

The first contention of Mr. Parekh, the learned Counsel for the petitioners is that as the tender which was submitted by the petitioners had been withdrawn earlier to the acceptance of the same by respondent No. 2 on 1st March, 1975, and thus there was no concluded contract the question of forfeiture of the earnest money cannot arise. He invokes to his aid Sections 5 and 6 of the Contract Act to support his argument that the tender which is equivalent to offer could be withdrawn by the petitioners before its acceptance by the respondent No. 2. This argument of Mr. Parekh proceeds on the fallacious assumption as if there was nothing in law binding the petitioners not to withdraw the offer submitted by them.

Now by Clause 5 of the Tender Form the petitioners had clearly bound themselves and stated clearly that they had no right to withdraw the tender and that in case they do so the earnest money deposited by them could be forfeited. Similarly, Clause 6 also binds the tenderer that if the petitioners do not deposit the security amount after the tender had been accepted the Excise Authorities

would have the right to cancel the acceptance of the tender and forfeit the earnest money. Similarly, Clause 12½ of Ex.1 also makes the tenderer liable for forfeiture of the earnest money if he does not remain bound by his tender. Thus the petitioners were bound by the statutory condition that if they default in terms of their undertaking given in the tender they would be liable to have their deposit of earnest amount forfeited. There is an obvious rationale behind this compulsion on the tenderer not to withdraw his offer. The revenue earned by the vend of the country liquor is quite a substantial part of the State Budget, and it is naturally interested in dealing with it in a definite known manner.

If the argument of Mr. Parekh was to be accepted that anybody can give a tender and before acceptance of it withdraw the same without attracting any penalty it may lead to an administrative confusion inasmuch as the State would not be certain of any tenders being genuine. The whole procedure of tender and acceptance is provided by these statutory rules and conditions and the petitioners having given their tender subject to those conditions is bound by them. It is true that there was an attempt by the Excise Authorities to auction the individual shops though nothing came out of it. There is some justification for the grievance made by Mr. Parekh on behalf of the petitioners that this action of the Excise Department in purporting to auction the individual shops when it had earlier invited tenders for group of shops was neither fair to the petitioners, nor was it based on any rational explanation.

I also personally find it a little odd that the Department should have attempted to auction individual shops without at least first deciding whether to accept or reject the tender submitted by the petitioners. Mr. Parekh says that this action of the respondent No. 2 shows utter disregard to the interest of the petitioners who had given the highest tender. That may be so, but unfortunately that will not help the petitioners because in law the tender had not been rejected. Though therefore the action of the Excise Department at the same time to auction the individual shops may be somewhat queer the petitioner cannot get out of their legal liability which they had undertaken when they submitted their tender.

8. As could be seen from the above judgment of the High Court of Rajasthan the facts in the above case were quite different from the facts in the present case. The contractor therein had sent his telegram to the Excise Commissioner after coming to know of the fact that his bid was the highest. On the other hand in the instant case the appellant herein revoked his offer in his tender by submitting his letter before the tenders could be opened. Further, the petitioner in the said case had stated clearly as required by Clause 5 of the Tender notification that he had no right to withdraw the tender and, in case he did so, the UMD made by him could be forfeited. But such a provision is not there in schedule "C" to Annexure "A" the notification issued by the Government herein subject to which the appellant submitted his tender. Therefore, we are of the considered view that the above said decision of the High Court of Rajasthan is of no help to the respondents herein.

9. In second of the above said decisions relied upon by the learned AGA i.e., National Highway Authority of India Vs. Ganga Enterprises and Another, the facts were:

The appellant National Highways Authority of India by a notice dated: 31.7.1997 called for the tenders for collection of toll on a portion of a particular highway. The said notice required the bidders to furnish i) a bid security in a sum of Rs.50 lakhs in the form of a bank draft or bank guarantee, and ii) a performance security in the form of a bank guarantee of Rs. 2 crores. The bid security was liable to forfeiture in case the bidder withdrew his bid during validity period of bid or failed within the specified period furnished to performance security and sign the agreement. In terms of the tender document the respondent firm gave its bid and offered an "on-demand bank guarantee" in a sum of Rs. 50 lakhs which could be enforced on demand if the bidder withdrew his bid during the period of bid validity or failed to furnish the performance security or failed to sign the agreement. While the validity period of the bid was to end on 28.11.1997 the respondent withdrew its bid on 20.11.1997 and did not furnish the performance guarantee.

10. It could be seen from the above facts of the said case before the Apex Court, that the facts in the present case are different from those in the said case inasmuch as if the bidder therein were to withdraw his bid during the validity period of the bid, the bid security amount of Rs. 50 lakhs was liable to be forfeited as per the conditions of the tender but in the instant case there was no such condition in schedule-C to the Notification Annexure-A subject to which the tender was submitted by the appellant. Therefore, the said decision of the Supreme Court cannot be made applicable to the facts of the present case. Besides this, the Supreme Court has not laid down the law in the said case that the provisions of the Contract Act are not applicable to the contracts entered into between the State through its instrumentalities and the private parties as contended by the learned AGA. Therefore, his said contention cannot be accepted.

11. Further, placing reliance on another decision in the case of Lakhanlal and Others Vs. The State of Orissa and Others, the learned AGA submitted that the moment the appellant submitted his tender in sealed cover to the 6th respondent the contract came to be concluded as per the terms and conditions of the tender and therefore nothing was required to be done further by the appellant pursuant to submission of the tender. This submission cannot be accepted for the reasons that as provided under Clauses 20 to 22 of Schedule-C annexed to the tender notification, after the Deputy Commissioner accepts the provisional tender he shall have to submit forthwith to the Excise Commissioner the record of the proceedings conducted by him for confirmation and, after the Commissioner considers the said record and passes the order confirming the retail vend of Arrack he shall communicate the same to the contractor requiring him to enter into the agreement of lease with the State Government incorporating the terms

and conditions under which the right of Retail Vend of Arrack is leased in his favour.

12. Sri V. Lakshminarayan, learned Counsel for the appellant, has placed his reliance on the decision of High Court of Madhya Pradesh in Rajendra Kumar Verma Vs. State of Madhya Pradesh and Others, and also on the decision of High Court of Bombay in the case of Vinod J. Agarwal v. Chief Officer, Mira Bhayander Municipal Council and Ors. reported in 2007(2) Civil LJ 290. In first of these decisions (i.e., Rajendra Kumar Verma Vs. State of Madhya Pradesh and Others,) the High Court of Madhya Pradesh has observed at paras 3 and 4 as under:

3.... We are unable to accept this contention. A person who makes an offer is entitled to withdraw his offer or tender before its acceptance is intimated to him. The Government, by merely providing such a clause in tender notice could not take away that legal right of the petitioner. The fact that the petitioner had applied for withdrawal of the tender is not denied. It is, therefore, quite clear that when the tenders were opened, there was really no offer by the petitioner and, therefore, there could be no contract either impliedly or explicitly between the parties.

4. It has been repeatedly held by this Court and by the Supreme Court that unless there is a valid contract executed as envisaged by Article 299(1) where the Government is a party, there could be no enforceable contract at all....

13. In second of the said decisions i.e. 2007(2) Civil LJ 290 relied upon by the learned Counsel for the appellant the facts were:

The respondent-council, by publishing a Notice in the daily "Loksatta" dated 25.4.1994, invited offer for the appointment of an agent for collection of the Octroi duty for a period from 1.6.1994 to 31.5.1995. The last date for filing the sealed covers for the said offer was 9.5.1994 and accordingly the petitioner filed his forms of offer. The date fixed for opening of the tenders was 11.5.1994 while the validity of the tender was upto 16.5.1994. The tenders were not opened on 11.5.1994 neither on 16.5.1994 and the date for opening of the tenders was postponed to 21.5.1994. Considering the postponement of the date for opening of the tenders, the petitioner, by letter dated 18.5.1994, informed the respondent-council that the petitioner was no more interested in continuing to keep his offer alive and therefore he withdrew the offer and demanded the refund of the earnest money. The tenders were opened by the respondent-council on 21.5.1994 and the petitioner was found to be the highest offerer and accordingly the petitioner was informed by the respondent counsel by its letter dated 23.5.1994 that his offer had been accepted.

On the above facts, Bombay High Court observed at para Nos. 6 and 7 as under:

6. Undisputed facts of the case reveal that the tenders were to be opened on 11.5.1994 but they were not opened till 21.5.1994. It is also undisputed fact that

the validity period for the bid was up to 16.5.1994. It is nobody's case that the respondents had requested the persons who had submitted their offer to extend the validity of their offer beyond 16.5.1994. It is also a matter of record that the petitioner, on the ground that the opening of the tenders was postponed beyond 11.5.1994, had withdrawn his offer under the letter dated 18.5.1994 and the letter was duly received by the respondents on 20.5.1994. In the background of these facts, there was no occasion for the respondents to open and/or accept the alleged offer by the petitioner on 21.5.1994. The offer of the petitioner having been specifically withdrawn under the letter dated 18.5.1994 and communicated to the respondents on 20.5.1994, prior to the date of opening of the tenders, it was but natural that the respondents ought to have ignored the tender submitted by the petitioner and even if it was opened, it could not have been accepted, as on "21.5.1994 the offer of the petitioner was not subsisting. The law on the point of withdrawal of offer is very clear in view of the provision of law comprised u/s 5 of the Indian Contract Act. One it is not in dispute that the alleged acceptance of the tender was on 21-5-1994 and the petitioner having chosen to withdraw the offer much prior to the said day, there was no subsisting offer on behalf of the petitioner on 21 -5-1994.

7. As regards the earnest, money, it is undisputed fact that the terms and conditions regarding the tender did not contain any term to the effect that the offerer would not be entitled for refund of the earnest money in case of withdrawal of the offer and certainly not in case of withdrawal of the offer beyond the period of validity of the bid. Once it is not in dispute that the period for the bid had expired on 16.5.1994 and thereafter, but before the date of opening of the tenders, the offer was withdrawn by the petitioner, in the absence of any condition to the contrary in relation to the earnest money, the same was liable to be refunded to the petitioner.

Further, in the case of Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram, relied upon by the learned Counsel for the appellant, the Supreme Court has observed at para 3 as under;

...till such confirmation the person whose bid has been provisionally accepted is entitled to withdraw his bid. When the bid is so withdrawn before the confirmation of the Chief Commissioner the bidder will not be liable for damages on account of any breach of contract or for shortfall on the resale.

14. Following the above judgements relied upon by the learned Counsel for the appellant, we are of the opinion that and in view of the admitted fact that the appellant submitted his letter Annexure-C to the 6th respondent on 26.05.2005 at 2.20 p.m., before the tenders could be opened at 2.30 p.m., on that day stating that for the reasons mentioned therein the tender submitted by him at 2.00 p.m., on that day should not be considered by respondents, the Appellant rightly contended that there was no offer at all by way of tender by the appellant at the time when the tenders were opened, as his earlier offer was withdrawn by him for which there was no impediment.

15. The learned AGA submitted that since the appellant and the respondent-State were governed by the terms and conditions as mentioned in Schedule-C of the notification (Annexure - A)the appellant had no opportunity to withdraw the proposal after submitting the tender. As against this while drawing our attention to Clause 13 of the said terms and conditions Sri V. Lakshminarayan, the learned Counsel for the appellant, has strongly urged that since the appellant did not give any prior undertaking to the respondents to the effect that the tender submitted by him shall not be withdrawn by him till the right of Retail vend of Arrack is disposed of, he had every legal right u/s 5 of the Contract Act to revoke the proposal given by him before the same could be accepted and its acceptance could be communicated to him by the 6th respondent. Clause 13 of the said schedule of the tender notification says that "the person submitting the tender shall give a prior undertaking that the tender shall not be withdrawn till the right of retail vend of arrack is disposed of. It is not the case of the respondents that the appellant had ever given any prior undertaking to them stating that he would not withdraw the proposal till the right of Retail vend of Arrack could be disposed of. Sri V. Lakshminarayana, the learned Counsel for the appellant has placed his reliance upon an unreported judgment of the Division Bench of this Court in W.A. Nos. 2076 to 2081 of 1982 to 20.1.1983 wherein the Division Bench has quoted at para No. 23, the observations of the Supreme Court in the case of State of Uttar Pradesh v. Kishori Lal Minocha reported in : [1980]2SCR724 at para 3, reads as under:

It is, therefore, clear that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and till such confirmation the person whose bid has been provisionally accepted is entitled to withdraw his bid. When the bid is so withdrawn" before the confirmation of the Chief Commissioner the bidder will not be liable for damages on account of any breach of contract or for the shortfall on the resale. An acceptance of an offer may be either absolute or conditional. If the acceptance is conditional the offer can be withdrawn at any moment until absolute acceptance has taken place.

Subsequent to the above judgment of Division Bench of this Court an amendment was brought to the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969, and Rule 12-A came to be inserted with effect from 1.4.1983 providing that the person submitting a tender or offering a bid shall give a prior undertaking to fulfill the stipulation in Rule 8, Rule 11(5) and Rule 12(21) as the case may be that the tenderer shall not withdraw the bid. But it is not the case of the respondents that the appellant gave such prior undertaking to the respondents as required under the amended Rule 12-A of the said Rules. Therefore, we are of the view that the appellant had every right to withdraw his tender before the same could be accepted by the 6th respondent and he has rightly done so by submitting his letter Annexure-C.

16. The learned AGA has also placed his reliance on the decisions of the Hon'ble Supreme Court in Abdul Rahiman Khan Vs. Sadasiva Tripathi, ; Viswesardas

Gokuldas Vs. B. K. Narayan Singh and Another, , Union of India (UOI) Vs. Maddala Thathiah, and State of Karnataka and Others Vs. Saveen Kumar Shetty, . Suffice to say the principles laid down in these decisions cannot be made applicable to the facts of the present case, inasmuch as the facts in the instant case are quite distinct and different from the facts in each of the said three cases. Further, in view of 7 Judge Constitution Bench decision of the Apex Court in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , the reliance placed upon the aforesaid decisions of the Apex Court have no application to the fact situation of the present case, in view of the clear pronouncement of law laid down by the Apex court to the effect that a party is entitled for fair hearing if the action of the Authority entails either civil or criminal consequences upon him.

17. The learned Counsel for the appellant also has placed his reliance on quite a number of other decisions of the Apex Court the xerox copies of which are produced along with a list. Suffice to say that the principles laid down in all the said decisions need not be discussed in detail as the same are not relevant for the disposal of the present appeal in view of our aforesaid reasons both on facts and law.

18. While referring to the contents of Annexure-C the latter of the appellant submitted before 6th respondent at 2.20 p.m. on 26.05.2005 the learned AGA submitted that the contents of the same would disclose that the appellant sought to introduce a new tender as a substitute for the tender that was submitted by him at 2 p.m. on that day and therefore the same could not be termed as withdrawal of the proposal in the earlier tender. This submission of learned AGA is not tenable both on facts and law for the reason that the said letter could never be construed as a new tender intended to be a substitute for the original tender. Besides this, admittedly, no tender, either as additional one or a substitute for the earlier one, could be permitted to be submitted by any contractor including the appellant after 2.00 p.m., on that day.

19. Further, the appellant has clearly stated in this letter Annexure-C that his power of attorney holder (clerk) incorrectly mentioned in the tender the price calculated at 5% over and above the EMD instead of calculating the same at 5% over and above the monthly rental for the previous year and therefore the said tender should not be considered. By this it is quite clear that the appellant, with the clear intention of withdrawing the offer that was made by him in the earlier tender, submitted his said letter at 2.20 p.m. on that day before the tenders could be opened. Therefore, we are of the considered opinion that since there was withdrawal of the proposal by the appellant before the tenders could be opened at 2.30 p.m. on that date, absolutely there was no legally acceptable offer made by the appellant before the 6th Respondent Deputy Commissioner and Sale Conducting Officer and as such the acceptance of the said tender and forfeiture of Rs. 1.84 crores being the EMD amount by the 6th respondent is not only arbitrary but also unreasonable, besides being not founded on facts and not

permissible in law or the terms and conditions mentioned in Schedule-C annexed to the tender notification Annexure-A.

20. In view of our foregoing discussion and reasons we answer Point No. 2 in the "affirmative" holding that the transaction between the appellant and the first respondent Government of Karnataka through its officers i.e., Respondent Nos. 2 to 6 in respect of lease of right of Retail vend of the Arrack for the period from 1.7.2005 to 30.6.2006 were governed by the provisions of Contract Act and we answer the Point No. 3 in the negative holding that the 6th respondent-Deputy Commissioner and Sales Conducting Officer of Dakshina Kannada, Mangalore, was not justified in forfeiting the EMD amount of the Appellant of Rs. 1.84 crores by drawing the impugned proceedings dated 1.7.2005 as per Annexure-G. Further, we answer Point No. 4 In the affirmative holding that the appellant is entitled to the reliefs sought for in the writ petition No. 11067/07.

21. In the result, we allow the present writ appeal with costs and set aside the impugned order of the teamed Single Judge dated 9.2.2008 passed in W.P. No. 11067/07 (Excise). Further, we quash the impugned order dated 25.6.2005 passed by the 6th respondent - Deputy Commissioner and Sales Conducting Officer, Dakshina Kannada, Mangalore, as per Annexure-EI and the order dated 1.7.2005 passed by him as per Annexure-G forfeiting the EMD amount of Rs. 1.84 crores. We also quash Annexure-K, the letter dated 24.10.05 issued to the appellant herein by the 2nd respondent -Pr. Secretary to Government, Finance Department Vidhana Soudha, Bangalore. We hold that the appellant is entitled to the refund of EMD amount of Rs. 1.84 crores. Therefore, respondent Nos. 2 to 5 are hereby directed to refund the same to the appellant, within eight weeks from the date of this judgment failing which the appellant would be entitled to interest at the rate of 9% per annum on the said amount from the date of expiry of the said eight weeks till the same is paid to him.