
(2004) 03 AP CK 0102

In the Andhra Pradesh High Court

Case No : Writ Petition No. 10021 of 2002

G.V. Pratap Reddy

APPELLANT

Vs

Government of A.P. and Others

RESPONDENT

Date of Decision : 09-03-2004

Acts Referred:

Citation : (2004) 3 ALD 51 : (2004) 3 ALT 601 : (2004) 4 BC 328

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Vedula Venkataramana, for the Appellant; Government Pleader for Irrigation and CAD, for the Respondent

Judgement

L. Narasimha Reddy, J.—The petitioner is a special class contractor registered with the concerned authority, and acquired the eligibility to execute the civil contracts with the Government exceeding the value of Rs. 1 crore. The Superintendent Engineer, Irrigation Circle, Dowlaiswaram, the 4th respondent, issued a tender notice dated 20-10-2001, inviting tenders for the work of construction of a reservoir across Dhara Kalava near Kithamurupeta Village, Prathipadu Mandal, East-Godavari District. The tender process comprised of two stages, namely, evaluation of technical bids and price bids. The price bids of tenderers who qualified in technical bids, are considered.

2. Petitioner and various others submitted the tenders within the stipulated time and among them, four tenderers including the petitioner were qualified in the technical bid. The price bids were opened on 19-11-2001. One Mr. P. Ranga Raju-(L-1) quoted his offer at 31.23% less than the estimated value. The petitioner became the second lowest-(L-2), with his offer at 24.39% less than the estimated value.

3. After this evaluation, certain correspondence ensued between the tenderers and the respondents. It was in this process that the petitioner gave his unconditional offer to execute the contract, if awarded to him, at the rates

quoted by L-1 namely, minus 31.23%. The Commissionerate of tenders, the 2nd respondent, considered the tender of L-1 as well as that of the petitioner, in view of his unconditional offer. Ultimately, it has decided to accept the tender of L-1. Consequently, the 4th respondent addressed letter dated 8-2-2002 accepting the tender of L-1 and asked him to attend his office to enter into agreement.

4. L1- tenderer, addressed letters dated 5-3-2002 and 7-4-2002 expressing his difficulties in furnishing the bank guarantee for a sum of about one crore, which is necessary for entering into agreement. The agreement could not be entered into as required under the letter dated 8-2-2002. It was in this context, that the petitioner appears to have been contacted by the respondents to express his readiness to undertake the work, if assigned. The petitioner addressed letter dated 20-4-2002 expressing his willingness to undertake the work at the rate quoted by him, namely, 24.39% less. The 4th respondent requested the petitioner to undertake the work at the rates quoted by L-1, namely: 31.23% less and addressed letter dated 25-5-2002. The petitioner responded through his letter dated 29-5-2002 expressing his unwillingness to work at such rates. The 4th respondent addressed letter dated 31-5-2002 informing the petitioner that if the petitioner fails to take necessary steps for execution of the agreement on or before 10-6-2002, the EMD would be forfeited and his registration as special class contractor would be revoked. Petitioner challenges the action of the respondents and seeks a direction to them to assign the contract at the rates quoted by him, namely, 24.39% less.

5. Petitioner contends that his offer to undertake the work at the rates quoted by L-1-tenderer was alive till the competent authority, namely, the 2nd respondent, has taken a decision, and once it has decided to award the contract in favour of L-1, his offer ceased to exist. He contends that the respondents cannot compel him to execute the work at a rate less than the one quoted by him, after they have failed to persuade or compel L-1 to execute the agreement.

6. On behalf of the respondents, the 4th respondent filed a counter-affidavit and thereafter an additional counter-affidavit. He states that in the tendering process, one Sri P. Ranga Raju, emerged as L-1 with 31.23% less, and petitioner as L-2 with 24.39% less. He submits that the petitioner addressed a letter dated 20-11-2001 pointing out certain defects on the part of L-1-tenderer and expressing his readiness to undertake the work at the rate, quoted by L-1-tenderer. It is stated that the Commissionerate of Tenders considered the offer of the L-1- tenderer as well as the petitioner and accepted the tender of L-1-tenderer. It is also stated that since L-1 tenderer did not fulfill the conditions, the work was offered to the petitioner at the rates of L-1. The 4th respondent contends that the offer of the petitioner was alive, by the time the respondents decided to accept the same. The 4th respondent justifies the action in forfeiting the EMD and taking steps to blacklist the petitioner, on account of the lapses committed by the petitioner.

7. Sri Vedula Venkata Ramana, learned Counsel for the petitioner submits that

after emerging as L-2, the petitioner expressed his willingness to undertake the work at the rates quoted by L-1, and on consideration of all the tenders, the 2nd respondent has decided to accept the tender of the L-1. It is his case that, once the 2nd respondent has accepted the tender of L-1, the offer of the petitioner stood rejected, and it was not at all open to the respondents to insist upon the petitioner to undertake the work, at L-1 rates and that there was no justification in forfeiting the EMD and taking steps to blacklist him.

8. The learned Government Pleader for Irrigation submits that the petitioner himself offered to execute the work at the rates of L-1 and he has kept the EMD alive, with a view to enable the respondents to take a decision. According to her, it was competent for the respondents to consider the offer of the petitioner as long as the EMD was alive, and the petitioner cannot escape from the consequences flowing from his own offer. She has referred to the various conditions incorporated in the tender notice as well as the correspondence that ensued between the parties.

9. The petitioner seeks a two-fold relief, namely:

- (a) to declare the action of the respondents in compelling the petitioner to execute the work in question at the rate quoted by L-1, as illegal and arbitrary,
- (b) to direct the respondents to consider and award the said work to the petitioner at the rate quoted by him, namely, 24.39% less, subject to fulfillment of other terms and conditions.

10. Before proceeding to discuss the matter on merits, it needs to be observed that the second limb of the relief, namely, directing the respondents to award the contract to the petitioner at 24.39% less, cannot be granted by this Court. It is settled principle of law that no agency can be compelled to accept any tender, even where it is the lowest. Therefore, it is not necessary to consider this aspect of the matter in the writ petition.

11. Petitioner responded to a tender notice dated 20-10-2001 for the work referred to above. Himself and three others were qualified in the technical bids, Petitioner emerged as L-2 tenderer with his offer at 24.39% less than the estimated cost. Once Mr. P. Ranga Raju, emerged as L-1-tenderer with his offer at 31.23% less. The petitioner addressed a letter dated 4-1-2002 expressing his willingness to undertake the work, if awarded to him, at the rates quoted by L-1 tenderer. He has also extended the validity of EMD, Having regard to the cost involved, the tenders were to be evaluated and finalised by the 2nd respondent. In view of the offer made by the petitioner, the 2nd respondent considered the tenders of L-1 as well as that of the petitioner.

12. On 16-1-2002, the 2nd respondent had accepted the tender of L-1. Consequential letter dated 8-2-2002 was addressed by the 4th respondent, requiring L-1-tenderer to take further steps for execution of the agreement. The execution of agreement involved, furnishing of bank guarantee for a sum of

about one crore. L-1 tenderer addressed two letters expressing his difficulty in furnishing the bank guarantee, and ultimately the agreement could not be entered into between him and the 4th respondent. Even while the correspondence was ensuring between the 4th respondent and L-1 tenderer, the petitioner addressed letter dated 14-2-2002 expressing his willingness to undertake the work at the rate quoted by him, namely, 24.39% less. Strictly speaking, this offer was superfluous, inasmuch as the contracts stood awarded to the L-1 tenderer.

13. Obviously in view of the failure of the L-1 tenderer to execute the agreement, the 2nd respondent took up the matter once again on 24-5-2002 and decided to accept the offer of the petitioner, made in his letter dated 4-1-2002, at 31.23% less. Consequently, the 4th respondent addressed letter dated 25-5-2002, requiring the petitioner to comply with the formalities to enter into agreement.

14. Petitioner responded through his letter dated 29-5-2002 stating that he is ready to execute the work at the rate quoted by him, namely, 24.39% less, and not at 31.23% less. This did not appeal to the 4th respondent, and ultimately, he passed orders dated 11-6-2002 forfeiting the EMD of Rs. 5,49,000/- on the ground that the petitioner failed to execute the agreement. A show-cause notice dated 11-7-2002 was issued, directing the petitioner to show-cause as to why he shall not be blacklisted, in view of his refusal to accept the offer.

15. The justification pleaded by the respondents to forfeit the EMD is that, the petitioner failed to enter into agreement, though his tender was accepted. Therefore, it is to be seen, as to whether there was any lapse on the part of the petitioner. If the petitioner failed to enter into the agreement in response to the acceptance of his tender by the respondents, without there being any justification in law, the action of the respondents, cannot be found fault with. This, in turn, would depend on whether the offer of the petitioner made through his letter dated 4-1-2002, can be said to be alive, even after acceptance of the offer of L-1 by the respondents.

16. In the realm of contracts, an offer once made, can be accepted, by the offeree, at any point of time, as long as it is alive. An offer can be revoked at any time before it is accepted. Revocation of an offer is mostly viewed from the point of view of the offerer. Revocations can be express, or by necessary implications. Such implication, can however be culled out from facts or events, which may emanate either from the offerer or offeree. For example, where the offeree makes a counter offer, non-acceptance of the same by the offerer may be treated as a revocation by implication. Similarly, failure by the offeree to accept the offer within the stipulated time, or non-compliance with a condition, may be equally treated as a revocation by implication. Where the offeree accepts one of several offers, the rest can be implied to have been rejected, from his point of view and; in a way, revoked, from the point of the concerned offerers. For this purpose, law does not insist on existence of specific correspondence. It can be gathered from the surrounding circumstances.

17. The situation can also be analysed from the point of view of legal rights and their correlatives. (See Chapter VII of Salmond on Jurisprudence, revised by P.J. Fitzgerald, Twelfth Edition). Immunity is recognised as a kind of rights, on par with rights stricto sensu, liberty and power. Its correlative is disability. Their purport was aptly explained by Sir John Salmond as under:

"just as a power is a legal ability to change legal relations, so an immunity is an exemption from having a given legal relation changed by another..... Immunity is exemption from the power of another in the same way, as liberty (not), is exemption from the right of another. Immunity, in short, is no-liability.

The correlative of immunity is disability (otherwise called inability, or, more clearly though less elegantly, no-power). Disability is simply the absence of power."

18. With the express or implied revocation of an offer, the person, who made it, acquires "immunity", whereas the person to whom it was made, incurs "disability"; in the matter of acceptance of the offer.

19. In case of tenders, the offerers would be many, whereas the offeree is only one. All the offers through tenders are treated as alive and in force, till the agency, which floated the tenders, takes a decision. Once a particular tender is accepted by the agency, the other tenders stand rejected, or at least, not accepted. Thereby, a curtain stands drawn, as regards the validity of the remaining tenders or offers, and they cease to be alive or in force. The remaining tenderers cannot insist upon the tendering agency to consider or accept their tenders. Conversely, after the tendering agency accepts one of the tenders, it cannot keep the rest of them alive. The legal relationship of offerer and offeree are promissory and promisee, brought about through the tendering process between the tendering agency and tenderers, stands dissolved with the acceptance of one of the tenders. A similar situation exists in the present case.

20. It is ,not in dispute that the respondents have accepted the tender of L-1-tenderer, on considering the many tenders including that of the petitioner. In his counter-affidavits, the 4th respondent has maintained blissful silence about the acceptance of the tender of the L-1-tenderer. However, the record makes no secret of it. The minutes of the meeting of the 2nd respondent held on 16-1-2002 are placed before this Court. After discussing the matter at length, the 2nd respondent stated as under:

"In view of the above and in the light of the recommendations of Chief Engineer, Minor Irrigation, the members decided to accept the lowest tender of Sri P. Ranga Raju, at (-) 31.23% less than the ECV of Rs. 5,49,05,652/- priced with SSR 2000-2001, subject to the following observations."

21. This was followed by letter dated 8-2-2002 addressed by the 4th respondent. The brief of the letter reads as under:

"Your tender for the above work is accepted by C.O.T. on 28-1-2002 at (-)

31.23% less than the estimated amount. You are requested to attend this office on or before 20-2-2002 to enter into the agreement, duly furnishing the following."

22. This does not leave any doubt that out of several tenders that were received in response to the tender notice, the one of L-1 tender was accepted. Thereby, the other offers, including the one made by the petitioner stand dissolved. The fact that the L-1-tenderer did not comply with the conditions, does not clothe the respondents with any right to insist upon the petitioner to execute the work at the rates of L-1-tenderer, Once this legal position is clear, the consequential steps taken by the respondents fall to ground.

23. One of the justifications put forward by the respondents in support of the action is, that the petitioner has extended the validity of his EMD. It hardly makes any difference. Keeping the EMD alive is of no consequence, once the respondents have rejected the offer of the petitioner by implications, namely, by accepting the tender of the L-1-tenderer.

24. The matter can be examined from another angle. The petitioner made an offer through his letter dated 4-1-2002 to undertake the work at the rates quoted by L-1. This was not accepted. The petitioner addressed another letter dated 14-2-2002, revising his offer. He states that he is prepared to execute the work at the rate quoted by him, namely, 24.39% less than the ECV. The 4th respondent does not dispute the receipt of his letter. It is settled principle of law that it is always open to an offerer to revoke or modify his offer at any point of time before it was accepted. The respondents do not contend that they have accepted the offer of the petitioner made through his letter dated 4-1-2002, before they received the revised offer of the petitioner through his letter dated 14-2-2002. To put it in other words, by the time the 2nd respondent accepted the offer of the petitioner, on 24-5-2002, it stood revised through letter dated 14-2-2004. Once this is so, it was not open to the respondents to insist upon the petitioner to stand by his offer made through his letter dated 4-1-2002. Hence, there did not exist any basis in law, or on facts, for the respondents to forfeit the EMD of the petitioner.

25. The respondents have also issued a show-cause notice to the petitioner, directing him to show cause as to why he shall not be blacklisted. The validity of the show-cause notice cannot constitute the subject-matter of the writ petition. The petitioner has to submit his explanation and await orders, that may be passed thereon. If any order is passed adverse to him, he can work out his remedies.

26. Hence, the writ petition is partly allowed, setting aside the letter dated 11-6-2002 issued by the 4th respondent, forfeiting the EMD of the petitioner. He is directed to refund the EMD to the petitioner within two weeks from the date of receipt of a copy of this order. Non-compliance with the same would entail payment of interest at the rate of 12% from 8-2-2002, the date on which the

tender of L-1 was accepted. No order as to costs.