

(2008) 07 PAT CK 0210
In the Patna High Court
Case No : C.W.J.C. No. 4962 of 2008

M/s. Technocom

APPELLANT

Vs

Railway Board and Others

RESPONDENT

Date of Decision : 25-07-2008

Acts Referred:

Citation : (2008) 07 PAT CK 0210

Judgement

Navaniti Prasad Singh, J.—The petitioner had responded to a tender issued by the East Central Railway being Tender No. S&T/C/79/R with regard to panel interlocking at Mohammadpur, Kamtaul, Jogiara, Janakpur Road, Bajpatti and Parsauni (6 Stations). The approximate cost of the work after corrigendum was issued in this regard was estimated at about Rs. 7.66 crore with earnest money of about Rs. 5.33 lakh. Petitioner having the requisite qualification and experience obtained documents of tender and filed his tender as a composite tender in relation to all the six stations and the entire work. The rates quoted by the petitioner were above the estimate prepared by the railway and as such railway issued a letter to the petitioner being letter dated 2-2-2008 (Annexure 6) calling for a meeting on 5-2-2008 for rate negotiation. Petitioner pursuant to the aforesaid rate negotiation agreed to reduce the rates under various heads and duly communicated the same to the respondent clearly stating that in respect of the original tender i.e. the entire tender rates were being reduced as communicated. Then the petitioner was communicated by railway letter dated 9-2-2008 (Annexure 8) that railway had accepted the part of his tender. In the said letter the railway deleted the substantial quantity of work altering the very basic tender. It may be noted that as per petitioner's revised rate the value of the work was about Rs. 10 crore. On so called acceptance by Annexure 8 the value of the work was reduced to 4 crores by deletion of various items as mentioned in the said letter. Petitioner immediately protested and wrote to the railway that the petitioner had only agreed to reduction of rates pertaining to various type of work in the tender, which was a composite tender, petitioner had not agreed to offer of reduction of scope of work. If the scope of work had to be

reduced so drastically then the petitioner was not interested in the tender.

2. Railway, on non acceptance of the contract by the petitioner and thus a breach of the agreement, ordered by the impugned order, as contained in Annexure 2, for forfeiture of the earnest money.

3. Initially petitioner had challenged Annexure 2, which is dated 20th February, 2008 and Annexure 1 the subsequent tender issued for the same. The work had already been allotted to other, the petitioner now restricts his prayer only with regard to challenging the forfeiture of earnest money.

4. Mr. Sanjay Singh, learned counsel for the petitioner submits that once a tender was issued by the railway in relation to various works at six stations, it was a composite tender. Considering the total scope of work petitioner quoted its rates. Petitioner was called for rate negotiation at any point there is no communication that the scope of work was also likely to be reduced.

5. Petitioner considering the entire scope of work, agreed to reduce the rate. This, however, did not permit the railway to truncate the tender itself reducing the scope of work by over 60%. Petitioner had not made an offer for such a truncated work. He had negotiated for the price of the whole work and not part thereof. Thus learned counsel for the petitioner submits that there was no ad infinitum which is essential for formation of valid contract. The offer as made by the petitioner was not accepted as such by the respondent-railway. The offer as made by the railway subsequently tinkering the tender, the scope of work was not acceptable to the petitioner. Thus, there was no agreement as between the parties and that being so, petitioner was not entitled to enter into a contract and failure to do so the earnest money could not be forfeited.

6. Railway has appeared and filed a counter affidavit, rejoinder where to also filed.

7. Heard the parties and with their consent this writ application is being disposed of at this stage itself.

8. It is now established beyond doubt that a notice inviting tender is nothing but calling of an offer u/s 4 of the Contract Act. Tenders filed are nothing but offer made. Petitioner made his offer for the entire scope of work and quoted his rate. For the purpose of exclusive rate negotiation petitioner was called and considering the entire scope of work, petitioner agreed to reduce the rates. Thus, we find that considering the scope of work and the negotiation that followed, petitioner negotiated the rates. It was open to the railway to accept the rate or if they wanted to bifurcate the tender or withdraw substantial work from the tender to further call the petitioner for negotiation but they could not unilaterally tinker the offer as made by the petitioner and accept a part of it and reject another.

9. The only option to the railway was either to accept the entire offer i.e. the entire work with the rates of the date as offered by the petitioner or re-negotiate the matter but they themselves could not drastically cut the scope of work and force the same as an agreement on the head of the petitioner. This was clearly

impermissible. This in terms of Section 4 read with Section 7 of the Contract Act is not a valid acceptance. There being no valid acceptance by the railway, there is no question of holding petitioner to be resiling from the agreement. Petitioner has not resiled to complete the agreement provided. It was so accepted. Petitioner's refusal to sign the agreement and enter into an agreement was, if any, due to failure on part of the respondent-railway to accept the offer of the railway in entirety. A reservation or a trinket acceptance is not an acceptance in the eye of law. Thus there being no acceptance of offer of petitioner there cannot be violation of any agreement in this regard. If that be so, then the earnest money cannot be forfeited because the petitioner is not at fault. He cannot be forced to work against his terms and against his will. Thus, the letter, as contained in Annexure 2, dated 20-2-2008 communicating the decision forfeiting the earnest money cannot be sustained and is hereby quashed. The railway would be obliged to refund the earnest money forthwith. In the result, the writ application is allowed.