

(2014) 03 GAU CK 0042

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 5481 of 2007

Raju Jyrwa

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 13-03-2014

Acts Referred:

Contract Act, 1872 — Section 5

Citation : AIR 2014 Guw 163

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : A. Sarma and C. Talukdar, Advocate for the Appellant; P.K. Roy and S.K. Chakraborty, Advocate for the Respondent

Judgement

Hrishikesh Roy, J.—Heard Mr. A. Sarma, the learned Counsel appearing for the petitioner. The respondents 2 to 7 are represented by Mr. P.K. Roy, the Standing Counsel for the Food Corporation of India (FCI). The petitioner responded to the tender notice dated 21.6.2007 (Annexure-1) of the FCI for the carriage contract at item No. 2 wherein the technical bids were scheduled to be opened on 18.7.2007. But after the technical bids were opened on the scheduled date, the validity of the tender period was extended by the FCI for 30 days i.e. until 2.10.2007. Before the price bids could be opened, the petitioner through the letter dated 6.8.2007 (Annexure-3), wrote for withdrawal of his tender by citing the credit difficulties with his bank and he requested for withdrawal of his earnest money before disclosure of the financial bids of the eligible tenderers.

2. But through the impugned letter dated 5.9.2007 (Annexure-5) the tenderer was considered to have resiled from the contract and construing it to be a breach under Clause C. 4 of the General Conditions of Contract, the earnest money of Rs. 6,49,000/- furnished by the petitioner was ordered to be forfeited by the FCI.

3. Assailing the legality of forfeiture of his earnest money, the petitioner contends that he withdrew from the process before opening of financial bids or in other words before the acceptor took a decision on the contract and accordingly

it is argued that it was open for the tenderer to withdraw from the contract at that stage and this should not lead to forfeiture of the earnest money.

4. Projecting that the contract in question was awarded eventually to the L1 bidder, advocate Mr. A. Sarma submits that the FCI did not suffer any loss through petitioner's withdrawal as his bid was higher than the L1 bid, at which the carriage contract was eventually awarded to the L1 contractor.

5. Referring to Section 5 of the Indian Contract Act, 1872 (hereinafter refer to as the Contract Act), the learned Counsel submits that before communication of acceptance, an offer may be revoked against the proposer and projecting the contract to be incomplete without acceptance, the petitioner submits that the forfeiture of the earnest money in the circumstances was unjustified.

6. Representing the respondents, Mr. P.K. Roy, the Standing Counsel, FCI however submits that the petitioner by withdrawing his tender disabled the acceptor to consider his tender and accordingly the respondents contend that forfeiture of the earnest money was justified.

7. According to the respondents, earnest money is required to be furnished by the participating tenderers in order to show their capability and seriousness and since the petitioner gave his tender without financial backing of his bank, it is argued that the petitioner was a non-serious tenderer and therefore his earnest money on withdrawal of the tender was rightfully forfeited by the tendering authority.

8. In order to determine whether the forfeiture of the earnest money was lawfully ordered against the petitioner, it will be necessary to take note of the stage at which the contractor withdrew his tender. Since the validity of the contract period was extended until 2.10.2007 and price bids were not yet opened, the withdrawal of the tender on 6.8.2007 was at a stage when the financial bids were still in sealed cover and the acceptor was yet to take a decision on awarding the contract. Eventually when the financial bids were opened, it turned out that the petitioner's bid was not the lowest and the contract was awarded to L1 bidder i.e. M/s. Ranjit Kr. Saha & Sons. Therefore withdrawal of the tender at a stage when financial bids were in sealed cover, did not result in any loss to the tendering authority i.e. FCI.

9. That apart, the petitioner withdrew his tender before it could be acted upon by the respondents and in fact in contract transaction, the acceptance was not complete at the stage of withdrawal of the tender by the petitioner. Therefore revocation of the tender at that stage under Section 5 of the Contract Act was permissible for a tenderer.

10. Since forfeiture of the earnest money was ordered by invoking Clause C. 4 of the General Conditions of Contract, the judgment in Food Corporation of India and Another Vs. Sujit Roy, will bear consideration as in that case, the Division Bench was examining the legality of a forfeiture by invoking same Clause C. 4 of

the General Conditions of Contract. After considering the implication of Clause C. 4, the Division Bench declared that the authority can forfeit the earnest money of the tenderer only if the withdrawal has resulted in loss to the acceptor. Bearing in mind the ratio of this case, since the petitioner withdrew from the tender process at a stage when the financial bids were not disclosed the same was yet to be acted upon by the respondents and therefore, without causing any loss or prejudice to anyone, the tenderer could legally withdraw his bid.

11. That apart, the carriage contract was eventually awarded to the L1 bidder and assuming that the petitioner would have been in the fray till the end, his earnest money will have to be returned as an unsuccessful tenderer, under Clause C. 4 of the General Conditions of Contract.

12. In the above circumstances and having regard to the ratio of the decision in *Sujit Roy (supra)*, I hold that forfeiture of the earnest money by the FCI was unjustified. Consequently the respondents are directed to refund the earnest money amounting to Rs. 6,49,000/- to the petitioner within 8 weeks from today. The case accordingly stands allowed with the above direction without any order on cost.