
(2008) 05 PAT CK 0043
In the Patna High Court
Case No : CWJC No. 5523 of 2008

Rawatsons Engineers (P) Ltd.

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-05-2008

Acts Referred:

Contract Act, 1872 — Section 2, 7

Citation : (2008) 56 BLJR 2648 : (2008) 3 PLJR 83

Hon'ble Judges : Navaniti Prasad Singh, J

Bench : Single Bench

Advocate : Rajiv Kumar Verma and Rajneesh, for the Appellant; Anil Kumar Sinha, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—With the consent of the parties this Writ application is being disposed of at the stage of admission itself as counter affidavit has been filed on behalf of the concerned Railway and rejoinder thereto filed. Pleadings are completed.

2. Heard the parties.

3. The challenge in this Writ application is to the communication dated 24.3.2008 of the East Central Railway under the signature of Senior Divisional Engineer (2), East Railway, Danapur directing the petitioner to abide by the instructions issued to commence the work, deposit performance guarantee and execute the agreement within seven days, failing which action as provided under Clause 62 of the General Conditions of Contract, 2001, to terminate the contract and get it completed and other actions would be taken against the petitioner. The other actions which are contemplated are forfeitures of earnest money and other punitive action. This communication is Annexure 1 to the Writ application.

4. Mr. Rajiv Kumar Verma, learned Senior counsel appearing in support of the Writ petition has raised a very short and concised point that the aforesaid

communication, as contained in Annexure 1, is wholly without jurisdiction, unenforceable and illegal because notwithstanding the alleged letter of acceptance issued by the Railway dated 6.3.2008 (Annexure 4) there is no concluded contract as between the parties and in absence thereof the petitioner is not bound by any agreement nor Clause 62 of the General Conditions of Contract, 2001, can apply.

5. It appears that East Central Railway Danapur Division, issued on 14.9.2007 a notice inviting tender (Annexure 2) in relation to extension of heavy repair bay etc. for main line EMU shed at Jhajha. The approximate cost of the total work involved was assessed at about Rs. 3.26 crores and earnest money that was required to be deposited with the tender was Rs. 6,52,870/-. The period within which the work had to be executed by nine months and the date of opening tender was 25.10.2007.

6. The petitioner, who were reputed contractor with experience and financial capability having worked for Railway earlier intended to respond to the NIT and as such down loaded the tender form, which was available on the Railway website. The Writ petitioner then filed their tender paper along with their letter dated 16.10.07 (Annexure 3) along with earnest money of Rs. 6,52,870/-. In the said letter (Annexure 3) covering their tender in para 9 thereof they stated thus:

Sales Tax kindly note that all the fabricated members fabricated and sent from West Bengal shall fall under Central Sales and there shall be no deduction of any provincial Sales Tax from out components.

7. The Railway having received the tender of the petitioner communicated their alleged acceptance letter through letter dated 6.3.2008 (Annexure 4) but in the said communication with regard to Sales Tax they stated thus:

The payment is subject to deduction of Income Tax with surcharge as applicable and works contract, Sale Tax (Bihar) as per extent rule and submission of current and valid STCC.

Your condition regarding Sales Tax has been accepted by the Railway as under-

Sl. No.

Tenderer's Comments/conditions

Remarks of Railway

9

Sales Tax : Kindly note that all the fabricated members fabricated and sent from West Bengal shall fall under Central Sales and there shall be no deduction of any provincial sales tax from our components.

As per tender, the worl(sic) be done at JAJ. Hence (sic) sales tax is appl(sic) However, this will (sic) regulated as per sta(sic) provisions.

8. The petitioner received the said communication of alleged acceptance of their offer, as contained in Railway letter dated 6.3.08 (Annexure -4) on 11.3.2008 and immediately by their letter dated 20.3.2008 (Annexure 5) they responded clearly stating thus:

We are in receipt of your letter No. W-7/107/Misc/Open/KEU/07-08, dt. 06.03.2008 received on 11.3.2008 purported to be acceptance of our offer against the above tender.

Kindly note that you have not accepted the special condition quoted by us in respect of Sales Tax. This is a counter offer and the same is not acceptable to us.

In view of the above your letter of acceptance is returned herewith.

9. It is in response to this returning of letter of acceptance by the petitioner that the impugned communication dated 24.3.2008 (Annexure 1) was issued by the Railway.

10. The question is as to whether these correspondences, as referred to above, result in any agreement leading to a concluded contract binding the parties, the non- performance whereof by the petitioner could entitle railway to cancel the contract followed by various punitive actions including forfeiture of earnest money.

11. Now, the legal position is well established that a notice inviting tender is nothing but soliciting offer. A tender filed in response to the notice inviting tender is an offer or a proposal within the meaning of Section 2(a) of the Contract Act. A proposal by itself does not create any liability so far as the proposer is concerned unless it is accepted. Once acceptance to the proposal as such is communicated to the proposer it becomes an agreement. An agreement enforceable by law is a contract.

12. Section 7 of the Contract Act clearly lays down that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. If acceptance is not absolute in terms of proposal and is qualified or is at variance with the proposal then it is no acceptance in the eye of law and the proposal does not culminate into a binding promise, which is condition precedent for an agreement and a binding contract, binding the parties to the agreement.

13. In my view, the rule in the first Sub-section of Section 7 of the Contract Act is based on the principle that unless the parties have consensus ad idem, are of one mind, there cannot be an agreement between them. The rule is in itself obviously necessary, for the words of acceptance which do not correspond to the proposal actually made are not really an acceptance of anything, and, therefore, can amount to nothing more than a new proposal, or, as it is frequently called a counter offer. These, in my view, are well established principle of Law of Contract. Keeping in view of these principles of law governing contract, we must examine the fact of the present.

14. The facts clearly are that pursuant to notice inviting tender issued by the Railway, the petitioner responded and thus the petitioner made offer by its letter dated 16.10.2007 (Annexure 3). In the said letter it specifically mentioned the condition in relation to liability of Sales Tax, as quoted above. It clearly stated that the transaction in relation to the fabrication of various materials by the petitioner at their works in the State of West Bengal for being appropriated to the contract at Jhajha in the State of Bihar would be an inter State transaction and the petitioner would be liable to sales tax as under central sales tax and they would not be liable in to any provincial (Bihar) sales tax. Thus, their offer was based on Central Sales Tax applicability and not Bihar Sales Tax applicability. This was clear and unambiguous offer by the petitioner. This was responded to by the alleged letter of acceptance of the railway dated 6.3.08 (Annexure 4) wherein with regard to sales tax they did not accept this stipulation of the offer of the petitioner rather responded in the manner indicated and quoted above stipulating that as the work was to be done at Jhajha as such State Sales Tax (Bihar) is applicable. In their view that would be the result as per statutory provision. This variance as between the offer of the petitioner and the acceptance of the railway is brought about very clearly in the letter of the railway itself and which has been quoted above as a part of Annexure 4.

15. In my view, Mr. Verma, learned Senior counsel appearing in support of the Writ application is correct in stating that though this letter (Annexure 4) of the railway dated 6.3.08 purports to be a letter of acceptance in response to the offer of the petitioner, it is, in fact, no acceptance in the eye of law. In my view, in terms of the first part of Section 7 of the Contract Act and the rule of law envisaged therein, the acceptance has to be absolute and unqualified for converting the offer into promise and thus by act of acceptance resulting in an agreements and the agreements then being executed resulting in a contract.

16. In the present case it would be seen that the offer of the petitioner was that they would admit liability only under Central Sales Tax and not any sales tax under Bihar Law. This offer of the petitioner was unambiguous and in simple words it was open to the railway "to take it (acceptance)" or "to leave/reject it (reject the offer)". The railway in turn did not accepted as they stipulated that Bihar Sales Tax would apply contrary to the offer of the petitioner. This, in my view, was not an absolute acceptance nor unqualified acceptance as stated above. As is commonly referred it was virtually a counter offer by the railway which the railway has wrongly treated as its acceptance of the offer.

17. In fairness to learned Counsel for the railway I must note his submissions. He submitted that once the petitioner filed his tender he bound himself to the terms of the tender notice and thus was bound by contractual obligation. He then submitted that railway, in fact, did not make any counter offer. They only stated the law applicable. In my view, these are arguments in desperation noted only to be rejected. Firstly, as noted above, filing of tender is merely making an offer and unless the offer is validly and legally accepted, it is not binding as a promise.

There being no valid acceptance, as held above, it is not binding on the petitioner.

18. With regard to second submission, the offer of petitioner was clear notwithstanding any law. It was for railway to either accept it or reject it but they could not modify the same and treat the modified part of the offer as a part of their acceptance. It is clearly contrary to the first Sub-section of Section 7 of the Contract Act and hence it is fit to be rejected.

19. In law and in view of the rule, as laid down in the first Sub-section of Section 7 of the Contract Act, there is no acceptance by the railway and there being no acceptance, the parties cannot be said to be in consensus ad idem.

20. That being the position there is no agreement as between the parties and once there is no agreement between the parties there is no concluded contract binding the parties. Once there is no concluded agreement then no party is bound by any of the terms and conditions of the agreement, much less, the General Conditions of Contract as has been sought to be enforced by the railway.

21. The letter dated 6.3.08 (Annexure 4 of the railway) is not and in law cannot be treated as railway's letter of acceptance in law. Once this position is clear in law on the facts as noticed above, then automatically the impugned communication dated 24.3.08 (Annexure 1) loses all its validity. Once there is no contract there is no question of terminating the contract or getting the balance work done, for no work was undertaken to be done nor Clause 62 of the General Conditions of Contract, 2001 at all can be invoked by the railway. There cannot be any breach of contract when no contract exists and the petitioner is under no obligation to either start the work or deposit the performance guarantee or to execute the agreement, there being no valid legal acceptance by the railway, as noted above. The consequence is that Annexure 1 is totally misconceived and is wholly without jurisdiction and is liable to be quashed and is quashed as such. The consequence is that there being no acceptance and there being no agreement amongst the parties notwithstanding valid offer made by the petitioner, for lack of valid acceptance by the railway, the earnest money as deposited by the petitioner has now to be refunded by the railway and the railway cannot take any punitive action against the petitioner for the alleged breach of contractual obligation as no contract in law exists.

22. The writ application thus stands allowed in terms stated above.