
(2007) 03 MP CK 0091
In the Madhya Pradesh High Court
Case No : Writ Petition No. 4671 of 2004

Shiv Singh

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 16-03-2007

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : (2007) 4 MPLJ 165

Hon'ble Judges : Abhay M. Naik, J

Bench : Single Bench

Advocate : Rajendra Tiwari, with T.K. Khadka, for the Appellant; Rajneesh Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Abhay M. Naik, J.

In response to N.I.T. for earthwork in embankment and cutting including side drains and ancillary work and construction of 23 Nos. minor bridges between Ch. 45146 to 56850 m. in connection with Udiapura Chhatarpur section of Lalitpur-Khajuraho New B.G. Rail Line, the petitioner submitted his tender form along with a security amount of Rs. 50 thousand in the office of the respondent No. 2 which was found to be the lowest. Petitioner was called for negotiations vide letter dated 17-10-2003 (Annexure/R-2). Petitioner appeared for negotiation on 28-10-2003 and put his signatures on the offer-sheet whereby the rates were reduced by 1%. Respondents informed the petitioner about acceptance of his tender vide letter dated 10-12-2003 (Annexure/P-4) and asked the petitioner to execute the agreement after depositing the security amount. Thereafter, vide letter dated 7-4-2004 (Annexure/P-11) the petitioner was again asked to execute the agreement within 48 hours. It was also informed that in case of failure, the respondents would be free to cancel the contract in terms of Clause 62 of General Conditions of Contract and the work will be got done at the risk and cost of the petitioner (Annexure/P-11). Thereafter, the respondents issued the

impugned order dated 15-4-2004 (Annexure/P 14) cancelling thereby the tender of the petitioner and further forfeiting the earnest money deposited by the petitioner. It was also observed in Annexure/P-14 that the work would be got done on the basis of risk and cost of the petitioner.

Case of the petitioner is that the entire terms and conditions of the tender were not accepted by him and he had not put his signature about acceptance. This was also taken note of by the Dy. Chief Engineer (Construction) Jhansi. Petitioner vide his letter dated 6-8-2003 (Annexure/P-2) issued under Postal Certificate (Annexure/P-3) informed the respondent that the petitioner has not put his signature on the terms and conditions mentioned in the tender form as the same were not acceptable to him. Despite it, the petitioner was informed vide Annexure/P-4 that his tender was accepted and he was required to execute an agreement after depositing the security amount. Again vide letter dated 17-12-2003 (Annexure/P-5) issued under Postal Certificate (Annexure/P-6), the petitioner informed respondent No. 2 that he had not accepted certain terms and conditions as was already informed vide Annexure/P-2. The petitioner vide Annexure/P-5 informed that unless the terms and conditions are amended, the petitioner was not ready and willing to sign the agreement or to execute the work. The respondents again ignoring Annexure/P-5 asked the petitioner vide Annexure/P-7 dated 19-3-2004 and P-8 dated 22-3-2004 to execute the agreement without amending the terms and conditions. Petitioner did not accept it, since, the terms and conditions of the tender were not amended. Thereafter, the petitioner was asked to execute the agreement within 48 hours vide Annexure/P-11 dated 7-4-2004. In response, the petitioner wrote a letter dated 9-4-2004 (Annexure/P-12) informing thereby that while submitting the tender he has not accepted certain terms and conditions involving financial repercussions. Ultimately, the respondents vide Annexure/P-14 cancelled the tender of the petitioner and forfeited the earnest money. A representation dated 22-4-2004 was submitted which was not decided therefore, the petitioner submitted Writ Petition No. 1002/2004 at Gwalior Bench which was dismissed for want of jurisdiction. Hence, this petition. During pendency, the petitioner received a letter dated 22-11-2004 (Annexure/P-17) requiring the petitioner to deposit Rs. 42,13,862 as the contract was rescinded and the work was awarded to new agency at the risk and cost of the petitioner.

Petitioner has challenged Annexure/P-14 and P-17 mainly on the ground that the terms and conditions mentioned in the N.I.T. were not binding on the petitioner since, the same were not accepted by him. The tender was submitted by the petitioner without accepting the entire terms and conditions which is evident from the absence of his signature. The petitioner had not put his signature on each and every page of the tender form and in the absence of signature on the terms and conditions, the tender could not have been validly accepted. Moreover, the petitioner had sent repeated reminders that certain conditions were not accepted by him. Therefore, the petitioner could not be compelled to execute the agreement contrary to his objection to certain terms and conditions.

Consequently, the action of forfeiture as well as assigning the subject work to other agency at the risk and cost of the petitioner is totally illegal and arbitrary.

Respondents submitted joint return refuting thereby the stand of the petitioner. In response to the subject N.I.T. about 12 tenders were received in relation to the work in Chhatarpur section of Lalitpur-Khajuraho New B.G. Rail Line. Tender of the petitioner was found to be the lowest and the petitioner was called for negotiations vide Annexure/R-2 dated 17-10-2003. Petitioner participated in negotiations on 28-10-2003 and reduced the rates by 1%. The details of the negotiation are contained in Annexure/R-3 which has been also signed by the petitioner. Offer-sheets and accompanying documents as contained in Annexure/R-3 and R-4 were duly signed by the petitioner in token of his acceptance. As regards the letters Annexure/P-2 and P-5, it has been stated that these letters were concocted letters. They were neither issued by the petitioner nor received by the respondents. It has been emphatically stated that the petitioner would not have participated in the negotiation contrary to his stand taken vide Annexure/P-2. On the contrary, the petitioner did participate in the negotiation and put his signature on various papers contained in Annexure/R-3 and R-4 in token of acceptance of the terms and conditions of the tender. The petitioner was given various opportunities to execute the agreement and perform his work. On account of failure on his part, the contract has been rightly rescinded and the work has been awarded to another agency at the risk and cost of the petitioner. The tender of the petitioner having been accepted and the letter of acceptance having been rightly and timely issued, the earnest money has been rightly forfeited. The petition is accordingly, liable to dismissal. This apart, it has been specifically pleaded that the petitioner has made suppression of material facts inasmuch as factum of negotiation and signing of offer-sheets and other documents has been suppressed deliberately. This being so, the petition is liable to be dismissed.

Later on, parties submitted rejoinder and reply to rejoinder along with certain documents which have also been taken into consideration.

Shri Rajneesh Gupta, learned counsel for respondents raised a preliminary objection that in a commercial contractual matter like the present one the writ petition is not maintainable. It involves disputed questions of facts which cannot be resolved in writ jurisdiction. I am not impressed by this submission because the Apex Court has recently in the case of Noble Resources Ltd. vs. State of Orissa and anr., AIR 2006 SCW 5408 has refused to accept the contention that Judicial review in contractual matter only because there exists a disputed question of fact or an alternative remedy is available, the same by itself would not be sufficient for High Court to decline its jurisdiction.

Shri Rajendra Tiwari, learned senior counsel submitted that as per Clause 5 contained in Annexure/P-1 all pages of tender were to be signed with neatly scored out corrections with initials. Again, according to Clause-ix at page No. 21 the tender documents were required to be duly signed and completed.

This submission will not detain this Court for a longer time because, firstly, the petitioner having himself submitted the tender cannot legally take advantage of his own wrong on the ground of absence of signature. It is not the case of the petitioner that the tender was not submitted by him. It is a trite law that a tenderer cannot ask as of right to make a change in the terms and conditions of the tender. If the terms and conditions in their entirety were not acceptable to the petitioner, he could have refrained from submitting the tender itself. If, he was so determined not to accept certain terms and conditions he could have expressly mentioned about the non-acceptance of such terms and conditions in specific. This having not been done, it cannot be said that the tender of the petitioner for want of his signatures at certain places could not have been accepted. Secondly, the petitioner was asked to participate in negotiations vide Annexure/R-2 dated 17-10-2003. He could have at this juncture insisted for amending terms and conditions before participating in the process of negotiation. Instead, he not only participated in the negotiation, but actively submitted a form of declaration (Annexure/R-3) and took part in the negotiation proceedings by reducing the rate and actively putting his signatures on the offer-sheets and other accompanying documents contained in Annexure/R-3 and R-4. In Annexure/R-3 as well as R-4, it has been clearly mentioned that the tenderer is aware that the instructions to the tenderers, Special General Conditions of Contract and appendices to the original tender would remain valid and binding on him. If, any of the terms and conditions of the tender were not acceptable to the petitioner, he would have got Clause 3 contained in Annexure/R-3 and R-4 scored out and would have got amended the terms and conditions not acceptable to him.

From the averments contained in the writ petition, it is clear that the petitioner did not make mention in the petition about the negotiation proceedings and the documentation made therein. The negotiation proceedings are obviously very important and the participation of the petitioner in the said proceedings has an important bearing on the issue involved in the writ petition. This has been suppressed by the petitioner, though, he was well aware of the same. The petitioner failed to provide any explanation for such suppression and is accordingly, held guilty of suppressio vary.

As regards the letters contained in Annexure/P-2 and P-5, it may be seen that they are stated to have been issued under Postal Certificates contained in Annexure/P-3 and P-6 respectively. The respondents have disputed the documents Annexure/P-2, P-3, P-5 and P-6 as concocted.

Shri Rajendra Tiwari, learned senior counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of H.V. Jayaram Vs. The Industrial Credit and Investment Corporation of India Ltd. and others, to contend that the petitioner was under no obligation to send Annexure/P-2 and P-5 by registered post. He rightly sent them under postal certificates and the presumption u/s 114 of the Indian Evidence Act about receipt of them is available to the petitioner. In the present case, the petitioner is stated to have issued Annexure/P-2 and P-5.

Receipt of these letters have been denied by the respondents on affidavit. Hon'ble Supreme Court in the case of Gadakh Yashwantrao Kankarrao Vs. E.V. alias Balasaheb Vikhe Patil and Others, has held that the certificate of posting is easy to procure and does not inspire confidence. The petitioner in order to ensure its delivery could have sent the letters by registered post. Moreover, the petitioner while participating in the negotiations on 28-10-2003 neither submitted the copy of Annexure/P-2 nor even referred to it. In the light of his this conduct, this Court finds it difficult to accept the averments that the letters contained in Annexure P-2 and P-5 were in fact sent to the respondents under Postal Certificates and they were received at the end of respondents.

This Court further observes that the Postal Certificate of the said nature do not afford a proof about delivery of letters. They, at the most may be treated as proof of dispatch. This apart the respondents have made available the inward register wherein the alleged letters (contained in Annexure/P-2 and P-5) have not been entered at all. In the absence of any entry about the alleged letters and further in the absence of proof about receipt of such letters at the end of respondents, the respondents are not found to be in receipt of the same and the petitioner cannot derive any benefit from Annexure/P-2, P-3, P-5 and P-6.

Shri Rajendra Tiwari, learned senior counsel relied upon Dresser Rand S.A. Vs. BINDAL Agro Chem Ltd. and K.G. Khosla Compressors Ltd., , Sultan Sadik Vs. Sanjay Raj Subba and Others, and Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others, to contend that there was no concluded contract between the petitioner and respondents since, the petitioner did not accept all the terms and conditions contained in the tender form. This Court in the preceding paragraphs has already found that there was no specific non-acceptance of any of terms and conditions of the tender form and the letters with postal certificates contained in Annexure/P-2, P-3, P-5 and P-6 are of no assistance to the petitioner. Since, the tender form was admittedly submitted by the petitioner and it was never withdrawn by the petitioner at all before its acceptance vide Annexure/P-4, it not open for the petitioner to contend that there was no concluded contract between the parties. Moreover, it was clearly stipulated in the tender form that until a formal agreement is prepared and executed the acceptance of tender shall constitute a binding contract. In view of this it cannot be said that there did not exist a contract between the petitioner and respondents so as to empower the respondents to cancel the same in exercise of the powers conferred by virtue of Clause 62.

As regards the absence of execution of the agreement, it may be seen that the tender form clearly stipulates that until a formal agreement is prepared and executed, the acceptance of tender shall constitute a binding contract. Admittedly, the petitioner even on account of alleged non-acceptability of certain terms and conditions of the tender has not chosen to withdraw the tender at any point of time. On the contrary, he participated in the negotiation proceedings on 28 10-2003 and put his signatures as a token of acceptance. Thereafter, a letter

of acceptance dated 10-12-2003 (Annexure/P-4) was issued by the respondents which was received by the petitioner. Thus, the petitioner was bound by the terms and Conditions including Clause No. 62 which empowers the respondents to determine the contract owing to default of the petitioner. Thus, the petitioner has failed to establish that there is an illegality or arbitrariness in rescission of contract as well as in forfeiture of earnest money. Clause 62 clearly empowers the respondents to forfeit the whole or such portion of the security deposit as it may consider fit or to recover from the contractor as a cost of carrying out the work at the risk and cost of defaulting party.

In the result, there is no substance in the writ petition and the same is hereby dismissed. No order as to costs.