

(2009) 03 DEL CK 0096

In the Delhi High Court

Case No : Writ Petition (Civil) No. 8030 of 2008

S.P. Singla Constructions Pvt. Ltd. and Mr. S.P. Singla
Managing Director

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-03-2009

Acts Referred:

Citation : (2011) 177 DLT 412

Hon'ble Judges : Siddharth Mridul, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : P.H. Parekh, Ajay Kumar Jha, Arjun Garg, Vishal Prasad and Pallavi Sharma, for the Appellant; Geetanjali Mohan, for Union of India, A.K. De and Rajesh Dwivedi, for the Respondent

Final Decision : Dismissed

Judgement

Madan B. Lokur, J.—Sometime in November, 2007 Respondents No. 1 to 4 (East Central Railways) issued a tender bearing No. 116 of 2007-08 in a two packet system. The date of opening the tender was 21st November, 2007 and the description of the work was "Construction of foundation and sub-structure of four additional wells (P27 to P30) on north end and both abutments on pile foundation in connection with construction of Rail cum Road Bridge at Munger".

2. The Petitioners (Singla Constructions) responded to the tender by putting in its bid by a letter dated 21st November, 2007. Along with the letter, Singla Constructions forwarded a demand draft of Rs. 25,000/- towards tender fee and made an earnest money deposit of Rs. 18,73,830/-.

3. After processing the bid documents East Central Railways issued a letter dated 25th April, 2008 to Singla Constructions stating that its offer for the tendered work was accepted at a cost of Rs. 39,43,56,407.85. The letter dated 25th April, 2008 further stated that the acceptance of Singla Constructions' offer is subject to the following stipulations/conditions:

1. The work shall have to be executed as per terms and conditions laid down in the tender document.
2. The work shall have to be completed in all respect within 18 (Eighteen) months from the date of issue of this letter of acceptance i.e. 24/10/2009 in terms of Clause 41 of Chapter-III (Condition of tender and instruction to tenderers).
3. While every care has been taken to fully incorporate the decision of the accepting authority regarding acceptance of your offer. Railway Administration reserves the rights to correct the inadvertent mistakes which may have occurred in communication of the accepted rates and other terms and conditions at the time of signing formal agreement between the contractor and the Railway Administration.
4. You are requested to contact Dy. CE/C/IGB/Munger for further instructions in connection with the above and also start the work within 15 days from the date of issue of this letter of acceptance of the tender failing which full value of earnest money will be forfeited & contract terminated in terms of Clause 3 of Chapter-IV "Special conditions of the contract (General)".
5. You are requested to attend this office within 15 days from the date of receipt of this letter for execution of agreement alongwith performance guarantee in the form of an irrevocable bank guarantee amounting to 5% of the contract value i.e. Rs. 1,97,17,850/- (Rupees one crore ninety seven lakh seventeen thousand eight hundred fifty only).
6. This letter of acceptance will form a binding contract between you and the Railway Administration till the formal agreement is executed and signed after which this will merge into the formal agreement.
4. There was no response from Singla Constructions to the letter sent by East Central Railways on 25th April, 2008 with the result that a reminder dated 16th May, 2008 was sent informing Singla Constructions that neither the work had been started nor the bank guarantee for the execution of the contract agreement had been submitted. Singla Constructions was informed that further inaction would be taken as a disregard of the instructions given in the Special Conditions of Contract and necessary action would be taken. Even this letter met with no response from Singla Constructions with the result that a further reminder was sent by East Central Railways on 6th June, 2008.
5. Eventually, since it appeared that Singla Constructions was not taking adequate steps to further proceed in the execution of the contract, a notice dated 9th June, 2008 was sent by East Central Railways to Singla Constructions in which it was reminded that the work had not yet commenced, the bank guarantee had not yet been submitted nor had the agreement been executed. Accordingly, Singla Constructions was advised that if the agreement were not executed within seven days, the earnest money deposited would be forfeited and

the contract terminated in terms of the tender conditions. Singla Constructions continued to maintain silence and so East Central Railways sent a formal show cause notice dated 14th June, 2008 to Singla Constructions in terms of Clause 62 of the General Conditions of Contract to:

(i) Immediately start the work.

(ii) Submit the requisite bank guarantee.

(iii) Execute the agreement. failing which action would be taken to terminate the contract and complete the work at the risk and cost of Singla Constructions.

6. The show cause notice sent by East Central Railways evoked a response from Singla Constructions who sent a letter dated 17th June, 2008. In that letter, it was stated that the letter of acceptance sent by East Central Railways on 25th April, 2008 purportedly awarding the contract to Singla Constructions was actually hedged in with conditions and reservations which were in the nature of an unacceptable counter offer. It was stated that the acceptance was not absolute and unqualified. It was also stated that "the turn of events resting with continuing abnormal run away rise in prices" resulted in a fundamentally different situation making it impossible for Singla Constructions to reconcile with the conditions of acceptance and, therefore, the tender stands revoked u/s 6 of the Contract Act having not received absolute and unqualified acceptance within the validity period and due to the turn of events. Singla Constructions requested for a refund of the earnest money at an early date.

7. On 20th/23rd June, 2008 East Central Railways informed Singla Constructions that no new conditions or reservations had been incorporated in the letter of acceptance and the letter dated 25th April, 2008 could not be interpreted as a counter offer. It was also mentioned that Singla Constructions had not specified any condition or reservation mentioned in the letter of acceptance dated 25th April, 2008 which could be called a counter offer. Another opportunity was therefore given to Singla Constructions to submit a bank guarantee and execute the formal agreement.

8. Singla Constructions responded to East Central Railways by a letter dated 23rd June, 2008 that reliance on Clause 62 of the General Conditions of Contract was contrary to the Conditions of Tender and Instructions to Tenderers and it was also not correct to say that the letter of acceptance was absolute and unqualified. East Central Railways was advised to take corrective action.

9. There were a few further letters exchanged between Singla Constructions and East Central Railways and eventually on 5th July, 2008 East Central Railways rescinded the contract in terms of Clause 62 of the General Conditions of Contract and informed Singla Constructions that the work would be carried out at its risk and cost.

10. On 16th July, 2008 and 6th August, 2008, Singla Constructions wrote to East Central Railways outlining its grievance and making it clear that what was

essentially objected to was condition No. 3 in the letter of acceptance dated 25th April, 2008 which is once again reproduced for ready reference: 3. While every care has been taken to fully incorporate the decision of the accepting authority regarding acceptance of your offer. Railway Administration reserves the rights to correct the inadvertent mistakes which may have occurred in communication of the accepted rates and other terms and conditions at the time of signing formal agreement between the contractor and the Railway Administration.

Learned Counsel for the Petitioner during the course of arguments, emphasized this objection before us.

11. Be that as it may, since Tender No. 116 of 2007-08 was cancelled as a result of the developments mentioned above, East Central Railways invited another tender bearing No. 49 of 2008-09 in which the date of opening was given as 8th August, 2008.

12. The second tender was not proceeded with by East Central Railways for reasons which are not germane. Thereafter, a third tender bearing No. 96 of 2008-09 was put out by East Central Railways with the closing date as 12th November, 2008.

13. Singla Constructions apprehended that in view of the events that had transpired with regard to the first and second tender, it might not be considered for the award of the third tender. Under these circumstances, Singla Constructions preferred the present writ petition in which it was prayed, inter alia, that no contract was entered into between Singla Constructions and East Central Railways by virtue of the letter of acceptance dated 25th April, 2008 and that Singla Constructions was in fact entitled to a refund of the earnest money deposited by it in respect of the first tender bearing No. 116 of 2007-08. It was also prayed that no action could be taken against Singla Constructions debarring it from responding to tenders floated by East Central Railways.

14. East Central Railways filed a counter affidavit reiterating its view that the offer given by Singla Constructions was unconditionally and absolutely accepted by letter dated 25th April, 2008. It was stated that there was no change in the terms and conditions as earlier indicated and all that had been done was to ensure that by virtue of stipulation/ condition No. 3 mentioned in the letter of 25th April, 2008 any inadvertent mistake that might occur in communication of the accepted rates and other terms and conditions at the time of signing the formal agreement could be corrected. It was submitted that this was really to take care of any inadvertent typos and by no stretch of imagination could this be interpreted to mean that East Central Railways was reserving a right to ride rough shod over the terms and conditions of the tender enquiry. It was further submitted that since Singla Constructions had backed out of the contract, it could not participate in the second and third tenders for executing the balance work. This was in terms of Clause 6(d) of Chapter II of the Special Tender Conditions and the forfeiture of earnest money was also permissible in terms of the tender

conditions. As far as the third tender bearing No. 96 of 2008-09 was concerned, since Singla Constructions was not the highest bidder, the contract was awarded to some other party. Before us, no grievance was made by Singla Constructions in this regard.

15. At this stage, we may note that during the hearing, the controversy before us had considerably narrowed down as recorded in our order dated 18th February, 2009. It was noted that Singla Constructions had not challenged the award of the third tender to Respondent No. 5, that is, M/s Arvind Techno Engineers Pvt. Ltd. and, therefore, there was no need for us to dwell on this aspect of the matter any further. It was also noted that learned Counsel for East Central Railways stated that Singla Constructions had not been debarred from entering into any further contract (as apprehended by learned Counsel for Singla Constructions) but had only been disallowed from participating in tender No. 49 of 2008-09 and tender No. 96 of 2008-09 both of which were called as a result of the cancellation of the first tender. The question that, therefore, survived before us is twofold, namely, whether Singla Constructions could have been disallowed from participating in the second and third tenders and whether East Central Railways was within its rights to forfeit the earnest money deposited by Singla Constructions.

16. Before we answer the issues raised, a few clauses from the tender documents need to be quoted. On the first issue, the relevant clauses are Clause 29(iv) of Chapter III of the Conditions of Tender and Instructions to Tenderers and Clause 6(d) of Chapter II of the Special Tender Conditions. These read as follows:

29. Performance Guarantee (P.G.)

(i) to (iii) xxx xxx xxx

(iv) Wherever the contracts are rescinded, the security deposit shall be forfeited and the Performance guarantee shall be encashed and the balance work should be got done independently without risk and cost of the failed contractor. The failed contractor shall be debarred from participating in the tender for executing the balance work. If the failed contractor is a JV or a partnership firm, then every member/Partner of such a firm shall be debarred from participating in the tender for the balance work either in his/her individual capacity or as a partner of any other JV/Partnership firm.

(v) & (vi) xxx xxx xxx

6 (d) The original contractor shall be debarred from participating in the tender for executing the balance work. If the failed contract is a JV or a partnership firm then every member/partner of such a firm would be debarred from participating in the tender for the balance work either in his/her individual capacity or as a partner of any other JV/Partnership firm.

On the second issue, the relevant clauses are Clause 5(v)(a) and Clause 5(v)(d)

of the Conditions of Tender and Instructions to Tenderers and clauses 61 and 62(1)(vi) of the General Conditions of Contract. These read as follows: -

5. EARNEST MONEY:

(i) to (iv) xxx xxx xxx

(v) FORFEITURE

(a) It shall be understood that these documents have been issued to the tenderer(s) and the tenderer is permitted to tender in consideration of the stipulations on his part that after submitting his tender, he will not resile from his offer or modify the rates, terms and conditions thereof in a manner not acceptable to the Railway. Should the Tenderer fail to observe or comply with the said stipulations full amount of Earnest Money shall be forfeited by the Railway.

(b) & (c) xxx xxx xxx

(d) In the event of tenderer(s), whose tender is accepted, resiles from the contract after issue of letter of acceptance or fails to commence the work within 15 (fifteen) days of issue of letter of acceptance or handing over of the site, which ever is late, the provisions contained in Clause 61 of GCC-2001 shall be applicable.

61. DETERMINATION OF CONTRACT

(1) Right of Railway to determine the contract. - The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such determination and the reasons therefore shall be conclusive evidence thereof.

(2) Payment on determination of contract. - Should the contract be determined under sub-clause (1) of this clause and the Contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the work, the Railways shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Engineer. The Railways' decision on the necessity and propriety of such expenditure shall be final and conclusive.

(3) The Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract.

62. Determination of contract owing to default of contractor.

(1) If the Contractor should

(i) to (v) xxx xxx xxx

(vi) abandon the contract, or

(vii) to (xiii) xxx xxx xxx

Then and in any of the said cases, the Engineer on behalf of the Railway may serve the Contractor with a notice (Proforma at Annexure III) in writing to that effect and if the Contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry on the work or comply with such directions as aforesaid to the entire satisfaction of the Engineer, the Railway shall be entitled after giving 48 hours notice (Proforma at Annexure IV) in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts (as may be specified in such notice) and adopt either or both of the following courses: -

(x) to carry out the whole or part of the work from which the contractor has been removed by the employment of the required labour and material, the costs of which shall include lead, lift freight, supervision and all incidental charges.

(y) to measure up the whole of part of the work from which the contractor has been removed and to get it completed by another contractor, the manner and method in which such work is completed shall be in the entire discretion of the Engineer whose decision shall be final:

and in both the cases (x) and (y) mentioned above, the Railway shall be entitled (i) to forfeit the whole or such portion of the security deposit as it may consider fit, and (ii) to recover from the Contractor the cost of carrying out the work in excess of the sum which would have been payable according to the certificate of the Engineer to the contractor if the work had been carried out by the contractor under the terms of the contract, such certificate being final and binding upon the contractor. Provided, however, that such recovery shall be made only when the cost incurred in excess is more than the security deposit proposed to be forfeited and shall be limited to the amount by which the cost incurred in excess exceeds the security deposit proposed to be forfeited. The amount thus to be forfeited or recovered may be deducted from any moneys then due or which at any time thereafter may become due to the Contractor by the Railway under this or any other Contract or otherwise.

17. The first question that we are required to answer is whether the letter of acceptance dated 25th April, 2008 is unconditional or not. We have quoted the letter in extenso and find nothing in it to suggest that East Central Railways wanted to add or modify any of the terms of the tender. It is not necessary for us to look into each of the clauses mentioned in the letter (all of them are innocuous anyway) but the objection of learned Counsel for Singla Constructions is to stipulation/condition No. 3 mentioned in the letter. As we have noted above, this merely enabled East Central Railways to correct inadvertent mistakes and the inadvertent mistakes (if any) were also limited to those that might occur in

communication of the accepted rates and other terms and conditions at the time of signing the formal agreement between Singla Constructions and East Central Railways. Clearly, what is envisaged by this precautionary stipulation is that errors in the accepted rates or similar inadvertent communication errors in the terms and conditions could be corrected by East Central Railways, nothing more or less. There is nothing in the language used to suggest that the intention was, either apparent or ostensible, to modify any of the terms and conditions as notified by East Central Railways. It does appear to us that learned Counsel for Singla Constructions is making much ado about nothing and learned Counsel for East Central Railways is correct in submitting that Singla Constructions is using this rather innocuous "condition" as a lever to somehow or the other wriggle out of the tender awarded. We are of the firm view, on a bare reading of stipulation/condition No. 3 mentioned in the letter dated 25th April, 2008 that it is nothing more than a precaution taken to correct unintended typos.

18. In our opinion, the contention of learned Counsel for Singla Constructions is negated by the fact that several letters were sent by East Central Railways to Singla Constructions, and we have adverted to those letters above, but none of them were even responded to by Singla Constructions. If the concern of Singla Constructions was genuine, it would have immediately protested against the unwarranted change in terms and conditions, but it remained silent. Eventually, when Singla Constructions did give a response after almost two months on 17th June, 2008, it virtually let the cat out of the bag by suggesting that the turn of events resting with continuing abnormal run away rise in prices had made it impossible to go ahead with the contract. It is significant to note that even in this letter, Singla Constructions did not indicate what "condition" imposed by East Central Railways was a change from the original terms and conditions.

19. It is for the first time that Singla Constructions, in its letter dated 16th July, 2008 mentioned that its objection was to condition No. 3 in the letter of acceptance dated 25th April, 2008. As we have already held above, this was not a condition imposed by East Central Railways. It was merely a reservation for correcting any inadvertent or typographical errors which could not and did not affect the terms and conditions of the tender. The submission of learned Counsel for Singla Constructions to the effect that East Central Railways had not unconditionally accepted the offer made by it is, therefore, without any substance and is rejected.

20. Having come to a conclusion that a contract was entered into between Singla Constructions and East Central Railways, we now have to see the effect of rescission of the contract. Clause 29(4) of the Conditions of Tender and Instructions to Tenderers shows that three consequences would follow as a result of the rescission. They are:

- (i) forfeiture of the security deposit and performance guarantee,
- (ii) the balance work would be got done independently at the risk and cost of the

contractor, and

(iii) the contractor would be debarred from participating in the tender for executing the balance work.

21. A similar consequence is to be found in Clause 6(d) of Chapter II of the Special Tender Conditions particularly relating to a prohibition from participation in the tender for executing the balance work. Additionally, both Clause 29(4) and Clause 6(d) mandate that if the contractor is a member of a joint venture or a partnership firm, then every member of that joint venture or partnership firm would be prohibited from participating in a tender relating to completion of the balance work.

22. In our opinion, this is a logical and inevitable result of rescission of the contract due to a fault on the part of the contractor. In the present case that we are concerned with, the allegation against Singla Constructions is that it had abandoned the work. That being so, it would be extremely odd if Singla Constructions is unable to complete the work awarded to it but is made entitled to bid for the balance work. The avoidance of such an odd situation appears to be the rationale behind Clause 29(4) and Clause 6(d) mentioned above and there is hardly any scope for judicial interference in this regard. We are, therefore, of the opinion that when East Central Railways floated the second and third tenders which were for completion of the balance work, which had not even been started by Singla Constructions in respect of the first tender, East Central Railways was well within its rights to exclude Singla Constructions from consideration for award of the balance work.

23. It was then contended by learned Counsel for Singla Constructions that Clause 61 of the General Conditions of Contract was inapplicable to the case. As we have noted above, Clause 61 is referred to in Clause 5(v)(d) of the Conditions of Tender and Instructions to Tenderers. We have also noted the statement on affidavit by East Central Railways that the reference to Clause 61 is inadvertent and what is really applicable is Clause 62 of the General Conditions. We are of the view that the submission of learned Counsel for East Central Railways in this regard must be accepted. A perusal of Clause 61(1) would show that East Central Railways is entitled to determine and terminate the contract at any time if:

- (i) cessation of work becomes necessary owing to paucity of funds, and
- (ii) from any other cause whatsoever.

It is nobody's case that East Central Railways sought to terminate the contract because of a paucity of funds or that it even sought to terminate the contract at all. Rather, it was Singla Constructions who terminated the contract and gave a letter to that effect to East Central Railways. Ex facie, Clause 61 is inapplicable to the facts of the case.

24. In fact, as learned Counsel for East Central Railways submitted Clause 62 of the General Conditions of Contract is the one that is really apposite and deals

with a contractor abandoning the contract and the effect thereof. It is clear from an examination of the scope and content of Clause 61 and Clause 62 that while the contract can be determined by East Central Railways under Clause 61 for its own "fault" it can be determined by the Railways under Clause 62 for a "fault" of the contractor, for example, by his abandoning the contract. This is made further clear from the consequences that flow from the operation of these two clauses. While the effect of Clause 61 is that the Railways would have to compensate the contractor (the "fault" being of the Railways), the effect of Clause 62 is that the security deposit given by the contractor is forfeited and the balance work is completed by the Railways at the risk and cost of the contractor (the "fault" being of the contractor).

25. Since it is nobody's case that East Central Railways had determined the contract due to its own "fault" the question of the applicability of Clause 61 simply cannot arise. On the other hand, it is quite clear that it is only Clause 62 which is applicable to the fact situation that we are concerned with since Singla Constructions had abandoned the work. The explanation given by East Central Railways in its affidavit that the reference to Clause 61 in Clause 5(v)(d) of the Conditions of Tender and Instructions to Tenderers is clearly a typographical error appears to be correct.

26. If we were to accept the argument advanced by learned Counsel for Singla Constructions, it would lead to a rather absurd situation. This is because in terms of Clause 5(v)(a) of the Conditions of Tender and Instructions to Tenderers where a tenderer merely submits his tender, and before it is accepted, he resiles from his offer or modifies the rates, terms and conditions thereof in a manner not acceptable to East Central Railways, the full amount of earnest money is liable to be forfeited. On the other hand, the consequence of a contractor resiling from the contract after it is accepted would be nothing at all because Clause 61 of the General Conditions of Contract does not provide for any penalty against him. In other words, even before the issuance of a letter of acceptance, if the contractor goes back on his offer, his earnest money is liable to be forfeited but if he goes back on the offer after its acceptance is given, then no penalty would be attracted against him. Surely, this is rather odd, bordering on the absurd, and it cannot be rationally construed as the intention of the General Conditions of Contract. There is, therefore, no doubt that the reference to Clause 61 of the General Conditions of Contract is a typographical error in Clause 5(v)(d) of the Conditions of Tender and Instructions to Tenderers and that it should actually be Clause 62 as contended by learned Counsel for

East Central Railways.

27. There is no dispute that East Central Railways has taken action against Singla Constructions under Clause 62 of the General Conditions of Contract. No procedural defect has been pointed out in this decision making process. Consequently, even the second submission made by learned Counsel for Singla Constructions is rejected.

28. The natural consequence of a reading of the various clauses of the tender documents leads to the inescapable conclusion that Singla Constructions made itself liable to penal action in terms of forfeiture of the earnest money deposit. Thus Singla Constructions is not entitled to any relief in this regard.

29. For the reasons given above, we are of the view that there is no merit in the writ petition. It is, accordingly, dismissed. However, we make it clear that East Central Railways is bound by the statement made on its behalf by its learned Counsel on 18th February, 2009 to the effect that Singla Constructions has not been prohibited from participating in any other tender floated by the Railways.