

(2011) 08 SC CK 0120

In the Supreme Court Of India

Case No : Civil Appeal No. 7033 of 2011 (Arising out of S.L.P. (C) No. 24107 of 2009)

State of Haryana and Others

APPELLANT

Vs

Malik Traders

RESPONDENT

Date of Decision : 17-08-2011

Acts Referred:

Contract Act, 1872 — Section 5

Citation : AIR 2011 SC 3574 : (2011) AIRSCW 5094 : (2011) 5 ALLMR 947 : (2011) 5 AWC 5378 Supp : (2011) 5 CHN 45 Supp : (2011) 4 KLT 20 SN : (2011) 4 RCR(Civil) 873 : (2011) 9 SCALE 1 : (2011) 13 SCC 200 : (2011) 10 SCR 372

Hon'ble Judges : V.S. Sirpurkar, J; Cyriac Joseph, J

Bench : Division Bench

Advocate : P.N. Mishra, Manjit Singh, Vivekta Singh, Harkesh and Kamal Mohan Gupta, for the Appellant; A.K. Sanghi D.K. Garg, Dipak Kumar Jena, Minakshi Ghosh Jena, Abhishek Garg and Dhananjay Garg, for the Respondent

Final Decision : Allowed

Judgement

Cyriac Joseph, J.—Leave granted.

2. This appeal is filed against the judgment dated 7.7.2009 rendered by a Division Bench of the High Court of Punjab & Haryana in C.W.P. No. 2266 of 2009, allowing the said writ petition. The Appellants were the Respondents in the writ petition and the sole Respondent herein was the Petitioner therein.

3. Facts in brief are stated hereunder:

On 18.9.2008, the Appellant State of Haryana invited tenders from interested persons for appointment as Entrepreneur/Agent for collection of toll at Toll Bridge over river Yamuna on Karnal Meerut Road, near U.P. Border. The Respondent M/s. Malik Traders was one of the 13 bidders who submitted tenders. As required by the terms and conditions of the Bid, all the bidders, including the Respondent, deposited the Bid Security of Rs. 20 lakhs in the form of bank guarantee or FDR

in favour of the Executive Engineer. M/s. Gaurav Traders who quoted Rs. 8,83,30,000/- was the highest bidder and the Respondent M/s. Malik Traders who quoted Rs. 7,97,66,180/- was the second highest bidder.

4. As required under the terms and conditions of the bid, the Respondent in paragraph 8 of its written offer/bid agreed to keep the bid open for acceptance up to 90 days after the last date of receipt of bid. The Respondent also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the aforesaid period of 90 days. In paragraph 10 of the offer/bid, the Respondent also agreed that the full value of Bid Security would be forfeited without prejudice to any other right or remedy available to the Executive Engineer or his successor in office or his representative, should the Respondent withdraw or modify its bid/offer after the last date and time for the receipt of bids, during the period of bid validity (90 days) or extended validity period.

5. Since M/s. Gaurav Traders was found to be the highest bidder, a letter of acceptance was issued to it on 25.9.2008. However, it failed to deposit the security amount and the first installment as per the letter of acceptance. Therefore, as per condition No. 9.3(B) of the Detailed Notice Inviting Tender (DNIT) and condition No. 6 of the acceptance letter, the Bid Security of Rs. 20 lakhs deposited by M/s. Gaurav Traders was forfeited and the letter of acceptance was cancelled and withdrawn vide letter dated 16.10.2008 of the competent authority. Thereafter, a letter of acceptance dated 26.11.2008 was issued to the Respondent M/s. Malik Traders who was the second highest bidder. As per condition No. 6 of the said letter of acceptance, the Respondent was required to deposit the security amount and the first installment within 21 days from the receipt of the letter of acceptance. However, the Respondent failed to deposit the security amount and the first installment as required by the letter of acceptance. Hence, vide Memo No. 5029 dated 17.12.2008 issued by the Executive Engineer, Provincial Division No. III, PWD, B&R Branch, Karnal, the letter of acceptance was cancelled and withdrawn and the Bid Security of Rs. 20 lakhs was forfeited.

6. It has to be mentioned that before receipt of the letter of acceptance, the Respondent had sent a letter dated 15.11.2008 informing the Executive Engineer that the Respondent was not interested in the work and, therefore, the amount of Bid Security deposited on 19.9.2008 may be refunded. However, the Appellants did not consider or act upon the said letter dated 15.11.2008 of the Respondent, as the Respondent had agreed to keep its bid open for acceptance up to 90 days after the last date of receipt of bid and the said period of 90 days had not expired. In this connection, it has also to be mentioned that the letter of acceptance dated 26.11.2008 was issued to the Respondent before the expiry of the above-mentioned period of 90 days.

7. After cancellation of the letter of acceptance issued to the Respondent and after expiry of the above-mentioned period of 90 days on 17.12.2008, the Executive Engineer vide Bid Notice No. 5160 dated 31.12.2008 re-invited bids for

the collection of toll at toll point on the Bridge over river Yamuna on Karnal-Meerut Road. The Respondent again participated in the bid, offering an amount of Rs. 4,94,91,810/-. It may be noted that the amount offered by the Respondent in the subsequent bid was less than its offer in the first bid with a difference of Rs. 3.03 crores. Since the Respondent's bid was the highest bid among the bids submitted pursuant to the Bid Notice dated 31.12.2008, a letter of acceptance was issued to the Respondent on 6.2.2009. The Respondent deposited the security amount and the first installment in terms of the said letter of acceptance.

8. After the second letter of acceptance dated 6.2.2009 was issued to the Respondent, the Respondent on 7.2.2009 filed C.W.P. No. 2266 of 2009 in the Punjab & Haryana High Court praying for quashing the first letter of acceptance dated 26.11.2008 of the Executive Engineer and the Memo No. 5029 dated 17.12.2008 canceling the said letter of acceptance and forfeiting the Bid Security of Rs. 20 lakhs. Even though the Appellants opposed the grant of prayers in the writ petition, a Division Bench of the High Court vide order dated 7.7.2009 allowed the writ petition quashing the letter of acceptance dated 26.11.2008 and the Memo dated 17.12.2008 and also directed the Executive Engineer (Appellant No. 5) to refund the Bid Security amount of Rs. 20 lakhs to the Respondent within two months from the date of receipt of a copy of the order. Aggrieved by the said order dated 7.7.2009 passed by the High Court in C.W.P. No. 2266 of 2009, the Respondents in the writ petition have filed this appeal.

9. We have considered the pleadings in the case, the submissions made by the learned senior counsel for the parties and the materials placed on record.

10. For allowing the writ petition, the only reason stated by the High Court is that, since the writ Petitioner (Respondent herein) had withdrawn its offer before it was accepted, there could be no acceptance of the offer and there could not be any consequence of the Petitioner not honouring the commitment. However, we cannot agree with the view taken by the High court. It is true that as per Section 5 of the Indian Contract Act, 1872 (hereinafter referred to as "the Act"), a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer. It is also true that before receipt of the letter of acceptance dated 26.11.2008, the Respondent had sent a letter dated 15.11.2008 withdrawing its offer. However, admittedly, in paragraph 8 of the written offer/bid, the Respondent had agreed to keep the bid open for acceptance up to 90 days after the last date of receipt of bid. The Respondent had also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the aforesaid period of 90 days. Hence, the Respondent could not have withdrawn the bid before the expiry of the period of 90 days. It is not disputed that the acceptance of the Respondent's bid was communicated to the Respondent within the said period of 90 days. Therefore, the Respondent was bound by the said acceptance of the bid, despite its withdrawal by the Respondent in the meanwhile. In paragraph 10 of the offer/bid, the Respondent

had also agreed that the full value of the Bid Security would be forfeited without prejudice to any other right or remedy available to the Executive Engineer or his successor in office or his representative, should the Respondent withdraw or modify its offer/bid during the period of bid validity (90 days) or extended validity period. Since the Respondent withdrew its offer during the period of bid validity in violation of the above-mentioned agreement in paragraph 8 of the offer/bid, the full value of Bid Security was liable to be forfeited in terms of the agreement contained in paragraph 10 of the offer/bid. Thus, even though u/s 5 of the Act a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, the Respondent was bound by the agreement contained in its offer/bid to keep the bid open for acceptance up to 90 days after the last date of receipt of bid and if the Respondent withdrew its bid before the expiry of the said period of 90 days the Respondent was liable to suffer the consequence (i.e. forfeiture of the full value of Bid Security) as agreed to by the Respondent in paragraph 10 of the offer/bid. Under the cover of the provisions contained in Section 5 of the Act, the Respondent cannot escape from the obligations and liabilities under the agreements contained in its offer/bid. The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of agreement. A person may have a right to withdraw his offer, but if he has made his offer on a condition that the Bid Security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the Bid Security should not be forfeited and it should be returned to him. Forfeiture of such Bid Security amount does not, in any way, affect any statutory right u/s 5 of the Act. The Bid Security was given by the Respondent and taken by the Appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.

11. In taking the above view, we are supported by the decision of this Court in National Highway Authority of India Vs. Ganga Enterprises and Another, which was rendered in a similar case. In the said case, the Appellant, National Highways Authority of India, by a notice, called for tenders by 31.7.1997 for collection of toll on a portion of a particular highway. The notice provided that toll plazas would be got completed by the Appellant and handed over to the selected enterprise. The notice required the bidders to furnish: (i) a bid security in a sum of Rs. 50 lakhs in the form of a bank draft or bank guarantee, and (ii) a performance security in the form of a bank guarantee of Rs. 2 crores. The bid security was liable to forfeiture in case the bidder withdrew his bid during the validity period of the bid or failed within the specified period to furnish the performance security and sign the agreement. The bid was to remain valid for a

period of 120 days after the last date of bid submission. In terms of the tender document, the Respondent firm gave its bid or offer and furnished a bank guarantee in a sum of Rs. 50 lakhs. It was an "on-demand bank guarantee" stating that it could be enforced on demand if the bidder withdrew his bid during the period of bid validity or failed to furnish the performance security or failed to sign the agreement. While the validity period of the bid was to end on 28.11.1997, the Respondent withdrew its bid on 20.11.1997 and did not furnish the performance guarantee. Therefore, the Appellant although found the Respondent to be the highest bidder and accepted its offer on 21.11.1997, encashed the bank guarantee for Rs. 50 lakhs. The Respondent then filed a writ petition in the High Court for refund of the amount. The High Court formulated two questions viz.: (a) whether the forfeiture of security deposit was without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition was maintainable in a claim arising out of a breach of contract. Without considering Question (b), the High Court allowed the writ petition on the ground that the offer was withdrawn before it was accepted and thus no completed contract had come into existence. The High Court observed that in law a party could always withdraw its offer before acceptance. Therefore, it held that the invocation and encashment of the bank guarantee was illegal and void and was liable to be set aside. The Appellant then approached the Supreme Court. Allowing the appeal, this Court held as follows:

In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.

We respectfully agree with the above view of this Court.

12. Hence, the High Court was not justified in quashing the letter dated 26.11.2008 accepting the bid of the Respondent and the letter dated 17.12.2008 forfeiting the Bid Security amount of Rs. 20 lakhs. The appeal is allowed and the order dated 7.7.2009 passed by the High Court of Punjab & Haryana in C.W.P. No. 2266 of 2009 is set aside. Consequently, the writ petition stands dismissed. There will be no order as to costs.