**(2016) 03 P&H CK 0107**

**In the Punjab And Haryana At Chandigarh**

**Case No :** RSA No. 2835 of 1997 (O&M)

Union of India APPELLANT

Vs

Goyal Electrical and Metals and Others RESPONDENT

**Date of Decision :** 10-03-2016

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 80
Contract Act, 1872 — Section 5

**Citation :** (2016) 03 P&H CK 0107

**Hon'ble Judges :** Raj Mohan Singh, J.

**Bench :** Single Bench

**Advocate :** Lakhinder Singh, Advocate, for the Appellant;

**Final Decision :** Allowed

# Judgement

Raj Mohan Singh, J.—1. Defendant No. 1 has filed this appeal against judgment and decree dated 03.02.1997 vide which judgment and decree dated 05.03.1993 passed by the Sub-Judge Ist Class, Patiala was upheld.

2. Plaintiffs filed suit for permanent injunction seeking restraint order from en-cashing bank guarantee furnished by defendant No. 3 on behalf of the plaintiffs. Plaintiff was a proprietorship concern and Mr. Rajeev Goyal was sole proprietor. Defendants No. 1 and 2 floated tender which was opened on 01.12.1988 for the sale of five lots of copper scrap.

3. Plaintiff submitted five tenders for five lots of copper scrap and also submitted bank guarantee to the tune of Rs. 1,35,000/- by way of earnest money as per condition of the notice inviting tender. The validity of the offer was for six months and the same was to be opened on 01.12.1988.

4. Plaintiff further alleged that the tender was opened on 15.12.1988 and after opening of tenders, the tenders of plaintiff were never rejected or accepted but the matter was kept pending by the defendants No. 1 and 2. Plaintiff further alleged that before acceptance of the tender, the Government of India made

heavy reduction in the prices of the copper. Plaintiff vide communication/telex dated 29.12.1988 informed the defendants No. 1 and 2, requesting for negotiations for the settlement of rates as they were unable to comply with earlier quoted rate due to reduction in prices of copper scrap by the Government. Plaintiff did this as their offer was not accepted by that time. Plaintiffs also sent a confirmatory message on 03.01.1989 besides writing to Chief Administrative Officer of defendant No. 2 on 04.01.1989 in the aforesaid context of holding fresh negotiations regarding prices of copper scraps. According to the plaintiff, nothing was done. The tender of the plaintiffs was never accepted or rejected. Ultimately, the plaintiff withdrew the offer and requested the defendants No. 1 and 2 to release the bank guarantee or call the plaintiff for further negotiations. Plaintiffs further alleged that they were entitled to withdraw their offer before acceptance thereof by the defendants No. 1 and 2. Accordingly, they withdraw the offer. No objection was raised by the defendants No. 1 and 2 against the withdrawal.

5. Plaintiff further asserted that on 10.02.1989, defendants No. 1 and 2 called upon the defendant No. 3 to send the amount of Rs. 1,35,000/- covered under the said guarantee to the defendants No. 1 and 2 on account of withdrawal of offer by the plaintiffs. Feeling positive apprehension of withdrawal of the bank guarantee, the suit came to be instituted.

6. The claim of the plaintiffs was contested by the defendants on number of accounts. The main defence projected by defendants No. 1 and 2 was that as per Clause 24 of the tender notice/bilateral obligation, the withdrawal of tender would entail in forfeiture of bank guarantee, if done within stipulated period of 90 days. Defendants also contested that the validity of offer was for 90 days and not for six months. Since the tender offer was withdrawn, therefore, as per Clause 24, defendants No. 1 and 2 were justified in forfeiting the bank guarantee and the course adopted for en-cashing the same was a lawful criteria that was resorted to by the defendants No. 1 and 2.

7. Defendants further claimed that the plaintiffs were not entitled to withdraw the tender. Defendants alleged that by withdrawal of the offer by the plaintiffs, they have suffered a huge loss of Rs. 5,61,000/-, after deducting Rs. 1,35,000/- they will suffer a loss of Rs. 4,26,000/-.

8. Defendant No. 3 did not contest the suit and pleaded that they will abide by the orders of the Court. After necessary pleadings, both parties went to trial on the following issues:-

1. Whether the plaintiffs validly withdrew the tender offer made by them and are not liable for the amount of guarantee as alleged? OPP. (onus by chief)

2. Whether the suit is not maintainable in the present form? OPD.

3. Whether the suit is bad for want of notice under Section 80 CPC? OPD.

4. Whether there was no privity of contract between the plaintiff and defendants

 

No. 3 regarding the disputed amount of bank guarantee, if so its effect? OPD.

5. Whether the plaintiff has no locus standi to file the suit? OPD.

6. Whether the defendants are entitled to special costs? OPD.

7. Relief.

9. Trial Court decreed the suit vide judgment and decree dated 05.03.1993, thereby restraining the defendants from en-cashing the bank guarantee dated 30.11.1988 furnished by the plaintiffs accept in due course of law. The judgment and decree of the trial Court was upheld by the Lower Appellate Court.

10. I have heard the learned counsel for the parties.

11. The appeal was admitted on 21.11.1997 and thereafter, it was ordered to be listed for final hearing within one year vide order dated 10.10.2001. Once the matter was listed before Lok Adalat for settlement. The matter was deliberated before the Lok Adalat but the learned counsel for respondents No. 1 and 2 did not appear.

12. On 05.09.2012, learned counsel for the appellant submitted that the controversy is covered by the decision of the Hon''ble Supreme Court in State of Haryana and others Vs. M/s. Malik Traders in Civil Appeal No. 7033 of 2011. The Lok Adalat took notice of it and issued notice to Mr. Rajesh Garg learned counsel for the respondents. On the adjourned date i.e. 04.10.2012, none appeared on behalf of respondents No. 1 and 2. Learned counsel for the appellant reiterated his stand that the appeal is covered by the judgment of the Apex Court. The matter was ordered to be listed before the Court being a covered matter.

13. Perusal of the record reveals that memo of appearance was filed by Mr. Rajesh Garg, Advocate (Now Senior Advocate) on behalf of respondents No. 1 and 2. In order to secure the presence of the counsel, this Court vide order dated 4.03.2016, issued an intimation to the office of Mr. Rajesh Garg, Senior Advocate, regarding enlistment of this case. The order dated 04.03.2016 reads as follows:-

"Learned counsel for the appellant and respondent No. 3 are ad idem that the controversy is covered by decision of Hon''ble Apex Court in Civil Appeal No. 7033 of 2011 titled as State of Haryana and others Vs. M/S Malik Traders decided on 17.08.2011. It is also brought to the notice of the Court that respondents No. 1 and 2 are necessary parties to be heard being plaintiffs. The matter was placed before the Pre-Lok Adalat. Notice was issued to the Mr. Rajesh Garg, Advocate for respondents No. 1 and 2. As per office report, the notice was served and case was posted for 04.10.2012. On 04.10.2012, following order was passed by the Pre-Lok Adalat:-

"Learned counsel for the appellant submits that the controversy in this appeal is covered by a decision of the Hon''ble Supreme Court in Civil Appeal No. 7033 of 2011 titled as State of Haryana and others Vs. M/S Malik Traders decided on

 

August 17, 2011.

In view of the above, the appeal may, therefore, be listed before an Hon''ble Judge for final disposal, being a covered matter after seeking appropriate orders from the Hon''ble the Chief Justice."

That is how the matter has been placed before this Court for final disposal being a covered matter.

Adjourned to 10.03.2016.

Let an intimation be also circulated to the office of Mr. Rajesh Garg, Senior Advocate regarding enlistment of this case."

14. Today, none has come forward to represent respondents No. 1 and 2. Learned counsel for the appellant and respondent No. 3 are ad idem that the matter is squarely covered by the dictum of the Hon''ble Apex Court in State of Haryana and others Vs. M/s. Malik Traders in Civil Appeal No. 7033 of 2011 and National Thermal Power Corporation Ltd. Vs. M/s. Ashok Kumar Singh and others in Civil Appeal No. 1852 of 2015.

15. The conclusion drawn in para No. 10 in M/s. Malik Traders case (supra) is reproduced here as under:-

"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 upto 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 under Section 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 upto 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 under Section 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."

16. Relying upon M/S Malik Traders case (supra), The Hon''ble Apex Court in National Thermal Power Corporation Ltd. Vs. M/s. Ashok Kumar Singh and others in Civil Appeal No. 1852 of 2015, also reiterated the observation made in M/s. Malik Traders case (supra) and held in the following manners:-

"The upshot of the above discussion is that it is no longer possible for the respondents to contend that the right to withdraw the bid in terms of Section 5 of the Contract Act, 1872 would entitle them to withdraw without suffering forfeiture of the earnest money even incases where the submission and receipt of bids is itself subject to the condition that in the event of a withdrawal of the bid the earnest money stand forfeited. Inasmuch as the High Court remained totally oblivious of the true legal position while directing refund of the earnest money, it committed an error."

17. According to the parties, there is a condition in the agreement that a tenderer cannot withdraw the tender before expiry of validity period. Since the plaintiff has withdrawn the tender within validity period, that would entail in

 

forfeiture of the earnest money in the form of bank guarantee.

18. In view of the aforesaid, this Court is now left with no option except to accept the submission made by the learned counsel for the appellant.

19. In view of aforesaid, this appeal is accepted and impugned judgment and order passed by the Courts below are set aside. Both the parties are left to bear their own cost.