
(2005) 11 GAU CK 0017
Gauhati High Court (Agartala Bench)
Case No: C.R. No. 284 of 1996

Ranjit Kumar Saha

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision: Nov. 11, 2005

Acts Referred:

- Contract Act, 1872 - Section 5

Citation: AIR 2006 Guw 70 : (2007) 2 CTLJ 356 : (2006) 3 GLR 751 : (2006) GLT 867 Supp

Hon'ble Judges: T. Vaiphei, J

Bench: Single Bench

Advocate: M.N. Indu, for the Appellant; A. Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T. Vaiphei, J.

The short question which falls for consideration in this writ petition is whether the earnest money deposited by the petitioner for bidding the contract for carriage of food grain and other essential commodities from FCI's different depots at Guwahati to Agartala in respect of the Notice Inviting Tender (in short NIT) dated 9-2-95 can be withdrawn by him after withdrawing his bid before acceptance of his tender by the respondent.

2. The controversy arose out on the following facts and circumstances:

By the aforesaid NIT, tenders were invited for transportation of food grain and other essential commodities. The petitioner, who is a transport Contractor, submitted his tender on 10-3-1995. The transportation work was to be carried out for the period commencing from April, 1995 to March, 1996. Being the lowest tenderer, the petitioner expected that he would be awarded the contract without any delay. While submitting his tender, he also deposited a sum of Rs. 50,000/- in the form of Fixed

Deposit vide his letter dated 12-10-1995 by way of earnest money. When his tender was not accepted even after the lapse of seven months from the date of opening of the tender, the petitioner vide his letter dated 19-12-1995 informed the respondent about his inability to execute the work due to inordinate delay in accepting his tender and requested them to release the earnest money deposited by him. It would appear that in response to that letter, the Food and Civil Supplies Department communicated the letter of acceptance and requested him to execute a deed of agreement after depositing the security amount of Rs. 1,00,000/- by 16-1-1996 positively. The petitioner by his letter dated 12-1-1996 replied that he would not be in a position to execute the work after the lapse of 10 long months, especially when the transportation work was to be done for the period of 1995-96. He also requested therein that the earnest money be refunded to him immediately. Instead of refunding the earnest money, the respondents apparently issued the work order dated 12-1-1996 for transportation of 500 MT S.F. Rice from FCI Depot, Guwahati to Central Store, A.D. Nagar, Agartala. The petitioner promptly sent his letter dated 12-1-1996 intimating the respondent of his inability to execute the work order issued belatedly. The respondents apparently retaliated by forfeiting the earnest money and terminated the tender of the petitioner. A number of representations were subsequently made by the petitioner to the respondents for refund of the earnest money, which did not evoke any positive response. This led him to file this writ petition.

3. The respondents in opposing the writ petition filed their counter-affidavit. The stands taken by the respondents as emerged from the counter-affidavit are that the petitioners in terms of Clause 8 of the NIT was prohibited from surrendering his rates pending finalisation of the tender, but when he refused to undertake the transportation work Which amounted to surrendering his rates before finalisation of the tender, the Department was well within its power to forfeit the earnest money. By refusing to lift the foods grains from Guwahati to Agartala, contend the respondents, the petitioner hampered the public distribution system. The respondents point out that they extended maximum co-operation to the petitioner by treating the security deposit made by him earlier for execution of the previous transportation contract as the security deposit for this transportation contract. It is, therefore, submitted by the respondents that the petitioner has no right to demand refund of the earnest money and the writ petition filed by him for a direction to that effect is devoid of merits, which is liable to be dismissed.

4. The following undisputed facts emerged from the pleadings of both the parties:

(a) The earnest money of Rs. 50,000/- in the form of fixed deposit was deposited by the petitioner while submitting his tender.

(b) The letter dated 12-10-1995 at Annexure-A is tantamount to withdrawal of his rates/bid with a claim to refund the earnest money deposited by him.

(c) The transportation work in question was to be carried out from April, 1995 to March, 1996, but the bid of the petitioner was accepted only on 10-1-1996 followed by issuance of the work order on 12-1-1996. The petitioner, accordingly, withdrew his bid on 12-10-1995 i.e. almost three months before the acceptance of this tender.

5. A perusal of the NIT will reveal that the petitioner was required to deposit the earnest money of Rs. 50,000/- for allowing him to take part in the bid. Clause 8 of the NIT provides that no tenderer would be allowed to surrender his rate(s) before finalization of the tender and that if any tenderer surrenders the rate(s) offered by him before finalisation of the tender in question, the earnest money deposited by him would be liable to be forfeited to the Government. Clause 13 further provides that the earnest money of the successful tenderer(s) who fails to comply with the directions for deposit of security money and for execution of the deed of agreement within the period stipulated therein would be liable to be forfeited at the discretion of the competent authority. A conjoint reading of these two clause plainly show that the earnest money deposited by a tenderer is liable to be forfeited to the Govt. if (1) the tenderer surrenders his rate(s) before finalisation of the tender, (2) if the successful tenderer fails to deposit the security money or fails to execute the deed of agreement within the period stipulated therein.

6. The letter dated 10-1-1996 issued by the Food and Civil Supplies Department, which is at Annexure-C, required the petitioner to execute the deed of agreement and to deposit the security money amounting to Rs. 1,00,000/- on or before 16-1-1996 positively. It is an admitted position of the parties that neither any deed of agreement was executed by the petitioner nor was the security money deposited within the period stipulated therein. It is the contention of Mr. M.N. Indu, learned Counsel for the petitioner, that when the respondents failed or refused to accept the tender of the petitioner within a reasonable period of time, the petitioner was not in a position to execute the agreement or carry out the transportation contract and that under such circumstances, the petitioner was within his right to withdraw his bid, especially when the withdrawal was made before acceptance of the tender and thereafter to request the respondents to refund the earnest money. In other words, the contention of the learned Counsel is that once the bid was withdrawn by the petitioner, that too before acceptance of his tender, no concluded contract came into existence and thus the respondents could neither compel the petitioner to execute the deed of agreement to carry out the contract in question nor could they forfeit the earnest money. On the other hand, Mr. A. Ghosh, learned Counsel for the respondents supports the contention of the respondents in the counter-affidavit that the petitioner, who surrender his rate before finalisation of the NIT is barred by Clause 8 of the NIT for claiming refund of the earnest money and submits that the Department has rightly forfeited the earnest money.

7. u/s 5 of the Contract Act, 1872, there can be no dispute that a contracting party has the right to withdraw his bid before its acceptance by either of the parties. In

this case, the respondents have no quarrel with this proposition of law. Their contention is that the petitioner may have the right to withdraw his bid before its acceptance, but he cannot escape the consequence of forfeiting the earnest money deposited by him by the operation of Clause 8 of the NIT, it may be noted that similar matter came up for consideration before the Apex Court in [National Highway Authority of India Vs. Ganga Enterprises and Another](#), This is what the Apex Court says:

9. 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.

8. In my opinion, the point raised by the learned Counsel for the petitioner has been completely answered by the Apex Court in the foregoing observations. The Apex Court was obviously considering the right of the respondent-authorities to forfeit the earnest money which was sought to be withdrawn by the petitioner consequent upon withdrawal of his bid before its acceptance. According to the Apex Court, withdrawal of an offer before its acceptance is one thing and forfeiture of the earnest money which was demanded from the bidder to ensure non-withdrawal of his offer within stipulated period is another matter. The Apex Court held that the right of the bidder to withdraw his bid before its acceptance does not bar the authorities to forfeit the earnest money deposited for a particular purpose. The earnest money is admittedly deposited by the petitioner to ensure that he would not surrender his rates till finalisation of the tender in question: That was the condition of the bid. Since the petitioner withdrew his bid before finalisation of the tender in

question, he obviously violated the conditions of the NIT, thereby empowering the respondents to forfeit the earnest money. True, no concluded contract has come into existence, but the existence or non-existence of an underlying contract is not material, when the forfeiture of the earnest money is made by evoking Clause 8 of the NIT. The NIT does not prescribe any period within which the tender should be accepted by the respondent authorities. On the other hand, Clause 8 indicates that the petitioner is bound to wait for finalisation of the tender and till then, he is prohibited from surrendering his rate(s) and he could only surrender his rates on the pain of forfeiting his earnest money. By refusing to execute the agreement and by surrendering his bid before finalisation of the tender in question, the respondent authorities invoked Clauses 13 and 8 of the NIT for forfeiture of the earnest money.

9. It is true that the respondents authorities can be faulted with for their apparent negligence in not accepting the tender of the petitioner immediately or within reasonable period of time and have allowed 8 to 10 months to lapse before accepting the bid of the petitioner, but notwithstanding such unacceptable and callous conduct of the respondent authorities, there can be no denial that the NIT evidently authorized or condoned them of such lapses. Having understood the meaning and application of the NIT and thereafter in response to NIT having submitted his bid, the petitioner must face the consequences or liabilities resulting from violation of the NIT, which is binding upon him. Moreover, the respondent authorities also realizing the difficulties faced by the petitioner voluntarily treated the previous security money as the security money for the instant contract. This is not a case in which the contract stipulates the carrying of minimum quantities of food grains within a particular period of time. In such circumstances, no hardship can possibly be caused to the petitioner by accepting the agreement or carrying out the contract. If a particular quantity of the food grain could not be carried by him, Clause 15 of the NIT enables the authorities to extend the contract period for a maximum period of six months. It must be remembered that the object of depositing the earnest money is to ensure that only a genuine person makes a bid and that only a person who has the capacity or has the intention of entering into the contract will make a bid. The petitioner cannot participate in a tender process and thereafter irresponsibly abandon the same at his sweet will, which will cause immense problems for the respondent-authorities.

10. For the reasons stated in the foregoing, I do not find any merit in this writ petition. Consequently, the writ petition stands dismissed by directing the parties to bear their own costs.