



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.08.2017

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

AND

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

W.A.(MD)No.443 of 2017

and C.M.P.(MD) No.4087 of 2017

The General Manager (TN),
Food Corporation of India,
Regional Office,
No.8, Sathiyamoorthi Road,
Chetpet,
Chennai - 31.

... Appellant/Respondent

Vs.

Arockiamatha Transport,
Represented by its Proprietor,
I.Arockiaraj,
No.355/80A Thilagar Street,
Kamaraj Nagar,
Airport,
Trichy - 7.

... Respondent/Petitioner

Writ Appeal filed under Clause 15 of Letter Patent against the order passed by this Court in W.P.(MD)No.3483 of 2017 dated 04.04.2017.

Prayer in WP(MD). 3483/ 2017 :

This Writ Petition is filed under Article 226 of the Constitution of India, for issuance of Writ of Mandamus, directing the respondent to refund the E.M.D. of Rs. 6,30,000/- to the petitioner forthwith as per the representation of the petitioner dated 17.02.2017.

For Appellant : Mr.S.Vijayakumar

For Respondent : Mr.V.Panneer Selvam

JUDGMENT

(Judgment of the Court was delivered by **M.M.SUNDRESH, J**)

The writ appeal has been preferred against the order of the learned Single Judge dated 04.04.2017, passed in W.P.(MD) No.3483 of

2.The appellant made an invitation calling for the tenders.



The respondent/writ petitioner is one among them. As per the tender conditions the tender would be remained open for acceptance up to and inclusive of 13.01.2017. The following is the note, which is relevant for the purpose of this case:

"Note:

1.The General Manager, Food Corporation of India Chennai may at his discretion, extend this day by 30 (Thirty) days and such extension shall be binding on the tenderers.

2.If the date up to which the tender is open for acceptance is declared to be a closed holiday / Sunday, the tender shall be deemed to remain open for acceptance till the next following working day.

3.No negotiations will be held with any bidder/tenderer and tenderers are requested to indicate their lowest rates at the very first instance."

Thereafter a communication was sent extending the said period in accordance with Note No.1 referred to above up to 12.02.2017. This was agreeable to the respondent. Once again, another extension was sought for to the letter dated 10.02.2017, which is reproduced hereunder:

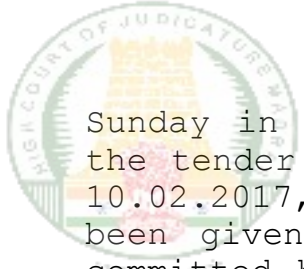
"Please refer to the Technical Bid opened on 13.01.2017 for the above subject work. The validity of tender is due to expire on 12.02.2017. The Validity of the Tender is hereby extended for another 30 (Thirty) days with effect from 13.02.2017 to 14.03.2017 according to the provisions of the tender document. The terms and conditions of the tender remain same.

You are requested to submit your consent letter immediately."

On receipt of the said communication, the respondent by his letter dated 14.02.2017, declined to give his consent by stating that his offer for acceptance of the tender expired on 13.02.2017. Though letter dated 14.02.2017, was received, the appellant has neither made reply nor given effect to letter dated 10.02.2017, by which validity of the tender was extended for another 30 days. However, the offer made by the respondent was accepted by the appellant. It was done so on 13.02.2017, but communicated to the petitioner through E-Mail on 16.02.2017.

3.The writ petitioner has approached this Court, seeking a mandamus directing the appellant to refund the amount of Rs.6,30,000/-. It was accordingly allowed by the learned Single Judge on the premise that second extension has not been accepted by the writ petitioner and therefore, in the absence of it, he is entitled to refund.

4.The learned counsel appearing for the appellant submitted that the learned Single Judge has committed a factual error. There was no extension beyond 12.02.2017, as 12.02.2017 happens to be



Sunday in accordance with clause 2 of the note, the acceptance of the tender was made on 13.02.2017. In other words, the letter dated 10.02.2017, seeking to extend the validity of the acceptance has been given effect to. Therefore, in view of the factual mistake committed by the learned Judge, the appeal will have to be allowed and with specific reference to clause 6(i) of the tender document, which states that the tenderer shall be permitted to bid on the express condition that in case he resiles or modifies his offer, or terms & conditions thereof, after submitting his tender, the Earnest Money deposited shall be forfeited.

5. Reliance has been made on the judgments of the Hon'ble Apex Court in **National Highways Authority of India v. Ganga Enterprises** reported in (2003) 7 SCC 410 and **National Thermal Power Corporation Ltd., v. M/s. Ashok Kumar Singh & Ors.** in **Civil Appeal No.1852 of 2015.**

6. The learned counsel appearing for the respondent/writ petitioner would submit that though factually the assessment made by the appellant is right, the communication of the acceptance of the tender was made only on 15.02.2017. Therefore, what is relevant for the contract is the date of communication and not the actual date of acceptance and therefore, it is probable that the actual date of acceptance is anti-dated.

7. In support of his contention, learned counsel for the respondent relied on the decision of the Hon'ble Apex Court in **Bhagwandas v. Girdharlal & Co.** reported in **AIR 1966 SC 543.**

8. We have considered the rival submissions and perused the materials available on record:

9. As above stated, there is dispute regarding the factual position. The tender document was accepted on 13.02.2017 since 12.02.2017 being the Sunday. Such contingency is prescribed in clause 2 of the note.

10. The Hon'ble Apex Court in **National Highways Authority of India v. Ganga Enterprises** reported in (2003) 7 SCC 410 was pleased to hold as follows:

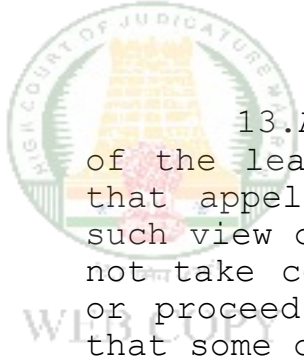
"9. In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian 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 not 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."

11. Similarly, in **National Thermal Power Corporation Ltd., v. M/s. Ashok Kumar Singh & Ors.** in **Civil Appeal No.1852 of 2015**, the Hon'ble Apex Court was pleased to hold that the tender condition is binding on the parties. What is rationalized from the above decision of the Apex Court is withdrawal of an offer before its acceptance is one thing and forfeiture of EMD is another thing.

12. The decision relied upon by the learned counsel for the respondent in which a suit for damages has been dealt with, is not applicable to the case on hand. We are not dealing with the effect of a contract. A contract would get concluded after a communication is received from the party, who accepted that. Thus the ready and acceptance starts from the date of acceptance. There is no quarrel over that. However, we are considering the effect of the acceptance made on the condition imposed on a tender. There is a difference between acceptance and the concluded contract as held by the decision of the Hon'ble Apex Court. Therefore, there is no difficulty in holding that the appellant having accepted the offer of 13.02.2017, the respondent would get his EMD forfeited as per clause 6(i) of the tender document. Though it is unfortunate that the order dated 10.02.2017 has not been specifically withdrawn, the fact remains that the acceptance has been made on 13.02.2017 and thus, the decision made earlier on 10.02.2017 has not been given effect to. The decision of the writ petitioner came into being only pursuant to letter dated 10.02.2017. In other words there is no objection for first extension. Thus, the writ petition is bound by the period mentioned in the first extension. We also find no material to hold that the acceptance was anti-dated as alleged by the learned counsel for the respondent in the absence of any material to substantiate it. Hence, looking from any perspective, we are of the view that the respondent cannot succeed. Therefore, he has to forego the EMD.



13. Accordingly, we are constrained to set aside the judgment of the learned Single Judge dated 04.04.2017. However, we do find that appellant has also contributed to the present situation. In such view of the matter, it is a fit case, where the appellant shall not take coercive steps to black list or debar the writ petitioner or proceed to recover money by way of damages as it is submitted that some other person has been contracted to abduct the amount.

14. Accordingly, this Writ Appeal stands allowed. The order of the learned Single Judge dated 04.04.2017, made in W.P.(MD) No.3483 of 2017 is set aside. However, the appellant shall not take coercive steps to black list or debar the writ petitioner or proceed to recover money by way of damages. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

+1cc to Mr.S.VIJAYAKUMAR Advocate in SR. No. 71109
+1cc to Mr.V.PANNEER SELVAM Advocate in SR. No. 71570
SJ
JS/SV.MMS/SAR.2/20.09.2017/ 2P-3C

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