IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.2578 of 2010 (O & M)
Date of Decision:-30.01.2018

M/s Kartar Singh and Company

...Appellant

Versus

The Food Corporation of India and another

...Respondents

CORAM:- HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. P.S. Rana, Advocate
for the appellant.

Ms. Puneeta Sethi, Advocate
for the respondents.

AMIT RAWAL J.(Oral)

The appellant-plaintiff is aggrieved against the concurrent findings of facts whereby the suit for recovery of Rs.5,52,500/- allegedly forfeited by the defendant-FCI has been dismissed by both the Courts below.

Mr. P.S. Rana, Advocate learned counsel appearing on behalf of the appellant submits that the suit aforementioned was filed for recovery of an amount of Rs.5,52,500/- alongwith interest @ 18% per annum on the premise that respondent-defendant-FCI issued a tender notice published through advertisement dated 11.10.1993. The plaintiff gave a tender No.67 in the prescribed form and also deposited a sum of Rs.5,00,000/- by way of draft drawn on Bank of India, Industrial Branch, Dhandari Kalan, Ludhiana. The date and time of receipt of the tender was up to 2.00 PM on 14.10.1993 as the time for opening the tender was 3.00 PM i.e. the same day. Plaintiff wrote a letter dated 15.10.1993 (Ex.P3) by way of clarification that the quantity of 5000 MT to be read as 500 MT and also requested for refund of the excess amount of security of Rs.4,50,000/- and a telegram dated 19.10.1993 but of no avail. The Courts below have committed illegality and perversity in dismissing the suit on the premise that the terms and conditions of the tender were sacrosanct and the defendant could not be blamed for the same. It was further argued that there was no contract and in the absence of the same, the earnest money could not be forfeited. In support of his contentions relied upon the judgment of Hon'ble Supreme Court in **India Meters Ltd. vs. Punjab State Electricity Board and others 1994(1) Arbitration Law Reporter 118**, **Vishwa Industrial Company Pvt. Ltd. vs. Mahanadi Coalfields Ltd. AIR 2007 Orissa 71** that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. Since in this case the acceptance was not absolute and unqualified, therefore, the FCI could not forfeited the entire amount. To the similar effect the judgment rendered by Hon'ble Gauhati High Court in **Food Corporation of India and another vs. Surjit Roy 2000(2) Arb. LR 71 (Gauhati)** by laying reliance to the paragraph 11 to submit that the FCI failed to lead evidence with regard to the alleged loss suffered on account of modification in the terms and conditions of the tender.

Per contra Ms. Puneeta Sethi, Advocate learned counsel appearing on behalf of respondents submits that the terms and conditions of the tender were not clear but unambiguous. It was not the case where the plaintiff did not know the terms and conditions muchless the clause of the forfeiture. In fact that tender was for 5000 MT wheat at a particular price for which earnest money was deposited. It was the unilateral comprehension which led to the change in the offer and giving cause of action to the FCI for invoking the forfeiture clause, thus urges this Court for dismissal of the appeal as no substantial question of law is involved.

I have heard learned counsel for the parties, apprise the paper book.

The Schedule-II Clause 'D' of the tender form dated 12.10.1993 Ex.P2 is not in dispute and for the sake of bravity the same is reproduced hereunder :-

> "D). Tenders should be accompanied by the earnest money in the form of Payee's A/cs Bank Demand Draft issued by any scheduled/Nationalised Bank in favour of the Sr. Regional Manager, FCI, Regional Office, Punjab, Chandigarh at the rate of Rs.10,000/- (Rs. Ten Thousand only) for each lot of 100 tonnes. The total amount of Earnest money deposit will match the total quantity offered for purchase. Tender not accompanied by the earliest money shall be summarily rejected. Earnest money shall stand forfeited if the tenderer after submitting his tender resiles/modifies his offer and/or the terms and conditions thereof in a manner not acceptable to the FCI or withdraws his offer before final acceptance it being understood that the tender documents have been issued to him and he is being permitted to tender in

> consideration of his agreement to this stipulation. The earnest money shall also stand forfeited in the event of the tenders failure, after acceptance of his tender, either to deposit the balance amount in full or to remove the stocks sold within the specified time. The earnest money will be returned to unsuccessful tenderer(s) within one week of the rejection of tender but the FCI shall not be liable to pay any interest thereon."

Since the wheat to be supplied was 5000 MT, per lot of 1000 tones and a sum of Rs.5,00,000/- was deposited as earnest money containing condition that if the tenderer resiles or modify the order, the earnest money shall be forfeited.

Now coming back to the arguments of Mr. P.S. Rana, Advocate learned counsel for the appellant, that there was no concluded contract and therefore the earnest money could not be forfeited, he referred to the letter dated 15.10.1993 (Ex.P3) addressed to the Senior Regional Manager, FCI, Punjab Region, Chandigarh, contents of which read as under :-

> "Sub :Tender for sale of indigenious wheat stocks lying at F.C.I. Depot, Jagraon.
>
> Dear Sir,
>
> Kindly refer to our tender No.67 opened on 14.10.93, we regret to clarify that our representative got prepared the demand draft towards earnest money for Rs.5,00,000/- (Rupees Five Lacs only) demand draft No.0001790 dt. 14.10.93 inadvertently, which should have been for Rs.50,000/- (Rupees Fifty Thousands only) and accordingly the quantity offered was also filled as 5000MT instead of 500MT. He further failed to specify the unit as quintal with rate offered. Our offer may be

considered as below :-

Name of Depot	**Qty offered**	**Rate quoted per tonnes**
Jagraon	500MT	380.00 per qtl.

We shall feel highly indebeted if your honour is pleased to refund the excess amount of Rs.4,50,000/- deposited as earnest money.

Assuring you our best services and whole hearted co-operation.”

In my view it was a plain and simple information bearing the offer of the contractor which had already been accepted by him and in lieu thereof a draft of Rs.5,00,000/- was deposited. In my view the valid cause of action accrued in favour of the FCI to invoke the clause 'D' ibid. There is no dispute to the ratio dicendi culled out in **India Meters Ltd.'s** case (supra), on perusal of the facts it reveals that it was a case of supply of the meters but the tenderer changed the condition for not submitting bank guarantee as per the tender notice, therefore, the fact as noticed above would not be applicable to the case in hand for adjudication of the terms and conditions of the tender notice. No separate suit for the loss had been filed. The fact of the matter is that the terms and conditions of the clause were sacrosanct thus can be pressed into service. Each and every case is to be decided on the facts and not on the ratio carved out. In the case in hand the cause of action accrued to the FCI only when the contractor appellant-plaintiff changed the valid terms and conditions after having accepting the terms and conditions though under the ploy of misunderstanding. The

Orissa High Court had an occasion to interpret the variation to be not a part of acceptance but a counter closer much less controversy pertained to the furnishing of the bank guarantee. However, the instant case was of forfeiture of the earnest money. Here as noticed above is the case of forfeiture of the earnest money. Both the Courts below after examining the evidence on record held that the plaintiff had not been able to make out a different case as per the documentary evidence.

No ground for interference is made out muchless no substantiaon question of law arises for adjudication.

The appeal stands dismissed.

January 30, 2018 **(AMIT RAWAL)**
Vijay Asija **JUDGE**

Whether speaking/reasoned Yes / No

Whether Reportable Yes / No