

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Civil Writ Petition No. 7399 of 2018 (O&M)

Date of Decision: 03.10.2018

Sabroop Feed & Dairy Farm Village Tajpur Road, Ludhiana

.....Petitioner

versus

Punjab State Cooperative Supply & Marketing Federation Ltd.
(MARKFED)

.....Respondent

**CORAM: HON'BLE MR.JUSTICE KRISHNA MURARI, CHIEF JUSTICE
HON'BLE MR. JUSTICE ANIL KSHETARPAL, JUDGE**

Present : Mr. Shiv Kumar, Advocate, for the petitioner.
Mr. Anhad S.Miglani, Advocate, for the respondent.

KRISHNA MURARI, CHIEF JUSTICE

Petitioner a sole proprietorship firm engaged in the business of manufacturing of Benola Khal, Dalia and cattle feed etc. has filed the instant writ petition seeking a writ of certiorari to quash the order dated 10.11.2017 forfeiting the earnest money deposited against the tender.

2. We have heard Shri Shiv Kumar, learned counsel for the petitioner and Shri Anhad S.Miglani, learned counsel appearing for the respondent.

3. The facts relevant for the purpose of adjudicating the issue raised herein in brief can be summarized as under:-

Respondent- Punjab State Cooperative Supply & Marketing Federation Ltd. (hereinafter referred to as 'the MARKFED') invited e-tenders for purchase of lot wise damaged wheat which was unfit for human consumption. The bids were closed on 22.03.2017. The terms and

conditions enumerated in the Notice Inviting Tender (NIT) stipulate that the tenderers were required to quote the rates in the financial bid and were at liberty to quote for any or all the lots put together separately for lot wise. The condition further stipulated that the rates offered will be valid up to 30 days further extendable to another 15 days from the date of opening of the tenders. As per Clause 12, the tenderers were required to pay the earnest money through RTGS/NEFT. NIT also contained a condition that the tenderer after submitting his tender in case does not keep his offer open or does not deposit the requisite security within a week's time from the date of acceptance of the offer or modify the terms and conditions thereof in a manner not acceptable to the MARKFED, then the same shall be rejected and the earnest money shall be forfeited. It may be relevant to quote the relevant clauses of the NIT which read as under:-

“10. The tenderer shall quote the rates in the Financial Bid (Annexure-B). The tenderer is at liberty to quote for any or all the lots put together separately, lot wise. The tenderer is to quote for the total quantity in each lot in the Bids in which rates have not been offered for the total quantity of the lot are liable to be rejected. The rates offered will be valid upto 30 (Thirty) days extendable to another 15 (fifteen) days from the date of opening of tenders.

11. The Punjab State Cooperative Supply and Marketing Federation Ltd. Chandigarh reserves the right to accept or reject any or all the tenders, without assigning any reason. All tenders shall be irrevocable and remain open for acceptance for a period of thirty days from the date of opening tender(s). If the said date is declared to be a closed holiday for Markfed, office, the tender shall be deemed to remain open for acceptance upto the following working day. The Managing Director, “The Punjab State Cooperative Supply and Marketing Federation Ltd., Chandigarh will have the discretion to extend this date of validity by another fifteen days”.

12. Earnest Money:

The tenderer shall pay to the Punjab State Cooperative Supply and Marketing Federation Ltd., Chandigarh an amount as mentioned in "Annexure G" as Earnest Money for the due performance of stipulations to keep the offer open. The earnest money shall be deposited in Markfed account through RTGS/NEFT Transaction. Tenders not accompanied by the required amount of earnest money shall be out rightly rejected. If the tenderer after submitting his tender does not keep his offer open or does not deposit requisite security within a week's time from the date of acceptance of his/her/their offer or modifies the terms and conditions thereof in a manner not acceptable to "The Punjab State Cooperative Supply & Marketing Federation Ltd., Chandigarh, then the same will be rejected and the earnest money will be forfeited in such event. The Punjab State Cooperative Supply and Marketing Federation Ltd. Chandigarh shall be within its rights to recommend to FCI/Department of Food and Civil Supplies, Punjab for blacklisting the said tenderer/firm for one year. Subject as aforesaid, the earnest money of all unsuccessful tender will be refunded after finalization of the tenders but the MARKFED shall not be liable to pay any interest thereon."

4. Admittedly, the petitioner submitted offer for two lots i.e. lot Nos. 383 and 384 through a single tender. A sum of ₹ 1,76,614/- was deposited as earnest money towards lot No.383 and a sum of ₹ 43,386/- towards lot No.384. In so far as lot No.383 is concerned, the rate of ₹ 1107.86 per quintal quoted by the petitioner was found to be lower than the bids of other tenderers, hence it was rejected and the same is not subject matter of dispute in the present petition.

5. On receiving an information through e-mail, the petitioner vide communication dated 29.03.2017 informed the respondent that the rate of ₹ 10097.9 per quintal for lot No. 384 was quoted on account of a mistake

and hence the offer be treated to be withdrawn and the bid may not be accepted. An identical communication was again issued to the respondents on 07.04.2017. On 07.04.2017 itself a communication was issued by the respondent to the petitioner conveying acceptance of its bid for lot No.384 and informing him that a sum of ₹ 2,20,000/- deposited as earnest money has been converted into the security amount and the balance security amount of ₹ 3,01,554/- be deposited by means of a demand draft. A reminder dated 17.04.2017 was issued by the respondents requiring the petitioner to deposit the balance security amount within two days failing which suitable action as per the terms and conditions of the tender notice shall be initiated. However, when the petitioner failed to deposit the balance security amount, the respondent vide letter dated 10.11.2017, which is impugned in this petition, communicated to the petitioner that since it has failed to deposit the balance security amount, as such, in accordance with the terms and conditions of the NIT, the security amount of ₹ 2,20,000/- deposited stands forfeited and lot No.384 has been included in the next tender to be opened on 15.11.2017. Aggrieved by the aforesaid communication/order, the petitioner has approached this Court.

6. Learned counsel for the petitioner vehemently contended that since the offer made by the petitioner in the form of bid on 22.03.2017 was withdrawn on 29.03.2017, much before the acceptance of the bid on 07.04.2017, thus the acceptance of the offer by the respondent on 07.04.2017 is of no consequence and the forfeiture is illegal. In reply it has been submitted that the petitioner in accordance with the terms and conditions of the NIT while offering the bid kept it open till 30 days of the opening of the tender, hence the same could not have been withdrawn within that period and since the offer was accepted within the period of 30 days,

there is a concluded contract between the parties and for non-compliance of the terms and conditions, that is failure to deposit the security amount, consequences of forfeiture ensued and the same has rightly been made.

7. We have considered the arguments advanced by learned counsel for the parties.

8. Section 5 of the Contract Act, 1872 provides that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer. Admittedly, in the case in hand, the petitioner while offering the bid had agreed to keep his bid open for acceptance for a period of 30 days from the date of opening of the tenders. There is no dispute that the tender was opened on 27.03.2017 and the acceptance was communicated to the petitioner vide letter dated 07.04.2017 within 30 days from the opening of the tender. Whether the forfeiture in such a situation is legally justified is no more res-integra and stands settled by a decision of the Hon'ble Apex Court. Reference may be made to the decision of the Hon'ble Apex Court in case ***National Highways Authority of India v. Ganga Enterprises 2003(7) SCC 410***, rendered in a similar case. In the said case National Highways Authority of India issued a Notice Inviting Tender 31.07.1997 inviting tenders for collection of toll on a highway. The NIT required the bidders to furnish a bid security for a sum of ₹ 40 lacs through a bank draft or by means of a bank guarantee and a performance security of Rs. 2 crores by way of a bank guarantee. The NIT contained a further condition that the bid offered was to remain valid for a period of 120 days after the last date of the submission of bid and the bid security was liable to be forfeited in case the bidder withdrew his bid during the validity period of bid or failed within the specified period to furnish the performance security. The bidder therein withdrew the bid within a period of

120 days from the last date of submission of the bids and thus the bid security was forfeited. The dispute travelled up to the Hon'ble Apex Court and while considering the issue it has been held as under:-

“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 Contract Act, 1872. The 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 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.”

9. Same view was again reiterated in a more recent judgment in the case of ***State of Haryana and others v. Malik Traders*** 2011(13) SCC 200. In identical facts and circumstances a Division Bench of this Court

while allowing the writ petition quashed the letter of acceptance and the order forfeiting the bid security and directed the respondents to refund the same. Hon'ble Apex Court while allowing the appeal and setting aside the order passed by this Court held as under:-

“10. For allowing the writ petition, the only reason stated by the High Court is that, since the writ petitioner (the 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 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 Para 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.

12. 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.”

10. In view of the settled proposition of law by the aforesaid pronouncements of the Hon’ble Apex Court and in the facts and circumstances, no illegality can be attributed to the action of the respondents in forfeiting the EMD/security amount and the same is not liable to be refunded to the petitioner. The impugned communication dated 10.11.2017 does not require any interference and the writ petition accordingly fails and stands dismissed.

However, in the facts and circumstances we do not make any order as to costs.

(KRISHNA MURARI)
CHIEF JUSTICE

(ANIL KSHETARPAL)
JUDGE

03.10.2018

ravinder

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No