

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.

WRIT PETITION NO. 13446 OF 2018

Chaitanya Electricals Pvt. Ltd., Jalgaon,
a registered Company having its
registration No. 11-47979/1988,
through its Director - Mr. Sanjay Satyanarayan Agrawal,
Age : 51 years, Occu. Business, R/o. 79,
Co-operative Industrial Estate Complex,
Old M.I.D.C., Jalgaon , Tq. & Dist. Jalgaon. Petitioner

Versus

- 1) Divisional Railway Manager,
D.R.M. Office, Central Railway,
Bhusawal, Tal. Bhusawal, Dist. Jalgaon.
- 2) Senior Divisional Signal &
Telecommunication Engineer (Works),
D.R.M. Office, Central Railway,
Bhusawal, Tal. Bhusawal, Dist. Jalgaon. Respondents

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Shri. Shailesh P. Brahme, Advocate for the petitioner
Shri. Manish N. Navandar, Advocate for respondents
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**CORAM : S. V. GANGAPURWALA
AND
A. M. DHAVAL, JJ.**

DATE : 1ST APRIL, 2019

ORAL JUDGMENT [PER S. V. GANGAPURWALA, J.] :-

1. Rule. Rule made returnable forthwith. Heard finally with the consent of parties and taken up for disposal at the stage of admission.

2. Pursuant to the tender process, the petitioner submitted his offer for the work of "provision of Digital Axle Counter vulnerable graded IBHs in Hirapur – Igatpuri Section", Bhusawal Division of Central Railway. The respondents issued letter of acceptance on 05.07.2018 (P.22). Under the letter of acceptance, the rates given by the petitioner of the items enumerated in Schedule 'C' were accepted with variation. The petitioner communicated that, the conditional acceptance of the respondent is a conditional offer and is not acceptable to it as the rates were reduced in respect of some of the items in Schedule 'C'. The respondents thereafter under letter dt. 19.11.2018 forfeited the earnest amount and directed the petitioner to pay 10% of the contract amount i.e. Rs. 68,93,408.08/- on account of non-performance on the part of the petitioner and the petitioner having failed to submit requisite performance guarantee even after expiry of 90 days from the date of issuance of letter of acceptance. The same is assailed in the present writ petition.

3. Shri. Brahme, learned counsel for the petitioner submits that, the petitioner had given an offer pursuant to the tender. The respondents are required to issue the letter of acceptance in terms of offer letter. The conditional letter of acceptance is not an acceptance and the same would tantamount to a counter offer. For an

acceptance to be valid it has to be unqualified and absolute. The learned counsel relies on Section 7 of the Indian Contract Act, 1872. The learned counsel submits that, the negotiation also had not taken place between the parties at any point of time. The learned counsel submits that, as no promise had come into existence, the petitioner was not bound to submit the performance guarantee. The petitioner had also communicated that the conditional acceptance is not acceptable to the petitioner by issuing letter dt. 03/11.09.2018 and subsequent notice of advocate dt. 17.11.2018. The order directing petitioner to pay 10% of the amount of contract and also forfeiting the EMD is illegal.

4. Shri. Manish Navandar, learned counsel for respondents submits that, the petitioner failed to perform the part of the promise. The offer of the petitioner was accepted. Letter of acceptance was also issued to the petitioner. The letter of acceptance having been issued, the petitioner was bound to submit the performance guarantee of Rs. 36,96,400/- within 30 days from the date of acceptance. The circular dt. 27.02.2011, more particularly, clause 52 of the general conditions of the contract is amended. As per the said amended clause, the recovery of claims of Railway in regard to terminated contracts can be made from the Final Bill, Security Deposits and Performance Guarantees of other contract or contracts

executed by the contractor. The petitioner was requested to start the work time and again and to complete it as mentioned in the letter of acceptance. The petitioner failed to do so. As such, as per clause 4 of letter of acceptance, the contract awarded to the petitioner came to be terminated and 10% of the total value of the contract is required to be paid by the petitioner. No illegality is committed by the respondents.

5. The tender is an invitation to offer. The petitioner submitted offer pursuant to the tender. While issuing the letter of acceptance, the respondents have reduced the rates for items of Schedule 'C'. The acceptance was not absolute and unconditional. As per Section 7 of the Indian Contract Act, for an acceptance to be valid, the acceptance has to be unconditional and absolute. Under the letter of acceptance, the respondents reduced the rates of various items of Schedule 'C' quoted by the petitioner. The same could not have been considered to be an acceptance in its strict sense. The petitioner on receipt of the conditional letter of acceptance, communicated to the respondents that the same is not acceptable to it under letter dt. 03-11.09.2018 and 17.11.2018.

6. It is only if the proposal is accepted, a promise would come into existence and it is only if a promise comes into existence the

parties would be governed by reciprocal rights and obligations. As the promise had not come into existence, the respondents cannot ask the petitioner to enforce any of the terms of the tender.

7. It is not a case that the petitioner accepted the conditional letter of acceptance by conduct nor communicated its acceptance to the conditional letter of acceptance which amounting to counter offer.

8. There was no consensus *ad idem* between the parties. It is submitted that, as per terms of the tender and after the petitioner quoted the rates no further negotiation had taken place between the parties and the respondents straightway issued a conditional letter of acceptance reducing the rates quoted by the petitioner of the items included in Schedule 'C', which was not acceptable to the petitioner.

9. In view of the above, the promise had not come into existence *inter alia* enforceable contract was not formed, the respondents could not have insisted upon the petitioner to submit performance guarantee. *Inter alia* the impugned notice issued to the petitioner directing forfeiture of EMD and payment of 10% of the contract amount is without any legal basis. The same as such stands

quashed and set aside. The respondents shall refund the EMD of the petitioner within a period of three months from today.

10. Rule is made absolute in the above terms. No order as to costs.

[A. M. DHAVAL]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

Punde