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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

FMA 418 of 2024
with
CAN 1 of 2024

The Senior Divisional Commercial Manager,
Eastern Railway, Howrah Division & Anr.
Vs.
Manjee Yadav & Ors.

Mr. Prabir Bhowmick, Advocate
Ms. Smita Das De, Advocate
..... for the Appellants
Mr. Saptarshi Roy, Advocate
Mr. Siddhartha Roy, Advocate
Ms. Kakali Das Chakraborty, Advocate
.....for the Respondent/Writ-Petitioner

1. The appellant is prevaricating its stand at the different stages of the dispute what was taken by the authority in a termination letter issued to the appellant is sought to be whittle down by taking a diametrically opposite stand in a pleading filed before the Court.
2. The genesis of the litigation ensued on uploading a notice inviting a tender in Indian Railways e-Procurement System (IREPS) for offering their price by the registered vendors with stipulation that when the total value of the tender exceeds Rs.1 Crore, the minimum Annual Financial Turnover required for such bidding by the said registered vendors, is Rs.50 lakhs.
3. Clause 1.2 of the Policy for Commercial Earning and Non-fare Revenue Contracts awarded through e-auction postulates that the entity who intends to offer their price, must upload the audited balance-

sheet and profit and loss statement for the last three years in their profile in the said Portal before the bidding starts for the auction.

4. Indubitably, the respondent no. 1 participated in the said tender process uploading the requisite documents indicating that the turnover for the year 2020-2021 is Rs. 64,34,450/-. Though it is claimed that the audited balance sheet and the profit and loss account in the aforesaid financial year was uploaded in support of such claim but the appellant did not find such documents in the said Portal and subsequently, issued a letter of termination dated 06.09.2023 observing thus:-

“In compliance to the above provision the participating entity is required to upload P & L account statement in support of their annual business turnover positively. But you have failed to upload a valid document viz. P & L accounts which tantamount to negligence in bidding procedures.

As the only eligibility criteria is not supported by proper documents, the competent Railway Authority finding on other option has decided to cancel your bid in the e-auction and to forfeit the amount of Earnest Money in terms of Para 2.2 of Standard Conditions of Contract as above”

5. The challenge was made to the said letter of disqualifying the respondent no. 1 from participating in the said tender process by filing a writ-petition before this Court. Curiously enough, stand was taken by the authority before the Writ Court to the effect that if false and misleading documents are filed by the entity, the Railway Authorities reserved their rights to terminate and/or cancel the bid and can also forfeit the earnest money/security deposit without any further notice.

6. Because of such diametrically opposite stand taken by the authority as indicated in the first paragraph of the judgment, the Single Bench relying on Clause 1.2 of the said Policy held that the documents produced by the writ-petitioner/respondent no. 1 is galore that the turnover as shown in the information put at the time of participating in the tender is correct and the stand of the authority that the same is false and misleading one, is unacceptable.
7. The Railway has challenged the said order primarily on the ground that clause 1.2 of the said Policy confers power upon the Railway Authority to terminate/cancel the bid and forfeit the earnest money/security deposit. It is further contended that the profit and loss account uploaded by the petitioner revealed the transactions during the aforesaid financial year to the extent of Rs.23 lakhs and odd and, therefore, the claim of the petitioner that the turnover in the said relevant assessment year is Rs.64 lakhs and odd a false/misleading statement and thus the judgment/order of the Single Bench needs to be interfered with.
8. The Counsel for the appellant vociferously submits that when a right to forfeit the security deposit is enshrined in the Contract, to be exercised in breach of the contract, the Court interference is minimal in this regard and placed his reliance upon an unreported judgment of the Apex Court in case of **Satish Batra Vs. Sudhir Rawal** (Civil Appeal No. 7588 of 2012 decided on 18.10.2012). Reliance is further placed upon a Coordinate Bench decision of

this Court in case of ***Essem Enterprise Vs. Kolkata Municipal Corporation & Ors.*** (APO 67 of 2021 decided on 05.04.2023) in support of the contention that in case of breach of a contract by the bidder in not disclosing the material fact while submitting the bid, there is no fetter on the part of the Authority to terminate the contract and forfeit the earnest money/security deposit. Lastly the judgment of the Allahabad High Court in case of ***Energo Construction Private Limited Vs. Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd & Ors.*** reported in ***2024:AHC:30429-DB*** is relied upon for the proposition that the power of judicial review should be exercised in a limited manner, more particularly, in a contractual field and once the wrong information has been uploaded, there is no impediment on the part of the appellant to reject/cancel the bid and forfeit the amount.

9. It is thus submitted that various clauses of the said Policy as well as the Freight Marketing Circulars would evidently show that the power is reserved upon the Railway Authorities not only to terminate/cancel the contract but also to forfeit the earnest money in case of a breach of the conditions enshrined therein.
10. Per contra, learned Counsel for the Respondent No. 1 submits that the clauses as relied upon by the Railway Authority are applicable in a specified eventuality and not in the manner as has been done by them. He further submits that participating in the bidding process and being unsuccessful therein cannot be regarded as a concluded contract as the

proposal which was made had not been accepted by the other side. He further submits that clause 1.2 of the said Policy is only attracted when a bidder is declared as successful bidder and not at the primitive stage of scrutinizing documents and rejecting the bid at the threshold for some alleged lapses and/or lack of requisite qualification. He further submits that there is no fetter on the part of the High Court while exercising the judicial review to entertain the dispute in a contractual matter and placed reliance upon an unreported judgment of the Division Bench, where one of us - Harish Tandon, J was a member, for the proposition that unless the acceptance is made to a bid culminated into execution of a contract, clauses or the terms relatable to the incidences of the contract cannot be activated nor made applicable. He thus submits that there is no infirmity in the impugned order, on facts discerned by the Writ Court from the record or the point agitated before this Court deserves any consideration.

11. On the conspectus of the aforesaid stands taken by the parties and the facts as adumbrated hereinabove, it is manifest that the bid of the respondent no. 1 was rejected by issuing a letter dated 06.09.2023 on the ground of failure to upload the aforesaid documents viz. profit and loss account which tantamount to negligence in the bidding procedures. The said letter would further reveal that since the eligibility criteria is not supported by proper documents, the appellant authority had decided to cancel such bid and forfeit the amount of

earnest money. Though clause 2.2 of the Standard Contents of Contract was quoted in the said letter dated 06.09.2023 disqualifying the respondent no. 1 from participating in the said bid but it appears from the stand of both the parties that it is replica of clause 1.2 of the Freight Marketing Circular No. 11 of 2022. The said clause is quoted as under:

1.2 The entity shall be required to upload the Audited Balance Sheets and P&L Account Statements of the Last three Financial Years in their profile in IREPS before start of bidding in the auction in which they want to participate., Railways shall verify the Audited Balance Sheet and P&L Account Statement uploaded in the profile in IREPS of the successful contractors anytime after acceptance of the bid or during the currency of contract, and if the information about the Financial Eligibility is found to be false misleading or the documents uploaded by the firm are found to be false/invalid, then the allotment of lot shall be cancelled or, if the contract has been issued, the same shall be terminated forfeiting the EMD/Security Deposit without any further notice.

12. The said clause is incorporated under the Brodhead 'Eligibility' mandating the uploading of the data – balance sheets and the profit and loss account statements of the last three financial year in IREPS before the bidding started. It further postulates that the railway authority while verifying the audited balance sheet and the profit and loss account statements so uploaded by the successful contractors any time after the acceptance of a bid or during the currency of a contract and if the information about the financial eligibility is found to be false/misleading, the allotment of the lot shall be cancelled or if the contract has been issued, the same will be terminated forfeiting the EMD/security deposit without any further reference.

13. The clause has to be interpreted in a meaningful manner in order to ascertain its applicability in a given situation. The verification of the documents i.e. the audited balance sheets and the profit and loss account uploaded is in relation to a successful contractor and not at the stage when the declaration of the results of such tender process has not been made. The words “successful contractors” have to be understood in such perspective with distinction and such qualification does not imbibe within itself the unsuccessful contractors whose bid is not accepted. Apart from the same, the expressions “the allotment of lot shall be cancelled” or “if the contract has been issued” has to be read in conjunction with the acceptance of the bid or the offer made by a successful contractor and not otherwise. The unsuccessful contractors does not have the privilege either of the allotment of lot or the contract having entered into inviting the consequences of termination of the same and forfeiting of the EMD/security deposit without any further notice.
14. There appears to be a fallacy in the stand of the appellant in treating the numerical figure shown in the balance sheet as inviolable contents relating to eligibility. Clause 1.1 of the said Circular does not postulates the numerical figure shown in the profit and loss account but the disclosure of the Minimum Annual Financial Turnover which is distinct and different to the numerical figure shown in the balance sheet. There is a misconception in the minds of the railway authority that the figure shown in the profit and loss account is equivalent to an

Annual Financial Turnover. The respondent no. 1 claimed to have submitted the audited balance sheet reflecting the turnover during the said financial year in support of its disclosure that the Minimum Annual Turnover in a financial year exceeds Rs.50 lakhs. Even the Single Bench has found such fact from the record and held that the stand of the railway authority in this regard is not acceptable.

15. The judgment cited by the learned Advocate for the appellant needs to be considered in the light of the facts emanates from the records of this case. The Apex Court in ***Satish Batra (supra)*** was considering a case where an agreement for sale of an immoveable property was entered into disclosing the total consideration price and an earnest money was paid by the intending purchaser. The purchaser therein admittedly defaulted in payment of the balance consideration and the seller forfeited the earnest money so deposited. The question that came up for consideration whether the seller can retain the entire amount of earnest money in terms of the clause contained in the said agreement. It is beyond cavil of doubt that the said case was decided by the Apex Court on the basis of a concluded contract having entered into by and between the parties and consequence of breach of any or more conditions incorporated therein. In the backdrop of the above and the clause of the said agreement provides for forfeiture of the earnest amount, the Apex Court held as follows:

“14. In V. Lakshmanan v. B.R. Mangalgiri and others (1995) Suppl. (2) SCC 33, this Court held as follows:

“The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount.”

15. In Housing Urban Development Authority and another v. Kewal Krishan Goel and others (1996) 4 SCC 249, the question that came up for consideration before this Court was, where a land is allotted, the allottee deposited some installments but thereafter intimated the authority about his incapacity to pay up the balance installments and requested for refund of the money paid, was the allotting authority entitled to forfeit the earnest money deposited by the allottee or could be only entitled to forfeit 10% of the total amount deposited by the allottee till the request is made? Following the judgment in Shree Hanuman Cotton Mills (supra), this Court held that the allottee having accepted the allotment and having made some payment on installments basis, then made a request to surrender the land, has committed default on his part and, therefore, the competent authority would be fully justified in forfeiting the earnest money which had been deposited and not the 10% of the amount deposited, as held by the High Court. In that case, this Court took the view that the earnest money represented the guarantee that the contract would be fulfilled.

16. This Court, again, in Videocon Properties Ltd. v. Dr. Bhalchandra Laboratories and others (2004) 3 SCC 711, dealt with a case of sale of immovable property. It was a case where the plaintiff-appellants had entered into an agreement with the respondents-defendants on 13.5.1994 to sell the landed property owned by the respondents and a sum of Rs.38,00,000/- was paid by the appellants as deposit or earnest money on the execution of the agreement. In that case, this Court examined the nature and character of the earnest money deposit and took the view that the words used in the agreement alone would not be determinative of the character of the “earnest money” but really the intention of the parties and surrounding circumstances. The Court held that the earnest money serves two purposes of being part-payment of the purchase money and security for the performance of the contract by the party concerned. In that case, on facts, after interpreting various clauses of the agreement, the Court held as follows:

“15. Coming to the facts of the case, it is seen from the agreement dated 13.5.1994 entered into between parties - particularly Clause 1, which specifies more than one enumerated categories of payment to be made by the purchaser in the manner and at stages indicated therein, as consideration for the ultimate sale to be made and completed. The further fact that the sum of Rs. 38 lakhs had to be paid on the date of execution of the agreement itself, with the other remaining categories of sums being stipulated for payment at different and subsequent stages as well as execution of the sale deed by the Vendors taken together with the contents of the stipulation made in Clause 2.3, providing for the return of it, if for any reason the Vendors fail to fulfill their obligations under Clause 2, strongly supports and strengthens the claim of the appellants that the intention of the parties in the case on hand is in effect to treat the sum of Rs. 38 lakhs to be part of the prepaid purchase-money and not pure and simple earnest money deposit of the restricted sense and tenor, wholly unrelated to the purchase price as such in any manner. The mention made in the agreement or description of the

same otherwise as "deposit or earnest money" and not merely as earnest money, inevitably leads to the inescapable conclusion that the same has to and was really meant to serve both purposes as envisaged in the decision noticed supra. In substance, it is, therefore, really a deposit or payment of advance as well and for that matter actually part payment of purchase price, only. In the teeth of the further fact situation that the sale could not be completed by execution of the sale deed in this case only due to lapses and inabilities on the part of the respondents - irrespective of bonafides or otherwise involved in such delay and lapses, the amount of rupees 33 lakhs becomes refundable by the Vendors to the purchasers as of the prepaid purchase price deposited with the Vendors. Consequently, the sum of rupees 38 lakhs to be refunded would attract the first limb or part of Section 55(6)(b) of the Transfer of Property Act itself and therefore necessarily, as held by the learned Single Judge, the defendants prima facie became liable to refund the same with interest due thereon, in terms of Clause 2.3 of the agreement. Therefore, the statutory charge envisaged therein would get attracted to and encompass the whole of the sum of rupees 38 lakhs and the interest due thereon....." In the above mentioned case, the Court also held as follows:

"14.Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be baked into and what may be called an advance may really be a deposit or earnest money and what is termed as 'a deposit or earnest money' may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."

17. Law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply."

16. The Division Bench judgment of this Court in case of **Essem Enterprises (supra)** was in relation to participation in the tender process where the appellant therein was adjudged as the lowest bidder and deposited the earnest money in terms of the condition of the tender. The validity of the bid extended beyond the period stipulated at the time of publishing the notice inviting tender which make

the appellant approach the Court. In the backdrop of the above, since he was adjudged as the lowest bidder, but for non-awarding the contract, damages was claimed under Section 74 of the Contract Act and it is held that the forfeiture condition in the contract is a standalone contract by itself and can be activated in the situation contemplated therein.

17. The ratio of the law enunciated in the report is to be read in the context of the facts involved therein. It cannot be applied in an abstract manner unless there is a commonality in the facts or somewhat nearer facts. In a contractual field the interpretation of various clauses are required to be made on the meaningful reading of the words and the expressions used therein and the intention of the parties and the conduct during the transactions are also required to be seen. A consequence is contemplated in a given situation as specified in the contract itself, its operation should not be extended beyond such stipulation.
18. Clause 1.2 as relied upon by the appellants can only be activated against a successful contractor on an eventuality of breach of the terms and conditions of the contract or the allotment of lot inviting the serious consequences of forfeiture of earnest money/security deposit. Whether the participation in the tender process without the offer being accepted constitutes a concluded contract is a question to be taken into account in this regard.
19. The unreported judgment of this Court in ***General Manager, Eastern Railway Vs. Dileep Kumar Sah*** (MAT 730 of 2020 decided on 22.04.2024) where

one of us - Harish Tandon, J was a member, had an occasion to consider the identical situation in pursuit of ascertaining whether the bid so offered would constitute a concluded contract. Relying on a judgment of the Apex Court in ***Vedanta Limited Vs. M/s Emirates Trading Agency LLC***, reported in ***AIR 2017 SC 2035***, it is held that unless the offer made by the bidder is accepted without any conditions or putting any rider to it shall partake a character of a contract otherwise it would not be treated as concluded contract in the following:-

“It is manifest from the aforementioned letter that the bid of the writ petitioner/respondent was accepted having quoted the highest rate but the acceptance would be completed only after the execution of the agreement for which the writ petitioner/respondent was called upon to attend the office. If the acceptance is coupled with certain conditions or reasonably inferred that something more is required by both the parties to be performed, it is regarded as an offer and the acceptance cannot be presumed to take a character of a contract. The Apex Court in M/s. Vedanta Ltd. (supra) in an unequivocal terms held that an offer has to be accepted without any rider or further conditions to be incorporated to achieve the character of a contract in the following:

"13. Section 7 of the Indian Contract Act, 1872 (hereinafter referred to as „the Act“) provides that in order to convert a proposal into a contract, the acceptance must be absolute and unqualified. The existence of a concluded contract is a sine qua non in a claim for compensation for loss and damages under Section 73 of the Act arising out of a breach of contract. If instead of acceptance of a proposal, a counter-proposal is made, no concluded contract comes into existence."

The first and second paragraph of the said letter indicates that though the bid was accepted but in order to complete the exercise, an agreement is required to be executed by both the parties so that it may constitute a contract. The contract would be presumed not only from the languages used in the offer or acceptance of letter but can also be presumed from the conduct of the parties in relation to a transaction. It is apparent from the letter dated 19.6.2017 more particularly, the subject for which it is issued which is indicative of the fact that it is in the nature of an offer letter and the acceptance can only be made on execution of an agreement. The acceptance must be unqualified and/or unconditional which is sine qua non to a concluded contract as held by the Supreme Court in M/s. Vedanta Ltd. (supra)."

20. It is thus apparent from the facts as indicated

hereinabove that clause 1.2 is only applicable against a successful contractor and not against an unsuccessful contractor which the respondent 1 is.

21. We thus do not find any justification in the stand of the railway authority in forfeiting the security deposit nor do we find any infirmity and/or illegality in the order of the Single Bench.
22. The appeal sans merit. The same **being FMA 418 of 2024** is hereby **dismissed**. No order as to costs.
23. The earnest money/security deposit as directed by the Single Bench shall be returned to the respondent no. 1 within three weeks from date.
24. Let the certified copy of this judgment/order dictated in open Court be given to the parties within three days from the date of an application.

(Harish Tandon, J.)

(Prasenjit Biswas, J)