IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE MADHURESH PRASAD

MAT 730 of 2020
CAN 1 of 2021
CAN 2 of 2021
The General Manager, Eastern Railway & Ors.
Vs.
Dileep Kumar Sah

Appearance:

For the Appellants : **Mr. Asok Kumar Chakraborty, Ld. A.S.G.**
Mr. Sanajit Kumar Ghosh, Adv.

For the Respondent : **Mr. Saptarshi Roy, Adv.**
Ms. Kakali Das Chakraborty, Adv.

Judgment On : **22.04.2024**

Harish Tandon, J.:

The Railway has filed the instant appeal assailing an order dated December 12, 2019 passed in WP 26079 (W) of 2017 whereby and whereunder the aforesaid writ petition was disposed of directing the appellants to return the earnest deposit and security deposit and further set aside the letter issued by the appellant blacklisting the writ petitioner/respondent for a period of 2 years. The dispute involved in the instant proceeding relates to a question whether there was a concluded contract between the parties and whether the Clauses contained in the tender documents or a policy of the Railways are restricted to a concluded contract or can be resorted to at the stage prior to entering of concluded contract.

A prelude to the undisputed facts are stated in order to determine the aforesaid question. The Railway floated a tender for leasing out the parcel van space in train No. 53041 ex Howrah to Jaynagar Express. The respondent/petitioner offered by participating in the said bid and was adjudged as the highest bidder. Subsequently, a letter was issued on 19.6.2017 by the Railway Authority intimating that his bid has been accepted for the space as specified in the tender and called upon the respondent to attend the office for the purpose of an agreement to be executed in this regard. The said letter further indicates that in terms of Para 20.1 and the provisions of instructions to tenderers, on allotment of a contract, the successful bidders shall be required to commence the loading within 15 days failing which the contract will be terminated and the earnest money/security deposit will be forfeited. In response to the aforesaid letter the petitioner sought extension of time citing a medical ground on 13.7.2017. The Railway proceeded to cancel and/or withdraw the offer so made by causing a letter dated 25.8.2017 and forfeited the earnest money deposit and the security deposit and debarred the petitioner from participating in any future tender in Howrah Division for 2 years. Subsequently, various correspondences were made by the respondent seeking to withdraw the said cancellation letter and ultimately filed the writ petition not only for setting aside the said cancellation letter but also the decision to debar him from participating in future tender in the Howrah Division for 2 years together with the return of the earnest money and the security deposit which was forfeited.

The writ petition was initially allowed and the challenge was made to a Division Bench which remanded the matter to the Single Bench as the Railway was not given an opportunity to disclose their stands in the form of an affidavit. After remand the impugned order is passed by the Single Bench in the following:

A) Having regard to the law on concluded contract, it is an accepted proposition that a tender document is in the nature of an Offer to the whole world and cannot give rise to a specific concluded contract between the tender offering authority and the highest bidder;

B) That the highest bid as submitted by the present petitioner qualifying in the tender, would be subject to several terms and conditions specified by the tender document as would be evident from the O.L. dated June 19, 2017;

C) It is upon the acceptance of such terms and conditions by the highest bidder and the communication of such acceptance to the Tender Issuing Authority that the Tender Agreement is executed between the parties;

D) The other conditions in the tender document and the Railway Policy can kick in only after the parties have entered into a concluded contract;

E) It is obvious to this Court that the O.L. dated June 19, 2017 refers to the commencement of the work by the successful bidder, in this case the petitioner, by applying Clause 20.1 of the tender conditions only after the allotment of the contract. The time period for commencement of such work is also specified in Clause 20.1(supra);

F) ***It is also obvious that no allotment of the contract by signing the agreement between the parties had taken place between the parties. The petitioner, even prior to signing the contract /agreement, had sought extension of time to sign the contract and thereafter refund of the SD and EMD;***

G) ***It is evident that the law has been correctly noticed by the Hon'ble Single Bench in (2006) 1 SCC 751 (supra) that till the parties enter into a concluded contract/agreement, no arbitration clause contained in the contract/agreement can be operative against either of them;***

H) ***This Court also finds the ratio of AIR 2017 SC 2035 stoods apropo the facts of this case since the O.L. dated June 19, 2017 was more in the nature of a counter proposal by E.R./the Respondents specifying the requirement of compliance of the further terms and conditions by the petitioner.***

In the above view of the matter, WP No. 26079(W) of 2017 stands allowed.

Accordingly, the order of the Hon'ble Single Bench dated 26th July, 2018 stands restored."

The counsel for the appellant submits that the letter dated 19.6.2017 has been construed wrongly by the Single Bench as a mere offer when in fact the offer made by the writ petitioner/respondent was accepted and, therefore, it should be construed as a letter of intent. In support of the aforesaid contention the reliance is placed upon the judgment of the Apex Court in case of ***Joshi Technologies International Inc vs. Union of India & Ors., reported in (2015) 7 SCC 728***. The counsel for the appellant further submits that the letter dated 19.6.2017 is, in effect, a letter of acceptance of the offer and should have been presumed as concluded contract and, therefore, the finding of the Trial Court in this regard is not acceptable in view of the judgment rendered by the Supreme Court in ***Dresser Rand S.A. vs. Bindal Agro Chem Ltd, reported in (2006) 1 SCC 751***. It is submitted that as per the Railway Board's extant policy guidelines contained in Para 20.1 and the provisions of the "Instructions to Tenderers" exposit that the commencement of the work should be made within 15 days and on failure to do so the contract may be terminated and the earnest deposit and the security deposit may be forfeited and, therefore any action taken on the basis of the aforesaid terms of the contract, court should seldom interfere in a contractual matter. It is further submitted that in fact, the reliefs claim in the writ petition is in the nature of recovery of money and therefore, the writ petition in this regard is not maintainable.

The learned Advocate for the respondent/writ petitioner vehemently submits that there was no concluded contract ever entered into between the parties and the letter dated 19.6.2017 is merely an offer letter which would turn into a concluded contract only upon an execution of an agreement between the parties which in fact has not been done. It is further submitted that the action of the Railway in taking recourse to any provision which does not partake a character of a concluded contract is *per se* illegal. It is further submitted that an offer was made by the Railways by causing a letter dated 19.6.2017 which was not accepted by the petitioner and in absence of any offer and acceptance, there cannot be any concluded contract and relied upon the judgment of the Apex Court in case of ***M/s. Vedanta Ltd. vs. M/s. Emirates Trading Agency LLC, reported in AIR 2017 SC 2035***. He thus submits that the Single Bench has held that in the absence of any concluded contract, the action of the authority in forfeiting the earnest money and security deposit and/or debarring and/or blacklisting the petitioner for a period of 2 years, are bad and therefore no interference is called for.

The entire argument is hovering around the interpretation of the languages used in the letter dated 19.6.2017 and the intention of the parties to be gathered therefrom. The question boils down as to whether the said letter dated 19.6.2017 is an offer by the Railway Authorities or an acceptance of an offer made by the writ petitioner/respondent constituting a concluded contract. It would be profitable to quote the said letter in its entirety before we proceed to gather the intention of the parties from the expressions or the words used therein. The said letter reads thus:

"

EASTERN RAILWAY
HOWRAH DIVISION
No.COM/PARCEL/LEASING/RSLR(D)/53041/17.04.17
Date: 19.06.2017

M/s. Kiran Cargo Daily Service,
5, Babu Lal Lane,
(171/1, M.G. Road)
Kolkata-700007

Dear Sir (s)/ Madam,

Sub: Offer letter in respect of leasing of 5.0 Tonne space of RSLR(D) of 53041 up for 04 days (Sun, Mon, Tues & Wed) of Train service in a week with 02 days of Leave per annum, ex HWH to JYG @ Rs. 16,500/- (Rupees Sixteen Thousand & Five Hundred only) per trip provided Loading/Unloading facility at BJU, SPJ & DBG for a period of 05 years.

In response to the Tender opened on 17.04.17 the bid offered by you for 5.0 Tonne space of FSLR(D)-II of 53041 up for 04 days (Sun, Mon, Tues & Wed) of train service in a week with 02 days of leave per annum, ex HWH to JYG @ Rs. 16,500/- (Rupees Sixteen Thousand & Five Hundred only) per trip provided loading/unloading facility at BJU, SPJ & DBG for a period of 05 years, has been accepted by the competent authority of Railway Administration.

In this regard an Agreement is required to be executed with Railway Administration and Leaseholder M/s. Kiran Cargo Daily Service for which you are requested to attend to this office.

Please take note that in terms of Rly Board's Extent policy guidelines contained in Para-20.1 & provision of "Instructions to Tenderers" being the part of the Tender document (opened on 21.09.2016) vide clause 12, the following span of time to start the operation of the subject leasing contract has been provided-

> **20.1 On allotment of contract the successful bidder (leaseholder) shall be required to commence the loading within a period of 15 days, failing which the contract will be terminated and Earnest Money/Security Deposit will be forfeited.**
>
> **The accepting authority shall be empowered to condone the delay on the merits of the case on written application from leaseholder and give another 15 days (maximum period) to the leaseholder for commencement of contract.**

Service Tax at 4.50% of the leased freight will be levied at the time of realization of advance freight in terms of Rly Board's FM Circular No. 21 of 2012 dt. 29.09.2012. Any modification in The policy made by the Ministry of Finance will become Applicable and will be notified accordingly.

You will have to pay applicable Development Charges or any other charges levied by the Railway Administration on the Freight over and above the lump sum leased freight & Service Tax as above, imposed by the Central Government from time to time for the transportation of goods/parcels at the time of depositing the freight of each single journey.

Railway Administration shall not give guarantee to supply any specific type of coaching vehicle. In case of non-availability of SLRD having carrying capacity of 5.0 tonnes, Railway administration may supply 4.0 Tonnes SLR Comptt. For which lump sum leased freight will be levied on prorate basis.

Para-2.3 of FM Circular 05 of 2016 dtd. 15.06.2016 & clause- 3.1 of the Draft Agreement, speaks as under:

Long term lease shall be awarded for a period of 5(five) years. There would be no escalation during the first three years in lumpsum leased freight. An annual escalation of lumpsum leased freight at the rate of 10% per annum on the

lumpsum leased freight of the immediate proceeding year shall be applicable from the fourth year onwards.

Acceptance of Offer : - You are requested to submit your acceptance letter up to 05 working days from the day of issue of the offer letter giving specific date of commencement of loading within the stipulated period of 15 days as above.

In view of the above, you are requested to give your acceptance of this offer and start subject leasing operation within 15 days positively after execution of agreement.

Deposition of security deposit/performance guarantee of amount equivalent to 10% of annual contractual value as per lump sum leased fright (accepted rates) of the leased Parcel space or Rs. 1,00,000/- (One Lakh) whichever is higher is required to be deposited in form of FDR/D.D in favour of FA & CAO/ Eastern Railway Kolkata.

Termination of Contract in case of failure to commence loading:- If you do not commence loading within the stipulated period, contract awarded to you will be terminated and SD/PG shall be forfeited without any further intimation.

Declaration form as enclosed at page 6 of 40 of the tender documents submitted by you is required to be filled up before execution of agreement.

Copies of Current Trade License & Audited Balance Sheet for the financial year ended in 31st March, 2016 along with original are also required at the time of execution of the Agreement.

Please acknowledge the receipt of this letter and adhere to the laid down schedule for operation.

Thanking you,

Yours faithfully,
Sd/- Illegible
16/6/17
Asstt. Comml. Manager/HWH
For Sr. Divl. Comml. Manager

Copy to:
CS/PF/PA/HWH, E.Rly for information with advice to arrange to hand over this offer to above named leaseholder/ their authorized representative under clear signature and submit the copy of acknowledgement to this office for record/ future consequences.

Asstt. Comml. Manager/HWH,
For Sr. Divl. Comml. Manager."

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).***

The response dated 13.7.2017 to the said offer letter dated 19.6.2017 would further manifest that the writ petitioner/respondent sought an extension of time to execute the agreement but admittedly no such agreement was entered into as by a letter dated 25.8.2017, the appellant extended the time for execution for contract for 15 days and simultaneously cancelled the offer and forfeited the earnest money and the security deposit and further proceeded to debar the petitioner from participating in future tender process in the Howrah Division for 2 years. The cumulative effect of the aforesaid letters manifestly conveyed an intention of the parties that a mere acceptance of a bid does not constitute a concluded contract as a further agreement was required to be executed. The aforesaid finding would get further impetus from the fact that the Clauses contained in the Railway Board's extant policy guidelines and the provision of "Instructions to Tenderers" would be activated on allotment of a contract and not otherwise. It is further provided that even if he is adjudged as a highest bidder the acceptance letter must be given within 5 working days from the date of issue of the offer letter specifying the date of the commencement of the loading in the following:

> ***"Acceptance of Offer:- Your are requested to submit your acceptance letter up to 05 working days from the day of issue of the offer letter giving specific date of commence of loading within the stipulated period of 15 days as above."***

The termination Clause as quoted in the letter dated 19.6.2017 clearly provides that in the event of the commencement of the loading having not started within the stipulated time, the contract awarded shall be terminated and the security deposit and the earnest money shall be forfeited without any intimation. Even Clause 12 of the "instructions to the tenderers" is repository of the power to terminate the contract only an allotment of the contract which in fact has not been entered into by and between the parties. Clause 22.1 conveyed further intention of terminating the contract/agreement in the following:

> ***"22.1: The Railway Administration shall have the right to terminate the operation of lease contract/agreement for any reason whatsoever after serving one month's notice to the leaseholder. However, the Railway shall reserve the right to terminate the contract as a punitive measure without giving any notice and at any time in case of breach of agreement or serious violation of any of the stipulation of policy railway's rules by the leaseholder or in case of operational exigencies."***

The contention of the Railways that the letter dated 19.6.2017 is in effect a letter of acceptance and not an offer, does not appear to us the correct intention from the language used therein.

There is no quarrel to the proposition that the letters of intent is construed as a letter of acceptance but it cannot be said to be an absolute proposition for the single reason that such intention has to be gathered or evidently found in the terms and the conditions embodied therein. The Apex Court in ***Dresser Rand S.A. (Supra)*** have held that in order to construe a letter of intent as letter of acceptance, the intention and the expression used therein has to be meticulously examined in the following:

> ***"40. It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter. Chitty on Contracts (para 2.115 in Vol. 1, 28th Edn.) observes that where parties to a transaction exchanged letters of intent, the terms of such letters may, of course, negative contractual intention; but, on the other hand, where the language does not negative contractual intention, it is open to the courts to hold that the parties are bound by the document; and the courts will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it, Be that as it may."***

We do not find any quarrel to the proposition of law laid down in the above report but as we held that the said letter dated 19.6.2017 is in the nature of an offer, the same cannot be construed as a letter of acceptance.

The law as laid down in the said report has no manner of applicability in the instant case.

Reverting to the question whether a writ petition for monetary reliefs is maintainable or not, the support can be lend to a judgment of ***Joshi Technologies (supra)*** wherein it is held that no bar can be seen in exercising the writ jurisdiction even in a contractual or a monetary claims in the following:

> ***"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, 'normally", the Court would not exercise such a discretion:***
>
> ***69.1. The Court may not examine the issue unless the action has some public law character attached to it.***
>
> ***69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.***
>
> ***69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.***

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.”

Taking a clue from the aforesaid decision of the Supreme Court, there is no fetter on the part of the writ court to entertain the writ petition even it relates to a monetary claim as the exercise of such jurisdiction is discretionary. The relief in this writ petition is composite one and if the monetary claim is intertwined and/or consequential to the main relief, the court is not denuded of its power to render complete justice and such discretionary exercise is based upon a sound principle. We thus do not find that the order of the Single Bench deserves any interference.

The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Madhuresh Prasad, J.)