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Omprakash Vs. City and Industrial Development Corp. of Mah. Ltd. and ors.

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Court : Mumbai

Decided On : Jun-29-1993

Reported in : 1994(1)BomCR30; (1993)95BOMLR252

Judge : M.S. Rane, J.

Acts : [Contract Act, 1872](#) - Sections 5 and 8

Appeal No. : Notice of Motion No. 1142 of 1993 in Suit No. 1833 of 1993

Appellant : Omprakash

Respondent : City and Industrial Development Corp. of Mah. Ltd. and ors.

Advocate for Def. : S.U. Kamdar, Adv. for defendant No. 1 and ;Jayesh Patel, Adv. for defendant No. 2

Advocate for Pet/Ap. : J.(sic). Mehta and ;J.J. Bhat, Advs., ;A. Desai, Adv., i/b., Mahimture & Co.

Judgement :

M.S. Rane, J.

1. The important issues arising in this matter are :

(i) Can a party, who responds to the tender by submitting its offer but withdraws the same before the stipulated date of acceptance, commits the breach, and

(ii) Whether providing clause in the tender notice imposing fetter on the exercise of right of tender to withdraw the offer is justifiable in the light of provisions as contained in section 5 of the Indian Contract Act.

2. Now straightway to the relevant facts.

(i) The plaintiffs are Builders and Contractors. The first defendants are Maharashtra State owned Company engaged in developing new areas in the State. The 2nd defendants are the Bank.

(ii) In or about February 1993 first defendants invited tenders for four sets of contract of N.R.I. Housing Projects on the plots situated at Nerul in New Bombay and plaintiffs in response thereto submitted on 6th April 1993 their tenders/offers for two contracts out of four. The plaintiffs also furnished the Bank Guarantee through the 2nd defendants in favour of 1st defendants for the sum of Rs. 24,50,000/-, which according to the 1st defendants as indemnity against any loss or damage they i.e. first defendants may suffer by reason of any breach by the plaintiffs of any condition contained in the tender in question.

(iii) The first defendants on 6th April 1993 opened all the tenders and by their communication dated 12th April 1993 addressed to all tenderers including the plaintiffs informed (relevant part reproduced) :

'On going through the details furnished by you, it has been noticed that you have put forth certain stipulations/conditions/clarifications. On careful consideration of all these in details it has been decided by our Corporation that none of these are acceptable to us. Please note that the provisions in the contract documents including all the corrigenda issued till the submission of the tender shall prevail.' By the said communication all the tenders were requested to review the financial bid and submit revised bid on or before 19th April, 1993.

(iv) The plaintiff, however, by their letter dated 23rd April 1993 addressed to the first , proceeded to revoke their tenders for both the contracts and requested them that thier offers/ tender be not considered. According to the plaintiffs they revoked their offer/ tender well before the stipulated date and they placed reliance to

condition No. 6 of the Tender Condition, which reads :

'6 We agreed to keep our offer open for one hundred and twenty days from the date of opening the financial bid.' (v) The 1st , however, ignoring the plaintiffs withdrawal of tender as above by their letter dated 11th May 1993 (Ex-D to the plaint) informed the plaintiffs about the acceptance of their offer/tender in respect of one contract out of two submitted for the sum of Rs. 34,98,67,862.33.

(vi) The plaintiffs, promptly, by their letter dated 17th May 1993 expressed their surprise and reminded the 1st about their letter of 23rd April, 1993 withdrawing and or revoking their tender in question. The plaintiffs asserted in their letter, which they have reiterated in the plaint herein that the proposal as per this tender stood revoked and there was no question of acceptance thereof and there could never be any valid contract in the circumstances. The plaintiffs claimed that they were within their rights to withdraw the offer before its acceptance.

3. However, not withstanding position as above, the first refused to accept the contention of the plaintiffs of revocation of proposal and instead, claimed and asserted, which 1st have done in this application also, that in accordance with the conditions of the tender, the proposal submitted by the tenderer was irrevocable and therefore plaintiffs have no right to revoke their proposal. The first contend that such revocation amounts to breach of the conditions of the tender. The first defendants, inconsistent with their said stand, sought and insisted to invoke the Bank Guarantee furnished by the plaintiffs through 2nd defendants as stated above, which has given rise to the filing of the suit by plaintiffs seeking reliefs against the invocation of the Bank Guarantee.

4. The application has been made claiming ad-interim and interim reliefs against the enforcement of the said Bank Guarantee by the first defendants.

5. By and large, the Counsel representing respective parties-plaintiffs and defendants Nos. 1 directed their address on the basis of cases as revealed in their pleadings noted above. Counsel also referred to certain decisions. Whereas the Counsel for the 2nd defendant left the matter to the order of the Court.

6. The grant or rejection of reliefs of this application would, although on the prima facia view, would depend upon the factual as well as legal position on two principal points mentioned at the resume of this judgement.

7. I have already adverted to hereinabove the factual position in the background upon which, more or less, there is no much dispute.

8. Certain materials dates, in course of chronological sequence of events, in the transaction, be conveniently noted.

I. February 1993 - 1st Defendants, invited Tenders

II. 6th April 1993 - Plaintiffs submitted their Tenders

III. 12th April 1993 - 1st Defendants' Communication to the Tenders for revision

IV. 23rd April 1993 - Plaintiffs wrote letter to 1st Defendants revoking the proposal

V. 11th May 1993 - 1st Defendants letter to the plaintiffs of acceptance of proposal

VI. 19th April 1993 - Opening of the Financial bid.

VII. 17th August 1993 - Period of 120 days for keeping the offer would expire as per Clause No. 6 of the tender.

9. As would be noticed that the plaintiffs have withdrawn their proposal on 23rd April, 1993, which is firstly before acceptance by the 1st defendants i.e. before 11th May 1993 and secondly before the expiry of 120 days i.e before 17th August 1993 the period for which offer was to be kept open.

10. It would thus be clear that the plaintiffs have withdrawn their offer before its acceptance by the 1st defendants. This being the position, there is no question of coming into effect of contract between the parties either express or implied which the 1st defendants can seek to enforce.

11. Section 5 of the Indian Contract Act provides option to the party to revoke its offer, of course, before its acceptance. In the instant case, the plaintiffs have exercised their right under statute before the date of acceptance of the 1st

defendants.

12. What is the effect of condition of the tender which makes the tender offer irrevocable In my view, by imposing such condition in the tender notice, party cannot be deprived of its legal right.

13. It would be convenient and useful to refer to only two decisions, directly on the points in the hand, which set the legal position luminiasly. Same are:

i. : AIR1987 Bom308 in the case of M/s. Kirloskar Pneumatic Co. Ltd. V. National Thermal Power Corporation Ltd. & another, : AIR1987 Bom308 , (which it is stated, was confirmed by the Supreme Court) and:

ii. : AIR 1972 MP131 in the case of R.K. Verma v. State of M.P. & others. The factual and legal position, as one reads, in both the decisions is the same as in the instant case.

14. Prima facie, therefore, since there is no concluded contract, the 1st defendants are not entitled and justified for the invocation of the Bank Guarantee. Consequently plaintiffs succeed in making prime facie case for the grant on interim reliefs of this application except prayer (c). Notice of Motion is made absolute in terms of prayers (a), (b) and (d). As far as relief of prayer (d) is concerned, it is made clear that the same is granted on the basis that the case of the plaintiff will be dealt with the considered as a fresh bid, on merits and pending of the suit herein be not taken as operating disqualification in the participation of future bids. Cost in the cause.

15. Issuance of certified copy is expedited.

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