

CASE NO.:
Appeal (civil) 4487 of 2003

PETITIONER:
State of Maharashtra & Ors

RESPONDENT:
A.P. Paper Mills Ltd

DATE OF JUDGMENT: 03/04/2006

BENCH:
ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Challenge in this appeal is to the judgment of a Division Bench of the Bombay High Court, Nagpur Bench, directing the appellant to refund the earnest money which was forfeited along with interest @ 6% from the date on which the respondent had withdrawn its offer till actual date of payment. Further direction was given to refund the amount within a period of 8 weeks from the date of judgment.

Factual background in a nutshell is as follows:

Appellant no.2 had issued a Tender Notice dated 8.6.1987 for sale of Bamboo Units in Vadasa (Unit No.7) and Gadchiroli (Unit Nos. 10, 11, 12 and 14). The appellant no.3 had also issued a Tender Sale notice in respect of Bhamragarh (Unit No.5) Chandrapur Circle for the same purpose. The terms and conditions of both the tender notices were identical. The tender was to be submitted in the prescribed form on or before 15.7.1987 and sealed tenders received from the bidders were to be opened on the same day and tenderers were to pay earnest money deposit i.e. 10% of the total royalty to be worked out on the basis of the total estimated yield of that Bamboo Unit. It was mentioned in the Tender Notice that the sealed tender should be accompanied by the treasury challan or demand draft indicating that earnest money has been deposited. It was further stated in the Tender Notice that in case of successful tenderers, the earnest money deposit would automatically stand appropriated towards the security deposit which is required to be furnished. It is the case of the respondent that as per the conditions stipulated in the tender after the submission of the tender, the offer would be considered valid for a period of 45 days from the date of the Tender Sale. Pursuant to the Tender Notices issued by the appellants 2 and 3, the respondent submitted tenders on 15.7.1987 and before submitting the Tender Notice the respondent had deposited the earnest money as required by the Tender Notice. As per the clause 7 of the Tender, the final sale result was to be declared within 30 days for getting approval of the competent authority and since appellants 2 and 3 did not declare the final sale result even after the expiry of 30 days from the date of opening of the Tender i.e. 15.7.1987, the respondent sent a telegram on 15.8.1987 to appellant nos. 2 and 3 in which it was stated that since the

final sale had not been declared within 30 days as per Clause 7 of the Tender Notice, the respondent had withdrawn its offer and requested for return of the earnest money deposit. The respondent also addressed letters to the appellants 2 and 3 on the same date, in which reference was made to the message and telegram which had been sent earlier. On 17.8.1987 the respondent addressed another communication reiterating its stand of withdrawing their offer and requesting for refund of the earnest money. But it did not receive any reply to the telegram which was sent on 15.8.1987 or to the letters sent on the same day addressed to the appellant nos. 2 and 3 and also to the communication dated 17.8.1987 which was addressed to appellants 2 and 3. Therefore, on 2.9.1987 a letter was addressed to the appellant no.2 stating therein that even after expiry of 45 days on 29.8.1987 the final results had not been declared and, therefore, earnest money deposited by the respondent should be refunded. Again on 16.9.1987 it addressed letters to appellants 2 and 3 stating therein that final sale result had not been declared even after the expiry of 45 days and the respondent had already withdrawn the offer and, therefore, the respondent was entitled to the refund of the earnest money deposit.

It is an admitted position that the final sale result in respect of the tender opened on 15.7.1987 was declared on 17.9.1987 which was communicated to the respondent on 21.9.1987, in which it was mentioned that the highest offer of the respondent was accepted.

Request of the respondent for refund of the earnest money deposit was rejected by appellant no.3 by letter dated 24.9.1987. The respondent filed a writ petition under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') challenging the decisions of the appellants 2 and 3 dated 23.9.1987 and decision dated 24.9.1987 rejecting the request of the respondent to refund the earnest money.

Present appellants filed their reply in which they denied the allegations and averments made by the respondent in the writ petition. It was specifically stated that in terms of Clause 7 the interpretation by the present respondent-writ petitioner was not correct. Since the respondent had withdrawn his tender in violation of condition nos. 5(iv) and 5(v) before declaration of final sale result, it amounted to the violation of the terms and conditions of the tender notice and, therefore, the earnest money was not to be refunded and the same was liable to be forfeited which has been done. It was also submitted that the writ petition was not maintainable as the controversy related to factual controversy was involved and, therefore, writ application should be dismissed.

The High Court held that the writ petition was admitted in the year 1988 and though an alternative remedy by way of suit was available, there was no bar for entertaining the writ petition. Interpreting the various conditions of the tender document, the High Court held that the respondent had withdrawn the bid before conclusion of the contract and, therefore, was entitled to refund of earnest money deposited which it had paid to the present appellants at the time of making its offer in the form of bid to the tender notice. Accordingly, as noted above, the writ petition was allowed.

In support of the appeal, learned counsel for the appellants submitted that the interpretation put by the High Court is clearly erroneous. Undisputedly, the withdrawal was

made before the declaration of the final sale result. The computation of the period as done is also not on a proper reading of the clauses.

Per contra, learned counsel for the respondent submitted that even if it is accepted for the sake of arguments that initial withdrawal was made before the stipulated period, yet there was another withdrawal. Looked from any angle the withdrawal was within the time schedule stipulated in the conditions.

The rival contentions need careful consideration. Clauses 3 and 5 are important for adjudicating the controversy.

Clause 3 reads as follows:

"3. EARNEST MONEY DEPOSIT:

i) The Earnest Money Deposit shall be paid for each Tender, at the rate of 10 percent of the total Royalty, to be worked out on the basis of total estimated yield of that Bamboo Unit and the same shall be calculated as per following formula:-

Estimated yield in
M.T. of Bamboo Unit
for which Tender is
filled

X
Rate quoted by the
Tenderer per
Metric Tonne

10

(Earnest Money Deposit amount be rounded to nearest highest figure of rupee).

ii) the intending Tenderer, in token of having paid the Earnest Money Deposit shall enclose a Receipted Treasury Challan or Demand Draft of Deposit at call, drawn in favour of the concerned Divisional Forest Officer on any branch of the scheduled Banks which is payable at Chandrapur or in the form of National Saving Certificates duly pledged in the name of the concerned Divisional Forest Officer. However cheques shall NOT be accepted towards Earnest Money Deposit.

iii) In case of successful tenderers, the Earnest Money shall automatically stand appropriated towards the Security Deposit required to be furnished.

iv) The Earnest Money Deposit of the unsuccessful Tenderer shall be refunded as early as possible after decision of the tenders.

v) No interest shall be payable in any case on the amount of Earnest Money.

Clause 5 so far relevant reads as follows:

"5. SUBMISSION OF TENDER:

iv) Once, a Tender is tendered no changes can be made, nor can Tender be withdrawn. In case a Tenderer whose, tender is accepted, withdraws the tender, the loss sustained in the resale, as may be ordered by the concerned Conservator of Forests, shall be made good from him while considering the amount paid by him towards the Earnest Money Deposit.

v) Once a Tender is tendered the offer shall be considered valid for a period of 45 days from the date of Tender Sale in case of Tenders which are under consideration or till the end of lease period in case of accepted Tenders, as the case may be. If the Tender is withdrawn prior to declaration of Final Sale Result, the amount of Earnest Money Deposit shall be forfeited to the Government.

XXX XXX XXX"

So far as the factual position is concerned, the last date for submission of tender was 15.7.1987 and the respondent had submitted its bid on that date. On 15.8.87 the respondent sent telegram stating that since final sales results had not declared within 30 days as per clause 7 of the notice, it had withdrawn its offer and requested for refund of the earnest money. On 3.9.1997 the appellant sought for approval of the competent authority i.e. the State Government for declaring the final sale result. On 7.9.1987 the Government accepted the tender of the respondent. On 23-24/9/1997 when the respondent was informed that the earnest money cannot be refunded as the Government had accepted the tender and its earnest money was forfeited on account of withdrawal of the tender.

An offer under the tender was valid for a period of 45 days from the date of tender of sale and in the instant case from 29.8.1987. Stand of the respondent that the sale results should have been declared for getting approval of the competent authority by 14.8.87 is clearly wrong. If the highest tender is not considered acceptable the final sale result was required to be declared within 45 days i.e. by 29.8.87. The bid once made remains operative for a period of 45 days. Therefore, the decision could be taken on the bid on or before 29.8.87. The withdrawal was made before the expiry of the period i.e. on 15.8.87. Stand of the learned counsel for the respondent that another request was made after the expiry of the 45 days period does not change the situation. Clause 5(v) clearly spells that once a tender is tendered the offer shall be considered valid for a period of 45 days from the date of tender sale in case of tenders which are under consideration. If this clause is read with clause 5(iv) the position is clear that once a tender is tendered no changes can be made and no tender can be withdrawn. We are not concerned with a case of consequences after acceptance of the tender by the successful bidder. In such a situation loss sustained in the re-sale and the amount realized less, shall be recovered from the bidder

while adjusting the amount paid by him towards earnest money deposit. In this case the acceptance of the tender was after the validity of the period. Therefore, this is not a case which could authorize the Government to recover the loss from the respondent. But it is a case of withdrawal of tender and the effect of it is to be considered. Since the tender is valid for a period of 45 days and withdrawal is before expiry of the period the earnest money is to be forfeited. The stand of the respondent that because of delay in declaration of the final sale results there was no bar on withdrawal of the tender is clearly untenable. Once the tender is withdrawn the result is that the tenderer who withdraws the tender cannot take the stand that since the final sale result has not been declared there is no bar on the withdrawal.

Clause 7 is also relevant for the purpose of adjudication. The same reads as follows:

"7. A Provisional sale result of the successful tenderers shall be declared as early as possible for the information of the Tenderers. However, this provisional Sale Result shall not be considered as Final Sale Result. The Final Sale Result shall be declared within 30 days, on getting the approval of the competent authority. Further, if in respect of any unit the highest Tender is NOT considered acceptable by the competent authority, and other lower tenders are to be considered, then the Final Sale Result shall be declared within 45 days."

A reading of the clause makes it clear that the provisional sale result has to be declared as early as possible. But the same is not to be declared which is not to be considered as final sale result and the final sale result can be declared within 30 days on getting approval of the competent authority. It had not done in the present case because withdrawal was done while the tender was under consideration. That being so, the interpretation put by the High Court is clearly erroneous and deserves to be set aside. The order of the High Court is accordingly set aside. The appeal is allowed but without any order as to costs.