

IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Irfan Saadat Khan
Mr. Justice Zulfiqar Ahmad Khan

H.C.A No. 28 of 2005

[Trading Corporation of Pakistan (Pvt.) Ltd. v. M/s. Azmatullah Limited]

Appellant : Through M/s. Ghulam Haider Shaikh and
Aamir Ali Shaikh, Advocates

Respondent : Through Syed Mazhar-ul-Haq, Advocate

Date of Hearing : 09-03-2021

Date of Judgment : 19-03-2021

JUDGMENT

Zulfiqar Ahmad Khan, J. This High Court Appeal has been filed against the judgment dated 01.12.2004 and decree dated 08.12.2004 passed by the learned single Judge of this Court in Civil Suit No. 296 of 1983 for Recovery of Rs.3,526,847.40, which was dismissed by the learned single Judge.

2. Learned counsel for the appellant by giving the background submits that the appellant, a Federal Government owned Corporation originally operating and existing under the name of Rice Export Corporation of Pakistan (Pvt.) Limited, merged into the present appellant i.e. Trade Corporation of Pakistan (Pvt.) Limited and invited tender for handling of rice 1980-81 crop at Q.R.G. Landhi and T.P.X. Godown in the month of September, 1980. Learned counsel draws Court's attention to some vital terms of the tender documents, which are reproduced hereunder:-

“Clause 2(h)

Earnest money paid by the Tenderer whose tender is accepted shall be retained and the Tenderer shall pay additional amount and make up the cash security deposit required by him to be paid upon acceptance of the Tender under condition hereinafter mentioned.

Clause 2(i)

The Tender shall be irrevocably open for acceptance within 30 days from the date of opening of Tender. Breach of this condition shall entitle the Corporation to for-feit the Earnest Money paid with the Tender.

Clause 15: Security deposit

- (i) Within one week of the acceptance of the Tender/I We shall deposit with the Corporation as Security Deposit such sum or sums of money in cash or in shape of Defence Saving Certificates of required amount of Security Money dully pledged in the name of Chairman, RECP, as with Earnest Money deposited with the Tender will make up a sum reckoned at Rs.1.50 (Rupees one & paisa fifty) only per Metric Ton of estimated quantity in invitation to Tender. The amount of Security so deposited shall remain with the Corporation until finalization of the accounts after performance of the Contract regardless of the quantities of stocks in the custody of the Contractor. No interest shall be due to the Contractor on the amount so deposited with the Corporation.
- (ii) The Corporation shall have lien or charge upon deposit and may forfeit the same if I/We commit a breach or fail to perform any of the terms, conditions, covenants or under-takings on my/our part to be performed under the Contract and out of the deposit may appropriate and reimburse themselves sums of monies due by me/us to the Corporation and return the balance to me/us or in-so-far as the same not extend, recover the balance from me/us.
- (iii) Subject as aforesaid upon satisfactory performance by me/us of terms, conditions, covenant and undertaking and or me/our duties and obligations the Security Deposit shall be refunded.

Clause 16

If the Tenderer commits a breach of any of the terms or conditions or fails to perform any of his duties or obligations or service under the Agreement to the satisfaction of the Corporation, the Corporation may at any time terminate the Agreement and or get the duty or obligation or service performed at the risk and cost of the Tenderer by labourer staff of or engaged by the Corporation or by engaging another Contractors.

Clause 17: ACCEPTANCE OF TENDER AND CONTRACT

Upon acceptance of the Tender there shall be binding contract between the Tenderer and the Corporation and the Tender and the letter of acceptance shall be complete contract between the parties.”

3. Per learned counsel, the respondent with other bidders submitted their bids for the purpose of handling rice at Q.R.G. with following rates:-

(i)	M/s. Azmatullah Ltd.	59.40%
(ii)	M/s. Jamal Agencies	70.50%
(iii)	M/s. Enterprises Agencies	72.00%
(iv)	M/s. Shahzad Enterprises	76.80%
(v)	M/s. National Charcoal Co.	80.00%
(vi)	M/s. A.H. Corporation	80.60%
(vii)	M/s. Merchant Agency	101.00%

4. Since the respondent offered the lowest cost its tender was accepted through letter dated 27.09.1980, which was delivered to the respondent on the same day. Per learned counsel, the letter required the respondent to furnish security amount within one week i.e. before 27.09.1980 as stipulated in clause 15 to Annexure 1 of the Tender form. The plaintiff further pointed out to the defendant through a letter dated 28.09.1980 that the defendant instead of providing security deposit to the tune of Rs.10,50,000/- in cash, could provide the same in the form of Defence Saving Certificates, however, if the latter option was chosen, upon a request from the selected bidder, appropriate letter addressed to the respective authorities could be obtained from it. Reaching towards the deadline of 05.10.1980, the plaintiff on 04.10.1980 wrote a letter to the defendant with the following contents:-

By Spl. Messenger

RECP-5/M&M/80-81.

4.10.1980

M/s. Azmatullah Ltd.,
1st Floor,
State Life Build. No.1-A,
I.I. Chundrigar Road,
Karachi

Sub: SECURITY DEPOSIT AGAINST THE TENDER No.RECP-5/M&M/80-81 FOR HANDLING OF RICE CROP 1980-81 AT QASIM RICE GODW.

Dear Sirs,

Please refer to our letter of even number dated 27th September, 1980 wherein you were required to deposit the requisite amount of Security Money within 7 days from 27th Sept., 1980. The time limit expires to-day the 4th Oct., 1980.

2. You were also reminded to make necessary arrangement for submission of the Security Money as per our letter of even number dated 28th Sept., 1980 to which we have not received any response from your side. To-day being the last day for deposit of the Security Money in accordance with the provisions of Clause No.15(i) of the contract, you are once again reminded to deposit the Security amount by the closing office hours of today i.e. 2.30 P.M. failing which the Corporation will be within its right to cancel the contract and make further necessary arrangements in accordance with the provision of the above mentioned contract.

Thanking you,

Yours faithfully,

For Rice Corp.of Pak. Ltd.

-sd-

(KHALIL AHMAD MALIK)
GENERAL MANAGER M&M

5. Per learned counsel, having been cautioned that deadline for providing security deposit was to expired on 04.10.1980, the plaintiff issued letter of even date to the defendant informing the latter that the plaintiff has chosen to cancel the contract and upon such termination, clause 16 of the Tender Documents will kick in, meaning thereby the services and obligations which the defendant had agreed to perform would now be got done or performed by engaging another contractor however at defendant's costs and that the latter would be held liable to pay all such losses and damages which the plaintiff may suffer on account of such default.

6. Per learned counsel, since the respondent in spite of the demand failed to deposit the security amount within the stipulated time, it committed breach of the contract and the appellant (plaintiff) was forced to award contract to the second lowest party viz. M/s. Jamal Agencies, whose offer was at the rate of Rs.70.50, hence incurred an extra cost accumulated to the tune of sums of Rs.3,526,847/-, recovery of which was sought through the suit under appeal. Per learned counsel, the respondent (defendant) though filed the written statement however did not produce any evidence, even in these circumstances, plaintiff's suit was dismissed. Learned counsel for the appellant/plaintiff produced his evidence through its witness Mr. Liaqat Ali Khan, who produced his affidavit in evidence and brought relevant documents on record, which evidence remained un-rebutted, nonetheless the learned single Judge instead of decreeing the suit in plaintiff's favour chose to dismiss the same. Per learned counsel, the learned single Judge has decided the Issue Nos.3 to 6 against the appellant without applying judicial mind to the evidence and documents brought on record and has ignored the relevant legal aspects and the governing principles of law. Per learned counsel, findings of the learned single Judge are contrary to facts and law and not based on consideration of evidence on record, hence need to be set aside.

7. Learned counsel for the respondent (defendant) submitted that admittedly bids of the defendant were accepted by the offer letter dated 27.09.1980 where seven days' time was given to the defendant (up to 04.10.1980) to provide the security deposit under clause 15, whereafter an explanation letter was issued on the following day i.e. 28.09.2021, where the defendant was informed that in case it does not wish to pay the security money in cash, it could avail the opportunity of furnishing the same in the form of Defence Savings Certificates, and in case the defendant wished to choose the latter option, it was directed to approach to the plaintiff seeking directions in this regard, so that the suitable letter addressed to the respective authority for issuance of DSCs could be provided to it. Per learned counsel, the defendant opted to choose the option of providing security deposit in the form of defence savings certificates on the motion of the plaintiff and wrote a letter dated 02.10.1980 seeking issuance of appropriate authority letter, which the plaintiff admitted having received, as shown through Ex.4/8 (page 93), however, no reply of the said letter was ever given and while the respondent/defendant waited for issuance of the said authority letter so that it could purchase DSCs and furnish the security in such form, the plaintiff unilaterally issued letter dated 04.10.1980 mischievously setting up deadline of 02:30 p.m. for furnishing the said security, which letter was immediately responded by the respondent through letter of even date (04.10.1980) by Ex.4/8 repeating the request of the respondent/defendant for issuance of the appropriate authority letter so that the defendant could procure DSCs and submit the same with the appellant/plaintiff in compliance of their letter dated 28.09.1980. However, disregarding the said letter, the plaintiff choose to issue letter dated 05.10.1980, terminating the contract unilaterally and indicating to the defendant that the plaintiff would proceed with alternative arrangements at the risk and costs of the respondent/defendant. Per learned counsel, not only that the plaintiff did this malafide act, they immediately on the following day i.e.

06.10.1980 signed an agreement with M/s. Jamal Agencies by awarding the said tender to them and no evidence has been brought on record that whether seven day's period was even given to the said entity for depositing the security money, or even whether the said entity ever made deposit of the said security money. Per learned counsel, instead of having timely responded to the defendant's letter of 02.10.1980 with regard to the submission of the security money through defence savings certificates, which letter till date remained un-answered, the plaintiff abruptly chose to unilaterally cancel defendant's duly executed award for no cogent reasons, particularly when the terms of the contract were for two years, nothing whatsoever stopped them to timely respond to the defendant's letter of 02.10.1980 enabling the defendant to provide certificates in line with the tender documents. Per learned counsel, the learned single Judge has rightly dismissed the suit of the plaintiff on merits and request was made for dismissal of the instant High Court Appeal.

8. Heard learned counsel for the parties and perused the material available on record.

9. In the interest of brevity, facts as narrated above are not repeated. However, it is noted that the learned single Judge framed seven issues, of significant to the current controversy are issues Nos.3 to 6 which are reproduced hereunder alongwith finding of the learned single Judge of each those:-

Issue No.3. *Whether the time of making the security deposit was of essence of the contract?*

Discussion

The submission of tender form by the defendant is admitted fact. Clause 17 of the form says that upon acceptance of the tender there shall be binding contract between the tenderer and the corporation and the tender and letter of acceptance shall be complete contract between the parties. It is an admitted fact that the tender submitted by the defendant was accepted by the plaintiff and letter of acceptance had been delivered to them. Thus, in view of clause 17 of the tender, the contract, between the parties was complete. Although the agreement of appointment as handling agent was not signed by the parties, the contract between them is deemed to be complete on receipt of letter of acceptance by the defendant/contractor.

Clause 15 of the contract requires the tenderer to furnish security deposit within one week of the acceptance of the tender. Therefore there can be no denial of the fact that the furnishing of security deposit by the contractor within one week of the acceptance of his tender was the requirement of the contract. However it deserves to be considered first as to whether the time line fixed by clause 15 was absolute and inflexible or the same could be relaxed. For answering this, the clause 16 of the form which provides the consequences of the failure to fulfill the terms and conditions or perform the acts by the contractor, reads as under:-

“16. If the tenderer commits a breach of any of the terms or conditions or fails to perform any of his duties or obligations or services under the agreement to the satisfaction to the Corporation, the Corporation may at any time terminate the agreement and or get the duty or obligation or service performed at the risk and cost of tenderer by labourer staff of or engaged by the Corporation or by engaging another Contractor.

The bare look at the clause gives out that is enabling one and not imperative and rigid. Words “may” and “at any time” significantly reflect that impression. They leave upon the corporation to take decision for terminating the contract. Obviously the discretionary authority conferred upon the corporation is to be exercised rationally, fairly and reasonably. Unfair, rash and unreasonable exercise of the discretion has to be avoided.

Therefore the answer to the issue will be that the furnishing of security deposit within seven days was the requirement of the contract but it was not rigid or final. Issue is answered accordingly.

Issue Nos.4. *Whether the defendant was in breach of the contract as concluded between the parties? If so, whether the plaintiffs suffered any loss as consequence thereof?*

Issue Nos.5. *Whether the plaintiff is entitled to recover the claim amount and whether the plaintiff took all reasonable steps to mitigate the alleged loss?*

Issue Nos.6. *Whether the plaintiffs acted bona fide in awarding the contract to M/s. Jamal Agencies at the risk and cost of the defendants?*

Discussion on issues 4 to 6 (as grouped together)

Looking to the nature of these issues and their correction inter-se, I take up them together. It was urged on plaintiff's behalf that all the acts of plaintiff were bona fide. It tried its best to mitigate the loss but the defendant committed breach of the contract. Plaintiff's counsel further urged that despite repeated invitations from the plaintiff's side they (defendant) did not collect the letter for issuance of defence saving certificate in favour of plaintiff.

Plaintiff's letter dated 28.9.1980 produced in evidence as Ex.9/4 clearly admits the responsibility of plaintiff to issue in case the contractor desires to furnish defence saving certificate against the security money. Letter issued by the defendant to Chief Manager to the plaintiff on 4.10.1980 has also been produced by the plaintiff as Ex. P/6. It contains that the defendant through their letter dated 02.10.1980 had requested the plaintiff to issue necessary letter to the concerned authority for issuance of defence saving certificate. The letter further contains the request for issuance of the letter and extension of time for depositing security money by further seven days. Since the document has been produced by the plaintiff in evidence without denying contents thereof it deserves to be accepted as it is. No where in evidence on plaintiff's side the receipt of letter dated 2.10.1980 from the defendant has been denied. It is also no where in evidence that the plaintiff had ever issued letter for

issuance of defence saving certificates to the concerned authorities or dispatched it to the defendant. The entire correspondence between the parties which has been produced in evidence confirms that all the letters were delivered through special messenger. In such circumstances, had the plaintiff been fair it could issue the letter and arrange its delivery to the defendant through the same mode. Non issuance of the letter, despite requests from the defendant reflects the rigid rather negative attitude adopted by the plaintiff.

When the defendant could not get the defence saving certificates issued in favour of plaintiff without its (plaintiff) letter the default to deposit the security money within seven days was due to plaintiff's attitude.

Not only the attitude of the plaintiff highlighted above reflects its mind, but the following points also are of much significance. The fact that immediately on 8th day of acceptance of the contract the plaintiff terminated the same without waiting for a moment and on the say day finalized the deal with M/s. Jamal Agencies and signed the contract, despite the fact that the contractor had to go on the job after 15.10.1980.

Above facts and circumstances show clearly that the plaintiff with pre-determination and under calculated strategy did not perform the act pre-requisite of the issuance of defence saving certificates and then hurriedly terminated the contract of defendant and assigned the same to M/s. Jamal Agencies on higher rates instead of taking reasonable steps to avoid the excess financial burden. This attitude cannot be accepted as bona-fide one.

For the conclusions recorded above the issues are answered in negative.

10. It is pertinent to note from the findings of the learned single Judge that based on the entire correspondence as shown in the evidence, the learned single Judge time and again questioned the rouge attitude of the plaintiff by not responding to the defendant's letter of 02.10.1980 affording it an opportunity of providing security in the form of defence savings certificates as per law, the learned single Judge has also questioned that how come on the 8th day, the plaintiff terminated defendant's offer without waiting for a single moment and finalized the deal with M/s. Jamal Agencies on the following day at much higher rate, which ought to have been done at least after waiting seven days period of furnishing security money by M/s. Jamal Agencies too. Learned single Judge also observed that facts and circumstances clearly show that the plaintiff was pre-determined and had made gross error for not allowing the defendant to perform the contract and abruptly terminated the contract with the defendant and assigned the same to M/s. Jamal Agencies, on much higher rate, instead of taking reasonable steps to avoid such exceptionally high financial burden to the Exchequer which could have been amicably

resolved and such loss could not be attributed to anyone else, but the plaintiff itself.

11. From the submissions of the learned counsel and having perused the material available on record the single point of determination as to the veracity of the judgment and decree passed by the learned single Judge accordingly is answered in favour of the respondent, as we have no reason to deviate from the findings penned down by the learned single Judge and have sadly observed that the national entities like the present appellant which ought to act strictly in accordance with the law and refrain themselves from such unbecoming conduct which on the face of it appear maliciously, whereas lawful conduct would have clearly guided them to save national exchequer from the extra burden that it had to pay once the defendant's contract was un-ceremonially cancelled for patently unfounded reasons.

12. We therefore do not see any merit in the instant High Court Appeal, which is accordingly dismissed.

Judge

Judge