

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

S.C. (C.H.C) 07/2009

In the matter of an Appeal from the Judgment in H.C. (Civil) Colombo case No. 72/2003(1) in terms of Section 5(1) of Act No. 10 of 1996 read with Section 754(1) of the Civil Procedure Code.

Flexport (Private) Limited of  
127, Jambugasmulla Mawatha,  
Nugegoda.

**PLAINTIFF**

Vs.

Bank of Ceylon  
Bank of Ceylon Headquarters  
Colombo 1.

**DEFENDANT**

Flexport (Private) Limited of  
127, Jambugasmulla Mawatha,  
Nugegoda.

**PLAINTIFF-APPELLANT**

Bank of Ceylon  
Bank of Ceylon Headquarters  
Colombo 1.

**DEFENDANT-RESPONDENT**

**BEFORE:** Priyasath Dep P.C., J.  
Anil Gooneratne J. and  
Prasanna S. Jayawardena P.C., J.

**COUNSEL:** Hemasiri Withanachchi for the Plaintiff-Appellant  
  
Nerin Pulle D.S.G. for the Defendant-Respondent

**ARGUED ON:** 08.11.2016 and parties agreed to conclude the case based on  
Written Submissions

**DECIDED ON:** 25.01.2017

**GOONERATNE J.**

This is a direct Appeal to the Supreme Court from the Judgment of the Commercial High Court, Western Province holden in Colombo, delivered on or about 18.01.2008. The case of the Plaintiff-Appellant is based on a tender claiming a sum of Rs. 3,500,000 as damages with interest, was dismissed by the Judgment of the High Court.

The Plaintiff Company was in the business of manufacturing furniture, name boards, Bill Boards, Mementos etc. Defendant Bank called for tenders to manufacture and supply 1600 mementos to the Defendant Bank, to be presented to their employees who had served the Bank for long years. Tenders were called (bearing No. R. OC/2002/09) by the Defendant Bank. It is stated that the Defendant Bank by its letter dated 12.08.2002 accepted the

Plaintiff-Appellant's bid and awarded the tender, subject to conditions. i.e to submit an acceptable bank guarantee to the Defendant Bank for the full value of the tender, and items to be supplied before 20.08.2002. However the Plaintiff Company was informed that the tender Evaluation Committee of the Bank rejected the tender of the Plaintiff Company. The position of the Plaintiff Company according to the material furnished to this court are as follows:

- (a) Rejection and cancellation of the tender not due to any fault of the Plaintiff Company
- (b) Tender Evaluation Committee of the Bank has not adduced any reasons for the rejection of the tender.
- (c) Plaintiff Company had commenced the manufacture of Mementos (was in progress) even prior to awarding the tender.
- (d) It has resulted in causing financial loss to the Plaintiff Company.

The position of the Defendant Bank was that Plaintiff Company has failed to fulfil the tender conditions. Further it was also brought to the notice of the Defendant Bank that the Plaintiff Company was in default of a loan granted to the company by the Nugegoda Branch of the bank. It is also stated that the Plaintiff Company failed to deliver the Mementos on time and in any event it was different to the specifications given by the bank. Parties proceeded to trial on 9 issues and 6 admissions, were recorded in the High Court.

I have perused the Judgment of the learned High Court Judge. It is the view of the learned High Court Judge that the letter awarding the tender

(P6) was a conditional award of the tender to Plaintiff-Appellant. Further trial Judge states document P7 is not a Bank guarantee, but an insurance guarantee. On the above basis which seems to be the main points inter alia considered by the learned High Court Judge to reject the case of the Plaintiff Company. The Appellant had not been in a position to fulfil the tender conditions, and P6 indicates it was a conditional award of tender. Therefore the trial Judge held that Plaintiff-Appellant was unable to fulfil the tender conditions stipulated in the invitation to tender. It is also in evidence and discussed by the trial Judge in his Judgment in this regard that Plaintiff-Appellant had not been able to tender a bank guarantee. Witness for the bank testified that document P7 is not a bank guarantee but only an insurance guarantee which was not acceptable to the bank. It is also in evidence that letter P12 was not acceptable to the bank, and bank could not proceed with the tender. P12 is a letter by the Janashakthi Insurance Company to Chief Manager, Properties and Procurement Department, Bank of Ceylon. All these relevant points had been considered by the learned trial Judge.

On a perusal of P12 it is evident that (and as testified by witness for the bank)

- (a) P12 relates to an insurance guarantee which is not acceptable to the Defendant Bank.
- (b) In any event it is conditional that Janashakthi Insurance Company could issue the same only upon Defendant-Respondent Bank releasing an

advance payment in favour of the Plaintiff-Appellant of 50% of the value of the Bond. (value of work they executed on tender sum)

On the above I wish to observe that the bank would not have been in a position to have complied with the requirements (as in P12). There is no requirement for a payment to be made by the bank as per tender documentation and tender conditions, which material are made available for perusal of this court and contained in the record of the case. In a way it is a conditional offer or an attempt of the offeree (Plaintiff Company) accepting subject to conditions. Counter offer is equivalent to a rejection of the original offer. Cheshire & Fi foot 6<sup>th</sup> ed. pg.32: Watermeyer Vs. Murray (1911) AD 61.

A tender is an offer of performance in accordance with the terms of contract. An acceptance of a tender has different legal results, depending on the wording of the form of tender which is accepted. An offer could be rejected if the offeree makes a counter-offer. If the offeree accepts subject to conditions it amounts to rejection of an offer. Only an absolute and unqualified assent to all the terms of the offer constitutes an effective acceptance. The tender of the Defendant Bank, has definite and serious terms, of performance. There is nothing vague in its terms, and to submit a Bank Guarantee would be part and parcel of the tender conditions. i.e terms of the contract.

In Pamkayu & Another Vs. Liyanarachchi, Secretary, Ministry of Transport & Highways 2001 (1) SLR 118, 125.

“..... award of a tender must be based on the compliance of the tender documents on the date and at the time specified for the closing of the tender. An offer that does not comply with the terms, conditions and specifications at that time must be rejected in the same way as a late offer”.

This court having considered all the material made available and on perusal the Judgment of the learned High Court Judge, does not wish to interfere with the Judgment of the High Court and the position of the Defendant-Respondent Bank. I see no legal basis to fault the Judgment of the High Court. Document P7 is not a Bank Guarantee, and it is a document not acceptable to the bank. Tender conditions do not contemplate such a document. Further Janashakthi Insurance requiring the Defendant Bank to fulfil their conditions, which would be contrary to the tender conditions. Therefore this court affirm the Judgment of the High Court. This appeal is dismissed with costs.

Appeal dismissed.

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Prasanna S. Jayawardena P.C., J.

I agree.

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