

1941

Present: Keuneman and Wijeyewardene JJ.

THE ATTORNEY-GENERAL v. VITHILINGAM.

105—D. C. Mullaittivu, 648.

Contract—Tender for the right to exploit forest reserve—Acceptance of offer—Failure of tenderer to carry out agreement—Grant of contract to next highest tender—Claim by Crown for damages.

By Gezette Notification the Conservator of Forests called for tenders for the right to exploit a certain forest reserve.

The defendant's tender, being the highest, was accepted but the defendant failed to implement the terms of the agreement. The Conservator of Forests thereupon accepted the bid of the second highest tenderer after an attempt to get him to increase his offer.

Held, that the Crown was entitled to recover from the defendant the difference between the amounts of the two tenders as damages.

A PPEAL from a judgment of the District Judge of Mullaittivu.

G. E. Chitty, C.C., for plaintiff-appellant.

No appearance for defendant-respondent.

Cur. adv. vult.

September 25, 1941. KEUNEMAN J.—

In this case the main facts are not in dispute. By Gazette Notification dated October 14, 1938 (P 1), the Conservator of Forests called for tenders for the right to exploit, *inter alia*, the "Puvarasankulam Reserve Coupe 4". Under the Notification the successful tenderer had, within 10 days of being informed in writing of the acceptance of his tender, to pay in full the amount of his offer and enter into the necessary agreement. If he failed to do this, his tender form deposit of Rs. 50 may be forfeited by the Crown, and he may render himself liable to make good any resultant loss.

The defendant-respondent made his tender on December 3, 1938 (P 2), and this was accepted on December 21, 1938 (P 3). He was asked to enter into the necessary agreement on or before January 4, 1939, but failed to comply with this request. He asked for time and made several excuses from time to time. Eventually on April 10, 1939, he stated that he had grown sickly and was not in a position to work the area in question within the prescribed time (P 13). After some further correspondence, the Conservator of Forests with the prior sanction of the Tender Board accepted the bid of the second highest tenderer on May 26, 1939 (P 18). Prior to that an attempt was made to get the second highest tenderer to increase his offer (see P 16 of May 9, 1939), but without avail.

Thereafter the Attorney-General brought action against the defendant, claiming as damages the difference between the amounts of the two tenders.

It is not contested that there has been a breach of contract, but it was argued that the plaintiff is not entitled to the amount claimed. The learned District Judge has held in substance that the damages claimed were not in the contemplation on the parties, and that no material has been placed before him on which damages can be assessed. He has accordingly dismissed the plaintiff's action with costs.

I do not follow this argument. I think it is clear that it must have been in the contemplation of the parties, that if the defendant defaulted, the right to exploit this forest would have to be given to some other offeror, and in fact it was the duty of the Conservator of Forests to seek to minimize the damages, by giving this right to some such person. The real point which might have been argued is that the price tendered by the second offeror was not the best price which could have been obtained outside at the time of the breach. It was perhaps open to the Conservator to readvertise the right of exploitation, and to accept the highest offer. But it has to be remembered that this is a very specialized form of contract, and that the number of offerors must of necessity be limited, and I do not think it can be said that the Conservator failed to act *bona fide* and reasonably in regarding the persons who actually made offers as the only potential offerors. Only a short period of time had elapsed between the date of the breach and the acceptance of the tender of the second offeror. As we have seen an attempt was made to get this man to increase his offer, but that was not successful. I think we must regard this as the best tender available at the time of the breach, and regard the acceptance by the Conservator of this tender, as a *bona fide* transaction. In this connection I have not forgotten the disparity between the two tenders.

In the circumstances, I am of opinion that the plaintiff is entitled to claim the difference between the two tenders. The deposit of Rs. 50, which has been spoken to by the witnesses may be applied as against the amount due under the decree. I am not disposed to allow any interest on the amount decreed.

I allow the appeal and enter judgment ordering the defendant to pay the plaintiff the sum of Rs. 753 and costs in both Courts.

WIJEYWARDENE J.—I agree.

Appeal allowed.

