

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: .24.3.2009
Date of Order: 14th May, 2009

OMP No. 36/2001

%

14.5.2009

Escorts Communications Ltd. ... Petitioner
Through: Mr. Sunil Malhotra, Advocate

Versus

Union of India ... Respondent
Through: Mr. Sameer Aggarwal, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

By this petition under Section 34 of the Arbitration & Conciliation Act, 1996 the petitioner has assailed an award dated 9.2.2001 whereby the learned Arbitrator rejected the claim of the petitioner for a sum of Rs.1,28,93,493/- and accepted the contention of the respondent that the respondent was entitled to forfeit the bank guarantees furnished by the petitioner for a sum of Rs.49,55,000/- towards non fulfillment of contractual obligation.

2. Pursuant to tender for supply of C-DoT-256 PORT RAX Exchanges in various configurations, a purchase order for total supply of 159 packages was placed on the petitioner. Out of this, 76 packages were to be supplied in the year 1995-96 and the balance packages were to be supplied in the year 1996-97. The supply schedule was given along with the purchase order. This purchase order got kept on hold due to a stay granted by the Karnataka High Court on a petition filed by an unsuccessful bidder. After the stay was vacated, purchase order was revived vide order dated 16.10.1996. The original contract provided that the supply was to be made within six months from the date of issue of purchase order but in the revival order, the period of supply was reduced to five months. The petitioner, within this period of five months, supplied only 33 packages against 76 packages and applied for extension of delivery period. An extension of four weeks was granted by the respondent vide letter dated 1.4.1997 subject to imposition of liquidated damages (LD) in terms of the contract and at provisional rates arrived @ 95% of rate quoted in another tender opened on 17.3.1997 for the same package exchange. The petitioner after receipt of this extension letter did not protest against extension of time subject to imposition of LD or subject the price which were to be applicable i.e. as quoted in the new tender for the same item. The petitioner supplied 7 more packages during the extended period. Thus, out of 76 packages only 40 packages were supplied by the petitioner. Again on request of petitioner a further extension of time was allowed by the respondent vide letter dated 10.9.1997 for a period of 45 days,

again with the condition of imposition of LD charges and with the condition that the goods be supplied at the price quoted in the tender dated 17.3.1997 for the same item. The petitioner did not protest this conditional extension of time and supplied 21 more packages of the C-DoT RAX exchanges of different configurations. Thus, the petitioner made total supply of 61 packages within the conditionally extended period granted by respondent. The order for the supply of packages for the year 1996-97 was placed on 15.1.1997. Supplies were to be made within six months at the firm rate quoted in the order. Upto 12.6.1997, the petitioner supplied only 30 packages against an order of 74 packages. A major outburst of fire had taken place at the shop floor of the petitioner/claimant in June, 1997 resulting into damage of the testing equipment etc. As a consequence, the petitioner by the scheduled date of delivery i.e. 14.7.1997 could supply only 21 additional packages. Thus, total supply made upto the scheduled date was 51 packages out of 74 packages ordered. The petitioner vide letter dated 26.6.1997 informed the respondent about fire having taken place and sought extension of delivery schedule for remaining packages by a period of 45 days from the expiry of Purchase Order. The respondent extended the delivery schedule by 45 days by imposition of LD charges and also put the condition that rate applicable would be the one as quoted in the tender opened on 17.3.1997. However, the respondent later on communicated to the petitioner that it would not levy LD charges for the period of extension of 45 days given for Purchase Orders dated 15.1.1997. The petitioner failed to complete the supply

within the extended period and second extension was sought which was again granted by the respondent on the request of claimant by imposition of LD charges at the firm rate as indicated in the earlier extension order. During the extended period only 18 additional packages were supplied by the petitioner making the total supply of 69 packages against 74 packages ordered by the respondent. The petitioner had not raised any objection either against revised rates or imposition of the LD charges. In view of the petitioner's failure to supply the complete quantity of C-DoT RAX packages even within the second extended period, the respondent vide letter dated 1.7.1998 short closed the order with immediate effect at the risk and liabilities of the claimant.

3. The claimant made a claim before the Arbitrator about the deduction of LD to the tune of Rs.9,93,622/- from payment of order dated 10.10.1995. The petitioner also raised a claim of Rs.64,67,250/- on the ground that the respondent wrongly paid for the goods at the price of the new tender instead of original agreed price. A total sum of Rs.74,60,872/- was claimed against the order dated 10.10.1995. Similarly, a sum of Rs.54,32,621/- was claimed against the second order dated 15.1.1997. The petitioner thus, claimed a total sum of Rs.1,28,93,493/-. It was pleaded that LDs had been wrongly imposed and the respondent had wrongly reduced the price. It was further pleaded that the respondent wrongly invoked the bank guarantees issued by the petitioner although no loss was suffered by the respondent.

4. The respondent refuted the claims of the petitioner before the learned Arbitrator and took the stand that the payment was made to the petitioner in accordance with the contract, LD was provided in the contract itself. The respondent had agreed by its conduct to supply the goods within the extended period at the amended price. The respondent was at liberty not to supply the goods at the amended price.

5. The learned Arbitrator came to the conclusion that the respondent had granted extension of delivery period at the request of the claimant. Extensions were granted twice in case of both the orders. While granting extensions, the respondent had informed the conditions for granting extensions and the respondent had also informed the new rates for supply of the remaining equipments, these rates were based upon approved rates of the new tender opened on 17.3.1997. If the new rates were not acceptable to the petitioner, the petitioner was at liberty not to accept the extension. Once the petitioner had accepted the extension without any demur on the condition of imposition of LD and the rates specified in the extension order, the petitioner cannot take a stand that these were not acceptable to it and it should be paid the original amount. The learned Arbitrator observed that once the respondent had clearly indicated in the extension letters the terms of the extension and the same were accepted by the petitioner without any demur, this amounted to amendment of the contract.

6. Regarding force majeure clause, relied upon by the petitioner because of fire in the factory, it was observed by the learned Arbitrator that the

force majeure clause provided that in case of force majeure, the delivery schedule could be extended and in this case the respondent had extended the delivery schedule by 45 days without imposition of LD. The petitioner was therefore fully compensated by extension of delivery schedule by 45 days because of force majeure. Regarding invocation of bank guarantee, the learned Arbitrator observed that performance bank guarantee was related to the performance of the terms and conditions of the agreement. It was a safeguard to the respondent against non-fulfillment of the contractual obligations including warranty obligations. When particular quantity as agreed in the order was not supplied and the agreement was cancelled at the risk and cost of the supplier, then the performance bank guarantee could be encashed and no part of it was outside the scope. He therefore rejected the claim of the petitioner and allowed the respondent to encash the bank guarantees.

7. It is submitted by the counsel for the petitioner that the unilateral reduction of price for supply of the goods during extended period was contrary to the contract. The extension was sought in accordance with the contract, which was granted by the respondent. The respondent could not have reduced the price. It is also submitted that the learned Arbitrator wrongly came to the conclusion that the supply of equipment by the petitioner on grant of extension by the respondent, amounted to consent of the petitioner.

8. I consider that the challenge to award made by the petitioner on this ground must fail. It is settled law that where there is a contract between the

parties and the contractor fails to perform the contract within the stipulated period and seeks extension, if the extension is granted by the employer putting certain conditions and the contractor without any demur continues the supply of goods, a new contract comes into force between the parties and the conditions imposed by the employer become part of the contract. If the petitioner was not agreeable to the conditions imposed by the respondent in this case, the petitioner had liberty to refuse to accept the conditional extension. Since the petitioner did not refuse the conditional extension and rather made supplies after grant of conditional extension, that signifies the acceptance of the conditions by the petitioner and thereby of the amendment of the contract. It is settled law that an offer can be accepted by conduct of a party and in this case the petitioner had accepted the offer of respondent of extension of delivery period subject to conditions given in the extension letter. The petitioner by supplying the material within the extended period and not protesting against the condition accepted the offer. In General Manager Northern Railways & Anr. v. Survesh Chopra JT 2002 (2) SC 445, the Supreme Court laid down that the contract between the parties stands modified if a conditional supply or extension of time is agreed. It observed:-

“15.....Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under

section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

9. This Court in Union of India v. Daulat Ram Industries OMP No. 42/2006 d decided on 21.4.2009 had observed as under:

10. An Arbitrator is a prisoner of the contract entered between the parties and he has to abide by the terms of the contract which was entered into between the parties. In the present case, the Arbitrator awarded old price to the respondent despite the fact that the respondent without any demur and protest had supplied the items after time was extended with a condition of new price at which the product was available. The award given by the arbitrator is thus beyond his jurisdiction being beyond the contract.

10. The other ground taken by the petitioner for challenging the award is that the learned Arbitrator had not considered the force majeure clause properly. A fire had broken at the premises of the petitioner and the petitioner therefore was not able to supply the goods due to this fire. The petitioner could not be penalized in view of the force majeure clause.

11. The force majeure clause as contained in the contract reads as under:

17.1 If any time during the continuance of this contract, the performance in whole or in part by either party of any obligation under this contract shall be prevented or delayed by reason of any war, or hostility, acts of the public enemy,

civil commotion, sabotage, fires, floods, explosions, epidemics, quarantine restrictions, sinker, lockouts or act of God (hereinafter referred to as events) provided notice of happenings of any such eventuality is given by either party to the other within 21 days from the date of occurrence thereof, neither party shall by reason of such event be entitled to terminate this contract nor shall either party have any such claim for damages against the other in respect of such non-performance or delay in performance and deliveries under the contract shall be resumed as soon as practicable after such event may come to an end or cease to exist, and the decision of the Purchaser as to whether the deliveries have been so resumed or not shall be final and conclusive, provided further that if the performance, in whole or part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding 60 days either party may, at his option terminate the contract.

A perusal of the above clause would show that the only effect of force majeure clause is that the supplies could be accepted by the respondent with some delay. However, the total reading of the contract and the force majeure clause would show that the time was very crucial to the contract and even in case of force majeure, if the postponement of the supplies was beyond a period of 60 days, the respondent had option to terminate the contract. This signifies the importance of time frame in the contract. In the present case, the respondent gave extension of 45 days to the petitioner because of the representation of the petitioner of a fire having erupted in the factory. However, it is noteworthy that fire had taken place on 12.6.1996, the respondent made supplies of 21 additional RAX packages soon after the eruption of the fire between 12.6.1996 and 14.7.1997 i.e. when the shop floor of the petitioner had caught fire. That only shows that the work was not totally hampered it might have become slow. The

earlier record of the petitioner regarding supply would show that during delivery period of 05 months from 15.1.1997 to 12.6.1997 the petitioner had supplied only 30 packages thus the fire was not a major cause of delayed supplies, despite that the extension of time was given without LD to the petitioner for 45 days. Thus, no fault could be found with the reasoning of the learned Arbitrator regarding force majeure clause.

12. The third ground raised during arguments is that the learned Arbitrator had wrongly allowed the respondent for encashment of bank guarantees. It is stated that the respondent could not prove actual loss and damage caused due to breach of the terms of the contract or because of the reasons of petitioner's failure to perform the contract. The reliance placed by the learned Arbitrator on the statistics taken from the booklet (Indian Telecommunications Statistics - 1999) and reliance on the tables given in the booklet could not be a ground for grant of damages to the respondent. It is submitted that no evidence was produced by respondent to prove that it suffered any damages.

13. The present project was for the supply of C-DoT RAX Exchanges. The time schedule for the supply was specified in the order. The contract provided for furnishing of a bank guarantee by the petitioner for due performance of the contract. The due performance of the contract only means that the quality and terms of the supplies were to be adhered to by the supplier. If the terms were adhered to, it amounted to due performance, if the terms were not adhered

to, it amounted to failure of the due performance of the contract. The insistence of the respondent on the bank guarantee was for the purpose of due performance. If the delay in supplies was to be treated in a causal manner, there was no necessity for the respondent to insist upon bank guarantee and if the petitioner was not to be particular about supplying the material within the delivery schedule, the petitioner should have at the very inception refused to accept the condition of furnishing bank guarantee and in its tender document should have stated it would not furnish bank guarantee as there was no guarantee of supplying the material within the time schedule. The purchase of telecommunication equipments, by the respondent was for purpose of setting up exchanges to provide service to the customers. The delay in supply of equipment was naturally going to result in delay in establishment of the telephone exchanges or replacement of old telephone exchanges by new telephone exchanges. With every installation of a telephone exchange, customers are provided services by the respondent and the respondent earns revenue from these customers. The respondent spends crores and crores of rupees on establishment of this infrastructure and the earning of revenue is essential so that this infrastructure is not only maintained but fresh infrastructure for new areas is created. These equipments become obsolete in short span of time and new technology is required to be introduced in this field from time to time and that envisages a necessity for changing the old exchanges into new exchanges. If the equipment is not supplied within time, the suffering of loss by the respondent

is but natural. The Arbitrator could rely upon the data and statistics collected by the Government showing as to what was the revenue collection in respect of each line and how much was the loss suffered. It is not required that these losses should be proved by producing customer specific evidence in the Court. There are many areas where losses can be inferred by the circumstances. If a road project is not completed within time by a contractor and it takes more years beyond the specified date, no evidence can be produced that how many commuters suffered because of non-completion of the road project in time and how much petrol was wasted because of commuters taking longer route or standing at red lights waiting hours. Such losses are built in losses and if the contract provides for these losses and provides for LD, I consider that the learned Arbitrator was within his right to say that such losses could be inferred from the statistics.

In view of my above discussion I find no infirmity in the award. The petition filed by the petitioner is hereby dismissed.

May 14, 2009
vn

SHIV NARAYAN DHINGRA, J.