

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision : October 24, 2011

+ RFA(OS) No. 8/2001

HIMACHAL PRADESH STATE ELECTRICITY BOARD

....Appellant.

Through: Divjeet Singh Vohra, Advocate

versus

M/S SUMER CHAND & SONS

...Respondents

Through: Mr.Rahul Sain, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE S.P.GARG

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

S.P.Garg, J. (Oral)

1. Appellant has challenged the judgment and decree dated 22.02.2000 passed by the learned Single Judge dismissing the suit filed by the appellant against the respondent. Appellant filed a suit claiming a sum of ₹2,66,400/- from the respondent being the loss suffered by it due to failure of the respondent to supply the goods as per the stated concluded contract between the parties.

2. The appellant invited offer as per tender No.28 in terms of the general conditions of the contract detailed in para No. 3 of the plaint for supply of galvanized mild steel tubes with the schedule of requirement and dispatch as mentioned therein on 19.06.1973. Last date for submission of tender was 23.07.1973. On 23.07.1973 the respondent submitted offer along with a cheque in the sum of ₹5,000/-; by way of earnest money. On 18.08.1973 the appellant accepted the offer made by the respondent in respect of pipes of different sizes but at different rates mentioned therein. Thereafter supply order was placed on the respondent on 18.08.1973 itself. In continuation of the said order the appellant wrote a letter dated 31.08.1973 giving details of material, delivery and other terms and conditions as noted in para No.6 of the plaint. As the appellant did not receive any reply, another letter dated 08.10.1973 was sent to the respondent asking it to acknowledge the receipt of the said supply order and also to execute a contract which was only a formality. Respondent replied by sending letter dated 08.10.1973 repudiating the supply order, which was received by the appellant on 18.10.1973. By this letter, the delivery was repudiated on the ground of deviations in the conditions of the contract.
3. It was claimed by the appellant before the learned Single Judge that with the placing of supply order on 18.08.1973,

acceptance of the tender by the respondent, the contract was concluded.

4. Case of the respondent before the learned Single Judge was that no valid contract came into existence between the parties. There was no unconditional acceptance of the offer by the appellant. The respondent filed a counter-claim claiming earnest money tendered along with interest.
5. After considering rival contentions of the parties and scanning the testimonies of the witnesses for the parties, the learned Single Judge dismissed the suit filed by the appellant. It also dismissed the counter-claim of the respondent, holding the same to be time barred.
6. Aggrieved by the dismissal of the suit, the appellant has come up in appeal.
7. We have heard the learned counsel for the parties and have scrutinized the evidence on record.
8. It is not disputed that the appellant had issued a notice inviting tender for supply of GI pipes in 1973, it being tender No.28. The description of the goods to be supplied was detailed in the tender document. The respondent was one of the offerer and its offer was considered. On the alleged acceptance of the offer, a supply order Ex.P-1 was placed on the respondent. The offer dated 23.07.1973 submitted by the respondent was accompanied by document Ex.P-2. It is also not in

controversy that before the offer was allegedly accepted, there were negotiations with the respondent. Conditions of the tender were discussed and allegedly the conditions were finalized and thereafter the offer was accepted. It is also not disputed that purchase order (Ex.PW-1/1) was placed upon the respondent on 18.08.1973. Detailed supply order was also placed on the respondent which is Ex.PW1/2. It is also not disputed that no goods were supplied by the respondent on the basis of the supply order placed upon it by the appellant.

9. Short question for consideration arises "Whether concluded contract between the parties had come into existence at any time?"
10. In the cross-examination PW-1 A.K.Srikanta working as Chief Purchase Officer with the appellant admitted that invitation for tender was published in the newspaper as well. D-1 is the tender cutting from the newspaper advertising the invitation of tender. The respondent was one of the offerer and it submitted an offer Ex.P-1 dated 23.07.1973. The terms and conditions as mentioned by the respondent in Ex.P-1 were never accepted by the appellant. In the further cross-examination, PW-1 A.K.Srikanta deposed that at the time when the offer Ex.P-1 was submitted, no one from his office pointed out that terms offered by the respondent were different than those given in the invitation to tender. He further submitted that the terms quoted by the defendant might

be different than those given in the tender document. It shows that the terms and conditions as detailed in the offer submitted by the appellant were never accepted absolutely by the respondent. The very fact that the representative of the respondent was invited at Simla for negotiation reveals that the parties were not having meeting of mind of all about the terms and conditions of the offer. The representative of the respondent had visited Simla for negotiation and there was change of terms and conditions for which the respondent was asked to agree. The appellant has placed on record letter dated 31.08.1973 Ex.P-1/2 (which was not admitted by the respondent) in which it is mentioned that "in continuation of the office letter dated 18.08.1973 and as agreed by you during negotiation held on 18.08.1973 at Simla, your tender for supply of GI pipes has been accepted." However, the changed terms and conditions as per any settlement after negotiation between the parties at Simla were never reduced into writing. There is nothing on record to show if the changed terms and conditions were ever accepted by the respondent at any time. No contract containing such changed terms and conditions was executed between the parties. Rather, unilaterally the appellant placed an order upon the respondent for supply of the goods. Since the respondent had never accepted the terms and conditions of the appellant absolutely, in our view, no concluded contract came into existence between the parties at any time requiring the respondent

to supply the goods to the appellant on the basis of purchase order. The respondent was under no legal obligation to supply goods.

11. Under Section 7 of the Contract Act, in order to convert a proposal into a contract, the acceptance must be absolute and unqualified. An acceptance with a variation is in effect a counter offer and not an acceptance. Absolute acceptance of an offer to result in a binding contract must extend to all the terms of the contract under negotiation. In the present case when there was change in the terms and conditions contrary to the one in the tender document, there was no unconditional and absolute acceptance by the respondent. The purchase order placed by the appellant was rather an offer on changed terms and conditions to the respondent and that offer was never accepted by the respondent.
12. We find no substance in the plea of the learned counsel for the appellant that the variation in the terms and conditions of the tender document were not material and had no affect on the acceptance of the offer. It is well settled that when there is variance between the offer of acceptance in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract. To constitute an agreement it is essential that the offeree should give in return for the proposer's act or promise exactly the consideration which the proposer requests. If

an act is requested, the offeree must give that very act and no other. The least variation of any material term or any substantial modification has the effect of rejecting the proposal.

13. In the present case the respondent had pointed out that there were variation of term Nos.4,5,6,7,8,9, and 10.of the tender document, the negotiation between the parties at Simla vindicated the stand of the respondent that the purchase order placed by the appellant was not as per the terms and conditions offered by him. These terms and conditions cannot be termed to be minor or immaterial.
14. The learned counsel for the appellant has failed to show any material irregularity in the impugned order of the learned Single Judge.
15. We find no merit in the appeal filed by the appellant and the same is dismissed.
16. No costs.

(S.P.GARG)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

October 24, 2011
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