AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 199 of 2015

- A. T. Gooyee And Co 68-E, Netaji Subhash Road, Kolkata Wb Pin 700001 Through The Power Of Attorney Holder Ajit Kumar Mozumder, Aged About 73 Years, S/o K.C. Majumdar R/o 35/1, Dr. K.D. Mukherjee Road, Thana Baghela Kolkata, Kolkata Wb, Pin 700060, West Bengal

---- Appellant

Versus

- South Eastern Coalfields Ltd. A Government Company Having Its Head Quarters At Seepat Road Through Its Chairman Cum Managing Director Seepat Road, Bilaspur Chhattisgarh Pin 495006, Chhattisgarh

---- Respondent

For Appellant	:	Shri Ravindra Sharma, Advocate
For Respondent	:	Shri H.B.Agrawal, Senior Advocate along with Shri O.P. Agrawal, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Rajani Dubey

Order On Board

26/07/2018

This appeal is directed against impugned judgment and decree dated 27/04/2015 passed against the appellant / defendant and in favour of respondent / plaintiff by which the respondent's suit has been decreed.

2. The respondent / plaintiff filed a suit for recovery of Rs.44,72,196.40 p. on the pleadings *inter alia* that in response to notice inviting tender dated 06/04/2005, the defendant submitted his tender (offer) on 06/05/2005. Later on, the plaintiff accepting the offer of the defendant, issued a work order on 22/12/2005, which amounted to acceptance of proposal. Even thereafter, the defendant did not make supplies of

goods under the concluded contract between the parties though, number of notices were issued to the defendant. Initially, the plaintiff had issued notice inviting tender for supply of goods, pursuant to which, tender was submitted for supply which was accepted and supply orders were given and payments also made. According to the plaintiff, as per terms and conditions of notice inviting tender, once the tenderer failed to make supply of goods, the goods would be obtained under another tender at the risk purchase of the prior tenderer and therefore, in these circumstances, when the plaintiff had accepted the offer of the defendant resulting in concluded contract, failure on the part of the defendant to supply and subsequent purchase at higher rate, entitle the plaintiff to recover the difference in the form of damages from the defendant. According to the plaintiff, in the concluded contract with the defendant, the goods were to be supplied for a total value of Rs.34,21,600/- whereas in the second round of tender, the subsequent tenderer supplied goods at a higher value of Rs.78,93,796.40p. Therefore, the plaintiff was entitled to recover Rs.44,72,196.40 p. from the defendant.

3. In rebuttal, the defendant came out with the case that there was a concluded contract. According to the defendant, after he had made offer and before it could be accepted, the defendant already expressed his inability and communicated the plaintiff that because of rise in the prices, it was not possible for him to supply goods at the quoted rates which had resulted in several negotiations, but the parties did not arrive at a consensus on the rates and other terms and conditions of the contract. Therefore, in the absence of there being any concluded contract, the defendant would not be held liable for any damages. It is also submitted that there is no specific express terms and conditions of concluded contract, even if it is accepted for the argument's sake that in the event of failure of supply, later procurement and purchase would be at the risk of the defendant. Thirdly, it was stated that as no payment was

made to the subsequent tenderer, even the plaintiff was not entitled to any decree.

4. Learned Trial Court framed as many as six issues as below -

i.) Whether the defendant entered into a concluded contract with plaintiff for supply of 14000/- Kg of Copper Ingots ?

ii.) Whether the defendant committed breach by not supplying material as per contract ? If yes, then effect.

iii.) Whether the plaintiff itself was responsible for the losses incurred due to risk purchase ?

iv.) Whether the plaintiff is entitled to recover Rs.44,72,196.40p from the defendant?

v.) Whether the plaintiff's suit is not maintainable?

vi.) Relief and cost ?

5. After allowing the parties to lead oral and documentary evidence, learned Trial Court passed impugned judgment and decree holding that the plaintiff proved that there was a concluded contract and therefore, the defendant was liable to pay difference of the price of goods which the defendant failed to supply to the plaintiff.

6. Assailing the correctness and validity of the impugned judgment and decree, learned counsel for the appellant argued that the learned Trial Court fell in error of law and fact both in recording finding of concluded contract between the parties. He would contend that the offer made by the plaintiff was already on certain terms and conditions. Later on, the plaintiff revoked its offer because of increase in rates followed by various negotiations which did not materialize. According to him, the defendant came with the case that the offer was already revoked prior to issuance of work order dated 22/12/2005. Therefore, in any case, it cannot be said to be a case of concluded contract. He would further submit that even if it is accepted to be a case of concluded contract, there is no express or implied term or condition that in the

event of failure of supply, later procurement and purchase would be at the risk of the defendant. Thirdly, it is submitted that the plaintiff has failed to prove by clinching evidence that he had actually purchased goods for a price of Rs.78,93,796.40p. from the subsequent tenderer i.e. M/s. Bhanu Metal and Engineering Works.

7. Learned senior counsel appearing for the respondent/plaintiff would argue that negotiations were going on only to seek reduction of the rate which was quoted by the defendant in his offer and not for increasing the rate as quoted because the defendant has failed to aver and prove that he had revoked his offer on the ground that after submission of offer rates in the market increased or that before acceptance of the same, the defendant had revoked his offer on another ground. He would next submit that till 22/12/2005, though certain negotiations were going on, the defendant kept alive his offer up to 22/12/2005. The plaintiff accepted defendant's offer, as originally submitted by him, by placing work order on 22/12/2005. The defendant did not raise any objection to the same, except certain minor clarifications, which were not material terms of contract. Thus, a concluded contract came into existence binding the parties. Learned senior counsel further argued that once the defendant submitted his offer pursuant to the tender notice, all the terms and conditions of tender notice are impliedly included in the concluded contract between the parties even without there being any written agreement executed between the parties. Under Clause 14 of the notice inviting tender, it was clearly stipulated that once there is a contract of supply and there is failure of supply, subsequent procurement and purchase would be at risk of the successful tenderer. This, according to him, was impliedly included as the term of contract. Lastly, it is submitted that there is ample evidence on record to prove that after acceptance of bid of M/s. Bhanu Metal and Engineering Works, supply orders were placed and he was actually paid the entire amount of Rs.78,93,796.40p.

8. After hearing learned counsel for the parties, following points arise for determination before this Court.

a) Whether there was a concluded contract between the plaintiff and the defendant.

b) Whether Clause 14 of the notice inviting tender is impliedly included as implied terms and conditions of contract between the parties even though there is no agreement in writing executed between the parties.

c) Whether the plaintiff has succeeded in proving that it had actually paid Rs.78,93,796.40p. to subsequent tenderer i.e. M/s. Bhanu Metal and Engineering Works against supply of goods which the defendant failed to supply.

Consideration of point (a) -

9. If we look at the pleadings of the parties in the plaint, the plaintiff has averred that in response to tender notice of 06/04/2005 for purchase of Copper Ingots, the defendant submitted his bid, whereafter, supply order was supplied to him on 22/12/2005. In the entire plaint, it has nowhere been stated by the plaintiff that prior to 22/12/2005, the plaintiff put in the course of transmission, his acceptance to the offer dated 06/05/2005 made by the defendant. According to the plaintiff, the defendant failed to supply material despite repeated letters, notices and finally, the plaintiff had to take recourse to re-tendering in which, offer was received from another supplier for a total value of Rs.78,93,796.40p. The difference of value at which the defendant was required to supply under the concluded contract and the value at which it was actually purchased from subsequent tenderer was Rs.44,72,196/- which the plaintiff is entitled.

10. In the written statement, the defendant came out with a stand that the plaintiff had suppressed the fact that after submission of tender, there were negotiations going on between the parties and it cannot be said that a concluded contract had come into existence. It was pleaded that the defendant did not accept terms and conditions contained in plaintiff's letter dated 22/12/2005 and rather conveyed to plaintiff its

counter offer vide its letter dated 21/01/2006, followed by another letter dated 21/02/2006, which was not replied by the plaintiff and thus, in the absence of there being any mutual agreement on all terms and conditions offered by the defendant, no concluded contract came into existence.

11. From the pleadings of the parties, what is not in dispute is that in response to NIT (Notice Inviting Tender), the defendant submitted his tender on 06/05/2005. However, thereafter a letter dated 06/08/2005 (Ex.D/3) was sent by the plaintiff to the defendant which states regarding price negotiation. According to this letter, the plaintiff informed the defendant that for price negotiation, meeting is scheduled on 12/08/2005. It also records that the defendant's representative should authorise to take on the spot decision. This shows that at this stage, the price negotiation were going on between the parties.

Another communication dated 17/11/2005 (Ex.D/2) sent by the plaintiff to the defendant again reflects that various rounds of price negotiation were going on between the parties and again meeting was scheduled on 25/11/2005. The plaintiff requested the defendant to extend validity of his offer till 31/12/2005 and fax his confirmation. What is important to note is that price at which goods were to be supplied was not finalised between the parties as would be clear from following recitals of letter dated 17.11.2005 (D/2) -

> “**xxxxxxxxxxx**
> Your representative should be authorised to take on the spot decision and he must come prepared with the documents in support of his stand / justifications, including copies of the recent Purchase orders for the tendered item, e.t.c., to establish the reasonableness of price and offering further maximum possible reduction in price for the tendered item.”

It was followed by defendant's response vide its letter dated 19/11/2005

(Ex.D/1) in which the defendant stated thus -

> "**xxxxxxxxxxxx**
> Thank you for you letter No :SECL/BSP/MMW/SEC.III/A/3659 dt. 17.11.05 for another round of price negotiation. In this respect, we would like to inform you that the price of Copper going up day be day. You will find the copper price in the Economics Times on 15.11.05 a sheet enclosed herewith for your ready ference.
>
> We are unable to reduce our price in this case, extended our offer valid upto 31/12/05."

This again shows that the parties were not *ad idem* on the rates of supply. It appears that price negotiation was going on and price or value at which, the goods were to be supplied was not agreed upon. But then, what is seen is that the defendant stated that they are unable to reduce their price to extend their offer valid upto 31/12/2005.

12. Neither the plaintiff nor the defendant have placed before the Court below, any minutes of meeting relating to price negotiation held prior to 22/12/2005. However, it appears that the defendant stated that his offer would be valid up to 31/12/2005. As to what was his offer, according to learned counsel for the defendant, this would mean the offer which the defendant had made to the plaintiff. According to learned counsel for the respondent, this letter refers to that offer which was initially made by the defendant i.e. tender submitted by him in the beginning.

13. M.M.Sarewar (PW1) in his cross examination states that upon acceptance of the rate offered by the defendant, the work order (Ex.P/4) was issued. In para 18 of his cross examination, he admits that prior to issuance of supply order, communication relating to rates were made. He admits that on 06/06/2005 and 17/11/2005, the defendant was called in the office to disclose about the rates but then

denies that vide letter dated 19/11/2005 and 22/11/2005, the defendant informed that because of increase in the rates, he is unable to make supply at the agreed rates. He further states that in the letter dated 06/08/2005 of the plaintiff, no new rate was separately fixed. Further, in para 22 of his cross examination, this witness further admits that the defendant company was asked to contact the office for price negotiation.

14. Ajit Kumar Majumdar (DW1) has stated in his affidavit under Order 18 Rule 4 CPC that pursuant to tender notice dated 06/04/2005, they had submitted their rates. In para 3, he states that after the tender notice, because of sudden ups and downs in the market, the defendant had made various communications and also talked on telephone. He has also stated that for price negotiation, he was called on 06/06/2005 and 17/11/2005 in the plaintiff's office. In para 5 of his affidavit, he states that he had informed in his letter dated 19/11/2005 and 22/11/2005 to the plaintiff that because of increased rate, they are unable to supply goods at the agreed rate. He further states that after sending letter dated 19/11/2005 and 22/11/2005, no rates were fixed by the plaintiff nor any letter regarding re-fixation of rates was sent by the plaintiff and thereafter, a work order was issued on 22/12/2005 whereas the defendant has already expressed its inability to make supply on the rates earlier quoted.

15. In his cross examination, he admits having received work order dated 22/12/2005. He has also stated that he did not deposit the bank guarantee. In para 21, he has stated that after receiving purchase order, he had talked on telephone and admits that he had not made any supply. He, then, states that as negotiation was going on, no supply was made.

16. We may, at this stage, usefully refer to two important letters dated 12/01/2006

and 21/01/2006. Letter dated 12/01/2006 (Ex.D/5) is a letter sent by the defendant to the plaintiff in response to the work order dated 22/12/2005 by which, the defendant sought information regarding the value of non-judicial stamp for issuance of bank guarantee and requested to amend two conditions relating to commencing of delivery period from March, 2006 and further regarding delivery to be made @ 0.5 M/T to 2.5 M/T per month stating that all other terms and conditions remain unchanged. The other letter dated 21/01/2006 (part of Ex.D/2) reiterated what was written earlier on 12/01/2006.

17. From the pleadings and the oral and documentary evidence led by the parties, what is undisputed is that on 06/05/2005, the defendant submitted his offer in the form of tender (Ex.P/3). Further, it is also seen that prior to 22/12/2005, there was no communication made by the plaintiff to the defendant accepting the offer of the defendant. The communication dated 06/08/2005, 17/11/2005 and 19/11/2005 relate to price negotiation but there is nothing to show that the plaintiff had accepted defendant's offer. At this stage, we notice that in letter dated 19/11/2005, the defendant states that his offer is extended upto 31/12/2005. This appears to be the offer made by the defendant by submitting his tender way back on 22/12/2005. It would thus be seen that till 21/12/2005, there was no acceptance of proposal by the plaintiff and price negotiation were going on. There is a dispute as to for what purpose, price negotiation was going on. According to the plaintiff, price negotiation was confined to possible reduction of the quoted price of the defendant whereas according to the defendant, negotiation was for the increased quoted rate because of the market fluctuation and inability expressed by the defendant to make supply at the quoted rate. Either way, one thing is clear that there was no acceptance of proposal but the defendant's offer remained valid till that time it was submitted by him with his tender to remain valid.

18. The work order dated 22/12/2005 (Ex.P/4), on its reading, is a conditional acceptance. We say so on the basis of correspondence of plaintiff's offer with the terms and conditions of work order dated 22/12/2005. A perusal of plaintiff's offer / tender (Ex.P/3) would show that the plaintiff had quoted price rate for supply of goods with certain terms and conditions. In the work order / acceptance dated 22/12/2005, the terms and conditions are completely different and distinct than those terms and conditions on which the defendant had submitted an offer. Therefore, the acceptance by the plaintiff was a conditional acceptance. If that be so, then in that case, in order to bring into existence the concluded contract, it is required to be proved that upon receipt of conditional acceptance, the defendant accepted the same without any demeanor.

19. In this regard, it is apposite to refer to provisions contained in Section 7 of the Contract Act, 1872 (for short "the Act of 1872") with regard to acceptance which reads thus -

> "7. Acceptance must be absolute—In order to convert a proposal into a promise, the acceptance must—
>
> (1) be absolute and unqualified;
>
> (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance."

20. Section 7 (2) of the Act of 1872 makes it clear that where acceptance is not made in the manner as offered by the proposal, meaning thereby that acceptance is conditional, the proposer may, within a reasonable time after acceptance is

communicated to him, insist that the proposal shall be accepted in the prescribed manner and not otherwise. If he fails to do so, then accepts the acceptance.

If we apply the aforesaid provisions of law to the proved facts and circumstances of the present case, when plaintiff sent his conditional acceptance in the shape of work-order on 22/12/2005, it was open for the defendant to accept the conditional acceptance or not. The defendant's first response is its letter dated 12/01/2006. In the absence of there being any specific evidence on record to show as to on which date, the defendant received the work order dated 22/12/2005, we would proceed by holding that the defendant submitted his response within a reasonable time in terms of Section 7 (2) of the Act of 1872.

The contents of letter dated 12/01/2006 show that the defendant did not accept conditional acceptance, as it is, but he insisted to amend the work order on two conditions. First of it being with regard to commencement of delivery from March 2006 and other being delivery to be made @ 0.5 M/T to 2.5 M/T per month and stating that other terms and conditions will remain unchanged. It, therefore, cannot be said that the defendant / offerer accepted the conditional acceptance, as it is. The subsequent communication dated 12/01/2006, 21/01/2006 also repeats the same condition as stated earlier. To this, the plaintiff never communicated his acceptance. In the result, no concluded contract came into existence between the parties because at the end, there was no mutual agreement on all terms and conditions under the offer and counter offer made by the respective parties. It is also to be seen that the defendant's witness (DW1) has stated in para 5 of his affidavit under Order 18 Rule 4 CPC that the defendant had informed the plaintiff on 19/11/2005 and 22/11/2005 that because of price fluctuation, he is no longer prepared to supply goods at the quoted rate. As far as letter dated 19/11/2005 is concerned, the same has been filed by the plaintiff itself which has been examined by this Court. Letter dated 22/11/2005 is not on record as the defendant did not file it. But the averment that the defendant had expressed its inability to supply goods at the quoted rate has not been controverted in its cross examination. In the light of this uncontroverted testimony, it is difficult to hold that there was a concluded contract.

21. Therefore, we are inclined to hold that there was no concluded contract between the parties. Accordingly, the defendant would not be liable to bear the risk of subsequent purchase at a higher rate. We must hasten to add that it is not a case under any law for the time being in force that a statutory liability is fastened upon the defendant to comply with the terms of tender without there being any concluded contract.

22. Having held that there was no concluded contract, it is not necessary to examine other issues. Accordingly, this appeal is allowed. The impugned judgment and decree is set aside and plaintiff's suit is dismissed. The parties to bear their own cost. Let appellate decree be drawn accordingly.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(**Rajani Dubey)**
Judge

Deepti