

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

FAO No. 304 of 2003 (O&M)
Date of decision: 6.2.2019

M/s Kala Ram Siri Ram

...Appellant

Versus

The Punjab State Civil Supply Cooperation Ltd. and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Kanwaljit Singh, Senior Advocate with
Ms. Payal, Advocate,
for the appellant.

Mr. Anil Bansal, Advocate,
for the respondents.

JAISHREE THAKUR, J.

1. The instant appeal has been filed by the appellant M/s Kala Ram Siri Ram against the judgment dated 17.9.2002 passed by the Additional District Judge, Chandigarh, whereby the objection under Section 34 of the Arbitration and Conciliation Act, 1996 (henceforth called 'the Act' for short) filed by the appellant against the award of the Arbitrator dated 4.8.1998 were dismissed.

2. A few facts that need to be noticed for proper adjudication are that the respondents issued a tender notice for sale of rejected wheat crop. The tender notice was for the sale of rejected wheat crop for the year 1993-1994, 1994-1995, 1995-1996 and 1996-1997 on gross weight basis and tender was to be opened in the Head Office of Punjab State Civil Supply

Corporation Limited (hereinafter referred to as 'the PUNSUP') on 13.8.1997. The appellant gave his offer long with a demand draft of ₹2,02,000/- as earnest money which was a pre-condition of the tender notice. Thereafter, negotiations took place on 14.8.1997 and the offer of rejected wheat lying at Rampuraphul of crop for the year 1994-1995 was accepted by vide letter of acceptance dated 8.10.1997, and the appellant was given time uptill 6.11.1997 to lift the stock and to deposit the full cost of stock. The appellant herein in fact had sent a Fax No. 601309 dated 5.9.1997, which is available on record as Annexure A/7, stating therein that he had not received any intimation for acceptance of his bid and because of heavy rain further deterioration is being caused to the stock lying in the open and, therefore, asked for refund of the earnest money. This was again followed by another letter dated 9.10.1997, which is available on the record as Annexure A/8 on similar grounds asking for refund of the earnest money. As the respondents did not refund the earnest money, the appellant sent a legal notice to the PUNSUP in this regard. The respondents on receipt of the legal notice, came to hold that there is an arbitration Clause 14 in the tender notice and on that basis arbitration proceedings were initiated by the Managing Director who was the competent person under the tender notice. The appellant herein filed his claim petition seeking refund of ₹2,02,000/- along with 18% interest from the date of earnest money had been deposited till the date of payment along with ₹50,000/- as damages. The Arbitrator proceeded with the arbitration proceedings. Reply was filed and thereafter the date was fixed before the Arbitrator for framing of issues. On the date issues were to be framed, the matter itself was disposed of rejecting the claim in the

absence of the claimant or his counsel. While disposing of the matter, it came to be noted that the claimant/appellant had not deposited the security within the stipulated period as per Clause 10 of the tender document i.e. within 5 days of the acceptance of their offer so the earnest money deposited is liable to be forfeited. Aggrieved against the award, objection under Section 34 of the Act were filed, which came to be dismissed. Hence the present appeal.

3. Mr. Kanwaljit Singh, learned Senior Counsel, along with Ms. Payal, Advocate, appearing on behalf of the appellant herein contends that for a contract to be concluded there has to be an offer and acceptance and in the present case there is no acceptance by the appellant herein. In fact, the appellant by letter dated 14.8.1997 had applied for lifting rejected wheat for the year 1993-1994, 1994-1995, 1995-1996 and 1996-1997 which was available in various districts of Punjab State. In the offer dated 14.8.1997, it was clearly stated that the offer was being made for the following quantity of wheat:-

<i>District</i>	<i>Centre</i>	<i>Complex</i>	<i>Quantity of bags</i>	<i>Rate P.O (figures & words)</i>
Bathinda	Rampura Phool	Harbans Singh, Ajmer Singh, Platform No.1	20129	Rs. 271-65 (Rs. Two Hundred Seventy one and Sixty Five
-do-	-do-	Platform No.2	4379	Rs. 119-99 (Rs. One Hundred Ninety Nine and ninety nine
Bathinda	-do-	C.S. Bahia Platform No.1	3724	Rs. 159 (Rs. One Hundred and Fifty Nine only)

and the offer was accepted only for lifting wheat at Ramphul Bhatinda Center pertaining to 20129 bags, therefore, at best it could be held to be a

counter offer. It is argued that the acceptance was beyond the period as specified in Clause 6, wherein it has been clearly stated as “6. *Successful tenderer will have to lift the entire stocks by 12.9.1997 without any L.D. charges and upto 22.9.1997 with L.D. charges of 0.75 paise per bag per day. However, M.D. PUNSUP reserves the right to give extension beyond 22.9.1997 with L.D. Charges even.*” It is argued that once the contract itself has not been concluded, therefore, there was no occasion for the Arbitrator to have appointed in terms of Clause 14 of the tender notice. It is also submitted that a perusal of the written statement and the statement given on oath by an employee of the respondent would reflect that there was no concluded contract. Furthermore it is argued that the Arbitrator had misconducted himself in so far no opportunity of defending the claim was allowed. It is argued that the case was disposed of on the same day as the issues were framed while proceeding the claimant to be exparte. 4.

4. Per contra, Mr. Anil Bansal, learned counsel for the respondents, urges that the appellant herein was bound by Clause 10 of the terms of the tender notice, wherein it was stipulated that in case the party fails to deposit the security within a period of five days after acceptance of the offer, the earnest money would be forfeited without any notice and in the instant case offer made by the appellant had been accepted on 14.10.1997. However, since he failed to deposit the security amount as requested, the earnest moony was rightly forfeited.

5. I have heard learned counsel for the parties and have also perused the pleadings and the evidence of the case.

6. Admittedly, an offer had been made by the appellant herein for

lifting rejected wheat lying at Rampura Phool and along with the application had deposited earnest money of ₹2,02,000/- which was a pre-condition laid down. In terms of the tender notice, tenders were to be opened on 13.8.1997 at the Head office of the PUNSUP. The successful tenderer was to lift the entire stock by 12th September, 1997 without any labour charges and upto 22.9.1997 with labour charges of 0.75 paise per bag per day. However, the Managing Director, PUNSUP would reserve the right to give extension to lift the store beyond 22.9.1997 without labour charges. As per clause 8 of the tender notice, in case of non-lifting of stock by the party within the stipulated date, PUNSUP will get automatic right to forfeit the earnest money/security without any notice and as per Clause 10 in case the security was not deposited within 5 days after acceptance, the earnest money would be forfeited without notice.

7. The question that arises for consideration in this case is, whether “partial acceptance” of the offer amounts to “concluded contract” between the parties?

8. Section 5 of the Indian Contract Act 1872 (henceforth called '**the Act**') pertains to revocation of proposal and acceptance. Section 6 of the Act deals as to how the proposal can be revoked, while Section 7 of the Act stipulates that an acceptance must be absolute. In the instant case, an offer had been made to lift stocks of rejected wheat (re-produced above) in terms of the tender notice floated by the PUNSUF, which offer was not accepted in its totality and a partial offer was accepted for the following Centre.

<i>Sr. No.</i>	<i>Centre</i>	<i>Name of Plinth</i>	<i>No. of bags</i>	<i>Crop year</i>	<i>Rat P.Q.</i>	<i>5% Security amount</i>
1	RAMPURATH UL	Harbans Singh Ajmer Singh P.F. No.1	20129	94-95	276/-	2,63,891-19

This offer was immediately rejected by the appellant herein on the ground that the offer of acceptance of tender was not in terms of the tender form, meaning thereby the offer was not accepted in totality and there was delay in acceptance of the same which resulted in causing damage to the rejected wheat.

9. Section 7 of the Act provides that in order for the proposal to be concluded into a contract, the acceptance must be absolute and unqualified. If the proposal is partially accepted it can be considered to be a counter offer and cannot be said that the contract has been concluded. The acceptance has to be absolute and unqualified, and in case it is at variance with the initial proposal/offer, then such acceptance does not culminate into a binding contract. Such partial/modified acceptance of the initial proposal at best can be said to be a counter offer and not a concluded contract.

10. In a similar situation the Supreme court in **Vedanata Limited Vs Emirates Trading Agency 2017 (3) RCR (Civil) 61** has held:

“ 13. Section 7 of the Indian Contract Act, 1872 (hereinafter referred to as 'the Act') provides that in order to convert a proposal into a contract, the acceptance must be absolute and unqualified. The existence of a concluded contract is a sine qua non in a claim for compensation for loss and damages under Section 73 of the Act arising out of a breach of contract. If instead of acceptance of a proposal, a counter proposal is

made, no concluded contract comes into existence.

14. ***U.P. Rajkiya Nirman Nigam Ltd. v. Indure (P) Ltd., 1996(2) R.R.R. 31 : (1996) 2 SCC 667***, also related to a proposal and counter proposal. Holding that no concluded contract had come into existence, the Apex Court observed as follows :-

"9...As seen, the material alterations in the contract make a world of difference to draw an inference of concluded contract...."

15. *The fulcrum of the entire controversy is the draft agreement dated 26.10.2007 marked Exhibit 8-A, for supply of phosphoric acid by the Appellant to the Respondent. The proposal of the Respondent, led to a counter proposal by the appellant. There was no acceptance of the proposal by the Appellant giving rise to a concluded contract. The quantity and duration of supply, therefore, remained in the realm of uncertainty and was never agreed upon so as to give rise to a concluded contract."*

11. Similar is the view that has been held in **Surinder Singh Sachdev vs Canara Bank and others 2016 (3) AD (Delhi) 197, Rawatsons Engineers (P) Ltd vs Union of India 2008(9) RCR (Civil) 454.**

12. In the present case, the offer of the appellant was partially accepted and the appellant did not accept the counter offer by sending a telegram. Once the contract was not a concluded contract, the terms of the tender notice as enumerated under Clause 14 of the Tender notice for appointing an Arbitrator would not come into effect. The argument raised by the learned counsel for the respondents that the earnest money has rightly been forfeited by the Arbitrator would again have no meaning in the instant case because the Arbitrator in the opinion the Court could not have

proceeded with the proceedings. Furthermore, once there is a categorical averment made by PUNSUP itself, taking a preliminary and legal objection that Clause 14 of the Tender notice is not applicable in the case and the dispute cannot be referred to the Arbitrator, the Arbitrator ought to have stayed his hand and terminated the proceedings. This object was duly signed by the Secretary-cum-Manager (Legal) PUNSUP. Even otherwise, a perusal of the proceedings held by the Arbitrator would reflect that he has acted in undue haste in dismissing the claim of the appellant herein. The matter was listed on 16.7.1998, on which date, it was noted that the case is fixed for filing of the written statement on behalf of the respondents. The written statement was filed by the PUNSUP on the same date and the matter was adjourned to 28.7.1998 for replication. On 28.7.1998, the case was fixed for 4.8.1998 for framing of issues, after taking the replication on record. On 4.8.1998 itself, the award was passed in the absence of the counsel for the claimant. In normal course, when the issues are framed, date is given to the parties to adduce evidence in support of their respective claim/stand taken in the pleadings, which procedure is totally lacking in the present case. Without giving adequate opportunity to the claimant/appellant, the award has been passed in utter haste and in violation of the principle of natural justice and, therefore, even on this ground the award of the Arbitrator is not sustainable.

13. Since this Court is of the opinion that there is no concluded contract between the parties, as the acceptance was only a partial acceptance of the offer made, the Arbitrator could not have been appointed and the question of forfeiting could not have been dealt with.

14. In view of the above, the appeal is allowed and the Award of the Arbitrator being without jurisdiction is set aside and consequently the order of the Additional District Judge, Chandigarh is set aside too. However, since the respondents herein had appointed the Arbitrator who has been held to have acted without jurisdiction, the appellant herein is relegated to avail his available remedy in accordance with law to recover the earnest money along with interest and damages, if so advised. It is made clear that the period spent in these proceedings would be excluded while computing the period of limitation.

6.2.2019
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes