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

FAO-4458-2016 (O&M)
Date of Decision: February 27, 2019

M/s Chanda Cables

...Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam and another

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Gaurav Chopra, Advocate
for the appellant.

Mr. K.S. Malik, Advocate
for the respondents.

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JAISHREE THAKUR, J. (Oral)

1. The instant appeal has been filed seeking to challenge the order of the Addl. District Judge, Hisar dated 13.07.2016 dismissing the objection petition filed by the appellant under Section 34 of the Arbitration and Conciliation Act 1996 for setting aside the Arbitral award dated 18.02.2013.

2. The facts as alleged are that the respondent-Haryana State Electricity Board floated a tender enquiry No.-NIT 59 dated 29.08.2005, inviting tenders for supply of "*LT PVC cable of various sizes*". Pursuant to the said NIT, appellant deposited earnest money and submitted the tender with supporting documents. The bid was accepted and the appellant emerged as the lowest bidder on account of quoting the lowest prices for

supply of goods i.e. 2Cx6, 2Cx10 sq. mtr LT PVC cable. As per Clause 10 of the notice of the NIT, the tender was to remain valid for 120 days from the date of opening and on account of the delay on part of the respondent in finalizing the contract, a letter dated 16.12.2005 was sent by respondent to the appellant seeking extension of the period of validity of the offer, which was agreed to by the appellant. The appellant herein agreed to extend the validity of its offer till 31.01.2006 as against the original validity period of 120 days, which was to lapse on 15.01.2006. The respondent issued a Letter of Intent dated 27.01.2006 and on receipt thereof, the appellant addressed a letter dated 03.02.2006 to the Chief Engineer-UHBVNL, expressing its inability to accept the Letter of Intent, which had been received after expiry of the validity of its offer and asked for refund of earnest money deposited by the appellant at the time of its offer. Despite the withdrawal of offer, a purchase order vide letter bearing reference No. DH-446/QH-11/1793/XEN/MM-1 dated 26.4.2006 was issued and on receipt thereof, the appellant informed the respondent that the validity period of its offer had expired on 31.01.2006 and thus was unable to comply with the purchase order. Thereafter, the respondent while treating the Letter of Intent dated 27.1.2006 as a binding contract between the parties invoked "*Risk Purchase Clause*" and proceeded to invoke the arbitration clause as per the Notice Inviting Tenders. It instituted its claim before the arbitrator, seeking an award for a sum of ₹7,51,820/- along with interest @ 18% per annum from the date of purchase of cables from a third part till the date of payment.

3. The appellant submitted its detailed reply controverting all averments made in the claim by the respondent while submitting that no

concluded contract had come into existence between the parties and as a consequence, the appellant firm was under no contractual obligation to supply the material as specified in the purchase order. It was submitted that the Letter of Intent did not constitute a valid contract between the parties.

4. The Arbitrator allowed the claim of the respondent and awarded an amount of ₹22,95,020/- to the respondent on account of 'Risk Purchase' made by it for procurement of *LT PVC cables* from other firms.

5. Aggrieved against the award, the appellant had filed an objection petition under Section 34 of the Arbitration and Conciliation Act, 1996, which was dismissed by the Additional District Judge, Hisar vide the impugned order dated 13.07.2016.Aggrieved against the dismissal of the objection petition, the instant petition has been filed.

6. Mr. Gaurav Chopra, learned counsel for the appellant herein submits that the Arbitrator has ignored the clauses of the NIT while concluding that the appellant herein is to pay an amount of ₹22,95,020/-. It is argued that there was no concluded contract between the parties and consequently 'Risk Purchase Clause' as well as other damages could not have been fastened upon the appellant herein. It is further submitted that as per the NIT the last date of validity of the tender was 15.01.2006 which was further extended by the appellant up to 30.01.2006. The purchase order was issued almost 3 months after the offer of the appellant had lapsed and therefore, there was no concluded contract executed between the parties. Reliance in this regard has been placed on Clause 5 of the NIT which clearly specified that "*tenders will be processed and finalized by UHBVN but* ***acceptance by way of Purchase Orders will be*** *either or both*

UHBVN/DHBVN individually against their respective requirement". In other words, acceptance of the offer made by the appellant would be in the way of issuing a purchase order. It is also argued that in the case referred to as ***CWP No.17169 of 2007 titled as M/s. Prakash Cable Industries Vs. Dakshin Haryana Bijli Vitran Nigam Limited***, the petitioner therein challenged an order dated 02.06.2007 passed by the Dakshin Haryana Bijli Vitran Nigam Ltd. whereby it was blacklisted. In the case referred to above, NIT dated 29.08.2005 was issued for LT PVC cable in which it was mentioned that the tender would remain valid for 120 days, i.e. up to 15.01.2006. Though the petitioner therein was the lowest bidder, the purchase order was issued only on 28.04.2006, to which the petitioner therein represented that variation in the integrum there was a huge price from the price quoted pursuant to the NIT. The purchase order was not completed and on account of non-completion, the petitioner therein was blacklisted which led to the filing of the CWP No.17169 of 2007. Taking note of the argument that the purchase order had been issued much after the period of validity of the offer under the NIT, it was held that there was no concluded contract and therefore, the question of blacklisting could not be sustained. It is also submitted that the said judgment and order passed was challenged before the Supreme Court and the same was dismissed.

7. Mr. Gaurav Chopra, learned counsel for the appellant submits that the Arbitrator and the District Judge have both ignored the orders passed in the aforesaid CWP No.17169 of 2007 wherein it has been held that "*in the absence of a purchase order no concluded contract had come into being between the parties".*

8. Per contra Mr. K.S. Malik, learned counsel appearing on behalf of the respondent urges that the order of the Arbitrator as well as the District Judge being reasoned, it does not warrant any interference. It is argued that clause 32 of Schedule 'B' of "Uttar Haryana Bijli Vitran Nigam Limited" referred to in Regulation 7.1 provides that the purchase contract will come into existence on the day the purchaser posts its acceptance to the supplier. Therefore, the date of posting of the Letter of Intent was the date of acceptance and contractual obligation of the supplier commenced from the said date. It is argued that the respondent issued Letter Of Intent on 27.01.2006 informing the respondent regarding acceptance of their offer which was within the validity period of 30.01.2006 and, therefore, there was no ground for non-completing the purchase order. Since there was failure on the part of the appellant for supplying the material, there was no option but to invoke the risk purchase as per terms of the contract and procure supply from elsewhere which resulted in a huge loss to the respondent-DHBVN. It is argued that the District Judge while taking note of the well reasoned and detailed reasoning given in the award rightly, dismissed the objection petition.

9. I have heard learned counsel for the parties and with their assistance have perused the pleadings and the case law cited. The question that needs to be determined in the instant proceedings would be- whether there is a concluded contract between the parties?

10. 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. 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, than 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.

11. In a similar situation the Hon'ble Supreme Court in ***Vedanata Limited Vs Emirates Trading Agency 2017 (3) RCR (Civil) 61*** has held:

> *"13. Section7 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.*
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> *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."*

12. 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.***

13. Admittedly in the present case, a NIT was issued and in response thereto, the appellant submitted his bid which was valid for a period of 120 days from the opening of the bid i.e. upto 15.01.2006. The respondent through its letter dated 16.12.2005 sought extension of the validity upto 28.02.2006, however, the petitioner gave consent extending validity of its offer by another 15 days i.e. up till 30.01.2006. The respondent issued Letter of Intent dated 27.01.2006 by fax messenger and speed post and the same was duly received by the appellant herein, however, the purchase order was only issued on 26.04.2006. Two clauses of NIT i.e. Clause 5 and 32 are relevant for adjudicating whether the contract between the parties had been concluded.

> ***Clause 5****: Although the NIT has been issued by UHBVN, but the requirement of material against this NIT/tender documents is for both UHBVN/DHBNV which is as under:*

Sr. No.	Description of material	Qty. required by (in Kms.)		
	LT PVC Cable	UHBVN	DHVBN	TOTAL
As per technical specification No.9/p-18/DD-II/UHBVN and IS:694/90 with latest amendment/edition if any and shall be ISI marked				
1.	2CX4 sq. mm	--	500	500
2.	2CX6 sq. mm	500	800	1300
3.	2CX10 sq. mm	--	600	600
As per technical specification No.10/P-19/DD-II/UHBVN and IS:1554/Part-I-1988 with latest amendment/edition if any and shall be ISI marked				
4.	4CX16 sq. mm	150	350	500
5.	4CX25 sq. mm	--	100	100
6.	3.5Cx95 sq. mm	50	--	50
7.	SCx120 sq. mm	25	600	625
8.	SCx185 sq. mm	20	100	120

> *Tenders will be processed and finalized by UHBVN but acceptance by way of Purchase Orders will be either or both UHBVN/DHBVN individually against their respective requirement. The earnest money, a pre-requisite to be submitted alongwith tender would be in favour of UHBVN for the entire amount. After the issue of PO, the Bank Guarantee shall be furnished by supplier to the respective utilities (UHBVN/ DHBVN) who had placed the POs failing which the amount will be deducted from the bills in lieu of B.G. As warranty cover by the respective utilities and monitored by them. The tenderer has to specify that his offer can be accepted either by the UHBVN/DHBVN or both the utilities."*

and Clause 32 of Schedule 'B' of "Uttar Haryana Bijli Vitran Nigam Limited" reads as:

> *'The purchase/contract will come into existence on the day the purchaser post acceptance to the supplier offer either through telegram or by a letter through post. The date of posting the telegram or letter will the date of agreement and the contractual obligation of the supplier will commence from that very date. The supplier will have no right to revoke his offer after the purchaser has posted his acceptance in the aforesaid manner.'*

14. On a reading of the clause 32 of Schedule 'B' as reproduced above, a contract will come into existence on the date the purchaser (namely the respondent) post acceptance to the supplier (the appellant herein) either through telegram or by a letter through post and the date of posting of such telegram or letter will be the date of agreement and the contractual obligation of the supplier will commence from that very date and the supplier will have no right to revoke his offer after the purchaser had posted his acceptance in the aforesaid manner. The acceptance as per Clause 5 would be by way of purchase order. Therefore would the communication that has been addressed dated 27.01.2006 constitute a purchase order and the answer is in negative. A perusal of the said communication which is

being addressed on 27.01.2006 is a Letter Of Intent which clearly reflects that a purchase order is to follow. Since clause 5 clearly specifies that acceptance would be by way of a purchase order, a Letter of Intent cannot be said to be acceptance. Even the NIT stipulated that "*the tenderers are requested to go through the general conditions contained in the Schedule B, C & D enclosed with the specifications and also the conditions contained herein. The terms and conditions stated below shall supersede all relevant conditions, if any, contained in all tender documents including schedule B, C,&D"* . Therefore Clause 32 of schedule 'B' stands superseded by Clause 5 of NIT. The offer in terms of the NIT issued was only valid till 30.01.2006 and the purchase order came to be issued subsequent thereto. Therefore, it is the opinion of the Court that there was no concluded contract between the parties and the respondent could not have invoked arbitration . Moreover both the Arbitrator and the Additional District Judge have failed to appreciate the fact that in a writ petition, the High Court had already concluded in ***Parkash Industries (supra)*** that there was no concluded contract when the purchase order was placed upon the said firm after the validity of the offer under the NIT had expired.

15. In a judgment rendered in '***Associated Builders vs. Delhi Development Authority (2015) 3 SCC 49***' it has been held that in case there is a violation of the fundamental police of Indian Law, the Courts should interfere in an award and in the said case, it has been held " *that binding effect of the judgment of a Superior Court being disregarded would be equally violative of the fundamental policy of law".* Both the Arbitrator and the District Judge erred in not taking note of the decision rendered in

Prakash Industries case (supra) where the petitioner had submitted a tender pursuant to NIT issued and was similarly placed.

16. In view of the discussion held above, this appeal stands allowed and the award of the Arbitrator and consequently the judgment of District Judge are set aside leaving the parties to bear their own costs.

(JAISHREE THAKUR)
JUDGE

February 27, 2019
seema

Whether speaking/reasoned	Yes
Whether reportable	Yes/No