IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

CS 159 of 2019

Veekay General Industries
Versus
Eastern Railways, Through its General Manager

Mr. Sourojit Dasgupta
Mr. Vishwarup Acharyya
... for the plaintiff.
Mr. Avinash Kankani
Mr. Suman Majumder
... for the defendant.

Hearing Concluded On : 04.10.2023

Judgment on : 17.10.2023

Krishna Rao, J.:

1. The plaintiff has filed the suit for a decree of sum of Rs. 1,74,40,566/- along with interest against the defendant.

2. The defendant had issued a tender Notice dated 4th June, 2013 for procurement of jointless grooved copper contact wire made out of continuous cast copper wire rods. The plaintiff has participated in the said tender process. At the time of submission of the tender document, the plaintiff had reserved its price variation clause which contained in the tender notice and the plaintiff had also enclosed a separate price variation clause along with the bid. On 24th October, 2013, the defendant had issued letter of acceptance to the plaintiff for the supply of 186.184 MT for supply of jointless grooved copper contact wire 107 sq. mtr.

3. On receipt of the offer letter, the plaintiff has submitted its representation on 29th October, 2013, intimating the defendant that as per tender document, the delivery schedule was 50% within 04 months and the balance within 04 months thereafter. The plaintiff has proposed for changing the Clause as follows : *"Delivery to commence within 45 days at the rate of 63 MT per month and to be completed within three months thereafter."* The plaintiff has also informed the defendant about the price variation clause and mentioned that: *"We had in our offer very clearly recorded that the Custom Duty factor shall be as 'one' and also Custom Duty factor CD2 shall be 'one'."* In reply to the request of the plaintiff, the defendant by a letter dated 19th November, 2013, accepted the delivery period as proposed by the plaintiff but with regard to the Custom Duty factor, the defendant had informed that :

> *"Your attention is further invited to Part G. (12) of the Tabulation Statement of Financial BID of the said tender which has been digitally signed by the tenderer where acceptance of PVC clause has been confirmed as per annexed PVC formula*

> *as per based rate/exchange rate etc. indicated therein has been confirmed by saying 'yes' in the complied column XX in the remarks column. In Pt. E & F technical & commercial statement, no technical and commercial deviation has been offered (copy enclosed)"*

In the said reply, the defendant had further requested the plaintiff to confirm unconditional acceptance of the Advance Acceptance letter so that formal order can be issued.

4. In reply to the letter dated 19th November, 2013, the plaintiff had sent a reply to the defendant informing the defendant :

> *"We had assumed that there was a typographical omission in the PVC formula given in the tender documents. That is the reason we attached the standardized PVC formula in our offer as annexure wherein we had predetermined factor CD_1 as 1 and did not consider this as a case of commercial deviation.*
>
> *Hence, to summarize the above, please note that the rates offered by us are neither in deviation of PVC formula and nor is there any commercial deviation as the same are based on the standardized PVC formula wherein both CD_1 and CD_2 are taken as 1. We would now request you kindly to reconsider this case in the light of the above and hope for a favourable response on the same from you."*

Instead of confirming the unconditional acceptance of Advance Acceptance letter of the plaintiff, the defendant had issued two work orders dated 17.12.2013 for supply of 19.664 MT and 165.416 MT of HDGC Contact Wire respectively. On receipt of the work orders, the plaintiff vide its letter dated 06.01.2014 informed the defendant that :

> *"Kindly refer to our letter No. VKGI/COMM/ER/341 dt. 17.12.2013 wherein we had explained our position regarding factor CD1 being taken as 'One'. You have not accepted our clarification and placed a Purchase Order No.16.12.6025.1.41371 dated 17.12.2013 & P.O.No.16.11.5028.1.04978 dt. 17.12.2013 for supply of 185.080 MT. ofjointless Grooved Copper Contact wire (107 Sq.mm.) made out of Continuous Cast Copper Wire Rod with factor CD1 as 1.054. As explained in our earlier letters, we shall incur heavy losses on account of wrong interpretation of factor CD1.*
>
> *However, in view of our very long association with Railways, we are going to execute this order under protest. We may take up this issue at suitable time through arbitration."*

5. On 17th February, 2014, the plaintiff sent a letter to the defendant informing the defendant that :

> *"We propose to supply 50% quantity of Contact Wire 107 Sq.mm. against the Purchase Order No.16.12.6025.1.41371 dt. 17.12.2013 & P.O.No.16.11.5028.1.04978 dt. 17.12.2013 valued at approx. Rs.5,00,00,000.00 (Rupees Five Crores Only) in March/April 2014.*
>
> *We have already advised you that these orders are placed on us not in conformity with our offer and we shall suffer heavy losses in these orders. We would therefore like to execute these orders if our payments are not delayed.*
>
> *In view of the above please confirm that funds shall be available for payments against proposed supply in March/April 2014 so that we can go ahead with procurement of raw material/manufacture of Contact wire 107 Sq.mm."*

On 3rd March, 2014, the plaintiff has again sent a letter to the defendant informing the defendant as follows:

> *"As desired, we shall be offering 50% of the ordered quantity of Contact Wire for inspection to RITES in the first week of April. The material shall be delivered by mid April 2014.*
>
> *In this connection kindly refer to our letter No.VKGI/COMM/ER/413 dt. 17.02.2014. we request you to kindly arrange the required funds so that our payment are not delayed."*

On receipt of the letters dated 06.01.2014, 17.02.2014 and 03.03.2014, the defendant has not sent any reply to the plaintiff and accordingly, the plaintiff had again sent a letter on 24.03.2014 stating that :

> *"1. We have explained to you vide our letter No. VKGI/COMM/ER/341 dt. 17.02.2013 and No. VKGI/COMM/ER/360 dt. 06.01.2014 that our offer in the said tender was with factors CD_1 and CD_2 as 'One'. You have not accepted our offer as given but placed order on us with factor CD_1 as 1.054.*
>
> *2. We had explained to you that we shall be incurring very heavy losses if we agree to supply the Contact Wire with factor CD_1 as 1.054 instead of 'One'. However, in view of our long association we had agreed to execute the order subject to timely payments. Accordingly, we had agreed to executed the order and requested you to confirm availability of funds so that we supply the material. However, you have failed to confirm availability of funds. As such we have not been able to execute the order.*
>
> *In view of the above, we regret out inability to execute the above order. You may consider cancelling the same."*

No response were received from the defendant, the plaintiff had again sent a letter dated 07.04.2014 stating that :

*“**Ref: Your Letter No. CEE/CON/ER/Store/Contact Wire/917 dt. 27.03.2014***

Dear Sir,

Order placed on us for supply of Contact Wire is not as per our offer with deviation. Further, there is no confirmation about availability of funds for payment, if supplies are made. We have, therefore, requested Controller of Stores vide letter No. VKGI/COMM/ER462 dt.24.03.2014 to cancel this order.”

6. The defendant had sent a letter to the plaintiff on 17.04.2014 but the said letter was not placed either by the plaintiff or by the defendant but on receipt of the said letter, the plaintiff has sent a reply to the defendant on 21.04.2014 which reads as follows :

*“**Ref: Your Letter No. 16/11/5028 dt. 17.04.2014***

Dear Sir,

Para-wise comments on your letter under reference dt. 17.04.2013 is given under :

1.0. In this connection kindly refer to our letter No. VKGI/COMM/ER/3055 dt. 29.10.2013 wherein we have clarified that our offer is based on use of indigenous CCC Rod and thus both Factors CD1 & CD2 shall be “One”. This is in line with what is being followed by CORE/ALD and our offer.

However, you have placed Purchase Order No. 16.12.6025.1.41371 dt. 17.12.2013 & P.O. No. 16.11.5028.1.04978 dt. 17.12.2013 without incorporating changes as per our offer.

In view of our long association with Railways, we had agreed as a very special case to execute this order vide our letter No. VKGI/COMM/ER/360 dt.06.01.2014 under protest. We had organized the manufacture of Contact Wire to supply 50% of the ordered quantity by March/April and had accordingly *requested you to kindly confirm availability of funds for timely payment. Despite our repeated request to you to confirm availability of funds vide our letter No. 06.01.2014, 03.03.2014 and 07.04.2014, we did not receive any confirmation to the effect and as such we had no option but to seek cancellation of the order.*

2.0. The clarification given by you regarding PVC vide your letter No. 16/11/5028 dt. 19.11.2013 has not been accepted by us. We have already clarified this vide our letter No. VKGI/COMM/ER/341 dt. 17.12.2013. The Purchase Order has been issued without considering contents of our offer and clarifications.

4.0. We still can execute this order and arrange supply of the material to enable you to execute target work provide the orders are as per our offer i.e. both Factors CD1 & CD2 are accepted as 'One' for purpose of PVC.

5.0. Noted."

7. The defendant by a letter dated 01.05.2014 in reference to the letters dated 03.03.2014, 24.03.2014, 17.04.2014 and 21.04.2014 informed the plaintiff as follows:

"1.0. This office has already clarified/confirmed the contents of your letter dated 29.10.2013 vide letter no. 16/11/5028 dated 19.11.2013 and you have promised vide your letter under ref(1) that, you will be offering 50% of the ordered quantity in the 1st Week of April and material shall be delivered by mid April'2014.

2.0. As far as provision of fund is concerned it is well known to you that, unless and until clear fund provision is ensured, Railway do not issue any formal Purchase Order and thus seeking clarification in regard to availability of fund is not understood by this office. This is however, to mention that fund is available for the P.O. placed on you.

3.0. It is re-iterated that, many project works of this Railway are stuck-up for want of the above item.

4.0. You are therefore requested to confirm within seven days from the date of receipt of this letter that, P.O.s will be executed as per its terms and conditions failing which no further reference will be made and this office will be compelled to initiate Risk Purchase action at the risk and cost of your concern.

5.0. This is for your information and necessary action please. This letter is issued without prejudice to the Railways right for initiating Risk Purchase Action including other legal proceedings."

8. On 13.06.2014, the defendant had sent a letter to the plaintiff which reads as follows:

"Office of the
Controller of Stores
17, Netaji Subhas Road, Kolkata – 700 001

No: 16.115028 Date 13.06.2014

To
M/S. Veekay General Industries,
B-46, JhilmilTahirpur Industrial Area,
G.T. Road,
Shahdara, FAX NO. 01122589469
New Delhi-110 095.

Dear Sir,

Sub : Risk purchase action against

1) *P.O. No. 16/11/5028/1/04978 dated 17.12.2013 and*

2) *P.O. No. 16/12/6025/1/41371 dated 17.12.2013 for supply of joint less grooved copper contract wire, 107 sq mm made out of continuous cast copper wire rods as per RDSO SPEC No. ETI/OHE/76(6/97) with A & C slip no. – 1,3,4,5 & 6 against E.Rly's*

Tender No. 16/11/5028 Opened on 24.06.2013.

Ref : 1) This office's letters of even no. dated 17.04.2014 & 01.05.2014.

2) Your letter no. VKGI/COM/ER/201 dated 21.04.2014.

With reference to the above, you are informed that Eastern Railway had placed above Purchase orders as mentioned in the subject column for supply of joint less grooved copper contact wire, 107 sq mm made out of continuous cast copper wire rods as per RDSO SPEC NO. ETI/OHE/76 (6/97) with A & C slip no. 1, 3, 4, 5 & 6 on you.

Despite this office's letter under reference you did not agree to supply the material as per the terms and conditions of the contract and rather you have asked for change in the terms and conditions of the contract vide letter under reference-2 which is not acceptable at post contract stage. Hence, having no other way, final reminder was issued vide this office letter of even no. dated 01.05.2014 in regard to initiation of Risk Purchase action against above two P.Os.

In this connection one Risk Purchase Tender has been issued/floated against the above P.Os Vide tender No. 16/11/5028 (since the PO was placed against the same tender batch) for total quantity of 185.080 MT and the Risk Purchase Tender is due on 17.07.2014 and closing at 1:30 PM through IREPS Website (E.Tender).

You are, therefore, informed that in case you are interested to quote in the aforesaid Risk Purchase Tender then as per extant rule, you must submit your offer along with Security Deposit Money for10% of the total value of the offer <u>failing which your offer will be summarily rejected without making any back reference to you</u>. The copy of instrument of the S.D. Money must be uploaded along with your offer and original hard copy of the same should be sent/deposited to COS/ER/FP/Kolkata office well before the scheduled tender opening date and time failing which your offer will be summarily rejected without making any back reference to you.

This is without any prejudice to rights of Eastern Railway as a Purchaser. A copy of Risk Purchase Tender Schedule is enclosed herewith.

(S. Kundu)

Dy. Chief Materials Manager/Con-II
For & on behalf of the President of India."

9. The defendant had cancelled both the purchase orders on 12.08.2014 and 25.08.2014 on the ground that the plaintiff has failed to supply the materials as per the purchase orders. After cancellation of the purchase orders, the defendant had sent two letters dated 27.11.2014 informing the plaintiff that the defendant is entitled to claim of Rs. 18,65,569/- and Rs. 1,55,74,996.85/- towards the expenditure incurred in risk and purchase in terms of Clauses 2401, 2402 and 2403 of the IRS Conditions of Contract.

10. The Controller of Stores, Eastern Railway by his letter dated 16.02.2015 informed the plaintiff that if the plaintiff fails to comply with the terms of the purchase order dated 17.12.2013, the amount of Rs. 1,74,40,566/- shall be deducted as risk purchase loss from the pending bills of the petitioner. Being aggrieved with the letter dated 16.2.2015, the plaintiff has filed a Writ application being W.P No. 10789 (W) of 2015. The Hon'ble Court dismissed the writ petition on 23.06.2015 by passing the following order :

> *"Despite the existence of an arbitration agreement between the parties, this Court was minded to entertain the writ petition provided the petitioners secured the said amount of Rs. 1,74,40,566/- by depositing the same with the Registrar General of this Court for investment thereof in a fixed deposit account of Nationalized Bank. However, the petitioners having declined to secure such amount, there is no good reason as to why they should not be relegated to the forum for*

resolution of dispute by arbitration, which they intended by the letter dated 06.01.2014.

This Court is of the clear view that this writ petition ought not to be entertained. The same stands dismissed, without costs.

The petitioners are granted liberty to pursue their remedy before the arbitral tribunal in accordance with law.

Needless to observe, the observation made above are for the purpose of disposal of this writ petition and shall not influence the relevant Court or the arbitral tribunal, as the case may be, if at all approached by the petitioner.

Urgent Photostat certified copy of this order, if applied for, be furnished to the parties as early as possible."

11. The plaintiff being aggrieved with the order dated 23.06.2015, the plaintiff had preferred an appeal being FMA No. 3040 of 2015 and the Hon'ble Appellate Court had disposed of the appeal on 05.10.2015 by passing the following order :

"Having heard the learned senior counsel appearing for the appellants and the learned advocates for the respondents and in view of nature of the dispute which includes various factual aspects including the issue whether there was concluded contract between the parties we are of the opinion that it was just on the part of the learned Judge not to entertain the issue in a writ proceeding. We asked the parties as to their willingness to submit themselves to arbitration in respect of the dispute and the parties agreed to such suggestion.

Accordingly, we give liberty to the parties to refer the matter for arbitration in accordance with law. We also make it clear that the appellants are at liberty to seek necessary interim relief in contemplation or during the procedure of the arbitration proceeding in

> *accordance with law with regard to their claim of alleged illegal deduction towards risk purchase loss, if so advised.*
>
> *With the aforesaid observations the appeal is disposed of.*
>
> *All issues are kept open.”*

12. As per the order passed by the Hon’ble Appellate Court, the plaintiff by a letter dated 14.12.2015 requested the defendant for appointment of Arbitrator but in the said communication, the plaintiff has made clear that it is the stand of the plaintiff that there is no concluded contract between the parties and the plaintiff will take up the issue before the Learned Arbitrator. On receipt of the said letter, the defendant by a communication dated 29.12.2015, informed the plaintiff that the Controller of Stores is not the competent authority to appoint the Arbitrator and directed the plaintiff to approach the General Manager of Eastern Railway for appointment of Arbitrator. The plaintiff had approached the General Manager of the Eastern Railway for appointment of Arbitrator. The General Manager of the Eastern Railway had appointed one Shri Sidharth Sharma, Chief Material Manager as sole Arbitrator. The plaintiff by a letter dated 30.09.2015 informed the defendant that the appointment of the Arbitrator is contrary to the Arbitration and Conciliation Act,1996 as amended in 2015 as the Arbitrator appointed by the defendant is one of the employees of the defendant and requested for appointment of another arbitrator and the plaintiff has also suggested the name of three arbitrators.

13. As the defendant has not appointed another Arbitrator, the plaintiff has filed an Arbitration Petition No. 43 of 2017 for appointment of Arbitrator and during the hearing, the counsel for the defendant assured the Court, that they will appoint an arbitrator within 30 days as per the fifth schedule of the Arbitration and Conciliation Act, 1996 failing which the defendant shall forfeit its right to make any appointment and it would be open for the petitioner to apply afresh for appointment of arbitrator. In the meantime, the plaintiff has also filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 being AP No. 54 of 2017 and the Hon'ble Court had disposed of the said application on 22nd February, 2017. Being aggrieved with the order dated 22.2.2017, the plaintiff has filed an appeal being APO No. 92 of 2017 and the said appeal was disposed of on 5th April, 2017 by passing the following order :

> *"Accordingly, the merits of the order impugned need not be gone into. The tenure of the order dated February 22, 2017 is limited to a period of a fortnight from date, whereupon it will lapse automatically and without reference to any Court. It will be open to the appellants herein to institute a suit before an appropriate forum and apply for interlocutory orders therein in accordance with law. Upon any interlocutory application being filed by the appellants herein in the proposed suit, the forum in seisin of the suit will be entitled to consider the same in accordance with law, not limited or constrained in any manner by the order impugned herein or influenced by the continuation of such order by the present order.*
>
> *APO No. 92 of 2017 and GA No 1115 of 2017 are disposed of without any order as to costs."*

14. The plaintiff being aggrieved with the order dated 05.04.2017 had preferred an SLP but the same was dismissed on 11.08.2017. thereafter, the plaintiff has filed the present suit.

15. The defendant has filed written statement and on the basis of the pleadings and suggested issues, this Court has framed the following issues :

> *"1. Whether the suit is maintainable in law?*
>
> *2. Whether the plaintiff accepted the price variation clause in the tender document?*
>
> *3. Whether the tender was in the teeth of the govt. policy to allow indigenous copper?*
>
> *4. Whether the money deducted by Eastern Railway from the plaintiff company was for unjust financial enrichment?*
>
> *5. Whether the plaintiff is entitled to a decree for Rs.1,74.40.566/- against the defendant?*
>
> *6. Whether the plaintiff is entitled to interest as claimed on the decretal amount?*
>
> *7. Whether the claim of the plaintiff is barred by limitation?*
>
> *8. Whether there was a concluded contract between the parties?*
>
> *9. Whether the plaintiff acted in breach of the terms of the contract by failing to supply the material?"*

The plaintiff has examined one witness on his behalf and during the examination of the plaintiff's witness altogether 31 documents were exhibited being "Exhibit A to Exhibit EE".

16. The issue No. 1 is whether the suit is maintainable in law.

As per the case of the defendant, the plaintiff has filed the instant suit against the defendant who is the Railways Authority but before filing of the suit, the plaintiff has not issued notice under Section 80 of the Code of Civil Procedure, 1908 nor the plaintiff has obtained leave to file the suit dispensing notice under Section 80 of the Code of Civil Procedure, 1908. The plaintiff relied upon the notice dated 24.12.2014 "Exhibit W". The Plaintiff submits that in the said notice, the defendant was called upon to retract the letter under reply failing which the plaintiff will be compelled to avail the appropriate recourse as permissible under law and equity. The said notice is with reference to the notice dated 27.11.2014 wherein the defendant has informed the plaintiff that the defendant is entitled to a claim from the plaintiff for a sum of Rs. 18,65,559/- and Rs. 1,55,74,996/- towards extra expenditure incurred in risk purchase in terms of Clauses 2401, 2402 and 2403 of the IRS Conditions of the Contract. After issuance of the notice dated 24th December, 2014, the Controller of Stores, Eastern Railway has intimated the plaintiff for deduction an amount of Rs. 1,74,40,566/- on 16th February, 2015. Being aggrieved with the said notice, the plaintiff had also filed a writ petition against the claim. The Hon'ble Court had dismissed the said writ application by giving liberty to the plaintiff to pursue their remedy before the Arbitral Tribunal in accordance with law. The plaintiff had challenged the said order before the Hon'ble Division Bench and the Hon'ble Division Bench by an order dated 5th October, 2015 has given liberty to the parties to refer the matter for arbitration in accordance with law. The defendant had appointed the Chief Material Manager of Eastern Railway as Sole Arbitrator but the plaintiff has raised objection on the ground that the Arbitrator appointed by the Railway is the employee of the Railway and is contrary to the Section 12(5) of the Arbitration and the Conciliation Act, 1996 as amended in the year 2015. The plaintiff had filed an arbitration petition before the High Court being AP No. 54 of 2017 for appointment of Arbitrator and by an order dated 15th February, 2017, the Hon'ble Court had directed the defendant to appoint the Arbitrator within 30 days failing which the Appointing Authority shall forfeit its right for appointment of Arbitrator and it would be opened for the petitioner to apply afresh for appointment of Arbitrator. In the meantime, the plaintiff had also filed another application being AP No. 54 of 2017 under Section 9 of the Arbitration and Conciliation Act, 1996 and the same was disposed of on 22nd February, 2017. Being aggrieved with the said order, the plaintiff has preferred an appeal being APO No. 92 of 2017 and in the appeal, the Hon'ble Division Bench of the High Court by an order dated 5th April, 2017 given liberty to the plaintiff to institute a suit before an appropriate forum and apply for interlocutory orders in accordance with law. The plaintiff has preferred an SLP but the same was dismissed and thereafter the plaintiff has filed the instant suit.

Though the plaintiff has issued notice on 24th December, 2014 calling upon the defendant for recalling of the letters dated 27th November, 2014, wherein the defendant had informed about their claim against the plaintiff for payment of Rs. 18,65,569/- and Rs. 1,55,74,996.85/- being extra expenditure incurred in risk purchase in terms of Clauses 2401, 2402 and 2403 of the IRS conditions of contract.

The plaintiff had relied upon the Judgment reported in ***(2019) 13 SCC 142 (Y. Savarimuthu –vs- State of Tamil Nadu &Ors.),*** the Hon'ble Supreme Court has held that :

> ***"14.*** *On a perusal of the notice dated 14-1-2000, it is clear that this is a legal notice sent by a lawyer of the appellant to the authorities concerned. It is not disputed that it was by registered AD and served upon the authorities. There is also no dispute that the cause of action is sufficiently set out in the said notice, which is the illegality of the partial termination of the contract on 16-12-1999. It was also made clear that though a writ appeal at that point of time was going to be filed against the writ petition dismissal, yet this would be a notice to take "appropriate legal action" against the State. There is no doubt, whatsoever, that more than two months have elapsed from the date of this notice, after which the suit has been filed. In fact, the suit was filed long after, on 12-9-2002. Quite apart from this, on 29-1-2000 also, the letter of the appellant made it clear to the Divisional Engineer that not only is the partial termination bad in law but that the payments due for work would have to be made.*
>
> ***15.*** *It is clear, therefore, that there is sufficient compliance with the provisions of Section 80 CPC as has been introduced by the Amendment Act introducing Section 80(3) into the statute book. The respondents' argument that Section 80 is not*

expressly referred to and that the legal notice and letters were written prior to the disposal of the writ appeal have no legs to stand on. This is for the reason that a notice does not have to state the section under which it is made so long as the ingredients of sub-section (3) of Section 80 are met. It is admitted that there was no need for any legal notice before filing the writ appeal. The notice, therefore, that was sent on 14-1-2000, was only under Section 80 CPC in the event the writ appeal failed and a suit would have to be filed.

16. *We are, therefore, of the view that the learned Additional District Judge's judgment was correct. In this view of the matter, we set aside the impugned judgment of the High Court and remit the matter to the High Court to dispose of the two appeals on merits. Further, considering this is a suit of the year 2002, we request the High Court to take up these appeals and dispose of the same at the earliest."*

Notices dated 27th November, 2014 issued by the defendant wherein the defendant has informed about their claim against the plaintiff for payment of Rs. 18,65,569/- and Rs. 1,55,74,996.85/- total amounting to Rs. 1,74,40,566/- are marked as Exhibits U and V and the notice issued by the plaintiff is marked as Exhibit W. After issuance of the said notice, the defendant had issued an intimation by a letter dated 16th February, 2015 for recovery of the said amount and thereafter the plaintiff has filed writ application and several applications before the Hon'ble Court and subsequently by an order dated 5th April, 2017, the Hon'ble Division Bench had given liberty to the plaintiff to institute suit and accordingly the plaintiff has instituted the suit, thus issue no. 1 is decided in favour of the plaintiff and against the defendant.

17. Issue No. 7 is whether the claim of the plaintiff is barred by limitation?

As per the case of the defendant, an amount of Rs. 63,77,229/- was adjusted on 25th August, 2015 and the plaintiff has filed the suit in the year 2019, thus the suit filed by the plaintiff is barred by limitation. The defendant has issued two notices to the plaintiff on 27th November, 2014, out of which, in one notice the defendant has claimed an amount of Rs. 18,65,569/- and in another notice, the defendant had claimed Rs. 1,55,74,996.89/- being the extra expenditure incurred towards risk purchase in terms of Clauses 2401,2402 and 2403 of the IRS condition of contract. Immediately after receipt of the said notices, the plaintiff had issued a notice dated 24th December, 2014 calling upon the defendant to recall the said notices failing which, the plaintiff will avail appropriate recourses as permissible under law. Inspite of receipt of the notice, the defendant had issued notice on 16th February, 2015, for deducting an amount of Rs. 1,74,40,566/-. Being aggrieved with the notice dated 16th February, 2015, the plaintiff has filed writ application and the said writ application was disposed on 23rd June, 2015 but till date no amount was deducted/recovered from the plaintiff. Being aggrieved with the order dated 23rd June, 2015, the plaintiff has preferred an appeal being FMA No. 3040 of 2015 but during the pendency of the appeal, the defendant had recovered an amount of Rs.

63,77,229/- from the plaintiff. On 5th October, 2015, the said appeal was disposed of by giving liberty to the parties to refer the matter to the arbitration and all issues were kept open. Thereafter also the plaintiff has initiated several proceedings before the Hon'ble High Court and finally by an order dated 5th April, 2017, the Hon'ble Division Bench has granted liberty to the plaintiff to institute suit accordingly the plaintiff has instituted the present suit. During the pendency of appeal, the defendant had again recovered an amount of Rs. 1,10,63,335/- from the plaintiff. Since after the issuance of notices dated 27th November, 2014, the plaintiff has initiated several legal proceedings and during the pendency of the proceedings before the Hon'ble Court against the said recovery, the defendant has recovered the amount on two occasions. Thus, this Court finds that the suit filed by the plaintiff is not barred by limitation.

Issue No.7 is decided in favour of the plaintiff and against the defendant.

18. Issue No. 8 whether there was a concluded contract between the plaintiff and defendant.

The defendant had issued a tender Notice dated 4th June, 2013 for procurement of jointless grooved copper contact wire made out of continuous cast copper wire rods. The plaintiff has participated in the said tender process. At the time of submission of the tender document, the plaintiff had reserved its price variation clause which contained in the tender Notice and the plaintiff had also enclosed a separate price variation clause along with bid. On 24th October, 2013, the defendant had issued Letter of Acceptance to the plaintiff for supply of 186.184 MT for supply of jointless grooved copper contract wire 107 sq.mtr. In the Letter of Acceptance, it is mentioned that *"Contract is concluded by this acceptance. A formal purchase order showing all details is under issue. Please convey your unqualified acceptance to this offer by return fax No. (033) 22302553".*

On receipt of the offer letter, the plaintiff has submitted its representation on 29th October, 2013 intimating the defendant that as per tender document the delivery schedule was 50% within 04 months and balance within 04 months thereafter. The plaintiff has proposed for changing the Clause as follows : *"Delivery to commence within 45 days at the rate of 63 MT per month and to be completed within three months thereafter."* The plaintiff has also inform the defendant about the price variation clause and mentioned that: *"We had in our offer very clearly recorded that the Custom Duty factor shall be 'one' as also Custom Duty factor CD2 shall be 'one'."* In reply to the request of the plaintiff, the defendant by a letter dated 19th November, 2013, accepted the delivery period as proposed by the plaintiff but with regard to the Custom Duty factor, the defendant accepted the request made by the plaintiff which are marked as Exhibits E & F.

Instead of confirming the unconditional acceptance of Advance Acceptance letter of the plaintiff, the defendant had issued two work orders dated 17.12.2013 for supply of 19.664 MT 165.416 MT of HDGC

Contact wire respectively. On receipt of the work orders, the plaintiff vide its letter dated 06.01.2014 informed the defendant that *"However, in view of our very long association with Railways, we are going to execute this order under protest. We may take up this issue at suitable time through arbitration."* The said letter is marked as Exhibit 'J'.

On 17th February, 2014, the plaintiff sent a letter to the defendant informing the defendant that *"the plaintiff already advised the defendant that these orders are placed on plaintiff not in conformity with the offer and the plaintiff shall suffer heavy losses in these orders. We would therefore like to execute these orders if our payments are not delayed"*.

On 3rd March, 2014, the plaintiff has again sent a letter to the defendant informing the defendant. Both letters are marked as Exhibits "K & L".

On receipt of the letters dated 06.01.2014, 17.02.2014 and 03.03.2014, the defendant has not sent any reply to the plaintiff and accordingly, the plaintiff had again sent a letter on 24.03.2014 stating that "*the plaintiff in its offer in the said tender explained that the factors CD1 and CD2 as one but the defendant did not accept the offer, placed order with factor CD1 as 1.054. The plaintiff explained to the defendant that the plaintiff will suffer heavy losses if the plaintiff agree to supply with factor CD1 as 1.054 instead of one. The plaintiff further informed that due to long association with the defendant, the plaintiff agreed to* *supply subject to confirmation of funds but the defendant has not confirmed the availability of fund and thus, the plaintiff is not able to execute the order and informed the defendant to treat the same as cancel. The Letters are marked as Exhibits "M & N".*

The defendant had sent a letter to the plaintiff on 17.04.2014 but the said letter was not placed either by the plaintiff or by the defendant but on receipt of the said letter, the plaintiff has sent a reply to the defendant on 21.04.2014 which states that *"The order can be executed and supply of material can be arranged to enable the defendant to execute target work, provided that orders are as per the plaintiff's offer i.e. both Factors CD1 & CD2 are accepted as 'One' for purpose of PVC."*

Thereafter the defendant by a letter dated 01.05.2014 in reference to the letters dated 03.03.2014, 24.03.2014, 17.04.2014 and 21.04.2014 informed the plaintiff as follows:

> *"The defendant had mentioned that as far as the provision of fund is concerned it is well known to the plaintiff that unless and until clear fund provision is ensured, Railways do not issue any formal Purchase Order and thus seeking clarification in regard to availability of fund is not understood by the office of the defendant. Therefore the plaintiff was requested to confirm within seven days from the date of the receipt of this letter, failing which no further reference will be made and the defendant will be compelled to initiate Risk Purchase Action at the risk and cost of your concern including other legal proceedings."*

On 13.06.2014, the defendant had sent another letter to the plaintiff which states that *"in connection to letters sent by the* *defendant to the plaintiff, and various purchase orders made by the defendant, the defendant had issued/floated against the plaintiff one Risk Purchase Tender in regards with tender No. 16/11/5028 for total quantity of 185.080 MT and the Risk Purchase Tender is said to be due on 17.07.2014. The plaintiff was asked that is case the plaintiff is interested to quote in the aforesaid Risk Purchase Tender then as per extant rule, the plaintiff must submit its offer along with Security Deposit Money for 10% of the total value of the offer failing which your offer will be summarily rejected without making any back reference to the plaintiff."*

As per the contention of the defendant, the plaintiff has invoked the provisions of arbitration clause and the plaintiff has also agreed to supply of materials as per the work orders and thus the act of the plaintiff proves that there is a concluded contract between the parties. In the letter dated 6th January, 2014, Exhibit-J, it was the specific contention that the due to the long association with Railways, the plaintiff is going to execute the order under protest and the plaintiff will take up the issue at a suitable time through arbitration. The plaintiff has also requested the defendant to confirm that fund shall be available for payment against proposed supply. The defendant has not given any reply to the said requests and again on 21st April, 2014, the plaintiff informed the defendant that the plaintiff is still ready to arrange supply of materials provided the orders are placed by treating both factors CD1 and CD2 are accepted as 'one' which is marked as Exhibit O.

Section 10 of the Contract Act, 1872 postulates that all agreements are contracts if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, which are not expressly declared to be void and as such a transaction to constitute a contract must be preceded by offer of an proposal by one party and acceptance of the same by the other party.

A valid contract cannot be constituted by the act of one party and that there must be a valid offer and valid acceptance by the parties. On analysing the provisions of Sections 7, 8 and 9 of the Contract Act, 1872, it can be said that if a party to contract makes an offer and the same is accepted in an absolutely unqualified manner by the other party then the contract becomes a valid and complete contract. In a written contract containing signatures of both the parties is not sine quo non to constitute a valid contract and executable contract. All those are essential that there should be a valid offer, unqualified acceptance and agreement of the parties to abide by the terms and conditions and perform their respective part of contract.

In this case as per tender notice published by the defendant, the plaintiff has participated in the said tender. The defendant has issued letter of acceptance in favour of the plaintiff which is marked as Exhibit -D. In the said letter of Acceptance, it is mentioned that

"*Contract is concluded by this acceptance. A formal purchase order showing all details is under issue. Please convey your unqualified acceptance to this offer by return Fax.*"

The plaintiff has not submitted its unqualified acceptance and on the other hand, the plaintiff has submitted its request intimating that the changes made in the letter of Acceptance is not acceptable and requested the defendant to accept the delivery schedule given in the tender document and price variation Clause be accepted as given in their offer. The defendant has accepted the request of the plaintiff with respect of delivery period but has not accepted the price variation clause. The plaintiff has not accepted the price variation clause but the defendant had issued two purchase orders to the plaintiff. By a letter dated 6th January, 2014, Exhibit-J, the plaintiff has agreed to execute purchase order "under protest" and also made clear in the said letter that the plaintiff will take up the issue at a suitable time through arbitration.

It is found from record, the plaintiff has time to time change its decisions through various letters being Exhibits -J, K, L, M, N and O but had never submitted its unqualified acceptance as required by the defendant in its letter of acceptance.

In the case reported in ***AIR 2021 SC 341 (Padia Timber Company (P) Ltd. -vs- The Board of Trustees of Visakhapatnam Port Trust),*** the Hon'ble Supreme Court held that :

> ***"56.*** *It is a cardinal principle of the law of contract that the offer and acceptance of an offer must be absolute. It can give no room for doubt. The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition, as held by this Court in Haridwar Singh v. Bagun Sumbrui & Ors. AIR 1972 SC 1242. An acceptance with a variation is no acceptance. It is, in effect and substance, simply a counter-proposal which must be accepted fully by the original proposer, before a contract is made.*
>
> ***57.*** *In Union of India v. Bhim Sen Walaiti Ram (1969) 3 SCC 146, a three-Judge Bench of this Court held that acceptance of an offer may be either absolute or conditional. If the acceptance is conditional, offer can be withdrawn at any moment until absolute acceptance has taken place.*
>
> ***58.*** *In Jawahar Lal Burman v. Union of India (supra), referred to by the High Court, this Court held that under Section 7 of the Contract Act acceptance of the offer must be absolute and unqualified and it cannot be conditional. However, in the facts and circumstances of that case, on a reading of the letter of acceptance as a whole, the appellant's argument that the letter was intended to make a substantial variation in the contract, by making the deposit of security a condition precedent instead of a condition subsequent, was not accepted.*

In the present case also the plaintiff has not communicated its unqualified acceptance and in all communications, the plaintiff has put one or the other conditions which the defendant has not accepted, thus there is no concluded contract between the plaintiff and the defendant.

In view of the above, issue No. 8 is decided in favour of the plaintiff and against the defendant.

19. Issue No. 2 whether the plaintiff accepted the price variation clause in the tender document.

The plaintiff had submitted its bid on 22nd June, 2013. At the time of submission of tender documents, the plaintiff has indicated the reservations and non-acceptance of the Clause. The plaintiff has also enclosed a separate price variation clause along with the tender documents which is marked as Exhibit-C without any objection and the defendant has admitted the said document. The plaintiff has categorically mentioned in the said document with regard to delivery period and price variation clause but the defendant had considered the delivery period but had not considered the price variation Clause though the plaintiff time and again requested the defendant and in none of the request, the plaintiff has accepted the price variation Clause, thus issue No. 2 is decided in favour of the plaintiff and against the defendant.

20. Issues Nos. 3, 4, 5 and 6 are taken up together.

Issue No. 3 whether the tender was in the teeth of the Govt. policy to allow indigenous copper.

Issue No. 4 is whether the money deducted by Eastern Railway from the plaintiff company was for unjust financial enrichment.

Issue No. 5 is whether then plaintiff is entitled to a decree for Rs. 1,74,40,566/-.

Issue No. 6 is whether plaintiff is entitled to interest on the decretal amount.

The defendant by way of two letters dated 27th November, 2014 informed the plaintiff that the defendant is entitled to claim from the plaintiff for a sum of Rs. 18,65,569/- and Rs. 1,55,74,996.85/- respectively towards extra expenditure incurred in risk purchase in terms of Clauses 2401, 2402 and 2403 of the IRS Conditions of Contract governing the said contract. Subsequently, by an notice dated 16th February, 2015, the Controller of Stores, Eastern Railway informed the plaintiff for deducting an amount of Rs. 1,74,40,566/- as risk purchase loss and during the pendency of the proceeding before the Hon'ble Court, the defendant had deducted/recovered the said amount from the plaintiff.

The defendant had recovered the said amount in terms of Clause 2401, 2402 and 2403 of IRS Conditions of Contract. Clauses 2401, 2402 and 2403 reads as follows :

> ***"2401.*** *Whenever am claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security if any, deposited by the Contractor and for the purpose aforesaid, the Purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a*

lien over the same pending finalisation or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Purchaser shall be entitled to withhold and have lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the Contractor under the same contract or any other contract with the Purchaser or the Government pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Purchaser will be kept withheld or retained as such by the Purchaser till the claim arising out of or under the contract is determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under Clause 2703 hereinafter provided, as the case may be, and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the otherwise.

2402. *For the purpose of Clause 2401, where the Contractor is a partnership firm or a limited company, the purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts, in whole or in part from any sum found payable to any partner/limited company, as the case may be, whether in his individual capacity or otherwise.*

2403. Lieu in respect of Claims in other Contracts – *Any sum of money due and payable, to the Contractor (including the security deposit, returnable to him) under the contract may withhold or retain by way of lien by the purchase or Government against any claim of the Purchaser or Government in respect of payment of a sum of money arising out of or under any other contract made by the Contract with the Purchaser or Government.*

> *It is an agreed term of the contract that the sum of money so withheld are retained under this clause by the Purchaser or Government will be kept withheld or retained as such by the Purchaser or Government till his claim arising out of in the same contract or any other contract is either mutually competent Court under Clause 2703 hereinafter provided, as the case may be, and that the Contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the Contractor."*

The issue with regard to whether there was a concluded contract between the plaintiff and the defendant is decided in favour of the plaintiff being issue No. 8 and this Court has come to the conclusion that there was no concluded contract between the plaintiff and the defendant. As there was no concluded contract between the plaintiff and the defendant thus the amount recovered by the defendant in terms of Clauses 2401, 2402 and 2403 of IRS Conditions of Contract is not applicable in the case of the plaintiff, thus the amount recovered by the defendant is illegal and is liable to be returned to the plaintiff.

Accordingly, issue Nos. 3, 4, 5 and 6 are decided in favour of plaintiff and against the defendant.

In view of the above, the defendant is directed to return the amount of Rs. 1,74,40,566/-. The amount of Rs. 63,77,229/- shall carry interest @18% per annum with effect from 25th August, 2015 and Rs. 1,10,63,335/- shall carry interest @ 18% per annum with effect from 23rd March, 2017 till the realization of the said amount.

21. **CS 159 of 2019** is thus **disposed of**. Decree will be drawn accordingly.

(Krishna Rao, J.)