(2007) 08 DEL CK 0277

In the Delhi High Court

Case No : Writ Petition (C) No. : 9888 of 2004 CM No.: 6996 of 2004

Alcon Builders and Engineers Pvt. Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 10-08-2007

Acts Referred:
Contract Act, 1872 — Section 4, 5, 6

Citation : (2007) 3 ILR Delhi 222 Supp

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Anusuya Salwan, for the Appellant; None, for the Respondent

Final Decision : Disposed Off

Judgement

A.K. Sikri, J.—We note from the order sheet that on last three dates, nobody has appeared on behalf of Respondent. Even today we have passed over the matter once and waited for the Counsel for the Respondent. However, none has appeared. In these circumstances we have no option but to proceed with the matter. We have heard learned counsel for the Petitioner and also gone through the records including the counter affidavit filed by the Respondent.

2. The Office of Chief Signals and Telecommunication Engineer (P & P) floated a tender for the supply, installation, testing and commissioning of indoor equipments, relay racks, relay wire, power supply equipments, panels, signals point machines, track circuit, trenching, cable laying etc., in connection with the provisions of route setting type of interlocking by centralized operation of point and signals at 3 stations namely Ambernath, Badia Pur and Sangaon in Mumbai Division. The closing date and the time of submission of tender was 24th September 2003. These tenders were to be opened on the same date at 15.05. hours. Petitioner also gave its bid by submitting its tender. As per the tender conditions, offers of the tenderers were to remain valid for the period of four months from the date of opening of the tenders, i.e., till 23rd January 2004. The Respondent could not complete the exercise of processing the tenders by the

stipulated date and requested the bidders, including the Petitioner, for extending the validity period. Petitioner agreed to keep the tenders open till 24th February 2004.

3. According to the Petitioner as the work was still not awarded and the Respondent was delaying the finalization of the tender and in the meantime, the cost of raw material rose sharply and the Petitioner found that rates, offered by it, would no more be viable, vide its letter dated 17th February 2004, the Petitioner revoked its offer/tender. This letter was delivered to the Respondent through two modes, namely (a) by fax sent on 19th February 2004, which was received by the Respondent on the same day at 3:42 PM. In support of this submission, the Petitioner has placed the fax report on record; (b) letter dated 17th February 2004 was also hand delivered to the Respondent on 20th February 2004. The Petitioner has filed the said letter as Annexure P-3, which contains the stamp of the Respondent, acknowledging receipt of the said letter and it bears the date of 20th February 2004.

4. The Respondent, however, sent a letter dated 20th February 2004 accepting the bid of the Petitioner. This letter, according to the Petitioner, was dispatched on 21.2.2004 and was received on by the Petitioner on 24th February 2004. The petitioner has placed on record a copy of the envelope in which this letter was received, and the same shows the date of its posting as 21st February 2004. Respondent has also stated in its counter affidavit that the acceptance letter dated 20th February 2004 was sent by the Respondent to its Delhi Office, and Delhi Office in turn sent this letter to the Petitioner by fax on 23rd February 2004.

5. On the receipt of the letter dated 17th February 2004 of the Petitioner, the Respondent vide its letter dated 18th March 2004, informed the Petitioner that the earnest money deposit (EMD) alongwith the tender was forfeited by the Respondent. However, thereafter, vide letter dated 31st May 2004, Petitioner was informed that the contract was awarded to the Petitioner by the Respondent vide acceptance letter dated 20th February 2004 and as the withdrawal amounted to termination of the said work, the Respondent would be carrying out the work on the risks and costs of the Petitioner. Challenging this communication, present Writ Petition is filed by the Petitioner with the following prayers:

That this Hon''ble Court be pleased to issue writ of Mandamus, Certiorari and or any other writ directions or which this Hon''ble Court ay deem fit and proper in the facts and circumstances of the case quashing the order dated 20.02.2004 and 31.05.2004; pass such other order/orders as this Hon''ble Court may deem just and proper in the facts and circumstances of the case.

6. The submission of the learned Counsel for the Petitioner is that the Petitioner had withdrawn its bid/offer much before its acceptance and therefore, no concluded contract came into existence. She points out that though the last date up to which the bid was valid was 24th February 2004, the bid was withdrawn vide letter dated 17th February 2004 delivered on 19th February 2004. The only

consequence which it would entail was the forfeiture of the earnest money deposit which was done by the Respondent and with which Petitioner has no quarrel. However, since no concluded contract came into existence, there was no question of treating the so called contract as terminated by the Petitioner, and therefore the proposed action of the Respondent in threatening to carry out the work at the risk and cost of the Petitioner is plainly illegal and uncalled for.

7. In the counter affidavit filed by the Respondent, the Respondent has not denied that letter dated 17th February 2004 was received by it through fax on 19th February 2004. The only plea taken is that 19th February 2004 happened to be a holiday in Mumbai and therefore, it was not received on that date. It is further pleaded that this letter came to their notice only on 24th February 2004, by which date the Respondent had already communicated the acceptance of the tender. It is also not dented that in so far as acceptance letter dated 20th February 2004 sent by post, and the copy sent by the Mumbai Office to Delhi Office for onward transmission to Petitioner are concerned, these communications were sent on 21st and 23rd February 2004 respectively.

8. In view of the above factual matrix, on which there is no dispute, it is clear that the withdrawal letter dated 17th February 2004 sent by the Petitioner was received in the Office of the Respondent No. 2 on 19th February 2004, and another copy on 20th February 2004 was also hand delivered. Acceptance letter is dated 20th February 2004, dispatched at the earliest on 21st February 2004, which is, naturally, after the bid was withdrawn. Explanation given in the counter affidavit that though the letter dated 17th February 2004 was received through fax on 19th February 2004, but nobody could know about this letter till 24th February 2004 is hardly convincing. That apart, there is no explanation with regard to the receipt of the letter hand delivered by the Petitioner on 20th February 2004. Even if it is taken that 19th February 2004 was a holiday, letter dated 17th February 2004 was received by the Respondent through fax as well as by hand on 20th February 2004. Till that time, there was no acceptance of the bid. Mere acceptance of bid by letter dated 20th February 2004, would not be of any consequence as communication of that acceptance to the Petitioner is also required. This letter was dispatched on 21st February 2004 and received by the Petitioner only on 24th February 2004. Another letter sent through Delhi Office was received through fax only on 23rd February 2004. It is thus clear that the offer was withdrawn before it could be accepted and therefore, no contract came into existence. (See Union of India (UOI) Vs. Maddala Thathiah,)

We may refer to Section 5 of the Contract Act, which states that-

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

Section 5 embodies the principle discussed by Anson in "Anson''s Law of Contract" 23rd Edition at page 55, in the following words:

Acceptance is to an offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have laid until it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance. Also the offered may decide to reject the offer. Until an offer is accepted, it creates no legal rights, and it may be terminated at any times.

Section 6 of the Contract Act provides that a proposal may be revoked in the following ways:

6. Revocation how made. - A proposal is revoked -

(1) By the communication of noticed of revocation by the proposer to the other party;

(2) By the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) By the failure of the acceptor to fulfill a condition precedent to acceptance; or

(4) By the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

9. A communication of an acceptance is complete as against the proposer, when the acceptance is put in a course of transmission to the proposer so as to be out of the power of the acceptor. (Section 4 Contract Act). In case of acceptance being sent by post, the same is said to be completed when the letter of acceptance is posted. (See Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others,).

10. On the other hand communication of revocation of a proposal is said to be complete as against the person to whom it is made when it comes to his knowledge the person to whom it is made (see Section 4 Contract Act).

11. Therefore, before the communication of acceptance by the respondent was complete, as against the proposer, i.e., the petitioner (which would be 21st February 2004 at the earliest), the proposal had been revoked by the petitioner. Thus, no biding contract came into existence between the parties.

12. In these circumstances, the threatened action of the Respondent to get the work executed at the risks and costs of the Petitioner as contained in letter dated 31st May 2004 is clearly illegal and uncalled for.

13. We may at this stage deal with another objection of the Respondent, which relates to the territorial jurisdiction of this court. It is stated in the counter affidavit that since the tenders were floated by the Respondent''s Mumbai Office and were also accepted in Mumbai, Delhi Courts have no jurisdiction to entertain the present petition. Reliance is placed on the judgment of the Supreme Court in the case of Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, .

However, in the counter affidavit, the respondents have themselves admitted that acceptance letter was sent by the Mumbai Office to Delhi, and that the Delhi office faxed the letter to the Petitioner who is also having its office in Delhi. This communication is an integral part of the entire transaction, inasmuch as, the purported cause of action on the basis of which Respondent wants to get the work executed at the risk and cost of the Petitioner is based on this letter. This part of the cause of action has arisen in Delhi, and it is because of this purported letter that the letter dated 31st May 2004 has been issued by the respondent. In these circumstances, the Petitioner is forced to file this Petition. Consequently, this court has the necessary territorial jurisdiction to entertain the petition, since a part of the cause of action has arisen within its jurisdiction.

14. The consequence of the aforesaid discussions is that the ''Rule'' is made absolute. It is also held that there is no contract between the parties and resultantly, it is not open to Respondent No. 2 to get the work executed at the risk and cost of the Petitioner. Communication dated 31st May 2004 of the respondent is therefore quashed. The recovery of amount made, if any, pursuant to this threatened action, shall be refunded to the Petitioner except the earnest money. Petition stands disposed of.

