

(1971) 09 DEL CK 0028

In the Delhi High Court

Case No : Civil Revision Appeal No. 1 of 1968

Harish Chandra Saxena

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 27-09-1971

Acts Referred:

Citation : (1972) ILR Delhi 110

Hon'ble Judges : B.C. Misra, J

Bench : Single Bench

Advocate : S.N. Marwah and D.K. Kapur, for the Appellant;

Judgement

B.C. Misra, J.

(1) This revision petition has been filled u/s 115 of the CPC against the judgment and order of the Subordinate Judge 1st Class, Delhi, dated 6th October, 1967 by which the learned Judge had dismissed the application of the petitioner filed under sections 33 and 5 of the Arbitration Act.

(2) The facts giving rise to this revision are that the petitioner who is a contractor, in response to invitation to tender dated 1st December.. 1961, submitted a tender on 11th December, 1961 for carrying out the work of repairs to an approach road at a place in Morar, District Gwalior. The tender was roughly at 149 per cent above the scheduled rate. On 16th December, 1951, the petitioner-contractor sent a letter to the respondent to the effect that a mistake had occurred in calculations and his rates were really 249 per cent above the schedule rate instead of 149 percent. This letter was sent under certificate of posting and there is a dispute between the parties as to the date when it was received by the respondents. However, on 19th December. 1951 a Major of the respondents sent a letter by registered post intimating that on 17th December, 1951, the Commander Works Engineer of the Delhi Area. on behalf of the President of India, had accepted the tender of the petitioner dated 11th December, 1951 and he called upon the petitioner to attend the office and sign

the relevant formal agreement concerned. The parties are controverting the legal effect of this letter to bring about a binding contract on behalf of the President.

(3) Thereafter disputes arose between the parties since the petitioner- contractor did not carry out any of the obligations under the alleged contract and the respondents claimed from the petitioner damages for breach of contract. The matter was, in accordance with the agreement, referred to an Arbitrator by name Lt. Col. G. M. Advani who made an award on 14th July, 1955 for a sum of Rs 7,176 against the petitioner. An application was made to the trial Court for making the award a rule of the Court which was allowed on 11th April, 1957, but appeal against the same filed in the High Court succeeded and by order dated 11th January, 1965, the High Court set aside the award on the ground that it had been made beyond time and no application for extension of time u/s 28 of the Arbitration Act had been made. It is significant to notice that the High Court in passing the said order did not make any order u/s 19 of the Arbitration Act superseding the reference or the arbitration agreement.

(4) The learned counsel for the petitioner contractor that thereafter the case ought to have been sent back to the same Arbitrator as his authority to proceed with the arbitration could not be revoked except by the leave of the Court u/s 5 of the Arbitration Act or by an order of the Court u/s 11 of the same and in any view of the matter, the respondents had no power and jurisdiction to appoint another Arbitrator in his place on the facts and circumstances of the case. However, on 17th November, 1965, respondent No. 1 proposed to appoint respondent No. 2 as Arbitrator to which the petitioner objected. Thereafter the petitioner filed an application under sections 5 and 33 to the Arbitration Act in the Court below on 7th September, 1966 and during its pendency, a reference of the dispute had been made to respondent No. 2 on 12th December, 1966. the petition was tried on *amanitas* and by order dated 10th October, 1967 was dismissed by the Court below and aggrieved by it, the petitioner has filed this revision.

(5) In this revision, the learned counsel for the petitioner has raised the following contentions, namely (1) the acceptance of the tender dated 19th December, 1951 was illegal and ineffective as it did not conform to Article 299 of the constitution , and revocation of the offer had been made by the petitioner on 16th December, 1951 and the transmission of the acceptance if any subsequent to the" said letter prevented the formation of the contract, (2) after the setting aside of the previous award by the High Court by order dated 11th January, 1966, the reference ought, in the absence of an order u/s 19 of the Act, to be made to the so.e Arbitrator and the appointment of respondent No. 2 as Arbitrator is without jurisdiction and (3) in the alternative, unilateral reference of the dispute to the Arbitrator by respondent No. 1 is illegal and unjustified. The learned counsel has also contended that the trial Court has failed to give a decision on his prayer u/s 5 of the Arbitration Act for revocation of the authority of respondent No. 2.

(6) I have heard the learned counsel for the parties. There does not appear to be much dispute with regard to the basic facts and they are admitted in the pleadings of the parties supported by affidavits. The invitation to tender was issued on 1st December, 1951 and the tender was submitted on 11th December, 1951. The same is said to have been accepted by the Commander Works Engineer on behalf of the President of India on 17th December, 1951, but the same was admittedly communicated only by a Major (who is not a person authorised under Article 299 of the Constitution to make a contract on behalf of the President) and this acceptance was put in transmission through registered post on 19th December, 1951. Assuming for the sake of argument that the acceptance was validly made on 17th December, 1951, it was only communicated on 19th December, 1951. The petitioner-contractor had on 16th December, 1951 revoked his tender and submitted a counter offer for a higher rate and he sent the same by post under certificate" of posting. This letter, in due course of business, would be received in Delhi on 17th December or 18th December and in any event before 19th December, 1951. The learned counsel for the respondents has urged that this letter must have been received in the office of the respondents subsequent to 19th December, 1951 and the Court below has observed that there is nothing on record to indicate as to whether the same had been received prior to 19th December, 1951.

(7) In paragraph 15 of the application, the petitioner-contractor has specifically stated that the applicant admittedly dispatched the letter revoking the previous proposal under postal certificate on 16th December, 1961 giving the revised quotation of 249 per cent above the schedule rate instead of 149 per cent and the same had the effect of revoking the previous proposal under sections 4 and 5 of the Contract Act. In reply, the respondents stated that contents of the paragraph were denied and there had been no revocation of the contract as alleged by the petitioner. It is significant to notice that the respondents have not denied the receipt of the said letter, nor have they stated the subsequent date of its receipt and their pleas appear to have been as of law that there had been no legal revocation of the contract by the petitioner, but the basic facts mentioned in paragraph 15 of the petition have not been specifically denied. In the replication, the petitioner re-affirmed the same plea. At all events, the parties filed affidavits in support of their contentions and in paragraph 14 of the affidavit filed on behalf of the petitioner, this fact has been reiterated and it has been again specified that the "acceptance of the respondents had admittedly been dispatched on 19th December, 1951 whereas the petitioner had admittedly dispatched the letter revoking the previous proposal under postal certificate on 16th December, 1951." A counter affidavit was filed on behalf of the respondents by Shri Jagdish Mitter, Commander Works Engineer, in which he has reiterated the case of the respondents with regard to the acceptance of the proposal as having been made by the Commander on 17th December, 1951. It is most significant to notice that in this affidavit, the deponent has not made any mention whatsoever of the alleged letter of the petitioner for revoking the proposal (dated 16th December,

1951) having been not received by the respondents or having been received late. It is, Therefore, established on the record that the letter of revocation correctly addressed had been dispatched by the petitioner through post under certificate of posting on 16th December, 1951 and I am entitled to raise a presumption that in due course of business, the same would be delivered to the parties in Delhi on the 17th December or at the latest on the 18th December, 1951.

(8) It has, Therefore, been established that acceptance of the tender had been communicated by the respondents on 19th December, 1951 and prior to the same, a letter of revocation of the offer had been received from the petitioner. The law is contained in section 4 of the Contract Act as follows :-

"4.The communication of a proposal is complete, when it comes to the knowledge of the person to whom it is made.

the communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

the communication of a revocation is complete, as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

AS against the person to whom it is made when it comes to his knowledge."

Applying the aforesaid rule of law, it is obvious that the tender had been validly revoked by the petitioner before it had been legally accepted by the respondents. As a result. I hold that there is no concluded contract between the parties, nor any arbitration agreement to enforce.

(9) The learned counsel for the petitioner has also contended that the acceptance of tender ought to have been communicated by or on behalf of the President according to Article 299 of the Constitution. I find that there is force in the submission. The contract on behalf of the Union of India is to be expressed to be made in the name of the President and must be made by such persons as are legally authorised by him. The making of the contract would include communication of the acceptance and if the acceptance is not communicated, it cannot have any legal and binding effect. Admittedly, the Commander Works Engineer was a person authorised to make such contracts, but the Major who wrote the letter dated 19th December, 1961 was not so authorised. In my opinion, the officer who is authorised according to law to make the acceptance must communicate it to the other contracting party who, as stranger, has no access to the files or practices of the Government and the parties are entitled to know directly who is the person who has accepted the contract and whether or not such acceptance is according to law. The communication of such acceptance by another officer who is not so authorised, leaves room for doubt as to whether there has occurred any flaw in the making of a valid acceptance on the side of

the Government and the party would be entitled not to place reliance in the officer communicating acceptance who is legally not authorised to make the acceptance himself. nor in such communication by different officers justified by any order under article 299.

(10) Counsel for the respondents has urged that the petitioner had not raised the question that the contract contravened Article 299 of the Constitution in the previous proceedings. The learned counsel for the petitioner, however, urges that there cannot be any estoppel against the mandatory provisions of the statute, I find there is force in the contention of the counsel for the petitioner. The State itself takes advantage of non-conformity to the provisions of Article 299 of the Constitution in respect of contracts which are not so authorised and there can be no estoppel against a statute and it is open to the parties to raise the question of the contract being void for lack of compliance with Article 299 of the Constitution. In view of my finding on the first contention, raised by the petitioner, it is not necessary to discuss the other contentions raised in this revision. The revision is accordingly allowed, the order of the Court below is set aside and the application of the petitioner is allowed and it is declared that there is no valid contract between the parties and the reference to arbitration is quashed. There will be no order as to costs of these proceedings.