
(2012) 04 DEL CK 0390
In the Delhi High Court
Case No : FAO (OS) No. 323 of 2007

Himachal Futuristic Communications Ltd.	APPELLANT
Vs	
UOI and Another	RESPONDENT

Date of Decision : 19-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 9

Citation : (2012) 04 DEL CK 0390

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Sumant De and Mr. Chandrachur Bhattacharya, for the Appellant;
Sanjeev Narula and Mr. Ashish Virmani, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—This appeal is directed against the order of the learned single Judge dated 4.7.2007. The learned Single Judge by virtue of the impugned judgement has sustained the award dated 30.3.2007. The background in which the present controversy has arisen is briefly as follows:

1.1 The respondent had placed an Advance Purchase Order (for short "APO") dated 10.9.1998 for supply of "400W TWT high power amplifier in C-band for AC" (in short equipment) on the appellant.

1.2 The APO was admittedly altered by the respondent vide communication dated 22.9.1998. It is also not in dispute that the appellant by a return communication dated 30.9.1998, accepted the alteration proposed by the respondent. It is important to note that the alteration suggested by the respondent, admittedly brought about a change qua the model of the equipment. More pertinently, the letter of alteration clearly indicated that apart from the modification suggested therein, all other terms & conditions as already stipulated would apply. While, accepting the alteration to the initial APO dated 10.9.1998, the appellant unreservedly accepted all terms & conditions.

1.3 Thereafter, on 23.10.1998, the appellant sought extension of time for various reasons. The respondent was not in a mood to comply, and consequently, vide letter dated 19.11.1998 cancelled/terminated the APO as amended.

1.4 It is in this background that the appellant had come to this Court by way of a petition u/s 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Act"), being: OMP No. 64/1999, seeking an injunction on the encashment of the bank guarantee in the sum of Rs. 21.00 lakh; which had been furnished at the stage of submission of the bid.

1.5 This Court vide order dated 9.3.1999, had granted injunction on the encashment of the bank guarantee.

1.6 The matter thereafter was taken to the arbitrator for adjudication who, as noticed above by us, by virtue of the impugned award dismissed the claims preferred by the appellant. The claims of the appellant were varied. These being as follows:

- i. Loss of profit on account of wrongful termination of the contract;
- ii. Charges incurred in keeping the performance bank guarantee alive;
- iii. Litigation costs incurred on account of what the appellant claimed was illegal termination of the contract; and
- iv. Lastly, additional claims; which were stated as ones, qua which, the appellant was unable to crystallise the claims at that stage.

1.7 As against this, the respondent filed not only its rebuttal, but also raised counterclaims which, inter alia included their right to retain the bank guarantee amount of Rs. 21.00 lakh against damages suffered by them. In addition interest was also sought by the respondent.

1.8 The arbitrator by virtue of the impugned award, rejected all the claims of the appellant and allowed those of the respondent with interest @ 12 per cent per annum from the date of invocation of the bank guarantee till date of payment.

1.9 Aggrieved by the same, the appellant preferred their objections u/s 34 of the Act. By virtue of the impugned judgment, as noticed above, the objections of the appellant were dismissed.

2. Before us, Mr. De, learned counsel for the appellant, has made two submissions:

- i. The letter of termination issued by the respondent is not in terms of Clause 5 of the APO; and
- ii. The provisions of Clause 22 of the general terms & conditions of the contract mandated that before the respondent proceeded to terminate the contract it had to issue a written notice granting, at least, 30 days time for the appellant to cure the defect. Having not done so, the termination was bad in law and, therefore,

the claims of the appellant, at least, for recovery of Rs. 21.00 lakh ought to be rejected.

2.1 On the other hand, Mr. Sanjeev Narula, learned counsel for the respondent, has largely relied upon the award and the observations of the learned single Judge. In particular, Mr. Narula has submitted that in so far as the first objection of the appellant is concerned it is really a case of the appellant seeking to take advantage of an inadvertent typographical error in the said letter of termination. Mr. Narula says that if the letter is read in its entirety it is clear that the respondent was really advertent to the failure on the part of the appellant to supply the equipment, for purposes of validation within the stipulated period of one (1) month.

2.2 In so far as the second objection is concerned, Mr. Narula submits that Clause 22 of the general terms and conditions accords a discretion to the

respondent to either seek from the appellant a course correction by issuing him a written notice or, in the alternative confer a right on the respondent to proceed straightway to terminate the contract. In this behalf, Mr. Narula has made two other submissions. The submission being: that Clause 22 of the general terms & conditions of the contract really does not come into play since that clause gets triggered only after a purchaser order is issued to the appellant. The other submission on this aspect of the matter is that, Clause 22 would have to be read in conjunction with the APO, and if, what Mr. De says is accepted then, it would really amount to granting additional time of thirty (30) days for supply of equipment for the purposes of validation.

3. Having heard learned counsels for the parties and examined the record and the documents, with the assistance of counsels, we are of the view that the following emerges from the record:

3.1 The dates as set out above vis-?-vis issuance of the APO, the alteration of the APO and its acceptance are not in dispute. It is not in dispute as well that the appellant, while accepting the alteration had accepted it without any reservations or demur. The appellant categorically stated in the letter dated 30.9.1998, that it is willing to accept all terms & conditions contained in the APO. This aspect of the matter also come through upon reading of the averments made in the appeal wherein, it is stated that four (4) months time for validation would expire on 10.1.1999; which is a period relatable to the unamended APO of 10.09.1998. If that be so, then the appellant itself concedes that the APO was not altered except to the extent as indicated in the letter dated 22.9.1998.

3.2 As noticed by us above, the only alteration brought about is; (a fact which is not put in issue by counsels for the parties) qua the model number. Therefore, in so far as the other terms & conditions were concerned they did not get altered, which invariably would mean that the original time frame stipulated in the APO would have to be adhered to by the parties. This apart, we are of the view that even if we were to extend the time from the date of acceptance of the amended

APO, the appellant, admittedly, did not supply the equipment for the purposes of validation within one (1) month of 30.9.1998. On the other hand, the appellant on 23.10.1998, sought extension of time by 21/2 months on the pretext that equipment was not an off the shelf item and hence not available with its supplier, knowing fully well no such caveat was entered on 30.09.1998 when, the amended APO was accepted. If that be so, then surely, the respondent was well within its right to terminate the contract.

3.3 The argument that the termination letter dated 11.11.1998 was flawed, in as much as, it alluded to validation having to be obtained by the appellant, within one month, is also untenable for the following reason: The said letter of termination was issued in response to the appellant's letter for extension dated 23.10.1998. The respondent in the first part of its letter dated 11.11.1998 clearly states that the appellant's request for extension for the purpose of offering equipment to obtain type approval was not "acceded to". Therefore, the other part of the said letter, which states that: "vide clause (5) of the subject APO you were required to get your equipment validated within one month", is an obvious error when read with first part. The obvious purport of the letter is that because the equipment was not offered for validation within the stipulated period of one month, the APO was being terminated.

4. This brings us to the other aspect of the matter whereby, Mr. De has argued before us that no termination could have taken place without affording an opportunity to the appellant. It was submitted that a written notice had to be issued in terms of Clause 22 of the general terms & conditions which in this case admittedly had not been issued by the respondent. The question, therefore, is: whether clause 22 is at all applicable in the present case. According to us the answer to this has to be in the negative because a bare reading of clause 22 of the general terms & conditions make it clear to us that the said clause gets triggered only, when a purchase order is issued. For this purpose, clause 5 of the APO has to be read in conjunction with clause 22 of the general terms and conditions of the contract.

4.1 The manner in which clause 5 of the APO operates is thus: - the appellant was required to supply a sample equipment for type approval within a period of one (1) month. Thereafter, the respondent had four (4) months within which, it had to validate the sample. It is only post validation, i.e., type approval that a purchase order was to be issued by the respondent wherein, the delivery schedule for supplies had to be fixed.

4.2 The parties here, admittedly, did not reach the second stage and, therefore, in our view there was no question of clause 22 having been triggered and, thus there never arose a necessity to issue a written notice, prior to termination of the APO, as contended by the appellant.

4.3 In this regard, we may also notice a submission of Mr. Narula that it was the appellant's own case, as set up in the statement of claim, that the APO was in

the nature of an intention expressed by the respondent to purchase. It was, therefore, not a concluded contract, according to the appellant. For the sake of convenience we may extract the averments made in the statement of claim by the appellant, which reads as under:

... It is respectfully submitted that as with every other contract entered into by the respondent No. 1 and as per the law, the Advance Purchase Order is merely an intention of purchase. It is not a concluded contract as:

- i. APO itself says that it is intent to purchase;
- ii. No supply or payments can be made on the basis of the APO;
- iii. APO may not necessarily or mandatorily lead to concluded contract or issuance of P.O.

5. If one has regard to the averments made in the statement of claim, it fortifies over conclusion that the general terms & conditions of the contract would have no applicability at the stage of issuance of the APO. The APO had its own timelines which, the parties were required to adhere to. Having not adhered to the same, the appellant could not question the termination of the APO on the ground that no written notice was issued to the appellant under Clause 22 of the general terms and conditions. There are no other submissions made before us requiring our consideration. Therefore, as indicated hereinabove, the appeal has to be dismissed. It is ordered accordingly.