
(2007) 12 MP CK 0006
In the Madhya Pradesh High Court

M.P. Power Generating Co. Ltd.

APPELLANT

Vs

Flow More Pvt. Ltd.

RESPONDENT

Date of Decision : 07-12-2007

Acts Referred:

Contract Act, 1872 — Section 8

Sales of Goods Act, 1930 — Section 5

Citation : (2008) ILR (MP) 810 : (2008) 4 MPHT 92 : (2008) 3 MPLJ 161

Hon'ble Judges : S.A. Naqvi, J;Arun Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Arun Mishra, J.

The appeal had been preferred by the original plaintiff; Madhya Pradesh Electricity Board (MPEB), that has been succeeded by M.P. Power Generating Co. Ltd., Jabalpur during the pendency of the appeal. The Judgment and decree dated 9-10-2001 passed by the 12th Addl. District Judge, Jabalpur of dismissal of the suit filed for recovery of Rs. 19,35,410/- has been assailed in the appeal.

The original plaintiff; MPEB filed suit for recovery of aforesaid amount for which it floated tender notice PRG/SGTPS/T-19 for complete Design, Manufacture, Assembly, Testing at Manufacturer's works, Delivery etc. of equipments and accessories given therein and as indicated in respective tender specification contained therein. The tender specification contained in Section-I; General Conditions of Contract, Tendering conditions, Soil and climatic conditions at site and site facilities available. Section-II contained General specification etc. Technical specification for Vertical Wet pit pump and Specification for Electric Motors. The specification intended for cover the design, manufacture, for assembly, testing at manufacturer's work, delivery (FOR Project site) properly packed including shop painting, freight, transit insurance, all taxes, duties and other charges as applicable for the group-II of Vertical Wet-pit type Auxiliary Cooling Water pumps (ACW Pumps) with electric motor drives and all accessories

as specified in the scope of work and as required for safe and trouble free operation of the pumps to be installed at Sanjay Gandhi Thermal Power Station, Birsinghpur of Madhya Pradesh Electricity Board. Defendant submitted a tender which was opened on 10-3-1989. Revised price bids were also called, they were submitted on 26-12-1989. Plaintiff accepted the offer of the defendant in respect of 3 numbers of ACW pumps of the aforesaid description and not for the Raw Water pumps. The Letter of Intent was issued on 24-3-1990. It was also mentioned in the LOI that the detailed order indicating the price break-up and detailed terms and conditions was being mailed to the defendant separately by the plaintiff. The plaintiff acknowledged the receipt of the letter as per communication dated 14-4-1990. The defendant requested to send the detailed order at an early date to enable the defendant to proceed in the matter. The plaintiff sent two separate orders on 11-6-1990. The price was worked out by the plaintiff which was to remain firm throughout the tenure of the contract. The plaintiff sent a telex message to the defendant, on 4/5-9-1990 for submitting the performance bond and agreement bonds for both the aforesaid orders immediately as per Clause 11 and 7 of the orders dated 11-6-1990. No specific reply was sent by the defendant. On 15-10-1990 defendant had written two letters both dated 8/10-9-1990 to the plaintiff. These letters were not received and sent on 8/10-9-1990 by the defendant. The defendant seems to have concocted these letters with ulterior motive. On 17-12-1990 the defendant wrote yet another letter inviting attention of the plaintiff to the letter dated 8/10-9-1990. These letters were not received by the plaintiff. The defendant vide telegram dated 19-10-1990 requested the plaintiff to confirm the value of the bank guarantee for performance of contract on the contract value of Rs. 3,55,670/-. Telex message dated 30-10-1990 was sent confirming the amount of bank guarantee. Letters dated 8/10-9-1990 were received by the plaintiff just before the transmission of the aforesaid telex message dated 30-10-1990 only. The plaintiff asked the defendant to come-forward to perform his contractual obligation by issuance of bank guarantee etc. on 16-1-1991. Plaintiff did not receive any affirmative or other reply. Defendant wrote a letter on 17-12-1991, but, without any avail. Ultimately fresh NIT was issued and work was done by some other agency in which extra costs of Rs. 19,35,410/- was incurred. Reliance was placed by the plaintiff on Clause 29 of the General Condition of Contract for Supply. They submitted that as there was contract entered into between the parties as apparent from the correspondence, it was incumbent upon the defendant to make the supply. There was breach of contract committed by the defendant by not executing the agreement as well as performance guarantee and failure to effect supply. Hence, the suit be decreed.

The defendant M/s. Flow More Private Limited in the written statement contended that there was no signed contract reached between the parties, detailed order was asked, that was sent which was not acceptable to the defendant. Consequently, letters were written on 8/10-9-1990 which were received by the plaintiff. Letter dated 8/10-9-1990 was sent again on being

required by the plaintiff. Conditions imposed by the defendant were never accepted by the plaintiff. Thus, no contract came in existence on the basis of communications. There was no negligence or failure of the defendant in observance of their obligation. No contractual obligation arose. Plaintiff was not entitled for decree prayed for.

The Trial Court has found that there was no concluded contract reached between the parties, though extra costs of Rs. 19,35,450/- was incurred, but, plaintiff was not entitled to recover it from the defendant. Suit has been dismissed. Dissatisfied with the judgment and decree passed the appeal has been preferred.

Shri M.L. Jaiswal, learned Sr. Counsel appearing with Shri Amit Bajpai has submitted that the tender of the defendant was accepted. Acceptance of offer was communicated on 24-3-1990 which was acknowledged on 14-4-1990. Detailed offer was also sent. The defendant asked for the amount of performance of guarantee/bank guarantee. Correspondence with the consultant was going on with respect to drawing or designing. The concluded contract came into being on the strength of the communications, particularly (P-10, P-11, P-15, P-16, P-17 and P-18. Letters dated 8/10-9-1990 were not dispatched or received at the time when they were purported to have been dispatched. Even in the absence of formal agreement being executed as apparent from correspondence the contract which accepted, plaintiff was entitled for decree prayed for. He has also referred to other communications on record placed by the plaintiff and has referred to various decisions and clauses of agreement and Clause 29 of the General Condition of the contract. He has also submitted that the Clause 6 relating to performance bond contained in tendering condition Part-II could not have been construed as against the plaintiff to mean that only earnest money could have been forfeited as concluded contract arose between the parties on the basis of communications. Thus, the judgment and decree passed by the Trial Court being illegal deserve to be set aside. The plaintiff's suit be decreed.

Shri R.D. Hundikar learned Counsel appearing on behalf of the defendant respondent has submitted that it is apparent from the plaint averments as well from the correspondence placed on record by the plaintiff that no contract came into existence as contemplated u/s 8 of the Contract Act. At no point of time parties have reached consensus ad idem with respect to contract on particular terms and condition. The communication dated 8/10-9-1990 was timely sent, in fact, it was received, it was again sent on being insisted upon, thereafter also there was no response made by the plaintiff, after its receipt in the month of October. Thereafter also they slept over the variation sought by the defendant in the detailed offer sent by the plaintiff. Thus, the correspondence on record falls short of proving that there was any kind of contract much less concluded one reached between the parties which could be enforced. He has also submitted that in the absence of execution of performance bond and the agreement, tender condition provided for penalty of forfeiture of earnest money deposit. Earnest money deposit was already forfeited, that was the maximum penalty imposable

owing to default, if any on the part of the defendant. Thus, the plaintiff could not be said to be entitled for decree of difference of the amount by employing debitable agency on the basis of floating the tender afresh and realizing the difference of costs in the absence of agreement being reached between the parties.

The main question for consideration in the appeal is whether there was concluded contract reached between the parties as per the correspondence placed on record by the plaintiff, admittedly no agreement in writing was executed and performance guarantee was also not furnished which was necessary. We deem it appropriate to refer various clauses of the agreement pressed in to service by the Counsel appearing on behalf of the parties. Clause 29 has been relied upon by the plaintiff/appellant contained in General Conditions of the Contract. Clause 29 provides steps which can be taken by the plaintiff purchaser, in case of negligence by the contractor to execute the work. Clause 29 is quoted below:

29. NEGLIGENCE.--If the Contractor shall neglect to execute the work with the diligence and expedition or shall refuse or neglect to comply with any reasonable orders given to him in writing by the Engineer in connection with the work, or shall contravene the provisions of the contract, the Purchaser may give notice in writing to the Contractor calling upon to make good the failure, neglect or contravention complained of. Should the Contractor; fail to comply with such notice within a period considered reasonable by the Purchaser from the date of service thereof, in the case of a failure, neglect or contravention capable of being made good within that time or otherwise within such time as may in the opinion of the Purchaser be reasonably necessary for making it good, then and in such case the Purchaser shall have the opinion and be at liberty to take the work wholly or in part, out of the contractor's hands and may carry on the work envisaged in the contract either by himself or his agents or may re-contract at a reasonable price with any other person or persons to execute the same or any part thereof and provide any other materials, tools, tackle or labour for the purpose of completing the works or any part thereof. In such event the Purchaser shall without being responsible to the Contractor for fair wear and tear of the same, be entitled to seize and take possession and have free use of all materials tools, tackle or other things which may be on the site, for use at any time in connection with the work to the exclusion of any right of the Contractor over the same and the Purchaser shall be entitled to retain and apply any balance sum which may otherwise be then due on the contract by him to the Contractor or such part thereof as may be necessary, to the payment of the cost of execution of such work as aforesaid.

If the cost of executing the work as aforesaid shall exceed the balance due to the Contractor and the Contractor fails to make good the deficit, the said materials, tools, tackle, construction plant or other things, the property of the contractor as may not have been used up in the completion of the works, may be sold by the

Purchaser and the proceeds applied towards the payment of such difference and the cost of and incidental to such sale. Any outstanding balance existing after crediting the proceeds of such sale shall be paid by the Contractor on the certificate of the Engineer, but when all expenses, costs and charges incurred in the completion of the work as paid by the Contractor, all such materials, tools, tackle, construction plant or other things not used up in the completion of the works and remaining unsold shall be removed by the Contractor. If the proceeds of the above sale of the Contractor's materials, tools, tackle, construction plant etc. are insufficient to cover the cost of executing the aforesaid work, the balance remaining after crediting the proceeds of such sale shall be recoverable from the Contractor by action of law.

Tender conditions contained in Part-II, Clauses 4 and 6 relating to Validity of Tender and Performance Bond respectively have also been relied upon. The aforesaid clauses are quoted below:

4. VALIDITY OF TENDER.--The fact of the submission of a Tender shall be deemed to constitute an agreement between the Tenderers and the customer whereby such tender shall remain open for acceptance by the customer for a period of six (6) months from the date and time on which Tenders are opened, during which period the Tenderer shall not withdraw his offer or amend, impair or derogate therefrom. The Earnest Money deposited in accordance with the Tender document will be forfeited if the Tenderer withdraws, amends, impairs, or derogates from the Tender in any respect within the said period of six (6) months. Every Tenderer shall be deemed to have agreed as aforesaid in consideration of the Tender being considered by the Board in terms hereof, provided the same has been duly submitted and found to be in order. If the Tenderer is notified in writing at the address given in the Tender within the said period of six (6) months that his Tender has been accepted, he shall be bound by the terms of agreement constituted by his Tender and such acceptance thereof by the Board until a written contract has been executed in place of such agreement.

PERFORMANCE BOND.--After a Tender is accepted and a satisfactory performance bond [in the amount of ten (10) per cent of the Contract Price] is furnished by the successful Tenderer in accordance with clause "Performance Bond" of the General Conditions, the Earnest Money/Tender Bond may be returned in each instance within a period of sixty (60) days to the Tenderer furnishing this bond.

Should the successful Tenderer fail or refuse to execute the contract and to furnish a performance bond satisfactory to the Purchaser within the stipulated period the Tenderer shall be considered to have abandoned the Tender, and the amount of Earnest Money or any other Security delivered with the Tender shall thereupon be due to the Purchaser as liquidated damages for such failure or refusal and the Purchaser may thereupon award the contract to any other Tenderer. The term "Successful Tenderer" shall be deemed to include any

Tenderer whose proposal is accepted after another Tenderer has previously refused or has been unable to execute the contract or to furnish a satisfactory performance bond.

Clause 4 of the Tender Condition provides that the submission of a tender shall be deemed to constitute an agreement between the Tenderers and the customer whereby such tender shall remain open for acceptance by the customer for a period of six months. In case of any withdrawal, amendments, impairment or derogation by the Contractor the "earnest money" deposit in terms of tender documents would be forfeited. Furnishing performance bond is provided in Clause 6 of the tendering condition. It was required to be submitted in the amount of 10% of contract price. In case successful tenderer fails or refuses to execute the contract and to furnish the performance bond to the purchaser within the stipulated period the tenderer shall be considered to have abandoned the Tender, and the amount of Earnest Money or any other Security delivered with the Tender shall there upon be due to the Purchaser as liquidated damages for such failure or refusal and the Purchaser may thereupon award the contract to any other Tenderer. It was not the condition that in the event of failure of furnishing performance bond it was open to make fresh bid at the risk and costs of such defaulting contractor, that is precisely also not the submission of Shri M.L. Jaiswal, learned Sr. Counsel appearing on behalf of the appellant. What he has submitted that as independent contract came into existence on the basis of correspondence placed on record. The plaintiff's suit should have been decreed by the Trial Court as there was concluded contract between the parties.

Section 8 of the Contract Act provides performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. Thus, endeavour has to be made to find out whether there was a proposal and it was accepted on the basis of correspondence in the absence of execution of formal agreement and performance guarantee. Section 7 of the Contract Act provides in order to convert a proposal into a promise the acceptance must be absolute and unqualified, be expressed in some usual and reasonable manner, unless the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but, if he fails to do so, he accepts the acceptance. Thus, it also to be proved that whether there was any acceptance as contemplated u/s 7.

Before we dilate further we deem it appropriate to refer to the decisions on the aforesaid aspect cited at bar. Shri M.L. Jaiswal, learned Sr. Counsel appearing on behalf of the appellant has relied upon *Jawahar Lal Burman Vs. Union of India (UOI)*, in which the Apex Court has laid down that the acceptance of offer must be absolute and unconditional. According to one of the conditions of contract to which the tender was subject, the failure on the part of the contractor to make

the required security deposit constituted a breach of the contract itself and therefore the security deposit was a condition subsequent and not a condition precedent. The letter of acceptance however stated that the offer was accepted "subject to your depositing 10 per cent as security" but in the last Paragraph it was stated that "the contract was concluded by the acceptance and a formal acceptance of Tender will follow immediately on receipt of Treasury Receipt." It was held that reading the letter as a whole it amounted to an absolute and unqualified acceptance of the offer or tender made by the appellant and was not intended to make a substantial variation in the contract by making the deposit of security a condition precedent instead of a condition subsequent.

In *Kollipara Sriramulu Vs. T. Aswathanarayana and Others*, , the Apex Court has observed that a mere reference to a future formal contract in an oral agreement will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. The Apex Court laid down thus:

(3) We proceed to consider the next question raised in these appeals, namely whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and so such agreement was executed. We do not accept this argument as correct. It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton* (1857) 6 HLC 238 , the fact of a subsequent agreement being prepared may be evidence that the previous negotiation, did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In *Von Hatzfeldt-Wildenburg v. Alexander*

(1912) 1 Ch 284 it was stated by Parker, J, as follows:

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored." In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. In *Rossiter v. Miller* (1878) 3 AC 1124 Lord Cairns said:

If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared; and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract.

In AIR 1933 29 (Privy Council) , the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. in (1912) 1 Ch 284 was applicable in India. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of respondent No. 1 does not show that the drawing up of a written agreement was a prerequisite to the coming into effect of the oral agreement. It is, therefore, not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr. Gokhale is unable to make good his argument on this aspect of the case.

Shri M.L. Jaiswal, learned Sr. Counsel appearing on behalf of the appellant has also referred to the decision in *M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi*, to submit that offer and counter-offer became an integral part of the contract, thus, the offer made must be deemed to have been accepted.

In *M/s. Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd.*, , the Apex Court has laid down that while deciding the question, whether any

agreement can be spelt out from the correspondence between the parties the cardinal principle to remember is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were "ad idem" to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Apex Court has laid down, thus:

12. In this connection the cardinal principle to remember is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required to review what the parties wrote and how they acted from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.

From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between them and no concluded enforceable and binding agreement came into existence between them. Apart from the correspondence relied upon by the learned Single Judge of the High Court, the fax messages exchanged between the parties, referred to above, go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. The learned single Judge of the High Court was, therefore, perfectly justified in holding that Clause 53 of the Charter

Party relating to Arbitration had no existence in the eye of law, because no concluded and binding contract ever came into existence between the parties. The finding recorded by the learned Single Judge is based on a proper appreciation of evidence on the record and a correct application of the legal principles. We find no merit in this appeal. It fails and is dismissed with costs.

In *Bhagwati Prasad Pawan Kumar Vs. Union of India (UOI)*, while considering Section 8 of the Contract Act, the Apex Court observed that it provides for acceptance by performing conditions of a proposal. An offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The Apex Court has laid down thus:

19. It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle. Each case must rest on its own facts. The Courts must examine the evidence to find out whether in the facts and circumstances of the case the conduct of the "offeree" was such as amounted to an unequivocal acceptance of the offer made. If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand if the evidence disclose that the "offeree" had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act.

In the light of the aforesaid principles of law deducible from the decisions we delve upon the correspondence placed on record by the plaintiff. Letter (Exh. P-1) is the letter supplied with the tender. (P-2) letter was written by the defendant to the plaintiff in which it was mentioned that they have quoted the charges as well as the alternatives their price will be found reasonable and that their offer shall be considered favourably for an order. As per telex message (Exh. P-3) dated 24-3-1990 acceptance of the offer was communicated and at the same time it was mentioned in the telex message that "DETAILED ORDER INDICATING THE PRICE BREAK UP AND DETAILED TERMS AND CONDITIONS BEING MAILED SEPARATELY". What is of significance is in the letter dated 24-3-1990 that price, detailed terms and conditions were not sent by the plaintiff as yet. Thus, (Exh. P-3) acceptance of the tender did not constitute any concluded contract between the parties as detailed terms and conditions and price break up was yet to be disclosed by the plaintiff to the defendant. As a matter of fact as details were not sent the defendant wrote a letter (Exh. P-4) dated 14-4-1990 to send a detailed order at an early date so as to enable the defendant to proceed in the matter. Thereafter two offers (P-5 and P-6) were sent by the plaintiff which contained in Paragraph 18 that the agreement could be executed between the parties. Other requisites were also mentioned. The next correspondence is (Exh. P-8) dated 4-9-1990 in which the plaintiff wrote to the defendant that performance guarantee and agreement bond for both the orders

were required to be submitted and also the progress report. In case there was failure to submit the performance guarantee and executed agreement by 15th of September, 1990 the "earnest money" deposit will be encashed. It cannot be inferred from this letter that performance guarantee and executed agreement were not required to be executed. The intention of MPEB was to insure that these documents were executed and in the event of failure to furnish the said documents, forfeiture of the earnest money deposit was contemplated. Thereafter letter dated 15-10-1990 was written by the defendant to the plaintiff that of the letter dated 8/10-9-1990, written confirmation was not received as such appropriate action be taken at the earliest. (Exh. P-9) is letter dated 8/10-9-1990, certain changes were proposed by the defendant in the offer made by the plaintiff. It was insisted by the defendant that if the document of despatch through Bank are retired within 60 days from the date of despatch, all expenses which may be charged by their Bankers from them for delayed retirement of documents including interest charges shall be payable by Board. It was also insisted that in case the commissioning of the equipment is held up for the reasons beyond their control, such as required facilities not provided by Board in time etc., balance payment shall be released within 15 days of the erection of the respective equipment. The said period shall be counted from the date of receipt of technically-commercially clear and firm order/requisite advance payment subject to "force majeure". It is further proposed that all drawings, datas to be furnished by the contractor shall be approved by MPEB/Consultant within one month from the date of submission. With respect to penalty for late delivery to an extent of 1/2% (half per cent) per week or part thereof; subject to a maximum of 5 % (five per cent) of the net value of items delayed, was also proposed. It was clearly stated in the latter that the MPEB/purchaser should communicate acceptance of the above changes to the purchase order and sent formal amendment to the purchase order in the respective clauses, as requested above for records. In the meantime, steps were being taken by the contractor to furnish bank guarantee required to be furnished as per purchase order. With respect to both the offers some amendments were sought and acceptance was required from the purchaser with respect to other offer also, certain conditions were imposed in the communications dated 8/10-9-1990 (Exh. P-9). Though it is disputed that these letters were received or not in the month of September, however, the controversy is set at rest by communication of purchaser MPEB (P-11) dated 31-10-1990 in which it has been mentioned that letter dated 8/10-9-1990 has just been received vide along with letter dated 10-10-1990 and purchaser will revert on same shortly. However, the purchaser MPEB failed to revert the letter dated 8/10-9-1990, even if they did not receive letter (P-9) in the month of September, even if they were sent belatedly along with communication dated 10-10-1990 it was received as apparent from letter dated 31-10-1990. It was incumbent upon the purchaser MPEB to revert back and intimate to the defendant as to condition sought to be changed of the purchase order proposed by it, but, Counsel for the appellant has fairly stated that there is nothing on record to indicate the acceptance or rejection of changes in condition

as proposed in communication dated 8/10-9-1990 was communicated. What can be gathered from yet another telex (P-13) dated 16-1-1991 of MPEB that performance guarantee, agreement bond and progress report were required to be submitted, thus, the plaintiff very well understood and insisted for execution of performance guarantee, agreement bond, progress report was dependent thereupon, at no point of time the plaintiff waived the execution of formal agreement or submission of performance guarantee. We find on record letter (P-14) dated 25-2-1991 of MPEB informing the contractor that no drawings/documents/progress report/performance bonds/agreement bonds/Bank Guarantee for advance payment has been submitted. But, communication was again silent with respect to communication dated 8/10-9-1990 written by the defendant. Letter (P-15) dated 19-2-1991 indicates that certain drawings were sent by contractor to the Chief Engineer, MPEB. MPEB sent telegram (P-16) on 7-3-1991 that drawings were not received by it. Communication dated 5-3-1991 (P-17) indicates that the contractor had sent certain proposals for fitting of ACW Pump motor. Another letter (P-18) dated 22-4-1991 written by the contractor indicates that certain drawings were sent. Acceptance of any of the aforesaid communications has not been placed on record by the MPEB so as to constitute any contract and infer consensus ad idem between the parties. We find on record notice (P-19, P-20). Thereafter fresh NIT was floated on 21-1-1992. There is yet another legal notice (P-24) placed on record and the authority (P-25) to file the suit of Shri P.K. Wakankar. The aforesaid correspondence on record fall short of proving that any concluded contract was reached between the parties. There was no acceptance of detailed offer sent by MPEB made by the contractor at any point of time. On the contrary he had insisted for certain modifications as per letters dated 8/10-9-1990. It is not disputed by the Counsel appearing on behalf of the appellant that said letters were received belatedly in the month of October 1990, when said letters were received in the month of October 1990 and it was communicated that the MPEB was going to revert to letters, thereafter MPEB failed to communicate acceptance and at no point of time indicated that whether it was ready to accept by the contractor's conditions or not. On the other hand all throughout MPEB insisted on execution of performance bond and agreement at no point of time it was understood by the parties that the contract was to be carried out without execution of the aforesaid document. As per above quoted terms of the tender penalty for non-execution of performance bond was clearly stipulated and as per that forfeiture of earnest money deposit could have been made, that has been effected by the MPEB. Thus, in the absence of any concluded contract having been brought into existence by the correspondence on record within purview of Section 8 of the Contract Act and Section 5 of the Sales of Goods Act.

We find that the finding recorded by the Trial Court to be proper. In our opinion, no concluded and binding contract came in existence, parties were only negotiating and did not reach consensus ad idem necessary for enforceable contract.

Resultantly, we find that the appeal sans merit. Same is hereby dismissed. However, we leave the parties to bear their own costs incurred in the appeal.