

(2011) 09 GUJ CK 0157
In the Gujarat High Court
Case No : First Appeal No. 2590 of 2011

Raj Trishul Construction Company

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 16-09-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 34
Constitution of India, 1950 — Article 299
Contract Act, 1872 — Section 10

Citation : (2011) 09 GUJ CK 0157

Hon'ble Judges : R.M. Chhaya, J; Jayant Patel, J

Bench : Division Bench

Advocate : B.K. Raj, for the Appellant;

Final Decision : Dismissed

Judgement

Jayant Patel, J.—The present appeal is directed against the order dated 10.05.2011 passed by the learned District Judge in Civil Misc. Application 688/05, whereby the application has been rejected.

2. Heard Mr. Raj for the Appellant.

3. The relevant facts are that a tender was floated for giving contract by the Respondent No. 1 and its officers. As per the Appellant, there after vide letter dated 15.04.2000, the tender was accepted. But before the formal contract was entered into vide communication dated 13.03.2001, the Appellant was informed by the Respondents 1 and 2 that as the Government itself is desirous to undertake the process of tax collection, the tender is cancelled. Under these circumstances, the Appellant raised the dispute under the Arbitration and Conciliation Act, 1996 ("the Act" for short). It appears that the matter was there after carried before this Court for appointment of the arbitrator and as per the Appellant, this Court directed for appointment of the arbitrator with the specific observation that the question of maintainability of the arbitration shall also be decided including on the aspect as to whether there was any concluded contract

or not.

4. The learned arbitrator there after had taken the view that there was no concluded contract and consequently, dismissed the claim made by Appellant vide award dated 29.04.2005. Against the said decision of the arbitrator, the Appellant preferred application under the Act before the learned District Judge who at the conclusion of the proceeding dismissed the application by impugned judgment. Under the circumstances, the present appeal before this Court.

5. The contention raised on behalf of the Appellant is that even if there was no written or concluded contract, the question of damages could be gone into by the arbitrator. It was submitted that once the communication is sent by the Respondent Nos. 1 and 2 for acceptance of the tender, it could not have been cancelled. If cancelled, the arbitration clause could be invoked and the damages could also be claimed. The Learned Counsel relied upon the decision of the apex court in the case of Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd., India, to contend that even if there is no written contract, the claim can be made for invoking of the arbitration as well as of the damages.

6. We may record that the learned judge in the impugned judgment at para 20 has dealt with the said aspect and the reasons recorded for ready reference can be extracted as under:

20. Now, looking to the argument of learned A.G.P. the opponents have filed its objections at Exh.8 and it transpires from all these documents that the offer of the Petitioner have not been accepted, the Petitioner have not paid security deposit. There is no valid agreement with the Petitioner. Mere quoting the rate by any of the bidders does not create any legal responsibility on the part of the Government. The bidder do not get legal rights to enforce any of the terms of the tenders in absence of valid agreement. If we see Section 2 of the Act which Contract means Letter of Acceptance, given to applicant, Form of Agreement, signed by both the parties, Security Deposits, paid by the applicant, Mutually accepted Conditions, Work order issued by Department, i.e. Respondent Government of Gujarat, it could be seen from the above that the bid has been rejected and there is no contract, therefore, the provision of Clause 26 cannot be resorted to or enforced and that is not helpful to the applicant and in petition No. 10 of 2002, Hon''ble Gujarat High Court has made reference to the arbitrators because the question regarding bid, tender, contract and arbitration clause was there, but after perusal of the papers, learned arbitrators came to the conclusion that applicant is not succeeded. Now, we have to see that contract was discussed by arbitrators and as per objection, the contract is defined as (1) An agreement or a promise enforceable by law in a contract and (2) a legally binding agreement is a contract and (3), an agreement creating an obligation is a contract. Thus, looking to the two part, here in this case, agreement is not there. Therefore, obligation was not there. However, tenders were invited and approved but that was mentioned in correspondence between two office. But it creates no any right to the applicant, as there was no letter of acceptance was issued to the

applicant, then agreement was not made consent of party was not obtained, consideration was not made and lawful object between competent party was not made. Therefore, as per Section 10 of Indian Contract Act, 1872, all agreements are contract if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not expressly declared as void. Here in this case, mere correspondence of approval does not give any right to the applicant and as per Indian Contract Act, 1872, an offer may be revoked by the authority before acceptance and here also, it is revoked and as per Article 299 of Constitution of India, there was no formal contract executed by duly authorised person was not in writing and in *Karamshi Jethabhai Somayya Vs. The State of Bombay*, it was held that in these circumstances, that is not binding an absolutely void and here in this case also, learned arbitrators have very widely discussed all this chapter and learned D.R.C. has discussed all these correspondence and document of tender in which para 1 offer was invited, para 6 validity was for six months. In Chapter-2, Meaning of Agent was described, in para (b) toll tax was provided, page: 13 period of contract was for 365 days but here was no any appointment letter was there and at page 22 execution of agreement and furnishing of guarantee was not fulfilled, security deposit as per page 22 was not and earnest money was not there. Therefore, dispute resolution provision was discussed by the learned arbitrators and page 53 and 74 form of Agreement was considered and that was decided by the D.R.C. very wisely, widely and covering all these provisions of the fact and law and came to the conclusion that here no contract is concluded and thus, looking to the article 299 of Constitution of India, provision of tender, there is no conflict with the law or public policy and award is in fully conformity with law and award is not erroneous or illegal and very well reasoned order which is confirmity of law and hence, looking to the facts and circumstances, it clears that here in this case the application of the applicant is not tenable. Learned Arbitrators have passed the very well reasoned order according to the rules and Regulation an law and according to law of Contract, law of Arbitration and Constitution of law and it requires no interference as per Section 34 of Arbitration and Conciliation Act, 1996. I, therefore, answer points 1 an 2 in negative and it is not established by the applicant according to facts and law, and therefore, in issue No. 3, I pass following order:

1. This Application is hereby rejected.
2. The Award passed by the Dispute Resolution Committee (D.R.C.) appointed as Arbitrators dated 29-04-2005 that there is no concluded contract between the Government of Gujarat and Raj Trishul Construction Company, Rajkot for above work of collection of toll tax near Bamanbore Junction, is hereby confirmed.
3. The parties have to bear their own costs.
4. Pronounced in the open Court on this 10th day of May, 2011.
7. If the aforesaid reasons are examined in light of the contention raised, it

further appears that after the communication dated 15.04.2000, even it is not the case of the Appellant that the parties acted upon the same inasmuch as per the terms and conditions of the contract, the requisite security deposit was paid by the Appellant to the Respondents No. 1 and 2 or that the work of collection of the toll tax had started or otherwise. The another pertinent aspect is that the letter of acceptance of the tender is as back as on 15.04.2000 and there after, the cancellation of the tender is on 13.03.2001 and during the said period, no steps whatsoever have been taken by the Appellant for enforcement of the contract either by resorting to the proceedings before the competent court nor any action has been taken in furtherance thereto on the basis of which it can be said that the parties acted upon the contract by their implied conduct.

8. The another relevant aspect is that the contract work of the Government cannot be termed at par with the contract by the private parties unless there is a written contract entered into, various clauses under the contract cannot be invoked as sought to be canvassed. Even if it is considered for the sake of examination that there was offer and acceptance then also the same was for acceptance of the tender which was offered but such acceptance can not be termed as concluded contract when various terms and conditions of the contract were provided. It is not even the case of the Appellant that any security deposit was paid and/or was accepted by the Respondents No. 1 and 2 nor it is the case of the Appellant that any work for collection of toll tax had started or otherwise. Under these circumstances, we find that when there was no concluded contract entered into nor could it be said that any parties acted by their implied conduct in furtherance to contract, the claim for damages could be said as not maintainable and therefore, has been rightly not accepted by the arbitrator and not interfered with by the District Court in the proceedings under the Act.

9. The reliance placed upon the decision of Trimex International FZE Ltd. (supra) is ill founded inasmuch as in the said case, as it appears from the facts of the said matter, at paras 3,4 and 5, the contract was not only accepted, but the parties to the contract by their implied conduct acted upon the same. Such is lacking in the present case inasmuch as the first step in furtherance with the contract was to make the payment of the security deposit which was not even performed. Under the circumstances, the said decision is of no help to the Appellant.

10. In view of the above, the appeal is meritless. Hence, dismissed.