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**(2000) 02 DEL CK 0050**

**In the Delhi High Court**

**Case No : OMP No. 49/83**

Rattan Lal Katyal

APPELLANT

Vs

Union of India and Another

RESPONDENT

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**Date of Decision :** 01-02-2000

**Acts Referred:**

**Citation :** (2000) 5 AD 139 : (2000) 2 ARBLR 300 : (2000) 85 DLT 661 : (2000) 53 DRJ 589 : (2001) 2 RAJ 484

**Hon'ble Judges :** J.B. Goel, J

**Bench :** Single Bench

**Advocate :** Mr. D.K. Kapur and Mr. F. Hasan, for the Appellant; Mr. Sameer Aggarwal, for the Respondent

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## Judgement

J.B. Goel, J.—This petition u/s 33 of the Arbitration Act, 1940 (for short "the Act") seeks declaration that there is no valid and concluded contract and as such there is no arbitration agreement also between the parties.

2. The petitioner is doing business under the name of Malik Company as its sole proprietor. It appears that in pursuance of tender enquiries issued from the office of Director General of Supplies and Disposals (for short "the DGS&D"), Government of India, the petitioner had submitted his tender alias to be opened on 19.7.1980 for the supply of Myrabolams Nuts. This was not accepted and on 9.10.1980 fresh quotations being invited, the petitioner had submitted the following quotations:-

i) Our rate is Rs. 137.85 gross for net, if the order is placed for full quantity. We will allow you 2% discount.

ii) For dispatching from M.P.

iii) Inspection at various places at dispatching station, by DEF, Kanpur.

iv) No sales tax will be charges extra, but "D" from is required in the name Malik Co. Shodal, all correspondence will be done with Kanpur Office.

- v) Stores will be packed in old gunny bags.
- vi) Gross weight will be treated as net for payment.
- vii) 95% Payment against Inspection Note and R/R.
- viii) Inspection note must be issued at spot at the time of Inspection.
- ix) Our rate is valid up to 30th October, 1980.
- x) Order will be placed in the name of our Branch Office Shodal"
- xi) Delivery after 60 days from the date of receipt of the "firm" order 4000 quintal per months.
- xii) Delivery date mean the date on which we offer the store for Inspection.

On being asked by the respondent the petitioner also agreed to the following terms for his tender:-

1. Weighment at consignee's end;
2. To furnish security deposit 5%;
3. To allow 2% discount on the quoted price of Rs. 137.85 per quintal.

3. It is stated that the respondent accepted the tender and issued Acceptance of Tender (for short "A") dated 2.3.1981. This contained vital variations which are contrary to the tender offer of the petitioner in respect of (1) period of delivery; (2) weightment for purposes of payment; (3) quantity increased from quoted quantity of 18650 quintals 18750 quintals and further increased by 4562.50 quintals. It is alleged that the petitioner had not accepted and confirmed this AT being at variation of his tender and as such no concluded and valid contract between the parties was arrived at the hence there is no arbitration agreement also between the parties.

4. The respondent in their reply have denied the case set up by the petitioner. It is denied that there is any variation in the terms of the tender. It is asserted that the respondent had accepted the terms of the tender as agreed by the petitioner and in acceptance thereof, the respondent had issued the Advanced At dated 28.1.1981. This concluded the contract between the parties. The formal At dated 2.3.1981 was also issued. The petitioner has not supplied the goods and has committed breach of the contract. The case set up by the petitioner is an attempt to wriggle out of the concluded contract to avoid payment damages of Rs. 16,39,876/- incurred by the respondent in risk purchase made by them. The petitioner in rejoinder has denied that there was any concluded contract on the basis of advance At. It is asserted that the AT dated 2.3.1981 only is the acceptance of the contract and this being vitally at variance with the tender offer of the petitioner, it was merely a counter offer made by the respondent which was not accepted by the petitioner. Hence there is no valid acceptance of the offer of the petitioner.

5. The respondent has pleaded that advance At dated 28.1.1981 was also issued receipt of which is not denied. The petitioner has concealed this fact in his petition and withheld this material document. The following issue has been framed for determination in the case:-

"(1). Whether there was no concluded contract between the parties as alleged?

(2) Relief."

It is not disputed that if this issue is decided in the affirmative, there is an arbitration clause in the General Conditions of Contract as contained in DGS&D Form 68 (Revised) which governs this contract.

6. Both the parties have led evidence by way of affidavits and one affidavit each has been filed in support of their pleas.

7. Learned counsel besides oral submissions have also filed written notes of their submissions. It appears that the petitioner had earlier submitted tender on 19.7.1980 which was not accepted in spite of negotiations. On 9.10.1980 fresh quotations were called from him and in response thereto the petitioner had submitted fresh quotations on 9.10.1980 itself as noticed earlier. It is also admitted case of the parties that in reply to the respondent's telegram/letter dated 9.1.1981, the petitioner had agreed for "weightment for payment at consignee's end", also to give security of 5% and to allow 2% discount on the quoted rate which forms part of the terms of the tender. As stated in para 10 of the petition, the respondent had also sought extension of offer up to 31.1.1981. It is not the case of the petitioner that it was not so extended. The respondent had issued acceptance in Advance At dated 28.1.1981 accepting the tender. Formal At dated 2.3.1981 was also issued later. If At dated 2.3.1981 was to be taken as acceptance, the acceptance being beyond validity period would not be a valid acceptance, but no objection to this effect has been taken by the petitioner. This also shows that advance At dated 28.1.1981 was issued by the respondent to the petitioner within the validity period. The petitioner has not filed the original advance At dated 28.1.1981 which must be in his possession. The respondent has placed on record during arguments the signed carbon copy of the said Advance At dated 28.1.1981. Correctness of it has not been disputed during arguments. This being a relevant and material document is allowed to be taken on record. So far as relevant that advance At dated 28.1.1981 reads as under:-

REGISTERED ADVANCE ACCEPTANCE OF TENDER \* \* \* \* \* Date the 28th  
January 1981 M/s. Malik Company, Shadol (MP). Sub: \* \* \* \* \*

Ref: Your tender No. NIL dated NIL followed by letter No. MCK/Delhi Camp/1981 dated 9.1.81, telegram dated 19.1.81 and telegram dt. 26.1.81.

Dear Sirs,

Your offer for the supply of Myrabolams Nuts is hereby accepted to the extent shown hereunder subject to the terms and conditions applicable to the tender:-

Item Description of Stores Unit Quantity Rate per Total No. Unit Cost 1. Vacab Section H1 Myrabolams Nuts Quintal 18650 Rs.137.85 Rs. 2584687.50 + . 100 (under tolerance of 25% 18750 Less 2% Discount Rs. 51693.75 Total Cost: Rs. 2532993.75

Rupees twenty five lakh thirty two thousand nine hundred ninety three and paise seventy five only.

This contract will be governed by the General conditions of contract as contained in Form No. DGS&D-68 (Revised) amended till date including clause 24 thereof. The contract is hereby concluded by this acceptance. Formal acceptance of tender showing full details is under issue. In the meantime your attention is drawn to the following points:-

1. Specification Governing Supply : \* \* \* \* \* 2. Terms of Delivery : \* \* \* \* \* 3. Delivery period: To commence after 60 days on placement of At and to be completed by 30.9.81 or earlier. 4.(a)Inspection Authority: \* \* \* \* \* (b) Inspecting Officer: \* \* \* \* \* 5. Consignee: The General Manager, OEF, Kanpur. 6. Sales Tax; \* \* \* \* \* 7. Advance Samples: NIL 8. Security Deposit : A sum of Rs. 75000/- is required to be deposited by 10.3.81 or earlier for due performance of the contract.

9. Weightment at Consignee's end will be treated as final for payment purposes.

10. Prices are firm and fixed.

11. The purchaser reserves the right to cover additional 25% quantity. on the same terms and conditions during the currency of the contract less 100 quintals already covered vide this A/T.

12. The stores will be packed in used gunny bags.

Please acknowledge receipt and confirm that you have taken the order in hand.

sd/-

(P.D. TUTEJA)

SECTION OFFICER

FOR & ON BEHALF OF THE PRESIDENT OF INDIA

COPY TO:

REGD.

1. The General Manager, Ordnance Equipment Factory, Kanpur.

2. M/s. Malik Company, 14/10 Civil Lines, Kanpur along with original advance At in the name of M/s. Malik Co., Shadol (MP).

8. This acceptance contains all the relevant terms of the contract and is an acceptance of the tender with its terms accepted by the petitioner in letters and

telegrams as noted above. This acceptance of At also specifically states that "the contract is hereby concluded by this acceptance". This acceptance amounts to a concluded contract between the parties. In *Jawahar Lal Burman Vs. Union of India (UOI)*, also, it was held that the letter containing similar terms amounted to a concluded contract between the parties.

9. The first objection is regarding period of delivery. As already noticed in the tender, the petitioner in clause 10 had made the following offer:-

"10. Delivery after 60 days from the date of receipt of the firm order.

4000 quintals per month."

10. According to the petitioner, the quantity to be supplied was 18650 quintals. It would take four or at the most five months in completing the delivery of 18650 quintals 4000 quintals per month. The delivery period would be 4 or 5 months plus 60 days from the date of the order. In advance At dated 28.1.1981, the delivery period is contained in clause 3 which reads as under:-

"Delivery period : To commence after 60 days on placement of At and to be completed by 30.9.81 or earlier."

11. This advance At as held above is a concluded contract and it contains a firm order for supply of the specified quantity of the store. The delivery period given in the formal At dated 2.3.1981 is also the same. There is no variation in the delivery period offered by the petitioner and that accepted by the respondent and even assuming that the delivery period is to be counted from 2.3.1981 after excluding 60 days, the installment supplies 4000 per month could be made during May, June, July, August and September 1981. Learned counsel for the petitioner has contended that the delivery was as given in petitioner's letter dated 9.1.1981 where it was stated as under:-

"..... As regards delivery, we will start delivery after 60 days and will be completing within six months by average monthly installment basis."

12. In his tender, the petitioner had not so tendered to supply. And he had not sought variation in delivery offer to this effect. He could not vary it unilaterally. In any case, valid and binding contract was concluded on 28.1.1981 which also contains a firm order for the supply of the contract goods. After excluding 60 days, clear six months from April to September 1981 were available to complete the delivery by 30.9.1981. This contention thus has no merit.

13. The second objection is about "weightment for payment". Relevant clause 6 of the tender submitted by the petitioner is as under;-

"(6) Gross weight will be treated as net for payment"

Relevant clause 9 of the advance AT reads as under:-

"9. Weighment at Consignee's end will be treated as final for payment purposes."

14. There is no variance in this term. Obviously, the respondent has accepted it. There is thus no variation in this respect also. This also has no merit.

15. The third ground alleged is of excess quantity of stores accepted and ordered in the ATs. It is alleged that as against the tender order for 18650 quintals, order was placed for 18750 quintals which is a variation.

16. In the tender quotation, no quantity of the stores to be supplied is mentioned nor any enquiry to this effect was made on the respondent. The quantity to be supplied must be available in the original Notice Inviting Tender (NIT) to which tender was submitted on 19.7.1980 and also during oral negotiations which had preceded the tender submitted. In the AT, the quantity ordered is 18650 quintals + 100 under 25% tolerance claim. It is not the case of the petitioner that 25% tolerance was not contemplated in the NIT. Learned counsel for the petitioner relies on the petitioner's letter dated 9.1.1981 wherein it is stated that:

"..... We extend our validity up to 19.1.1981 for full quantity of 18650 quintals Rs. 137.85 (with) 2% discount"

And another letter/telegram available at page 4 of his documents wherein it is stated as under:-

".....confirm to deposit security as per DGS&D and agree weightment at consignee's end for payment purposes Rs. 137.85 per quintal if the order is placed 18650 quintals."

These two letters are rather suggestive of the minimum quantity, that is, the quantity of the stores would be not less than 18650 quintals.

17. In the advance At, it is specifically mentioned that:

"11. The Purchaser reserves the right to cover additional 25% qty. on the same terms and conditions during the currency of the contract less 100 quintals already covered vide this A/T."

18. No objection was raised on receipt of this acceptance also. The quantity thus was in accordance with the contract. There is no variation in this respect also. This obviously is another excuse thought of to avoid the contract. This ground also has no merit.

19. In the written submission, it is also contended that the condition to furnish security was beyond the terms of the offer. This objection has not been taken in the petition. The respondent had demanded and the petitioner had agreed and given confirmation to furnish such security of 5% in his letter/telegram available at page 4 of his documents. This condition thus also forms part of his tender. The petitioner cannot deny that this condition does not form part of the contract. This obviously is an afterthought.

In the result, this petition has no merit and is accordingly dismissed with costs, assessed at Rs. 5,000/-.

I.A. No. 1157/83 and I.A. 1349/83 are also dismissed.

20. OMP 49/83 and I.As. No. 1157/83 and No. 1349/83 are disposed of.