

(2014) 04 DEL CK 0256
In the Delhi High Court
Case No : FAO No. 264 of 2011

Union of India

APPELLANT

Vs

Tirupati Texco Products (P) Ltd.

RESPONDENT

Date of Decision : 24-04-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37

Citation : (2014) 210 DLT 288

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Anuj Aggarwal, Advocate for the Appellant; B.S. Mathur, Advocate for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—At the outset it is stated that there was a delay of 48 days in re-filing the appeal and therefore while issuing notice in the appeal, delay of 48 days in re-filing the appeal was condoned by allowing CM. No. 11020/2011. Counsel for the respondent contends that delay in re-filing the appeal ought not to have been condoned. I note that there is no application for recalling of the order dated 31.5.2011. Even assuming that there was such an application, yet, the delay of 48 days in re-filing the appeal is condoned inasmuch as delay of 48 days causes no real prejudice to the respondents and which period of 48 days is for removing objections raised by the registry. I therefore refuse to recall the order of condonation of delay in re-filing the appeal as passed on 31.5.2011 including because no application is filed for recall of this order. This first appeal is filed u/s 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") impugning the judgment of the Court below dated 10.11.2010 by which objections filed u/s 34 of the Act by the respondent herein, petitioner before the trial Court were allowed and the Award dated 13.2.2001 was set aside whereby the appellant/claimant was granted a money decree of Rs. 29,925/-.

The Court below has set aside the Award which granted damages on risk

purchase caused to the appellant/Union of India as the contract with the respondent was cancelled as the respondent had failed to supply the contracted goods/cotton ropes within the delivery period. The Court below held that there was no concluded contract and therefore there does not arise any issue of the appellant/Union of India contending that losses are to be compensated on account of risk purchase.

2. The facts of the case are that the appellant invited offers for supply of cotton ropes. Respondent submitted its tender on 28.9.1990 which was accepted by the appellant. Three different types of ropes measuring 69210 mtrs., 94350 mtrs., and 50,000 mtrs were ordered from the respondent in terms of the tender. The quantity was subsequently enhanced to 86512 mtrs. from 69210 mtrs. so far as first item is concerned, and from 94350 to 117938 mtrs so far as second item is concerned, and this was done vide letter dated 25.10.1990 of the appellant because the contract contained a + 25% variation clause. So far as the delivery period was concerned for item Nos. 1 and 2 it was extended up to dated 31.12.1990 and for item No. 3 the date of delivery was dated 31.8.1990. There was a mistake on behalf of the appellant because whereas the amendment letter was issued on 25.10.1990 the delivery period so far as item No. 3 was given as 31.8.1990 and consequently a fresh amendment was issued for supply by 28.2.1992. The issue is that whether this fresh amendment dated 13.12.1991 issued by accepting of the letter of the respondent dated 20.11.1991, and received by the appellant on 2.1.1992, amounted to a concluded contract and which would be if the request of the respondent for extension of the delivery period to 28.2.1992 in terms of the letter of the respondent dated 20.11.1991 was accepted by the appellant by the appellant's letter dated 13.12.1990. In sum and substance, the issue is whether the letter of the respondent dated 20.11.1991 amounted to an offer and the same on being accepted by the appellant by issuing its letter dated 13.12.1991 results in a concluded contract.

3. The arbitrator held that the letter dated 20.1.1992 showed that the contract stood concluded and not that this letter of the respondent dated 20.1.1992 was a fresh counter offer. The Court below has however accepted this letter dated 20.1.1992 as a counter offer and therefore objections of the respondent were accepted and the Award was set aside.

4. Since for determination of the issue, language of the letter dated 20.1.1992 is relevant, I reproduce the same along with another letter dated 10.2.1992 issued by the appellant to the respondent as under:

Letter dated 20.1.1992

Dated 20.1.92

No. 476/RC/91

Asstt. Director (Supplies)

7/29-B, Tilak Nagar,

KANPUR

Sub: A/T No. 101/504/K2/Tirupati/476/COAD dt. 28.9.1990 for supply of Rope Cotton.

Dear Sir,

With reference to the above A/T we are in receipt of your Regd. Letter No. 101/504/K2/476/Amd. No. 465 dated 13.12.91 by which you have re-fixed the D.P. upto 28.2.92 as requested vide our letter No. 476/RC/91 dated 20.11.91 and thanks for the same. Your above letter was received by us on 2.1.92.

In this regard we draw your kind attention towards personal meeting held with you on dated 19.11.91 in your office. It was requested by the undersigned to refix the D.P. up to 31.3.92 as requested in our letter dated 15.11.91. In response to our letter you have assured that the refixation of the delivery shall be given to us immediately upto 28.2.92. But the refixation of the D.P. letter No. 101/504/K2/476/Amdt. No. 465 dated 13.12.91 was only received by us on 2.1.92.

We therefore, request you to kindly refix the D.P. up to 31.3.92 as more than 45 days have passed from the Date of our discussion and receipt of your letter.

Thanking you,

Yours faithfully,

For Tirupati Texco Products (P) Ltd.

DIRECTOR.

Letter dated 10.2.1992

No. 101/584/K-2/476

Dated: 10.2.92

M/s. Tirupati Texco Products (P) Ltd.,

132-B, Cooperative Industrial Estate,

Kanpur-22.

Sub: A/T No. 101/584/K-2/476/COAD 28.9.1990 for supply of Rope Cotton.

Ref: Your letter No. 476/RC/91 dated 20.1.92

Dear Sirs,

Please refer to your letter cited under reference, this is to inform you that the delivery period was refixed accordingly as per your offer. Any how you are hereby advised to supply the stores and regarding delivery period when you will approach for extension of D.P. The delivery period shall be considered.

You are requested to inform the latest development of supplies to this office within 10 days.

This is however without any prejudice to the terms & conditions of the contract.

Yours faithfully

(D.N. SINGH)

ASSTT. DIRECTOR

OR D.S. &D.

5. The Court below has relied upon second para of the letter dated 20.1.1992 whereby the respondent has asked for extension of delivery period, however, in my opinion the Court below has fallen into a clear error in overlooking the first para of this very letter which showed that the respondent thanked the appellant for re-fixing the delivery period i.e. the respondent accepted the amended delivery period for supply. The respondent however only prayed for further extension of the delivery period because the fresh delivery period would expire on 28.2.1992. Delivery extension was asked because as per the respondent there was delay in receipt of the letter issued by the appellant dated 13.12.1991 inasmuch as the same was received by the respondent only on 2.1.1992. Whatever doubt remained that the contract was concluded/entered into by the appellant's letter dated 13.12.1991 becomes clear from the letter of the appellant to the respondent dated 10.2.1992 and which makes it more than abundantly clear that the delivery period up to 28.2.1992 was fixed/refixed according to the "offer" of the respondent i.e. the appellant reaffirmed the fact that the letter of the respondent dated 20.11.1991 was an offer and appellant accepted the offer by issuing its letter dated 13.12.1991. In my opinion, therefore, there cannot be any doubt that the contract stood concluded when the appellant issued its letter dated 13.12.1991 because this letter dated 13.12.1991 was an acceptance of the offer of the respondent given by the respondent's letter dated 20.11.1991 for re-fixing the delivery period up to 28.2.1992. As already stated above, the respondent thanked the appellant for accepting the fresh delivery period ending on 28.2.1992 but only requested a further extension of the same, however, such request cannot take away the fact that there was a finality with respect to a specific date of the delivery period being arrived at and hence a concluded contract.

6. In my opinion therefore the arbitrator was justified in referring to this letter dated 20.1.1992 for holding that contract was concluded, and this becomes clear from the first para last few lines of internal page 4 of the Award dated 13.2.2001. The Court below accordingly was not justified in accepting the objections and setting aside the Award and therefore the findings and conclusions of the Court below are set aside and the Award is restored.

7. Learned Counsel for the respondent however vehemently argued that even assuming the respondent was guilty of breach of contract, yet, the risk purchase

amount of Rs. 29,925/- ought not to have been awarded to the appellant because this risk purchase amount is on account of the acceptance of the fresh risk purchase tender ignoring the six other offers which were lower than the offer given by the respondent pursuant to the risk purchase tender. Learned Counsel for the respondent however does not dispute that the case of the appellant before the arbitrator was that the persons whose tenders were not accepted were unregistered partnership firms, and appellant did not accept the tenders from them for that reason and also for the reason that those entities were not having requisite experience. Therefore once legitimate reasons exist for accepting a particular tender at a higher rate, because of lack of reliability and other factors pertaining to other tenderers, it cannot be said that respondent is not liable for the risk purchase amount of Rs. 29,925/-. I may note that the appellant has claimed this amount of risk purchase because the risk purchase tender was ultimately awarded to one M/s. S.R. Enterprises from Kanpur.

8. Learned Counsel for the respondent sought to place reliance upon the judgment of this Court in the case of Union of India (UOI) Vs. Daisy Trading Corporation, , to argue that once the terms of the risk purchase tender are different than the tender which is cancelled on account of breach, then, the arbitrator has committed an error in awarding the amount of the higher risk purchase tender. I do not agree because no doubt ordinarily the amount of damages is as per the lowest risk purchase tender however if the lower tenders are for valid reasons not accepted by the Union of India, there is justification, and accordingly, the risk purchase amount for the higher cost would be payable by the respondent. In view of the above, appeal is allowed. Impugned judgment of the Court below dated 10.11.2010 is set aside and the Award of the arbitrator dated 13.2.2001 is restored whereby the appellant has been awarded a money decree for a sum of Rs. 29,925/-. Parties are left to bear their own costs.