

(2002) 11 DEL CK 0034
In the Delhi High Court
Case No : Suit No. 1242/91

Union of India (UOI)

APPELLANT

Vs

Peeco Hydraulic Pvt. Ltd.

RESPONDENT

Date of Decision : 01-11-2002

Acts Referred:

Contract Act, 1872 — Section 7

Citation : (2002) 11 DEL CK 0034

Hon'ble Judges : Vinod Sagar Aggarwal, J

Bench : Single Bench

Advocate : R.K. Sharma, for the Appellant; Girish Aggarwal, for the Respondent

Judgement

V.S. Aggarwal, J.—The arguments had been addressed and in fact confined to the sole question as to whether there is an arbitration agreement between the parties or not.

2. This question arises as a result of the following facts.

3. In pursuance of the arbitrator having filed the award notices had been issued regarding filing of the award and for making it a rule of the court. On behalf of the Union of India it has been pointed that it does not intend to file any objections and it prayed for the award to be made a rule of the court. Objections had been filed by M/s Peeco Hydraulic Pvt. Ltd. pertaining to the question in controversy. It was pleaded that the Deputy Chief Mechanical Engineer, South Central Railway had submitted an indent to the Director General of Supplies and Disposal for supply of an Oil Hydraulic Spring Testing machine. On the basis of the said indent the Director General of Supplies and Disposal invited tenders for supply for Oil Hydraulic Spring Testing machine to the Chief Mechanical Engineer, South Central Railway, Secunderabad. On 6th December, 1979 the objector submitted its tender documents along with the quotations for supply of Peeco brand Oil Hydraulic Spring Testing machine, namely Controller of Store, South Central Railway, Secunderabad. The tender document contained various clauses

which required to be filled up. One of the clauses was as to if the objector would agree to the arbitration of an officer in the Ministry of Law being appointed by Director General Supplies and Disposal. The objector had clearly placed a "NO" against that column. The tender of the objector was the lowest. It was accepted and formal letter of acceptance had been issued. Clause 24 had been added regarding the arbitration clause. It remained unnoticed but the objector had never agreed to such an arbitration. Accordingly it has been asserted and urged that there is no arbitration agreement between the parties.

4. Needless to say that in the rejoinder filed on behalf of Union of India the matter as such has been contested. It has been pointed that the contract was concluded in accordance with terms and conditions. Clause 24 of the same contained the arbitration clause. The objector had accepted the contract and at this stage it cannot say that it did not agree to the arbitration clause.

5. During the course of submissions learned counsel for the objector highlighted the fact that in the reply filed there is no specific denial of what has been alleged by the objector. it is a case of simple denial and further even when called upon Union of India did not care to produce the tender documents. The applicant in the tender documents had clearly stated that it does not agree to the arbitration and accordingly it was urged vehemently by the objectors learned counsel that there was no arbitration agreement between the parties.

6. At the outset one can conveniently refer to some of the orders passed by this court pertaining to this controversy. On 18th May, 1998 this court had directed that the Union of India should produce the original tender documents on the next date of hearing. On 21st December, 1998 the tender documents were not filed as per the directions of the court. The matter was adjourned to 29th January, 1999. On the said date on behalf of Union of India it was stated that tender documents are not available with the petitioner (Union of India) and Therefore the same cannot be filed. An affidavit in this regard even was required to be filed.

7. The tender documents obviously would be in possession of Union of India and the same and Therefore have not been filed, the court has no hesitation in acting on what is being alleged by the objector and drawing an adverse inference that had the same been produced it would not have supported the case of the Union of India. It must be taken as is alleged by the objector regarding the tender document.

8. The objector asserts that the tender document contained certain clauses and clause 14 reads:

"14. Do you agree to sole arbitration by an officer in the Ministry of Law to be appointed as Arbitrator by the Director General, Supplies and Disposals, as provided in Clause 24 of the General Conditions of Contract from DGS&D - 68 (Revised)

(Your acceptance or non-acceptance of this clause will not influence the decision

of the tender. It should, however, be noted that an omission to answer the above question will be deemed as acceptance of the clause)

9. As per the objector he had positively stated NO to the arbitration. To this extent there is no controversy before this court that can be raised and accordingly it must be held that when tender documents were filed the objector had categorically stated that he does not seek any arbitration clause.

10. However, it is admitted by the objector that advance letter of acceptance had been issued which was followed by formal acceptance of the tender dated 23rd June, 1980. It was issued by the Union of India in favor of the objector. It also admitted as already referred to above that therein clause 24 pertaining to the arbitration had been added and that no objection had been raised in this regard. The obvious question Therefore that comes up for consideration is as to whether in these circumstances it could be taken to be a concluded contract with respect to the arbitration agreement or not.

11. One of the earliest decisions pertain to the subject would be the decision rendered by Division Bench of the Lahore High Court in the case of Hargopal & Anr. vs. Peoples Bank of Northern India Ltd. AIR 1935 Lah 691. In the cited case an application was made for shares by the applicant. It was conditional or on undertaking by the applicant that he would be appointed as a permanent director of the local branch. The shares were allotted to him without fulfilling the conditions. The applicant accepted the position as shareholder by accepting the dividends. It was held that later on he could not contend that the allotment was void on the non-fulfilment of the condition. The court held that his conduct waived that condition and Therefore it was concluded that it would be a contract between the parties. The said person was taken to have accepted the position as shareholder and as at the relevant he did not protest with respect to the condition that had been offered.

12. A Division Bench of Karnataka High Court in the case of Rama Metal Works and Others Vs. The National Small Industries Corporation Ltd., was dealing with a matter wherein the government company had been established to assist small industries by arranging supply of machinery on hire purchase in terms of scheme. One firm (private firm) which was aware of the terms applied to be for supply of hire purchase lathe machines requested the government company to instruct another company to deliver the machines to the private company. The government company was established that the private company was prepared to sign the necessary documents. The relevant agreement as such had not been executed but the Division Bench held that parties had reached a completed hire purchase agreement keeping in view the nature of the correspondence that was between the parties.

13. Reference with advantage can also be made to a decision from the Punjab and Haryana High Court in the case of Punjab State Electricity Board, Patiala Vs. Abnash Textile Trading Agencies, In the cited case tenders were invited by the

Punjab State Electricity Board. The security deposited by the private party was accepted by the board and purchase order was issued. It was held that the contract between the parties was completed even if there was no regular document that had been executed.

14. A Division Bench of the Calcutta High Court in the case of Byomkesh Banerjee Vs. Nani Gopal Banik, was dealing with facts where a person initially offered to purchase a disputed land at a certain price, which offer was not accepted by the land owner. He required the offerer to inform if he was agreeable to purchase the land at some hire cost and to send some amount towards advance. It was held that it was a clear offer to sell the land and not mere invitation. Taking stock of the facts it was held that when there is a counter offer made by him and the intending purchaser had sent advance this would be a contract. In paragraph 6 the court held:-

"6. And if Ext.8 contained an offer to sell on the part of the defendant, then we have no doubt that such offer was duly accepted by the plaintiff by Ext.2 and Ext.10. It is to be noted that, barring Ext.2(a) dated 29.6.1974, there is nothing on record to show that the defendant ever proceeded or purported to revoke the offer communicated by and through Ext.8. It is settled law that the revocation of an offer, in order to be effective, must be communicated, and that too, before the offer is accepted for once the offer is accepted, it can no longer be revoked, Ext.2 dated 13.5.1974 and even Ext.10 dated 29.6.1974 were put in the course of postal transmission before Ext.2(a) dated 29.6.1974, purporting to revoke the offer, could reach the plaintiff by post. It is also the categorical and unchallenged evidence of the plaintiff that he received Ext.2(a) by post from the defendant after he sent Ext.10 through his lawyer. The purported revocation, as sought to be conveyed through Ext.2(a), could not Therefore be effective as the offer was already accepted by the plaintiff by Ext.2 and Ext.10 before Ext.2(a) could reach him."

15. Two decisions of the Supreme Court in this regard can also throw light on the controversy that has been raised. In the earlier decision rendered in the case of Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others, . The letters had let out the terms on which the parties were ready to do business but it was held that as soon as the order was placed and accepted a contract would come into being. The precise findings of the Supreme Court in this regard reads:-

"..... But except for this, the letters merely set out the terms on which the parties were ready to do business with each other if and when orders were placed and executed. As soon as an order was placed and accepted a contract arose. It is true this contract would be governed by the terms set out in the letters but until an order was placed and accepted there was no contract. Also, each separate order and acceptance constituted a different and distinct contract: see - "Rose and Frank Co. v. J R Crompton & Bros. Ltd. 1925 AC 445.

16. Lastly the Supreme Court in the case of Jawahar Lal Burman Vs. Union of

India (UOI), was dealing with facts wherein in pursuance of the advertisement published by Union of India Jawahar Lal submitted a tender for supply of required quantity of coconut oil. According to one of the conditions of contract to which the tender was supplied failure on the part of the contractor to make the required security deposit constituted a breach of the contract itself. The letter of acceptance however stated that the offer however stated that offer was subject to Jawahar Lal depositing 10% of security. But in the first paragraph it was stated that contract was construed by acceptance. Keeping in view Section 7 of the Contract Act that offer must be absolute and unqualified and reading the letter as a whole it was held that it was acceptance of the offer and there was a concluded contract.

17. The conclusions Therefore from the aforesaid are clear and unambiguous. u/s 7 of the Contract Act the acceptance of the offer has to be absolute but need not be conditional. However, if there is a conditional or counter offer and it is acted upon without protest and the acceptance has been conveyed subject to that, to which there is no dispute raised, this amount to a concluded contract.

18. With this backdrop one can refer back to the present case again. Even if while filling the document for tender the objector had stated that he does not agree to an arbitration but still when the contract was accepted and conveyed it contained an arbitration clause. Admittedly, the objector at no stage protested to it and acted on the same. In that view of the matter once acceptance contained an arbitration clause to which there was no protest an attempt was made to complete the contract. The conclusion would be that it was an accepted contract with the said stipulation pertaining to the agreement. It is too late in the day to rake up this plea at this stage in court for the first time. It must Therefore be held in the peculiar fact of the present case that there was an arbitration agreement between the parties and it is decided accordingly.

19. List it before the regular bench on 18th February, 2002.