
(2008) 12 DEL CK 0024
In the Delhi High Court
Case No : FAO (OS) No. 378 of 2005

Victor Cables Industries Ltd.

APPELLANT

Vs

Delhi Electric Supply Undertaking

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 33

Citation : (2008) 12 DEL CK 0024

Hon'ble Judges : Manmohan Singh, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Valmiki Mehta and Sangeeta Jain, for the Appellant; Avnish Ahlawat, Latika Chaudhary and Nidhi Gupta for Respondent No. 1, Navin Chawla and Sudhir Nandrajog, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—This Appeal is preferred against the impugned order dated 29th September 2005, passed by the learned single Judge of this Court deciding three matters, i.e. (i) CS(OS) No. 35/94 - Victor Cable Industries Ltd. v. Delhi Electricity Supply Undertaking; (ii) CS(OS) No. 1055/94 - Victor Cable Industries Ltd. v. Delhi Electric Supply Undertaking and (iii) Execution Petition No. 200/2000 - Victor Cable Industries Ltd. v. Delhi Vidyut Board whereby the objections filed by the Appellant to the Award dated 29th September, 1993 were dismissed and the Award was made rule of the court.

2. There was an agreement entered into between the Appellant and the respondent which contained an arbitration clause . The disputes arisen between the parties were referred to the sole arbitrator, Sh. O.P. Anand, Chief Engineer(d) of the respondent to determine/adjudicate upon the claims.

3. The following disputes were referred to the learned Arbitrator for adjudication and settlement:

i) Involving the recovery of Rs. 40,07,225.00 from M/s. victor Cables Ltd. 6,

Commercial Centre, Panchshilla Park, New Delhi-17 by DESU on account of the differences in risk purchase for P.O. No. ST(SP-I)TE-1873/154 dated 30.1.1990 and Addl. P.O. No. ST(SP-I)/TE 1873/1686 dated 19.02.1990.

ii) Cancellation of registration of the party M/s. Victor Cables Ltd with DESU.

4. On the pleadings and documents filed by the parties, following issues were framed:

(i) Whether there is a contract ? OPD

(ii) Whether the claimant/respondent herein is entitled to the claim preferred by him in the statement, if so what amount? OPC

(iii) Whether the claimant is entitled to interest ? OPC

(iv) Whether the claimant is entitled to the cost or any consequential relief ? OPC

(v) Relief.

5. The parties gave consent for enlargement of time upto 30th September, 1993 and the Arbitrator vide his Award dated 29th September, 1993 made and published his Award in the following terms:

1. Pay an amount of Rs. 40,07,225/- (Rupees forty lakhs seven thousand two hundred twenty five only), being the difference in risk purchase for purchase order No. ST (SP-I)/TE-1873/1594 dated 30-01-90 and additional purchase order No. ST(SP-I)/TE-1873/1686 dated 19-2-90, which amount the claimant has lost in procuring the ordered quantities, to the claimant DESU.

2. Pay the aforesaid amount to the claimant DESU within a period of three months from the date of this award, whereafter interest @ 18% per annum will be payable till the final payments are made.

6. After the Arbitrator filed his Award in this Court on 7th January, 1994, notices were issued to the parties on 8th March, 1994 regarding the filing of the Award and objections. The appellant filed an objection to the Award dated 29th September, 1993 bearing CS(OS) No. 35/94.

7. The Appellant had filed a petition u/s 20 of the Arbitration Act, 1940 i.e. CS(OS) No. 1055/94 praying therein that the disputes arising from another purchase Order No. ST/SP-I/TE-1991/1329 dated 11th March, 1992 be referred to arbitration. The disputes were referred to arbitrator and finally in that case also, the Award was passed in favour of the Appellant, M/s. Victor Cables Industries Ltd on 6th February, 1990. Objections to the said Award were dismissed and the Award was made rule of the court by order dated 26th October, 1992.

8. In order to execute the said decree of the court, the Appellant, M/s. Victor Cables Ltd had filed Execution Petition No. 200/2000. The DVB, successor of DESU had filed an appeal which was registered as FAO(OS) No. 534/01 and the

same was disposed of by the Division Bench while directing that the warrants of attachment shall not take effect till the respondent's objections in CS(OS) No. 35/94 are decided and one month thereafter.

9. In view of the Division Bench order dated 2nd December, 2003 the parties were directed to settle the amounts.

10. The payments due from each other were as follows:

i) The Award in favour of erstwhile DESU in September 1993 for Rs. 40,07,225/- with interest @ 18% p.a from 1.1.1994 till payment and Award has been made rule of the court.

ii) The total amount recoverable with interest comes to Rs. 78,09,376.99 and the amount payable to the party in another Award was Rs. 1,65,37,720/-. In the year 1999 itself accounts were settled and balance amount of Rs. 87,26,352.75 was paid by the erstwhile DESU/DVB to the petitioner.

11. As stated, CS(OS) No. 35/94 pertains to the objections under Sections 30 and 33 of the Arbitration Act, 1940 to the Award dated 29th September, 1993 made and published by the sole Arbitrator Sh. O.P. Anand.

12. By the impugned order, the learned Single Judge rejected the objections filed by the Appellant and made the Award dated 29th September, 1993 as rule of the court and decree was passed in terms thereof. CS(OS) No. 1055/94 and Execution No. 200/2000 were also disposed of by the learned Single Judge in terms of the order of the Division Bench as earlier mentioned by observing that the Appellant would be entitled to adjust the amount due and payable by it in order to settle the accounts accordingly.

13. The learned single Judge while dismissing the objections filed by the Appellant has, inter alia, observed in Para 9 as under:

".....Thus the parties had acted with full awareness and the afore-stated letters which were exchanged between the parties concluded the contract. After receipt of this letter and even after submitting their letter dated 12.2.90, it is clear from the record of the arbitrator that the company had submitted the bank guarantee in compliance to the said letter. All doubts were to be at rest vide letter dated 31.5.1990 when the undertaking informed the company that there is no much difference in the price structure and the letter dated 14.5.1990 was not appreciated. Thereafter notices were given by the undertaking to the company to complete the supplies which in any case is not in dispute, were not effected. In this very letter, it was informed to the company that they were expected to commence the supplies immediately and confirm within seven days positively, failing which the department would be compelled to take action as per the terms and conditions. The company despite service of such letter, chose not to take any action nor effected the supplies. This clearly shows a complete acquiescence on the part of the company in the claim of the undertaking. Vide letter dated 18.4.90, the company had stated that the purchase order should be treated as

cancelled without any financial repercussions. The subsequent correspondence on the part of the company as well as the plea before the arbitrator appears to be an after thought. Once the company had accepted to make the supplies at the agreed rate with validity period upto 15.2.90 and the order was admittedly placed vide letter dated 12.2.90, there was no occasion for the company to wriggle out of its liabilities. If the company bonafidely believed that there was no concluded contract at that stage of the proceedings, there was no occasion for the company to refer to various terms and conditions and pray for amendment of the supply order. Rather, it should have taken recourse to such rights as are permissible to it in law. On the one hand, the company has pleaded that it was fully aware of the procedure of working in DESU and on the other hand, it shows complete inaction in taking adequate steps which even a person of any business prudent would be expected to take. The letters of the company do not constitute variation of an unconditional acceptance submitted by them. At best, it could be said that certain further request was made by the company to the undertaking which was not accepted and the undertaking opted to enforce its rights under the concluded contract."

14. The present appeal has been filed against the said order passed by the learned single Judge on 29th September, 2005. During the course of the hearing, the learned Senior counsel appearing on behalf of the Appellant has mainly raised the plea that there was no valid and binding contract between the parties and, therefore, the Award of the arbitrator is a nullity.

15. The case of the Appellant is that the Appellant is an established business concern who has been doing business with DESU for a long time and the Appellant is aware of the system and working of the respondent. The respondent-erstwhile DESU issued tender for supply of LT-XLPE Cables of the size 3.5 x 95 sq. meter total quantity 100 Km on 26th June, 1989 and the tender was opened on 30th August, 1989. The respondent had issued two purchase orders dated 30th January, 1990 and 19th February, 1990 for 75 Kms and 50 Kms of cable.

16. On 25th August, 1989 the Appellant submitted their tender in which they quoted payment terms as follows:

PAYMENT TERMS

100% payment along with taxes and duties shall be collected against receipted challan for which we will submit a 5% revolving bank guarantee on pro-rata basis. The bills can be submitted directly along with the receipted challan as payment cheque shall be prepared in favour of our bankers Account Victor Cable Ltd. 1/2% cash discount shall be offered if the payment is made within 10 days from the date of submission of the bills on priority basis.

DELIVERY

The delivery shall commence within 2 to 3 months from the date of receipt of order technically and commercially clear from purchase order and shall be

completed 5 months thereafter.

17. The said offer of the Appellant were accepted vide letter dated 30th November, 1989 by the respondent and the Appellant was to send its consent for the above rates by 7th December, 1989 valid upto 15th February, 1990 failing which it will be assumed that the Appellant is not interested in the subject any more.

18. On 5th December, 1989 the appellant had communicated the acceptance but subject to the condition that their offer for cash discount of 1/2% for payment on priority basis shall stand deleted. The payment shall be made on priority basis within 10 days from the date of submission of the bill. In another letter dated 12th December, 1989 by the Appellant to the Executive Engineer, SP-I, DESU, it was submitted by the Appellant that they are reconfirming their right to accept the order @ Rs. 1,00,580/- per kms (computed) if the payment is to be made on priority basis instead of within 10 days and other contents of their letter dated 5th December 1989 shall remain the same.

19. In view of the above acceptance of the offer by the Appellant, the respondent placed the purchase order on the Appellant by letter dated 30th January, 1990 wherein the delivery schedule and payment schedule as submitted by the Appellant were quoted in the said letter under the heading "Payment" which reads as under:

PAYMENT

100% priority payment with full taxes and duties against received challan on furnishing of 5% revolving bank guarantee of the contract valued on pro rate basis valid for three months from the date of last supply.

Bill in duplicate be submitted to ACA/(SB-I)RPH, New Delhi. If any consignment is rejected due to bad workmanship the poor quality of material the payments terms will thenceforth change to 100% after approval of material at our stores.

20. Vide letter dated 8th February, 1990, the Appellant requested the respondent for amendment of the rate for 3-1/2% x 95 sq. m Cable to be Rs. 76,298.55 per km instead of Rs. 76289.55 as quoted in the respondent's offer dated 30th November, 1989. By another letter dated 12th February, 1990 written by the Appellant to the respondent, the Appellant conveyed their acceptance subject to the following terms and conditions:

(i) Per unit rate of Rs. 76289.55 should be amended to Rs. 76298.55 as mutually agreed upon vide letter No. SI/SP-I/TE 1073/1297 dated 30th November 1989 and No. Vol/Q-0667/1267 dated 8th February 1990.

(ii) Quantity Variation: Additional order of 50 KMS on same terms and conditions shall be acceptable only if released on us within one month from the date of this purchase order. Otherwise it shall be subject to our mutual agreement.

(iii) Payment: As indicated in the purchase order, payments shall be made on

priority basis and no discount shall be given by the same. If payments are not released on priority basis we shall be well within our rights to hold supplies against this purchase order.

21. The appellant had also informed the respondent that it would be prepared to supply the additional order of 50 kms if this order was placed on them within one month from the date of main purchase order.

22. It is pertinent to mention that by letter dated 8th February, 1990, the appellant wanted a slight correction in the amount mentioned in the order. The appellant had also stated that vide letter dated 12th February, 1990, the additional order of 50 kms was confirmed on the same terms and conditions only if released on them within one month from the date of its purchase order otherwise it shall be subjected to the mutual agreement.

23. On 15th February, 1990 the Appellant submitted the bank guarantee with respect to 100% payment and security deposit. After the receipts of these bank guarantees, the purchase order for 50 Km material was also placed by the respondent vide letter dated 19.2.1990 for which the Appellant was asked to submit bank guarantee or deposit the amount within 7 days for a sum of Rs. 38,145/- on the terms and conditions mentioned in the order dated 30th January, 1990. Thereafter the appellant failed to make the required supplies.

24. Before cancelling the contract by the Appellant on 18th April, 1990; the respondent has written letter dated 17th April, 1990 to the Appellant informing that since the supply was not being made as per the delivery schedule, respondent is facing acute shortage of material and important works were getting delayed, therefore, the appellant was asked to supply the material. Even after the cancellation of contract on 2nd May, 1990 another letter was written to the Appellant by the respondent to start supply.

25. The respondent wrote letter dated 14th May, 1990, 31st May, 1990 and 16th June, 1990 but the Appellant refused to supply the material and the contract was finally cancelled on 10th October, 1990 on the condition that the risk purchase was taken up at the risk of the Appellant. The matter was thereafter referred to the Arbitrator who gave his Award by awarding a sum of Rs. 14,07,220/- in favour of the respondent.

26. The main contention of the Appellant is that the parties were never at the same amount and there was no consensus ad idem. Respondent's acceptance after 3 months from the cancellation of the contract cannot be looked into. It is further argued by learned Counsel for the Appellant that the respondent vide order dated 30th November, 1989 in reply to the offer of the appellant gave its counter offer and asked the respondent to send the acceptance to the said counter offer by 7th December, 1989.

27. The appellant vide letter dated 5th December, 1989 conveyed their conditional acceptance of the said order of the respondent and further by letter

dated 12th December 1989 it was confirmed that the Appellant are ready to accept the offer of the respondent @ Rs. 1,00,580 (computed) per Km if the payment is to be made on priority basis within 10 days. It is further argued that the learned single Judge erred in observing that the Appellant submitted the acceptance as per letter dated 5th December, 1989 and no terms and conditions of any kind were attached to its acceptance.

28. The submission of the respondent is that after the contract was concluded between the parties, apparently the Appellant were not in a position to supply the material and the appellant made a representation on 21st February, 1990 wherein it was clearly stated that at the time of acceptance of the order letter dated 5th December, 1989, the payment would be made on priority basis within 10 days without any discount and the same has also been incorporated in the order. The said letter dated 21st February, 1990 cannot be considered to say that the Appellant offer of payment on priority basis was not accepted. The terms with respect to priority was accepted by the respondent and the respondent conveyed the same in the purchase order dated 30th January, 1990. The subsequent letters written by the Appellant and then cancelling the contract is just an excuse on the part of the Appellant.

29. It has further been submitted that after the concluded agreement, a representation to confirm with respect to the payment and slight variation in the price was only to the tune of Rs. 10/- which was under consideration but it does not mean that there was no valid and binding contract between the parties.

30. In those representations, it was particularly mentioned that the payment would be made on priority basis within ten days without any discount and the same should also be incorporated in the order. The appellant also made complaints about the discussion with Account Officer for no priority payment against the order unless the specific approval is conveyed by the Finance Advisor and Chief Accounts Officer. Although according to the respondent, there was specific request of approval of the Finance Advisor and Chief Account Officer conveyed to the paying authority.

31. It has been further contended by the respondent that the correspondence after 5th December, 1989 are only clarificatory and even in the letter dated 8th February, 1990 in the form of representation, the Appellant have categorically admitted that the offer dated 30th November, 1989 was accepted on 5th December, 1989. The said representation dated 21st February, 1990 was not a counter offer but it was merely a clarification.

32. It is settled law that for setting aside of arbitral Award there must be errors apparent on the face of the record or a misconduct by the arbitrator. The main argument addressed by the appellant in the present case is that there was no concluding contract between the parties and the arbitrator passed a non-speaking Award without even considering this issue which is a preliminary issue to proceed with the arbitration. We consider that when arbitrator had taken a

plausible view on interpretation of contract, court cannot set aside Award on ground of misconduct of arbitral proceedings.

33. A bare perusal of the Award of the arbitrator would show that he had considered the dates of the contract that is 30th January, 1990 and 19th February, 1990 and thereafter, gave the findings in favour of the respondent. The arbitrator was justified in passing the Award and there can be no interference in the Award passed by the arbitrator as the Award was not based upon either a proposition of law which is unsound nor there was an erroneous proposition of law established, to vitiate his decision.

34. As regards letter dated 19th February, 1990 was concerned, the said letter was also available before the Arbitrator in which the respondent placed further order of 50 kms on the same terms and conditions of the main purchase order dated 30th January, 1990. In this order the rate quoted by the respondent was the same as mentioned in the letter dated 30th January, 1990. The company was also called upon to furnish a bank guarantee.

35. Although the appellant wrote a letter dated 8th February, 1990 for the change of price but despite this letter, the appellant had accepted additional order of 50 kms on the same terms and conditions. The order was placed within one month and the appellant further mentioned that the payment shall be made on priority basis. It is clear that the appellant had accepted the supply of additional order of 50 kms despite the request made by the appellant to the respondent for variation of the prices which was not accepted by the respondent.

36. It appears that by sending various letters of similar nature dated 17th April, 1990, and 18th April, 1990 the respondent had written to the appellant to supply the material as per the schedule, otherwise the respondent would face acute shortage of material and important works would be delayed. Another letter dated 2nd May, 1990 was written by the respondent in this regard. However, the respondent did not supply the material inspite of reminders dated 14th May, 1990, 30th May, 1990 and 16th June, 1990. The contract was finally cancelled on 10th October, 1990. Therefore, the risk purchase was effected at the appellant's cost.

37. It further appears from the letter dated 30th May, 1990 when the respondent informed the appellant that there is not much difference in price structure that respondent accepted the offer of the appellant, therefore, letters written by the appellant to the respondent do not make any difference. Despite the letter dated 14th May, 1990, no supply was effected by the appellant.

38. It shows that the appellant was reluctant to supply the material to the respondent and by its letter dated 18th April, 1990 the appellant had cancelled the contract without any financial repercussion. The subsequent correspondence on behalf of the parties appears to be an afterthought.

39. Learned Counsel for the appellant has referred the decision of Supreme Court

in *The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another*, wherein it was held by the Supreme Court in para 11 as under:

In the process of interpretation of the terms of a contract, the Court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the Courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the Courts should not give weight to these further expressions by the parties in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent acting's as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation [see *Corbin on Contract*, Vol.3, pp.249 & 254-255].

40. In the present case, we feel that there is no fresh remake of mutual contract between the parties in order to change the terms of the contract previously made, all the subsequent communication exchanged between the parties are of clarificatory nature, therefore, the judgment cited above by the learned Counsel for the appellant does not help his case.

41. In a formation of contract, the basic ingredient to make it concluding one is the proposal from one party and its acceptance by the other. So long as one of the parties to the transaction could back out of it at his choice, there can be no binding or concluded contract between the parties, although they have an agreement on the material terms. The proposal must be sufficiently definite to permit the conclusion of the contract by mere acceptance. Similarly, an acceptance should be final and unqualified expression of assent, to the terms of an offer. An unqualified unconditional acceptance of the offer creates a contract when communicated to the offeror.

42. In view of the above, we agree with the findings of the learned Single Judge that there was a concluded binding contract between the parties on 5th December, 1989. After considering the correspondence exchanged between the parties, intention of the parties show that both the parties agreed to accept the basic terms of contract reached between them in letter dated 30th November, 1989 and later on by letter dated 5th December, 1989. All the subsequent events are of clarificatory nature.

43. Therefore, we cannot accept the contention of the learned Counsel for the appellant that vide letter dated 5th December, 1989 there was no concluding contract between the parties. Both the parties were well aware about the letters and correspondences exchanged between them which is in reference to the concluding contract dated 5th December, 1989.

44. It is not in dispute that the appellant had been dealing with the respondent for a very long time and if there was no concluding contract at any stage of the proceedings, the appellant ought to have taken the recourse of its rights in accordance with law.

45. We hold that the representation dated 21st February, 1990 was not a counter offer but it was merely a clarification. It appears that the appellant was not inclined to supply the material and therefore delaying the matter in one way or the other by sending various letters from time to time and there was a valid contract between the parties and the contention of the appellant cannot be accepted.

46. We feel that the material terms and conditions for construing a concluded contract were exchanged between the parties by letters dated 30.11.1989 and 5.12.1989. Even the appellant on 15.2.1990 submitted the bank guarantees with respect to 100% payment and security deposit.

47. The subsequent letters were only clarifications sought and there was slight variation in the price which was only to the tune of Rs. 10/-. Even on 19.2.1990, another order for 50 km. was placed on the respondents on the same terms and conditions as that of purchase order dated 30.11.1989.

48. The plea of the appellant that there was never a concluded contract arrived at between the parties since the parties were never of the same mind and there was no consensus ad idem is untenable and has no force. The conduct of the appellant by making bank guarantee clearly shows their intention to enter into this contract.

49. In view of above discussion, we find no infirmity with the orders passed by the learned Single Judge, the present appeal being devoid of any merits and the same is dismissed. No costs.