
(2007) 01 OHC CK 0023
In the Orissa High Court

Vishwa Industrial Company Pvt. Ltd.

APPELLANT

Vs

Mahanadi Coalfields Ltd. and Others

RESPONDENT

Date of Decision : 18-01-2007

Acts Referred:

Contract Act, 1872 — Section 4, 7

Citation : AIR 2007 Ori 71 : (2007) 103 CLT 246 : (2007) 2 CTLJ 118 : (2007) 1 OLR 318

Hon'ble Judges : S.B. Roy, C.J;M.M. Das, J

Bench : Division Bench

Judgement

M.M. Das, J.—A tender notice was floated by the Mahanadi Coalfields Limited (for short, "the MCL") on 20.1.2003 inviting quotations in sealed covers for supply of materials indicated in the schedule of requirement as per technical specification, which was attached as Annexure-A to the tender documents. Clause 21 of the Notice Inviting Tender was with regard to submission of Performance Bank Guarantee by the successful tenderer which reads as follows:

21. PERFORMANCE BANK GUARANTEE: The performance guarantee shall be submitted by successful tenderer for 10% Value of the for destination price of the order including all taxes and duties to cover both satisfactory performance and warranty. The performance guarantee for 10% value will be taken in the form of a Bank Guarantee. The Bank guarantee shall be valid for 18 months from the date of receipt and acceptance of the equipment/materials at site and the same shall be either released or extended thereafter, as deemed fit.

2. Pursuant to the said Notice Inviting Tender, the Petitioner submitted its tender on 8.3.2003. With regard to Performance Bank Guarantee, the Petitioner in its offer document (tender) mentioned as follows:

PERFORMANCE BANK GUARANTEE: Agreed. We have submitted OMNIBUS Bank Guarantee No. LG /14/12/90 dated 14.7.90 for Rs. 50,00,000/(Rupees Fifty Lakhs) only to Coal India Limited. In terms of the clause of the said OMNIBUS

Bank Guarantee Performance Bank Guarantee against various orders to CIL and its subsidiaries will be covered by it and no separate Bank Guarantee is required to be submitted to Coal India Limited and its subsidiaries. Authenticated Xerox copy of the valid Bank Guarantee is enclosed.

3. It is to be noted that as per conditions stipulated in the Notice Inviting Tender, the validity period of the proposal/offer was initially fixed as six months. After considering the tender offered by the Petitioner, the MCL by its letter dated 30.12.2003 placed a formal order on the Petitioner to supply the materials mentioned therein. However, though in the tender submitted by the Petitioner, with regard to Performance Bank Guarantee, the Petitioner claimed that the OMNIBUS Bank Guarantee given by it for an amount of Rs. 50,00,000/- on 14.7.1990 to Coal India Limited and in terms of the said Bank Guarantee, Performance Bank Guarantee against various orders to Coal India Limited and its subsidiaries will be covered by it and no separate Bank Guarantee is required to be submitted, but the MCL in its formal order dated 30.12.2003 placed on the Petitioner, required the Petitioner to submit a Bank Guarantee as per Clause 21 of the tender document which has been quoted above.

4. The Petitioner's case is that it received the said letter dated 30.12.2003 of the MCL on 12.1.2004, i.e., much after the expiry of the validity period of its offer and by its letter dated 12.1.2004, the Petitioner sent a reply to the Deputy Chief Materials Manager of the MCL, acknowledging receipt of the letter under which formal order was placed on the Petitioner and reiterating that as they have offered OMNIBUS Bank Guarantee to the Coal India Limited, they were not required to submit separate Performance Bank Guarantee and accordingly, made a request to the MCL to make necessary amendment of the order so that the Petitioner can supply the materials. The Petitioner again by its letter dated 27.1.2004 addressed to the MCL reiterated that Coal India Limited introduced the OMNIBUS Bank Guarantee to those suppliers whose past Performance were considered satisfactory and suppliers were given facility to submit" the OMNIBUS Bank Guarantee in place of individual Bank Guarantees to cover contractual obligation as well as equipment performance including warranty obligation and such facility of OMNIBUS Bank Guarantee was extended by the Coal India Limited to very few firms whose credential have continued to be satisfactory. The Petitioner stated further that in view of the above, it was required, not to insist for another Performance Bank Guarantee. From the letter dated 13.2.2004, it appears that the MCL on receipt of the letter of the Petitioner dated 27.1.2004 again requested the Petitioner to comply with the Performance Bank Guarantee clause of the tender document. This request was again turned down by the Petitioner by letter dated 19.2.2004 under Annexure-8 to the writ petition whereunder the Petitioner once again requested the MCL to review the matter in the light of the norms of the OMNIBUS Bank Guarantee specifically stating as follows:

We once again request you to review the matter in light with the norms of the

OMNIBUS Bank Guarantee, since a separate Performance Bank Guarantee, as mentioned in clause No. 20 of the subject supply Order, is not acceptable to us." It was further stated by the Petitioner in the said letter as follows:

Under the circumstances, if the Performance Bank Guarantee Clause (Clause No. 20) of the said Purchase Order is not withdrawn, it will make it hard for us to accept your subject Order.

5. It appears from the subsequent correspondences made between the parties that the MCL continued to insist upon the Petitioner to adhere to the condition of the Performance Bank Guarantee and the Petitioner, repeatedly stated that in "view of the OMNIBUS Bank Guarantee, it is not required to provide Performance Bank Guarantee. By letter dated 10.3.2004, the Petitioner clearly stated that since the MCL is not willing to accept the OMNIBUS Bank Guarantee, the Petitioner is unable to accept the order. However, from letter dated 29.3.2004, it appears that the MCL in the case of Supply Order placed on the Petitioner amended the Performance Bank Guarantee Clause to the effect that the supply shall be covered under the OMNIBUS Bank Guarantee No. LG/14/ 12/90 dated 14.7.1990 submitted by it to Coal India Limited. On receipt of the said letter dated 29.3.2004, it appears that the Petitioner acknowledging the receipt of the same, intimated the MCL that the Petitioner has already expressed its inability to accept the order as the OMNIBUS Bank Guarantee was not acceptable to the MCL in lieu of Performance Bank Guarantee and in no uncertain terms expressed its regret that the Petitioner is unable to reopen the case. Even thereafter, various correspondences were made between the parties with regard to the said formal order placed on the Petitioner and ultimately, it resulted; in the action of the MCL in issuing a Risk-Purchase Notice dated 10.6.2004 notifying to the Petitioner that if the supply of the conveyors is not commenced within 15 days from the date of issue of the said letter, the MCL will resort to alternative procurement action at the risk, cost and consequences, apart from initiating action to suspend business relationship with the Petitioner by it and all other subsidiaries of Coal India Limited. It was also stated in the said notice that in addition to the above, pending payments of the Petitioner from any subsidiary of Coal India Limited shall also be suspended forthwith and the OMNIBUS Bank Guarantee shall be invoked for encashment to realize the possible extra expenditure and consequential losses.

6. The Petitioner replied to the said notice on 19.6.2004 refuting the same and expressing that the said notice is unreasonable and illegal. By letter dated 25.10.2004, the MCL communicated its decision to suspend business relationship with the Petitioner for a period of six months from the date of the said letter and by letter dated 25.10.2004, the MCL cancelled the Purchase Order which was placed on the Petitioner intimating the Petitioner that it shall procure the said materials from alternative sources at the risk and loss of the Petitioner. Being aggrieved by such action of the MCL, the Petitioner has approached this Court seeking issuance of a writ of Mandamus on the Opp. parties directing them not to

take any step and not to initiate any action on the basis of the risk-purchase notice and subsequent actions contemplated under Annexures-17, 19 and 19 (A) and to quash the said Annexures, i.e., letters dated 10.6.2004, 25.10.2004 and 25.10.2004 issued by the MCL to the Petitioner.

7. A counter affidavit has been filed on behalf of the Opp. parties, inter alia, stating that though the request of the Petitioner for acceptance of the OMNIBUS Bank Guarantee was accepted by the MCL, but the Petitioner vide its letter dated 31.3.2004 under Annexure-12 withdrew from its earlier offer stating that the Petitioner will not accept the work order at that stage.

8. Mr. Panja, Learned Counsel for the Petitioner submitted that since there was no completed contract between the parties, the notice issued by the MCL stated to be a risk purchase notice (Annexure-17), was wholly unwarranted. He further submitted that the MCL having not agreed to accept the OMNIBUS Bank Guarantee, the Petitioner withdrew itself from the negotiation by clearly stating in its letter dated 10.3.2004 (Annexure-10) that the Petitioner is unable to accept the order. He further submitted that in the circumstances of the case, it cannot be concluded that the Petitioner accepting the supply order failed to supply the materials as per the said order and, therefore, the MCL has acted illegally and wholly without jurisdiction in issuing the letters under Annexures-19 and 19(A), both dated 25.10.2004.

9. Mr. Sanjit Mohanty, Learned Counsel appearing on behalf of the MCL, on the contrary, submitted that on the Petitioner receiving the supply order dated 30.12.2003, there was a completed contract between the parties since the offer made by the Petitioner was accepted by the MCL on issuing the said supply order. According to Mr. Mohanty, the contract was completed when the offer made by the Petitioner was accepted and communication of such acceptance was made.

10. Mr. Panja, Learned Counsel, however, submitted that the Petitioner clarified in its tender/offer that the OMNIBUS Bank Guarantee given to the Coal India Limited should be accepted as Performance Bank Guarantee. Any order placed by the MCL without agreeing to the said offer of the Petitioner cannot be treated to be an acceptance of the offer. It is also clear from the various correspondences made between the parties from where it would be seen that the MCL was repeatedly insisting upon the Petitioner to submit Performance Bank Guarantee and the Petitioner repeatedly declining to do so. He further submitted that at such a stage, the Petitioner having withdrawn itself from the dialogue by clearly stating that the supply order is not acceptable to it, the question of a completed contract does not arise.

11. Section 4 of the Indian Contract Act, 1872 provides that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made and the communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him so as to be out of the power of the acceptor. Section 7 of the Contract Act provides that in order to

convert a proposal into a promise, the acceptance must be absolute and unqualified. The corollary, therefore, is that an acceptance with a variation or a condition is not an acceptance and is merely a counter proposal, which must be accepted by the original proposer before a contract is made.

12. It is, therefore, to be examined as to whether the formal order placed by the MCL on the Petitioner by its letter dated 30.12.2003 amounts to an unqualified and unconditional acceptance of the offer made by the Petitioner.

13. The facts as narrated above would show that the Petitioner in its tender stated that in lieu of Performance Bank Guarantee, the OMNIBUS Bank Guarantee given by it, to the Coal India Limited should be accepted as sufficient compliance to Clause 21 of the Tender Document. In the letter dated 30.12.2003 by which formal order was placed by the MCL on the Petitioner, the MCL specified the terms and conditions with regard to supply of the said articles and in Clause 20 thereof, it was stated as follows:

20. PERFORMANCE BANK GUARANTEE: You shall submit a Bank Guarantee for 10% landed value of the order (i.e., Rs. 5.13, 63, 388.99) inclusive of Taxes, Duties, Freight and Insurance and P & F to cover both satisfactory performance and warranty. The 10% Bank Guarantee shall remain valid for 12 months from the date of commissioning or 18 months from the date of receipt and acceptance of materials at site, whichever occurs earlier. The said Bank Guarantee will either be released or extended after the above period as deemed fit (CIL BG. format enclosed at Annexure-B).

In the last paragraph of the said order/letter, it was mentioned as follows:

Two copies of the Supply order are enclosed herewith. Please return to us one copy duly accepted, signed and stamped as a token of acknowledgment and acceptance within ten days of issue of this order. In case no reply is received it will be presumed that you have accepted the order.

14. Admittedly, the said letter was received by the Petitioner on 12.1.2004. As per the above quoted paragraph of the order placed by the MCL, it was stipulated that one copy of the supply order was to be duly accepted, signed and stamped and returned as a token of acknowledgment and acceptance within ten days of issue of the said order and in case no reply was received, it would be presumed that the same has been accepted. The Petitioner, however, on the same day when it received the said order, i.e., on 12.1.2004 wrote back to the MCL that the term of Performance Bank Guarantee as stipulated in the said order is not acceptable to it.

15. We, therefore, find that the contract would have been completed if the Petitioner would have accepted, signed, stamped and returned one copy of the said supply order within ten days from the date of receipt thereof or if the Petitioner would have remained silent. But that was not the case, as stated above. The acceptance, signing, stamping and returning of the order or not

replying to the said order was, therefore, a pre-condition for making the contract a completed one.

16. In view of the above analysis, we find that there was no completed contract between the parties and when the matter was in a fluid stage, the Petitioner withdrew itself from the offer made by it. The irresistible conclusion, therefore, is that the MCL could not have issued the notice under Annexure-17 and could not have taken action as mentioned in Annexures-19 and 19(A) of the writ petition.

17. We, accordingly, quash the said letters dated 10.6.2004, 25.10.2004 and 25.10.2004 under Annexures- 17, 19 and 19(A) respectively and as a consequence, direct the MCL not to take any step pursuant to the said letters under Annexures-17, 19 and 19 (A) against the Petitioner.

18. The writ petition is accordingly allowed, but in the circumstances without any cost.

S.B. Roy, C.J.

19. I agree