

Union of India and Others

Vs

N. K. Private Limited and Another

Civil Appeal No. 1067 of 1971

(K. S. Hegde, P. Jagmohan Reddy, K. K. Mathew JJ)

11.02.1972

JUDGMENT

JAGANMOHAN REDDY J. -

1. This appeal is by special leave. The question for consideration is whether there is a binding, valid and concluded contract between the appellants and the respondents. On an application filed by the respondents under Section 20 of the Arbitration Act a single Judge of the Delhi High Court directed the appellants to file the arbitration agreement to refer the disputes between the parties arising under the contract to arbitrators. An appeal against that order to a Division Bench was dismissed.

2. In order to understand the scope of the controversy, a few facts may be stated. On March 21, 1968, a notice of Global Tender No. 1 of 1968 was issued by the President of India, therein referred to as the Government of India, Ministry of Railways (Railway Board), proposing to sell 80,000 tonnes of surplus released serviceable and scrap rails, as per details given in the schedule thereto, to established buyers abroad or their accredited agents. It invited offers in respect thereof to be addressed to the President of India and sent to Shri R. N. Mubayi, Director, Railway Stores, Railway Board. With this notice were enclosed the general conditions of tender, special conditions of tender, instructions to tenderers, including proforma for performance guarantee and deed bonds as in Clauses 4-A and 4-B, shipping terms and schedule of stocks available as on March 1, 1968. In the general conditions the seller was defined to mean the President of India acting through the Director, Railway Stores, Railway Board, unless the context otherwise provided. The delivery f.o.b. (free on board) / f.a.s. (free alongside ship) invoices and freight were dealt with in Clause 9. The default clause in Clause 11 provided that where a buyer fails to execute the contract the seller was to have power under the hand of the Director, Railway Stores, Railway Board, to declare the contract at an end at the risk and cost of the buyer. The special conditions of tender dealt with prices, quotations, payments, terms of shipment, weighing, basis of sales and handling at ports, force majeure, arbitration, legal jurisdiction, acceptance of offers and title and risk. In the instructions to tenderers, the tenderers were requested to quote their highest offer indicating the price per metric tonne inclusive of export incentive of 5% of f.o.b. value currently applicable as guarantee by the Government of India which will always be to the seller's benefit for handing over of the rails f.o.b. docks / f.a.s. / f.o.b. Indian Port or c.i.f. destination port. The tenderer was required to offer comments clause by clause on the 'general conditions of tender' and the 'special conditions of tender' either confirming acceptance of the clauses or indicating deviation therefrom, if any. It was further provided that the contract will come, into force from the date the buyers' letter of credit is accepted by the sellers' nominee. In Clause 4-A of these instructions the proforma deed bond was given which was to be signed by the tenderer and the acceptance was to be signed for and on behalf of the President of India by the persons designated for the purpose. Similarly, Clause 4-B gave the

proforma performance guarantee bond to be addressed to the President of India executed by the tenderer and accepted for and on behalf of the President of India by the person so designated. These terms and conditions also set out the shipping terms in detail, though a few of them were also mentioned in the special conditions under the headings Shipment, Terms of Shipping and Receiving Notice. It appears that the terms and conditions enclosed with the tender notice annexed to the petition filed in court were not full and complete. Consequently the appellant has annexed a true copy of the enclosures with the special leave petition and prayed that this may be admitted in evidence. As there was no dispute in respect of the contents thereof, we have allowed this prayer because without them it is not possible to arrive at a just conclusion.

3. Pursuant to this tender notice, the respondents by their letter, Ex. 'B', dated May 21, 1968 offered to buy 80,000 tonnes of rails at \$ 45.1 per tonne f.o.b. Indian Ports on the terms and conditions set out therein. In reply thereto, by a letter, dated May 25, 1968, the Deputy Director, Railway Stores, Railway Board, P. C. Oak in Para 1(6) categorically stated by reference to Para 14 of the conditions of the letter of the respondents that as shipping terms have financial implications they were requested to indicate with reference to the tender which particular clauses they desire to re-negotiate and settle. In Para 2 it was stated that the offer of the respondents was not addressed to the President of India as required under Clause 1(3) of the Instructions to the Tenderers and, therefore, the respondents were required to confirm that their offer was deemed to have been addressed to the President of India and is open for acceptance on behalf of the President. It was further stated in Para 4 that they should send the reply addressed to the President of India through the Director of Railway Stores, Railway Board covering all the points indicated therein, to reach them not later than May 28, 1968. No reply was, however, received by the time indicated in the letter of the appellants and while so stating another letter was addressed to the respondents on June 3, 1968, by C. Parasuraman for Secretary, Railway Board, seeking further clarification in respect of items Nos. 26 and 27 of the offer contained in the aforesaid letter of the respondents, dated May 21, 1968. There were also two other clarifications in respect of the weight of the tonne for which \$45.1 was quoted and the option to transfer the contract in the name of the foreign principles which it was stated, could not be agreed to straightaway unless and until they knew the names of the foreign principles and their willingness to enter into a legal binding guarantee of all the terms and conditions of the contract. The respondents wrote subsequently to the Director, Railway Stores on the 15th June, 29th June, 8th July and the three letters on 10th July and one on the 15th July, 1968, some of which were written after a discussion with the director of Railway Stores in the presence of the Director of Finance, Mr. Datta. On the same day as the letter of 15th July was sent by the respondents P. C. Oak signing for the Secretary of the Railway Board, addressed the following letter of acceptance, No. 68/RS(G)/709.10, to the respondents :

"Subject-Tender No. 1 of 1968 for Export sale of used re-rollable and relayable steel rails.

Reference - Your letters Nos. Nil,

dated May 21, 1968, June 15, 1968, June 29, 1968, July 8, 1968, July 10, 1968 and July 15, 1968.

Kindly be advised that your offer (at \$39 per long ton f.o.b. Indian Port for export and Rs. 458/- per long ton for indigenous consumption) with terms and conditions referred to in your above letters is hereby accepted. Formal contract will be issued shortly.

2. Kindly acknowledge receipt.

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Yours faithfully,

(Sd.)

P. C. Oakfor Secretary,

Railway Board."

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4. Thereafter, it is alleged that several draft agreements were exchanged regarding which there is a dispute but ultimately before us it is not contested that a draft agreement, which the appellants say is the 5th draft, but according to the respondents is the final draft, was handed over to respondents by P. C. Oak on August 27, 1968, but this, however, was not signed. Clause 2 of this draft agreement states that the contract has been concluded by the issue of seller's letter No. 68/RS(G)/709/10, dated July 15, 1968, to the buyers; that the term of the contract shall be three years from November 1, 1968 to October 31, 1971; that the buyers reserve the right to act upon the contract any time before November 1, 1968, and start inspection and take delivery of the goods but this will not in any manner affect the terms of the contract. Even thereafter there was further correspondence between the parties. By Letter, dated September 18, 1968, the respondents wrote to the Director, Railway Stores, agreeing to several other matters to be included in the final draft and requested him to issue the 'final contract' without delay. On September 21, 1968, the respondents again wrote to the Director, Railway Stores, complaining that the information provided by the various Railways was not complete and requested him to contact the various Railways and obtain the required information as soon as possible. After the receipt of this letter the Joint Director, Railway Stores (G), wrote to the General Manager (S), All Indian Railways with a copy to the respondents calling for the required information. In that letter the Joint Director stated thus :

"..... the Board have finalised an export-cum-internal sale contract with M/s. N.K. (P.) Ltd., New Delhi for a period of three years, entitling them to export stock of such surplus rails available with the Railways. The detailed terms and conditions of the contract will be apprised to you when finalised."

On October 23, 1968, C. Parasuraman, for Secretary, Railway Board, replied to the letter of the respondents of September 21, 1968, stating that it was not correct that their office has assured them that it would arrange to get the missing details from the concerned C.O.Ss. After this letter two other letters were written by the respondents to the Director, Railway Stores, dated 7th & 23rd November 1968. In the first letter it was stated thus :

"In pursuance of your invitation we submitted our tender for purchase of used relayable and re-rollable steel rails on May 21, 1968. After some negotiations the terms of the contract were finalised and the Secretary, Railway Board by his letter No. 68/RS(G)/709/10, dated July 15, 1968, accepted our offer and concluded the contract. We were informed that the formal contract will be issued shortly. A draft of the formal contract was handed over to us on August 27, 1968. In our letter of September 18, 1968, some agreed terms were set out which had to be incorporated in

the formal contract. Since the acceptance of our offer we have made all arrangement for the sale of the material. We beg to inform you that out of the total quantity of 88,936 tonnes of rails already offered to us for our approval we approve and shall take delivery of 53,807 tonnes as per list enclosed herewith. The above quantity may kindly be reserved for us and arrangement be made for their delivery in terms of the contract....."

In the second letter, the respondents complained that though the contract for sale of used rerollable and relayable steel rails was concluded on July 15, 1968, they regretted that they had not received the formal contract so far and requested that it should be sent without any further delay. In the last paragraph of that letter, the respondents complained that they came to know that some of the Railways who were holding stocks are selling the steel rails which they have no right to do and requested them to stop such sales. To this, P. C. Oak for Secretary, Railway Board, replied :

"Kindly refer to correspondence resting with your letters, dated July 26, 1968, September 18, 1968 and No. RB/Rails/68/1/114, dated December 2, 1968. Your contention contained in your letter No. RB/Rails/68/1, dated November 23, 1968, that the Railway Board is not authorised to sell rails to other parties because of their having concluded a contract with you is factually incorrect. No doubt, letter No. 68/RS(G)/709/10, dated July 15, 1968, indicated an intention to enter into a contract with you, but subsequent to this, discussions had been held with you over a number of sitting on July 20, 1968, August 12, 1968, August 26, 1968, August 27, 1968, culminating in your letter, dated September 18, 1968. This would amply indicate that no agreement had been reached on vital terms and conditions, and the question of the existence of a concluded contract does not arise...."

5. The respondents replied to this letter by their letter, dated January 25, 1969, expressing surprise and contesting the stand taken by the Railway Board. In the petition of the respondents filed in Court after setting out the relevant correspondence leading up to the letter of acceptance of P. C. Oak, dated July 15, 1968, it was stated that letter was a definite acceptance of the offer and constitutes a binding and valid contract between the parties. With respect to the draft agreement of August 27, 1968, handed over to the respondents embodying the agreement the parties, the averment was that the then Acting Director of Railway Stores desired certain additional terms to be embodied in the terms that were agreed to. The additional terms were agreed to by the plaintiffs (respondents) by their letter to the Director, Railway Stores, dated September 18, 1968. In Para 16 it was further alleged that after the letter of acceptance by the appellants the then Acting Director of Railway Stores and the Director of Finance proposed to the plaintiffs that the price offered by them should be increased or in the alternative certain alterations be made in the agreed terms, but the plaintiffs having justly refused to do so, the 2nd defendant (C. Parasuraman) falsely wrote to the plaintiffs on January 15, 1969, that no concluded contract had taken place and that the Railway Board was, therefore, not precluded from selling rails to other parties.

6. The appellants in their written statement, raised a preliminary objection, namely, that the petition was misconceived as there was no arbitration agreement between the parties and so the question of enforcing the arbitration clause in the alleged contract did not arise. It also reiterated its stand earlier taken that the letter, dated July 15, 1968, written by Oak on behalf of the Secretary, Railway Board, was not a letter of acceptance of the offer of the respondents so as to amount to a concluded contract binding on the Union of India nor could it be construed as such in view of the mandatory provisions of Article 299 of the Constitution of India. The contention was that unless and until a formal

instrument of contract was executed in the manner required by Article 299 of the Constitution and by the relevant notifications, there would not be a contract binding on the Union of India and at any rate no such agreement was entered into as it was alleged that though interviews had taken place at various times between the plaintiffs and the several officers of the Railway Board, no agreement had been reached on vital terms and conditions.

7. Two submissions were urged on behalf of the appellants, namely -

(1) that apart from the contention relating to Article 299 of the Constitution, there was no concluded contract between the parties, because : (a) the essential terms were not agreed to between them on the date when the acceptance letter was issued by P. C. Oak on July 15, 1968, and (b) even if there was an acceptance as alleged, that acceptance was conditional upon a formal contract being executed by the appellants;

(2) that the three mandatory requirements of Article 299 of the Constitution for a valid and binding contract made in exercise of the executive power of the Union have not been complied with, namely : (a) that the contract was not expressed to be in the name of the President, nor (b) was it executed on behalf of the President, or (c) by a person authorised to execute it on his behalf.

8. The crucial question which arises for determination is whether there was a concluded contract, and if there was one, whether the mandatory requirements of Article 299 of the Constitution for entering into a valid and binding contract have been satisfied ? It is now settled by this Court that though the words 'expressed' and 'executed' in Article 299(1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India. A contract whether by a formal deed or otherwise by persons not authorised by the President cannot be binding and is absolutely void.

9. We do not for the present consider it necessary to go into the question whether and to what extent the requirements of Article 299 have been complied with in this case. What we have to first ascertain is whether apart from the contention relating to Article 299, a concluded contract has come into existence as alleged by the respondents. Before us detailed arguments were addressed on behalf of the appellants to show that notwithstanding the letter of acceptance of July 15, 1968, no concluded contract had in fact come into existence and though that letter accepted certain terms, there were other essential terms of the contract which had to be agreed to and were the subject-matter of further negotiations between the parties; that it was the intention of the parties that all those terms were to be embodied in a formal contract to be executed which contract alone was to be binding between the parties; and that in any case the letter of acceptance and the subsequent letters were not by the Director of Railway Stores but by the Secretary to the Railway Board who was not a person authorised to enter into the agreement between the President of India represented by the Ministry of Railways and the respondents. On the other hand, the stand taken by the respondents was that all the essential terms of the contract were agreed to and the contract was concluded on July 15, 1968, though at the instance of the Director, Railway Stores further terms with respect to the execution of the contract were the subject-matter of negotiations between the parties and in any case these did not pertain to the essential terms and could not on that account detract from the binding nature of a concluded contract. It was also contended that the letter of acceptance by P. C. Oak though signed on behalf of the Secretary, Railway Board was in fact on behalf of the said Board which was authorised to enter into such a contract. It is in our view unnecessary to consider

the several contentions as to whether all the essential terms of the contract had been agreed to or that the contract was concluded by the acceptance letter of July 15, 1968, or whether the parties intended it to a terms of the contract that a formal contract should be entered into between them in order to bind the parties. In this case, we are of the view that the Secretary to the Railway Board, on whose behalf the offer of the respondents was accepted, was not the person authorised to enter into a contract on behalf of the President of India. As can be seen from the various documents already extracted that the tender notice invited offers to be addressed to the President of India through the Director of Railway Stores, Railway Board. Under the general conditions the seller was defined to mean the President of India acting through the Director, Railway Stores and in the default clause it was provided that where the buyer fails to execute the contract, the seller shall have power under the hand of the Director, Railway Stores, Railway Board, to declare the contract at an end. In the letter written by Oak on May 25, 1968, as earlier noticed, it was pointed out to the respondents that their offer was not addressed to the President of India as required under Clause 1(3) of the Instructions to the Tenderers and, therefore, the respondents were required to confirm that their offer can be deemed to have been addressed to the President and is open for acceptance on behalf of the President and their reply should be addressed to the President of India, through the Director of Railway Stores, Railway Board. Even the draft contract, dated August 27, 1968, in terms of which the Respondent were insisting on a final contract to be issued to them by the appellants was to be executed by the respondents as buyers on the one part and the President of India acting through the Director, Railway Stores, Ministry of Railways (Railway Board) as the sellers, on the other. There is little doubt that the only person authorised to enter into the contract on behalf of the President is the Director, Railway Stores. It is true that the notification of the Ministry of Law issued in exercise of the powers under Clause 1 of Article 299 of the Constitution shows that the President directed the authorities named therein to execute on his behalf the contracts and assurances of property specified therein. But notwithstanding this, the President is fully empowered to direct the execution of any specified contract or class of contracts on ad hoc basis by authorities other than those specified in the said notification. This Court had in *Seth Bikhraj Jaipuria v. Union of India*, ([1962] 2 SCR 880 : AIR 1962 SC 113 : (1962) 2 SCJ 479) earlier held that the authority to execute contracts may be conferred on a person not only by rules expressly framed and by formal notifications issued in this behalf but may also be specifically conferred. In this case the letter of acceptance, dated July 15, 1968, was on behalf of the Secretary, Railway Board, who is not authorised to enter into a contract on behalf of the President.

10. It is contended that Clause 43 of Part XVIII and Part XLI empower the Secretary, Railway Board to enter into such contracts. Clause 43 of part XVIII provides that all deeds and instruments other than those specified in that part may be executed by the Secretary or the Joint Secretary or the Deputy Secretary or the Under Secretary in the Railway Board or a Director, Joint Director, Deputy Director or Assistant Director in the Railway Board. It is submitted that as nothing has been specified in Part XVIII relating to the contract of the type we are considering, the Secretary, Railway Board, is authorised to enter into a contract on behalf of the President. This submission is untenable because Clause 9 specifically provides for the contracts connected with the sale of scrap, ashes, coal, dust, empty containers and stores. The tender, it will be observed, is for rails which are scrap as well as rerollable and relayable but it is urged that relayable rails are stores nor can they be considered as scrap and as these are not covered by Clause 9, the Secretary, Railway Board is fully empowered by the President to enter into a contract on his behalf. We cannot accept this argument because in our view relayable rails are part of the stores. It may be that some of these rails which are part of the stores may be considered to be in a condition which the authorities concerned think should be disposed of. The contracts relating to the goods of the nature specified in the tender notice

are, therefore, dealt with by Clause 9, as such Clause 43 will have no application. Part XLI empowers the Secretaries to the Central Government in the appropriate Ministries or Departments to execute any contract or assurances of property relating to any matter whatsoever and is in these terms :

"Notwithstanding anything hereinbefore contained any contract or assurance of property relating to any matter whatsoever may be executed by the Secretary or the Special Secretary or the Additional Secretary or a Joint Secretary or a Director, a Deputy Secretary to the Central Government in the appropriate Ministry or Department and in the case of...."

The contention on behalf of the respondents is that since Railway Board is a Department of the Government, the Secretary to the Department is authorised to enter into a contract under the above provision. This submission, in our view, is equally misconceived because reading the above requirement carefully it will appear that the persons there mentioned should be Secretary, Special Secretary etc., to the Central Government in the appropriate Ministry or Department and not that the Secretary to any Department or office of the Government of India is empowered thereunder. It is however contended that the Secretary to the Railway Board is a Joint Secretary to the Government of India and as such under the above provision the acceptance letter should be considered to have been executed on behalf of the President. Even this submission lacks validity because as pointed out on behalf of the appellant, at the relevant time the Secretary to the Railway Board did not have any status as Secretary to the Central Government. The status of a Joint Secretary was only conferred on him by a notification by the Government of India in the Ministry of Railways for the first time on September 15, 1969, with effect from that date. An affidavit of the Deputy Secretary to the Railway Board (Ministry of Railways) has been filed before us setting out the above fact and enclosing the said notification. Then again it was urged that the members of the Railway Board were Secretaries to the Central Government and hence the Board on whose behalf the Secretary communicated the acceptance could enter into a binding contract. This submission also is without force because there is no material before us to conclude that the Board was so authorised. In these circumstances, even if the correspondence shows that the formalities necessary for a concluded contract have been satisfied and the parties were ad idem by the time the letter of acceptance of July 15, 1968, was written, about which we do not wish to express any opinion, there is no valid or binding contract because the letter of acceptance, on the evidence before us, is not by a person authorised to execute the contracts for and on behalf of the President of India.

11. On the evening before the day the judgment in the case was due to be delivered, an application dated February 7, 1972, was filed enclosing an affidavit of R. N. Mubayi who was Director, Railway Stores, between December 18, 1965 to September 30, 1969, as also an affidavit of R. B. Lal, Managing Director of the Respondent No. 1 to take them in evidence and consider the facts stated therein before judgment is delivered, and if necessary, to call for the file and give a re-hearing. The affidavit of Mubayi to his Deputy Director, Shri P. C. Oak to convey the acceptance of the offer of M/s. N.K. Private Limited, that the acceptance was conveyed by Shri P. C. Oak to the said company. The affidavit of R. B. Lal says that though the affidavit filed by P. Lal, Deputy Secretary, Railway Board stating that the Secretary, Railway Board, did not have status of Secretary, Special Secretary, Additional Secretary, Joint Secretary or Deputy Secretary to the Government of India in the Ministry of Railway, he has not denied that the Secretary did not have the status of a Director. It is further submitted in the affidavit that the Secretary of the Board had the status of a Director at the relevant time and as mentioned in Part XLI of the Notification of the Ministry of Law, 'a Director' is authorised to accept offers.

12. Apart from the question whether we should admit additional evidence at this stage in this case and though we had rejected an earlier submission to call for the files, having regard to the facts stated by R. N. Mubayi, Director of Railway Stores during the relevant period that it was he who had asked P. C. Oak to accept the offer and had so endorsed it on the file, as also the affidavit of R. B. Lal that the Secretary to the Board was the Director of Railway Stores, we withheld the judgment and called for the file to satisfy ourselves. The file has been submitted to us by the appellants along with an affidavit of R. Srinivasan, Joint Director, Railway Board in which it is categorically averred that at the relevant time, namely, July 15, 1968, the Secretary Railway Board did not have the status of the Director under part XLI of the Notification of the Ministry of Law or at all. A perusal of the relevant file relating to the letter of acceptance would show that on July 15, 1968, Shri Oak made the following endorsement : "Reference to Board's orders at page 38/N, draft letter accepting M/s. N.K. (P.) Ltd., offer is being issued today. D.R.S. may kindly see before issue", and this endorsement was merely signed by R. N. Mubayi. We are not here referring to the other proceedings on the file as to whether the execution of a formal contract was a condition precedent and as one of the terms of the contract but even the above endorsement does not show that the letter of acceptance of July 15, 1968, was issued on the orders and directions of Mubayi as alleged by him in the affidavit. What it in fact shows in that it is the Board that issued the orders of acceptance and that the acceptance letter was only to be seen by him. Even the draft letter issued does not contain his initials or his signature in token of his having seen or approved it. The letter of acceptance not having been issued on the orders of the Director, Railway Stores, there was no concluded contract as on that date, by a person authorised to enter into a contract. There is also nothing to show that the Secretary to the Board was the Director, Railway Board as further alleged in the affidavit of R. B. Lal.

13. In this view the appeal is allowed and the application under Section 20 of the Arbitration Act is dismissed but there will be no order as to costs of the appellants. On the other hand, we direct the appellants to pay the costs of the respondents because special leave was granted on condition that the petitioner will pay the costs of the respondents in this appeal in any event.

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