

M/s. India Meters Ltd., Madras

Vs

Punjab State Electricity Board and Others

Civil Appeal No. 3496 of 1992

(N. M. Kasliwal, K. Ramaswamy JJ)

02.09.1992

JUDGMENT

KASLIWAL, J.

1. Special leave granted.

2. This appeal by M/s India Meters Ltd., hereinafter referred to as the appellant is directed against the judgment of the High Court of Judicature at Madras dated April 23, 1991.

3. The Punjab State Electricity Board issued a tender notice by publication in the newspaper Indian Express dated February 24, 1978 inviting sealed tenders for supply of house service electricity meters and Amps. The appellant offered to supply their standard meter type OB-7 and stipulated their own terms of payment and indicated that they would not submit a bank guarantee as demanded in the tender notice. The appellant also sent a telegram on June 2, 1978 reiterating the offer to supply the meter, keeping all their terms and conditions unaltered.

4. The Board vide their communication dated July 27, 1978 sent a purchase order-cum-contract for supply of 75,000 meters. In this purchase order no reference was made to the terms and conditions of payment and the inability to furnish bank guarantee by the appellant. In clause (20) of the purchase order the Board further mentioned that the meters supplied by the appellant would be accepted subject to their furnishing of samples. In clause (26) it was mentioned that disputes, if any would be referred to the sole arbitration of a nominee of the Board. The appellant by letter dated August 19, 1978 informed the Board that samples had already been sent, and that fresh samples could not be insisted upon, and called upon the Board to send their acceptance of the offer made by the appellant on the basis of the terms laid down by the appellant. The Board by its letter dated August 30, 1979 sent a reply stating that exemption from bank guarantee was not acceptable to them and called upon the appellant to send the samples again. The appellant then vide their letter dated November 7, 1978 informed the Board that they had been granted exemption from furnishing security deposit and bank guarantee for the various purchase order placed by Tamil Nadu Electricity Board and Haryana State Electricity Board. It was also stated that the factory of the appellant was under revival and it has been declared as a relief undertaking by the Government of Tamil Nadu, It was further mentioned that in spite of explaining special circumstances that appellant is a sick industry and is striving to revive with support from Government institutions, it was understood that the Punjab State Electricity Board was unable to agree to the original offer of the appellant and repeated requests made regarding acceptance of a bank guarantee of rupees one lakh towards 100 per cent payment and security deposit and in the absence of such concurrence the appellant was not in a position to take further action in the tender and production planning had been dropped.

Thereafter the Board by letter dated December 23, 1979 informed the appellant that the Board had appointed Shri A. N. Sharma, Superintending Engineer "T" & 'MR' Punjab State Electricity Board (respondent 2) as an arbitrator. On January 25, 1980 the appellant received a copy of the claim made by the Board before the arbitrator claiming Rs. 48,61,458 as damages for the alleged breach of contract made by the appellant.

5. The appellant then filed an application under Section 33 of the Arbitration Act alleging that there was no completed contract between the parties. The offer made by the appellant was subject to their own terms and conditions which were not accepted by the Board. The terms and conditions for the supply of the meters as made by the Board were not accepted by the appellant at any time. There was no consensus ad idem and there was no completed contract. Since there was no completed contract between the appellant and the Board, there was no arbitration agreement between the parties. The appellant in these circumstances prayed for an order declaring that there was no arbitration agreement between the appellant and the Board. It was also prayed that a permanent injunction may be granted restraining the arbitrator from proceeding with the arbitration.

6. The learned Subordinate Judge by his order dated September 5, 1981 allowed the application filed under Section 33 of the Arbitration Act (hereinafter referred to as the 'Act') and restrained the arbitrator, respondent 2 from further proceeding in the arbitration. The Board aggrieved against the order of the learned Subordinate Judge filed an appeal before the High Court under Section 39 of the Act. The High Court though agreed with the objection raised on behalf of M/s India Meters Ltd., that appeal under Section 39(1) of the Act was not maintainable, but took the view that the matter could be considered as a revision under Section 115 of the Civil Procedure Code. The High Court accepted the plea of the Board in this regard and ordered that the appeal filed in the case may be converted and treated as revision filed under Section 115 CPC and thereafter examined the merits of the case. The High Court allowed the revision after holding that the appellant had accepted the offer of the Board and thereafter the Board vide their letter dated July, 27, 1978 had placed the purchase order-cum-contract for the supply of 75,000 meters. The High Court further held that the subsequent correspondence regarding the security deposit, mode of payment and samples were merely consequential steps taken in furtherance of the implementation of the contract and they do not in any manner undermine the contract which otherwise stood concluded between the parties as could be seen from Ex A-7 (dated July 27, 1978) and Ex. A-8 (dated November 7, 1978). The High Court ultimately set aside the order of the Subordinate Judge and directed that the arbitrator shall be at liberty to proceed with the matter after giving sufficient and effective opportunity to the appellant. M/s India Meters Ltd., aggrieved against the judgment of the High Court has filed the above appeal.

7. We have heard learned counsel for the parties and have thoroughly perused the record. The parties have placed on record the entire correspondence which took place between the parties necessary for resolving the controversy. The appellant in their letter dated March 24, 1978 itself in clauses (10) and (12) mentioned as under :

Clauses (10) Payment.

We request you to make 100 per cent payment along with full payment of sales tax and excise duty etc., against R/R or L/R through Bank. We further request that the requirement of furnishing a bank guarantee equivalent to 1 per cent value of the order valid for two months from the date of last dispatch may please be waived of as a special a case. M/s Bharat Heavy Electricals Limited, a Govt. of India undertaking, have come forward to review this 'Sick Unit' and in the present financial position of

the company, this requirement may not be insisted upon.

Clause (12): Earnest Money Deposit and Security Deposit

M/s Bharat Heavy Electrical Limited, a Government of India undertaking has since taken over the management of India Meters Limited, being a sick unit, earnest money deposit has already been exempted by all the other Electricity Boards like Tamil Nadu Electricity Board, etc. It is requested that you may kindly exempt us from making the above mentioned payment as a special case. In this connection, we invite your kind attention to our letter No. SD/PSEB/632/78 dated March 7, 1978 requesting you to exempt us from making the payment."

8. The appellant while agreeing to supply the meters had clearly mentioned though in the form of request, that the appellant was a sick unit and M/s Bharat Heavy Electricals Ltd., a Government of India undertaking has come forward to revive the sick unit and as such in the present financial position of the company the requirement of furnishing a bank guarantee may not be insisted upon. The Board without settling the above mentioned condition placed a purchase order-cum-contract vide their letter dated July 27, 1978 reiterating their own terms of payment which included furnishing of bank guarantee. The appellant then vide their letter dated August 19, 1978 again requested the Board for consideration and favorable action in the following terms.

"We had also vide our offer No. SD/PS&B/718/D/23-4-1978 requested you for 100 per cent payment through bank against railway receipt, exempting us from furnishing a separate deposit towards the same. Further we had agreed to furnish the necessary security deposit as required by you. Hence, we may now request once against to kindly exempt us from furnishing a bank guarantee against 100 per cent payment."

9. It was further mentioned that the Board may accept a permanent bank guarantee for a value of rupees one lakh only which could go a long way in helping the appellant unit. As regards sample it was clearly mentioned in this letter that the appellant had submitted samples already against the tender and as such requested the Board not to insist on fresh samples again. The Chief Engineer of the Board then vide letter dated August 30, 1978 clearly mentioned that as regards the terms of payment the request of the appellant regarding the exemption from furnishing a bank guarantee against 100 per cent payment and furnishing a permanent bank guarantee rupees one lakh towards 100 per cent payment etc., had been considered and rejected. As regards the samples it was mentioned in this letter that the appellant had submitted only one sample meter of 2.5 amps rating against tender enquiry No. Q-2185, whereas order had been placed for the supply of meters of 5-10 amps and 10-20 amps ratings. It was thus again requested to submit the samples of the above capacities at once in accordance with clause (20) as already requested in the earlier letter. The Superintending Engineers also by another letter informed the appellant that the samples may please be got approved from their office before commencing the supply as mentioned under clause (20) of the purchase order. The appellant then vide their letter dated November 7, 1978 addressed to the Chief Engineer again took the stand that the appellant factory was under revival and had been declared as a relief undertaking by the Government of Tamil Nadu and that they had conveyed their acceptance to furnish a permanent bank guarantee for a value of rupees one lakh towards 100 per cent payment and security deposit. It was further mentioned that in the absence of concurrence on the above condition the appellant was not in a position to take any further action in the tender and production planning has been dropped. As regards the supply of the sample meters, the appellant reiterated its earlier stand. Thereafter the Board did not make any further correspondence

nor agreed to the counter offer made by the appellant in respect of the furnishing of the bank guarantee and sending the samples and the Board resorted to the enforcement of the arbitration clause and appointed respondent 2 as an arbitrator.

10. We have taken into consideration the entire correspondence made between the parties referred to above and we are clearly of the view that there was no concluded contract between the parties and as such the respondent Board was not entitled to enforce the arbitration clause. The High Court was not correct in holding that the subsequent correspondence regarding the security deposit, mode of payment and samples were merely consequential steps taken in furtherance of the implementation of the contract and the contract already stood concluded between the parties. The mode of payment which included the furnishing of bank guarantee was an important term and condition of the contract as well as the furnishing of the samples. The appellant in its offer made vide their first letter dated March 24, 1978 had clearly put their own terms and conditions as regards the furnishing of bank guarantee and the Board never concurred on those terms, rather in their letter dated August 30, 1978 clearly turned down the request of the appellant. Thus there was no concluded contract between the parties. It is not disputed that the appellant at the relevant time was a sick unit and the steps were being taken to revive the same through Bharat Heavy Electrical Limited, a Government of India undertaking and in those circumstances if the appellant was insisting on being given exemption from furnishing bank guarantee, it cannot be said that its action was unjustified. Thus in the circumstances mentioned above we do not agree with the view taken by the High Court.

11. In the result we allow this appeal, set aside the judgment of the High Court dated April 23, 1991 and affirm the decision of the Subordinate Judge. In the circumstances of the case we direct the parties to bear their own costs.

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