

SUPREME COURT OF INDIA

Vedanta Limited

Vs.

Emirates Trading Agency LLC

C.A.No.5448-5449 of 2017

(Ranjan Gogoi and Navin Sinha,JJ.,)

21.04.2017

JUDGMENT

Navin Sinha,J.,

SLP(Civil)No.34084-34085 of 2015

1. Leave granted.

2. The Respondent's Suit for breach of contract and damages was decreed on 16.04.2013 by the Principal District Court, Thoothukudi in Original Suit No. 73 of 2009 for a sum of Rs.5,25,55,460/- with interest @ 8% from the date of the plaint till realisation. First Appeal by the Appellant was dismissed by the High Court on 04.02.2014. In Special Leave Petition (Civil) Nos.12687-12688 of 2014 preferred against the same, liberty was granted on 12.5.2014 to approach the High Court in the review jurisdiction, on the issue whether the agreement dated 26.10.2007 between the parties constituted a concluded contract or matters rested at the stage of a proposal and a counter proposal only. Liberty was further granted to approach this Court again, if aggrieved. Review application No. 160 of 2014 was dismissed by the High Court on 09.07.2015. Thus, the present appeal.

3. Sri C.A. Sundaram, learned Senior Counsel appearing for the Appellant, submitted that the agreement dated 26.10.2007 was a draft proposal from the Respondent regarding supply of phosphoric acid by the Appellant in a specified duration. The Appellant made a counter proposal to the Respondent; both with regard to the quantity of supplies and the duration of supply. No concluded contract had arisen between the parties in absence of any final agreement having been executed. The draft agreement was never signed, stamped and returned by the Appellant, in confirmation, as asked for by the Respondent. The defence was taken specifically in the written statement. The Trial Court and the First Appellate Court, without proper appreciation of the draft agreement, arrived at a presumptive

4. This Court on 12.05.2014, after perusal of the agreement dated 26.10.2007, having been

satisfied with regard to lack of proper consideration of the issue, granted liberty to the Appellant for preferring a review application before the High Court. In the review application, objections were specifically raised that the draft agreement dated 26.10.2007 did not constitute a concluded contract, but was merely a communication of a proposal and a counter proposal. It was also urged that alterations had been made by the Appellant; both with regard to the quantity and period of supply. There was no material on record to demonstrate that any final agreement was arrived at between the parties thereafter. In absence of a valid acceptance, no concluded contract had come into being.

5. Unfortunately, the High Court relying on its earlier order dated 04.10.2014 that the correspondence preceding the agreement dated 26.10.2007 reflected that the latter was a concluded contract, dismissed the review petition without examining the corrections made in the draft proposal with regard to the quantity of supply and period of supply, the effect on the same, coupled with the Appellant not

6. Sri Vijay Hansaria, learned Senior Counsel appearing for the Respondent, submitted that three Courts having returned concurrent findings from the exchange of correspondence between the parties that the agreement dated 26.10.2007 constituted a concluded contract, interference is not called for. It was on the assurance of the Appellant to deliver supplies of phosphoric acid, coupled with its promised back up support in writing, that the Respondent had bid in response to the international tender published by Bangladesh Chemical Industries Corporation (hereinafter referred to as 'the BCIC').

7. The breach of promise by the Appellant to make the promised supplies had resulted in BCIC forfeiting the performance guarantee of the Respondent in addition to other pecuniary liabilities imposed. The Suit was then instituted by the Respondent claiming damages with interest. In a commercial contract, the course of conduct of the parties, the exchange of correspondences, are all important considerations for the conclusion whether there existed a concluded contract or not. Isolated examination of the agreement dated 26.10.2007 shall, therefore, not be appropriate so as to warrant interference with the concurrent findings.

8. The respective submissions on behalf of the parties have been considered by us. Briefly stated, the BCIC floated an international tender for supply of phosphoric acid. The Respondent submitted its bid and was awarded an order for supply of 30,000 MT. The Appellant had signed a backup support agreement with the Respondent for supplies in case the tender was awarded to the latter, and which was furnished by the Respondent to the BCIC in support of its capacity to deliver supplies. The correspondence between the Appellant and the Respondent culminated in the latter forwarding a draft agreement dated 26.10.2007, to the Appellant for Sale/Purchase contract for 3 x 10,000 MT phosphoric acid for supply to the BCIC during November and December, 2007. The covering letter, appended to the draft agreement, required the Appellant to sign, stamp and return the same to the Respondent in confirmation. The Appellant, in response, made a counter proposal for supply of 3 x 9500 MT (max) and between the period January to March, 2008 by incorporating necessary corrections in hand in the draft agreement. Resultantly, while there was a proposal from the Respondent, the Appellant made a counter proposal both with regard

to the quantity and the period of supply. There is no material or evidence placed by the Respondent that the draft agreement ever assumed the form of a concluded contract by a meeting of minds both with regard to the quantity of supplies and the duration for the same, much less was the agreement signed, stamped and returned by the Appellant to the Respondent in confirmation.

9. The contract between the Respondent and the Appellant was independent of the contract between the Respondent and the BCIC. The Appellant had only offered a backup support to supply phosphoric acid to the Respondent in case the contract was awarded to the latter. In the written statement, the Appellant had taken a specific defence regarding absence of any concluded contract between it and the Respondent. The Trial Court as well as the First Appellate Court did not specifically deal with the issue of the draft agreement, the corrections in the same, existence of a proposal and counter proposal with regard to quantity and time period for supplies, the absence of any executed contract by virtue of the Appellant having signed, stamped and returned the agreement to the Respondent, in confirmation. On a presumptive reasoning, based on the exchange of correspondence preceding the draft agreement, the First Appellate Court affirmed the finding in the Suit of a concluded contract between the parties.

10. The Appellant challenged the First Appellate Court's order dated 04.10.2014 earlier in a special leave petition. On 12.05.2014, this Court considering the plea for absence of a concluded contract and after perusal of the draft agreement dated 26.10.2007 containing corrections, in hand, had observed "that these aspects are not specifically dealt with by the High Court. In this view of the matter, it would be more appropriate for the petitioner to approach the High Court by filing a review petition". Observing that the High Court shall deal with the aspect on merits, liberty was also granted to challenge any fresh order along with the impugned orders, if aggrieved.

11. In the review petition, a specific plea was taken that the draft agreement dated 26.10.2007, Exhibit 8-A, did not constitute a concluded contract in view of the counter proposal made by the Appellant, both with regard to the quantity of supply and the period for the same. Reliance on the correspondence preceding the same was not sufficient in absence of acceptance by the Appellant of the proposal made by the Respondent coupled with signing, stamping and returning of the agreement in confirmation of the same.

12. The High Court, despite noticing the specific plea of the Appellant with regard to the absence of a concluded contract between the parties in view of a counter proposal, much less that the agreement was never signed, stamped and returned, reiterated the earlier observations of the First Appellate Court of a concluded contract between the parties based on exchange of correspondence preceding the draft agreement, and also on the premise that the Respondent had submitted its offer to BCIC on the assurance of the Appellant for backup support if the contract was awarded to the former. The High Court declined to delve further into the agreement dated 26.10.2017, holding it to be impermissible in the review jurisdiction and concluding that the grounds urged were superficial in nature without any material proof, designed to avoid payment, and dismissed the review application. The High Court failed to

notice that as recent as 28.01.2008, the Respondent was still awaiting confirmation of its proposal from the Appellant, and soon thereafter the performance guarantee was invoked by the BCIC against the Respondent on 13.04.2008.

13. Section 7 of the Indian Contract Act, 1872 (hereinafter referred to as 'the Act') provides that in order to convert a proposal into a contract, the acceptance must be absolute and unqualified. The existence of a concluded contract is a sine qua non in a claim for compensation for loss and damages under Section 73 of the Act arising out of a breach of contract. If instead of acceptance of a proposal, a counter proposal is made, no concluded contract comes into existence.

14. *U.P. Rajkiya Nirman Nigam Ltd. v. Indure (P) Ltd.*¹, also related to a proposal and counter proposal. Holding that no concluded contract had come into existence, the Apex Court observed as follows:-

"9...As seen, the material alterations in the contract make a world of difference to draw an inference of concluded contract...."

15. The fulcrum of the entire controversy is the draft agreement dated 26.10.2007 marked Exhibit 8-A, for supply of phosphoric acid by the Appellant to the Respondent. The proposal of the Respondent, led to a counter proposal by the appellant. There was no acceptance of the proposal by the Appellant giving rise to a concluded contract. The quantity and duration of supply, therefore, remained in the realm of uncertainty and was never agreed upon so as to give rise to a concluded contract.

16. In absence of a concluded contract between the parties having been established by the Respondent, the claim under Section 73 of the Act was not maintainable. The impugned orders are, therefore, held to be unsustainable and are set aside.

17. The appeals are accordingly allowed.

Judgment Referred.

¹(1996) 2 SCC 0667