2021 INSC 350

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4358 OF 2016

SOUTH EASTERN COALFIELDS LTD. & ORS. ... Appellants

Versus

M/s. S. KUMAR's ASSOCIATES AKM (JV) ...Respondent

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. South Eastern Coalfields Ltd., appellant no.1 is a Government company registered under the Companies Act, 1956. The appellant no.1 floated a tender for the work of "Hiring of HEMM and allied equipments including digging machines fitted suitable slump breaker for excavating overburden (including drilling in all kinds of strata/overburden) loading into tipples, transportation, unloading the extra waited material and silt, dumping dozing scrapping/removal bands preparation/maintenance of haul road water sprinkling and spreading of material at the site shown and

as per direction of the management/Engineer In Charge of Patch-D, Mahan I OCM of Bhatgaon Area" on 23.06.2009. Bids were received and respondent was the successful bidder. In view thereof a Letter of Intent ('LoI') was issued bearing No.2415 dated 05.10.2009 awarding the contract for a total work of Rs.387.40 lakh. The LoI stated as under:

i. A direction was made to the respondents to mobilize equipment for executing the work to handle minimum allotted Cu.m. per day and "commence the work immediately." Towards the said objective the respondent was directed to report to the Chief General Manager, Bhatgaon Area for "immediate commencement of work."

ii. The respondent was called upon to deposit Performance Security Deposit for a sum total to 5% of annualized contract amount within 28 days from the date of receipt of the LoI as per the provisions of the tender document.

iii. Sign the Integrity Pact before entering into the agreement in accordance with the tender document.

iv. The work order would be issued and the agreement would be executed at the Area Office.

v. The date of commencement of work may be intimated to the issuing office and agreement may be concluded within 28 days as per the provisions of the tender document.

2. The respondent, in pursuance of the LoI, mobilized resources at site and a measurement team was sent by appellant no.1 as intimated vide letter dated 09.10.2009. On 28.10.2009, the appellant issued a letter of site handover/acceptance certificate, which was to be taken as the date of commencement of the work.

3. The respondent apparently faced difficulties soon thereafter and the letter dated 05.12.2009 of the respondent records that though the work was started in all earnest and considerable quantity of overburden had been removed, the truck mounted drill machine employed by the respondent suffered a major breakdown. The work, thus, had to be suspended for reasons beyond the control of the respondent. The endeavour to rectify the position or arrange alternative machinery did not work out and the letter states that the purchase of new machines was expected only after about three months. The

contractual relationship apparently deteriorated as on 09.12.2009, the appellants issued a letter alleging breach of terms of contract and rules and regulations applicable by the respondent. The appellant further asked the respondent to show cause as to why penal action be not initiated of – (a) termination of work; (b) blacklisting of the respondent company; and (c) award of execution of work to other contractor at the cost and risk of the respondent.

4. Communications in this behalf continued to be exchanged and vide letter dated 12.12.2009, the appellants brought to the notice of the respondents that they failed to submit the performance security deposit which was required to be submitted within 28 days from the date of the receipt of the LoI as per the terms of the tender. Another show cause notice was issued on 15.12.2009 intimating to the respondent that the appellants were left with no option except to terminate the work awarded to the respondent and get it executed by other contractor at the risk and cost of the respondent in terms of clause 9.0 of the General Terms & Conditions of the Notice Inviting Tenders ('NIT') giving a ten days' time to the respondent to respond. It appears that there was no response

and on 23.12.2009, once again, a notice of termination was issued. The respondent objected to the same, stating that the work could not be executed at their risk and cost as the General Terms & Conditions were never part of the NIT but form the part of the contract which was never executed *inter se* the parties. In substance, the respondent objected to the invocation of the clause for the work to be carried out at their risk and cost. The appellant could not rely on clause 9.0 of the General Terms & Conditions. The final termination of work was carried out vide letter dated 15.04.2010.

5. It appears that thereafter the work was awarded to another contractor at a higher price and on account thereof a letter dated 16.07.2010 was issued by the appellants to the respondent seeking an amount of Rs.78,07,573/- being the differential in the contract value between the respondent and the new contractor.

6. The respondent filed a writ petition under Articles 226 & 227 of the Constitution of India seeking quashing of the termination letter dated 15.04.2010 the recovery order dated 16.07.2010. The writ petition was contested by the appellants who filed their counter affidavit. In terms of the impugned

judgment dated 07.11.2012, the Division Bench of the Chhattisgarh High Court opined that there was no subsisting contract *inter se* the parties to attract the general terms and conditions as applicable to the contract. Various clauses of the NIT were referred to and it was opined that there could not be a valid contract *inter se* the parties as it was subject to completion of certain formalities by the respondent, which were never completed, i.e. furnishing of the performance security; and the consequence was that the appellant was within their rights to cancel the award of work and forfeit the bid security. Thus, only the forfeiture of bid security was upheld while the endeavour of the appellants to recover the additional amount in award of contract to another contractor as compared to the respondent was held not recoverable. We may notice at the stage of admission of the writ petition and issuing notice, the respondent was directed to deposit a sum of Rs.10 lakh vide order dated 04.08.2010 and subject to the same the endeavour to recover any amount from the respondent was stayed. Thus, in the final order it was mentioned that after deducting the bid security amount, the balance amount out of Rs.10 lakh was to be refunded to the

respondent.

7. The appellant filed Special Leave Petition against the said order and notice was issued on 08.02.2013. The direction to refund the balance amount of Rs.10 lakh after deducting the bid security amount was stayed till further orders. Leave was granted on 13.04.2016.

Submissions of the Appellants

8. The substratum of the case of the appellants is based on a plea that the requirement of deposit of performance security limited to 5% of annualized contract amount within 28 days as well as the requirement to sign the Integrity Pact before entering into the agreement was not a pre-condition to the execution of the agreement but a "condition subsequent". By starting the execution of the work from 28.10.2009, learned counsel submitted, there was acceptance of the award of the work by the respondent. In fact, the respondent vide letter dated 05.12.2009 acknowledged that they had removed considerable amount of overburden and, thus, it is their own case that they had carried out substantive work after mobilization of the resources immediately after the issuance of LoI. Thus, the

absence of formal execution of the contract did not make a difference to the claim of the appellants arising from the breach of contract.

9. The distinction between a 'condition precedent' and a 'condition subsequent' was pleaded to be the crux of the issue and had not been appreciated by the High Court. To support his contention learned counsel referred to two judgments: (a) ***Jawahar Lal Burman v. Union of India***[1] and (b) ***Dresser Rand S.A. v. Bindal Agro Chem Ltd. & Anr.***[2]

10. In ***Jawahar Lal Burman***[3] case the factual matrix was that the tender was accepted by the respondent therein, which was alleged to have concluded the contract. The respondent's case therein was that the contract was governed by the general conditions of contract which included an arbitration agreement. The Supreme Court *inter alia* examined whether there was a concluded contract between the parties or not. The tender submitted was on a condition that on the acceptance of the tender, the contractor shall deposit the security deposit, at the option of the Secretary, Department of Supply, within the

1 (1962) 3 SCR 769
2 (2006) 1 SCC 751
3 Supra

period specified by him. A further condition stipulated that if, on being called upon to deposit the said security, the contractor fails to provide security within the period, such failure would constitute a breach of contract entitling the opposite party to make other arrangements at the risk and acceptance of the contractor. The contractor sought to argue that the acceptance letter changed the pre-existing position and made the security deposit a condition precedent to the acceptance itself and, thus, there was no concluded contract. We may notice that in the relevant letter issued by the awarding party in this regard, calling upon the security deposit of 10% to be deposited it was clearly mentioned that "the contract is concluded by this acceptance and formal acceptance of tender will follow immediately on receipt of treasury receipt." This Court, thus, discussed the ramification of this sentence vis-à-vis the clause stating "subject to your depositing 10% as security". In construing the true effect of the clause such requirement of deposit of security was held not to be a condition precedent as the letter, as well as the conditions of the tender, clearly stated that the contract was concluded by its acceptance. Section 7 of the Indian Contract

Act, 1872 requires the acceptance of an offer to be absolute and unqualified and not conditional. In the facts of the case the acceptance was found to be unconditional and the steps were taken as the contract was intended to be executed expeditiously relating to delivery of coconut oil which had to be supplied within 21 days. The security deposit was, thus, opined to be a subsequent condition.

11. In ***Dresser Rand S.A.***[4], the contract was to come into force upon receipt of the LoI by the supplier. The Supreme Court recognized the well settled principles of law that a LoI merely indicates party's intention to enter into a contract with the other party in future and is not intended to bind either party ultimately to enter into a contract. In this behalf observations in an earlier judgment in ***Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd.***[5] were referred to at page 773 para 39, which reads as under:

> "The letter of intent merely expressed an intention to enter into a contract. ….There was no binding legal relationship between the appellant and respondent No.1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with respondent No.1 or not."

4 Supra
5 (1996) 10 SCC 405

This was, however, followed by a caveat that it could also not be disputed that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, that in order to save time, a letter of intent communicating the acceptance of the offer is issued asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. Though such a letter may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. This is a matter to be decided with "reference to the terms of the letter." It was further observed that where the parties to a transaction exchanged letters of intent, the terms of such letters may have negative contractual intention but where the language does not have negative contractual intention, it is open to the courts to hold that the parties are bound by the document and the courts would be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it.

12. The terms of LoI were adverted to, more specifically clause

(L) therein, which stated that "this contract will come into force upon receipt of this letter of intent by supplier." In the different clauses the LoI were referred to as "this order" and "this contract" and it was, thus, argued to that the LoI be treated as purchase orders. The Court harmoniously construed the terms of the LoI to find that the effect of the LoI was that if the purchase orders were placed and LCs were opened the supplier was bound to effect supplies within the stipulated time at the prices stated in the LoI. It was not interpreted as a work order despite the wording utilized in the LoI.

Submissions of the Respondent

13. Learned counsel for the respondent, on the other hand, first sought to emphasise the aspect discussed in para 39 of the judgment in ***Dresser Rand S.A.***[6] case, which opined what an LoI was by referring to the earlier view of this Court in ***Rajasthan Coop. Dairy Federation Ltd.***[7] case. He further sought to refer the judgment of this Court in ***Bhushan Power & Steel Ltd. v. State of Odisha***[8] and drew our attention to what an LoI was. The nomenclature of the letter would not be the

6 Supra
7 Supra
8 (2017) 2 SCC 125

determinative factor but the substantive nature of the letter would determine whether it can be treated as an LoI, which as per the legal dictionary means a preliminary understanding between the parties who intend to make a contract or join together in another action. Some earlier precedents were also referred to.[9] In fact the judgment in ***Dresser Rand S.A.***[10] case was also referred to therein, more specifically paras 39 & 40. The LoI in question was held not to be a binding contract more specifically because entering into a lease license with prospective licensee would require "previous approval" of the Central Government. The LoI was held to amount to only an intention to enter into a contract which would take place after all other formalities are completed.

14. In order to substantiate his pleas, learned counsel for the respondent referred to various clauses of the NIT and the LoI. The relevant clauses in the tender document referred to are as under:

> "29. Notification of the award and signing of agreement:
>
> 29.1 The bidder, whose bid has been accepted will be notified of the award by the employer prior to expiration of

9 ***Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and Others*** (2015) 13 SCC 233
10 (supra)

the bid validity period by cable, telex and facsimile confirmed by registered letter. This letter (hereinafter and in Conditions of Contract called the "Letter of Acceptance") will state the sum that the Employer will pay the Contractor in consideration of execution and completion of the Works by the contractor as prescribed by the Contract (hereinafter and in the Contract called "the Contract Price").

29.2 The notification of award will constitute the formation of Contract, subject only to the furnishing of a Performance Security/Security Deposit in accordance with clause 30.

29.3 The agreement will incorporate all agreements between the employer and the successful bidder within 28 days following the notification of award along with the letter of acceptance.

30. Performance Security/Security Deposit

30.1 Security Deposit shall consist of two parts:

a. Performance Security to be submitted at award of work and

b. Retention Money to be recovered from running bills.

The Security Deposit shall bear no interest.

30.2 The performance Security should be 5% of annualized value of the contract amount and should be submitted within 28 days of receipt of LOA by the successful bidder in any of the form given below:

- A Bank Guarantee in the form given in the bid document.

- Govt. Securities, FDR or any other form of deposit stipulated by the owner.

- Demand Draft drawn in favour of the South Eastern Coal Fields Ltd. on any Schedule Bank payable at its Branch at…….

The bid security deposit in the form of Bank Guarantee shall be duly discharged and returned to the contractor. The bid security deposited in the form of demand draft shall be adjusted against the initial security deposit.

If the performance security is provided by the successful bidder in the form of bank guarantee it shall be issued either:

a. at bidder's option by a nationalized/scheduled Indian bank, or

b. by a foreign bank located in India and acceptable to the employer,

c. the validity of the bank guarantee shall be for a period of one year or ninety days beyond the period of contract, whichever is more.

Failure of the successful bidder to comply with the requirement as above shall constitute sufficient ground for cancellation of the award of work and forfeiture of the bid security.

34. Integrity Pact

SECL has signed MOU with M/s. Transparency International India for implementation of integrity pact in contracts for works valued at Rs.1.00 crore and above. The integrity pact document to be signed by the bidders is enclosed vide Annexure "D". Submission of integrity pact document duly signed, stamped and accepted is mandatory for this tender and is integral part of the tender document.

In case this is not submitted the tender may be considered as not substantially responsive and may be rejected.

…. …. …. …. ….

Section 3: Conditions of contract/General Terms and Conditions

1. Definition: ix. The "Contract" shall mean the notice inviting tender, the tender as accepted by the company and the formal agreement executed between the company and the contractor together with the documents referred to therein including general terms and conditions, special conditions, if any, schedule quantities with rates and amount, schedule of work.

2.0 Contract Documents

i. Articles of agreement,

ii. Notice inviting tender,

iii. Letter of Acceptance of tender indicating deviations, if any, from the conditions of contract incorporated in the bid/tender document issued to the bidder,

iv. Conditions of contract including general terms and conditions, additional terms and conditions, special conditions, if any etc. forming part of agreement,

v. Scope of works/Bills of quantities and

vi. Finalised work programme."

15. Learned counsel laid great emphasis on clause 29.2 aforesaid, which provided that notification of award will constitute the formation of contract, "subject only" to the furnishing of a Performance Security/Security Deposit in accordance with

clause 30. The agreement to be executed was to incorporate all the terms *inter se* the parties. The consequence of not furnishing the security deposit was specified in clause 30.2 at the end, i.e., it was to constitute sufficient ground for cancellation of the award work and forfeiture of the bid security. In terms of clause 34 requiring Integrity Pact document to be submitted duly signed, the consequence of not doing so was that the tender was to be considered as not substantially responsive and may be rejected. Lastly under Section 3, the Conditions of contract/General Terms and Conditions where it was defined in clause (ix) that a contract would mean the NIT and the formal agreement to be executed between the appellants and the respondent together with the documents referred to therein indicating the general terms and conditions, special conditions, if any, schedule quantities with rates and amount, schedule of work.

16. It was further contended that after acceptance of tender and on execution of contract, work order had to be issued which had also not been issued as the preliminaries were not complied with. The LoI was also referred to in the aforesaid context to show that nothing was done in pursuance thereto except

mobilization of the resources and commencement of the work, and that by itself could not be said to be a concluded contract. In fact, what was submitted by learned counsel for the respondent was that seeing the ground realities, the respondent found that it was not feasible to execute the contract and, thus, walked away from it, the consequence of which could only be the forfeiture of the bid security amount as directed by the impugned order, an aspect assailed by the respondent by filing a cross appeal. The respondent has not been paid by the appellant for whatever they may have done.

17. A reference was also made to the judgment in ***State of Madhya Pradesh And Anr. v. Firm Gobardhan Dass Kailash Nath***[11] where in respect of a tender for Government sale initial deposit of 25% of purchase price was an essential pre-condition for acceptance or sanction of tender was not complied with. It was held that taking into consideration what was required to enter into a contract, i.e., in writing and in prescribed form and 25% amount not being deposited, it could not be said that any concluded contract was arrived at between the parties.

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11 AIR 1973 SC 1164 :: (1973) 1 SCC 668

Conclusion

18. A consideration of the matter in the conspectus of the aforesaid pleas leads to a conclusion that it cannot be said that a concluded contract had been arrived at *inter se* the parties.

19. We have already reproduced aforesaid the terms of the letter of award and what it mandated the respondent to do. None of the mandates were fulfilled except that the respondent mobilized the equipment at site, handing over of the site and the date of commencement of work was fixed vide letter dated 28.10.2009. Interestingly this letter has been addressed to the Sub Area Manager of the appellant by the office of the appellant. The respondent, thus, neither submitted the Performance Security Deposit nor signed the Integrity Pact. Consequently, the work order was also not issued nor was the contract executed. Thus, the moot point would be whether mobilization at site by the respondent would amount to a concluding contract *inter se* the parties. The answer to the same would be in the negative.

20. We would like to state the issue whether a concluded contract had been arrived at *inter se* the parties is in turn dependent on

the terms and conditions of the NIT, the LoI and the conduct of the parties. The judicial views before us leave little doubt over the proposition that an LoI merely indicates a party's intention to enter into a contract with the other party in future.[12] No binding relationship between the parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a letter of intent as a binding contract if such an intention is evident from its terms. But then the intention to do so must be clear and unambiguous as it takes a deviation from how normally a letter of intent has to be understood. This Court did consider in ***Dresser Rand S.A.***[13] case that there are cases where a detailed contract is drawn up later on account of anxiety to start work on an urgent basis. In that case it was clearly stated that the contract will come into force upon receipt of letter by the supplier, and yet on a holistic analysis – it was held that the LoI could not be interpreted as a work order.

21. Similarly if we construe the documents as discussed in the

12 ***Dresser Rand S.A.*** (supra); ***Rajasthan Coop. Dairy Federation Ltd.*** (supra)
13 Supra

judgment of this Court in ***Jawahar Lal Burman***[14] case it is unequivocally mentioned that "contract is concluded by this acceptance and formal acceptance of tender will follow immediately on receipt of treasury receipt." Thus, once again, it has been stipulated as to at what time a contract would stand concluded even though it was later subject to deposit of the security amount. It was in these circumstances that the requirement of security deposit was treated not as a condition precedent but as a condition subsequent. We have to also appreciate the nature of contract which was for immediate requirement of the full quantity of coconut oil to be supplied within 21 days. It was also explicitly mentioned in the LoI itself that any failure to deposit the stipulated amount would be treated as a breach of contact. This is not the case here, where the consequence was simply forfeiture of the bid security amount, and cancellation of the 'award' and not the 'contract'.

22. If we compare the aforesaid scenario in the present case, the period for execution of the contract was one year. The respondent worked at the site for a little over the month,

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14 Supra

facing certain difficulties – it is immaterial whether the same was of the own making of the respondent or attributable to the appellants. No amount was paid for the work done. The respondent failed to comply with their obligations under the LoI. It is not merely a case of the non-furnishing of Performance Security Deposit but even the Integrity Pact was never signed, nor work order issued on account of failure to execute the contract. We are, thus, of the view that none of the judgments cited by learned counsel for the appellants would come to their aid in the contractual situation of the present case. The judgments referred by learned counsel for the appellants ***Jawahar Lal Burman***[15] case and ***Dresser Rand S.A.***[16] case, if one may say so are not directly supporting either of the parties but suffice to say that to determine the issue what has to be seen are the relevant clauses of the NIT and the LoI. On having discussed the non-compliance by the respondent of the terms of the LoI we turn to the NIT. Clause 29.2 clearly stipulates that the notification of award will constitute the formation of the contract "subject only" to furnishing of the Performance Security/Security Deposit.

15 Supra
16 Supra

Thus, it was clearly put as a pre-condition and that too to be done within 28 days following notification of the award. The failure of the successful bidder to comply with the requirement "shall constitute sufficient ground for cancellation of the award work and forfeiture of the bid security" as per clause 30.2. If we analyse clause 34 dealing with the Integrity Pact the failure to submit the same would make the tender bid "as not substantially responsive and may be rejected."

23. We may also add that the definition of what constitutes a contract as per clause (ix) itself includes the NIT, the acceptance of the tender, the formal agreement to be executed between the parties post contractor furnishing all the documents and the bid security amount.

24. The result of the aforesaid is that as rightly held in terms of the impugned order all that the appellants can do is to forfeit the bid security amount and, thus, it was so directed. Since as a pre-condition of any coercive action against the respondent, the High Court called upon the appellants to deposit a sum of Rs.10 lakh in terms of the interim order dated 04.08.2010, a direction is made to deduct the bid security amount out of the sum of Rs.10 lakh and to refund the balance amount to the

respondent. The needful would now have to be done within two months as in terms of the interim order of this Court dated 08.02.2013 such refund has been stayed.

25. We accordingly dismiss the appeal leaving the parties to bear their own costs.

26. Interim order stands discharged.

…….....…..J.
[SANJAY KISHAN KAUL]

…….....J.
[HEMANT GUPTA]

NEW DELHI,
July 23, 2021.