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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 30, 2009
Date of Order: April 21, 2009

+ OMP 42/2006

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Union of India

Through : Mr. Sunil Goel, Advocate

Versus

Daulat Ram Industries

Through: Mr. Tamali Wad, Advocate

21.04.2009

...Petitioner

...Respondent

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. This petition under Sections 34, 28(3) and 6(6) of the Arbitration & Conciliation Act, 1996 has been preferred by the petitioner to assail an award dated 18th October 2005 on the ground that the award passed by the learned Arbitrator was contrary to the terms of the contract and was violative of the public policy of India and was liable to be set aside.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner entered into a contract with the respondent for supply of 180 numbers of Dynamic Braking Resistors (DBR) @ Rs.5,48,000/- per DBR used in locomotives of Indian Railways. The total value of the contract was Rs.9,86,40,000/-. The contract provided that the delivery was to commence within one month and 60% of quantity was to be supplied by 31st March 2000 or earlier and the balance 40% quantity was to be supplied between 1st April

2000 and 30th April 2000 but not later than 30th April 2000. The petitioner reserved its rights to take the delivery of 40% quantity as well during the current financial year i.e. up to 31st March 2000 or earlier. The petitioner, vide an option clause reserved its right to increase/ decrease the quantity up to 30% of the ordered quantity during the currency of the contract.

3. The respondent did not maintain the delivery schedule and did not supply the contracted material before 30th April 2000 and wrote a letter dated 3rd May 2000 seeking an extension of time for supply of the material. Vide letter dated 6th June 2000, the petitioner extended the delivery period up to 31st December 2000 and notified to the respondent that in terms of the contract, liquidated damages for delay in supply of the stocks after expiry of the contract delivery period shall be recoverable notwithstanding the fact of grant of extension. Thus the contract period stood extended up to 31st December 2000. Vide another letter dated 15th September 2000, the petitioner exercised its option under Clause 19 and amended the quantities and increased it from 180 numbers to 234 numbers and also increased the delivery period for additional quantity up to 31st March 2001 with all other terms and conditions remaining unaltered. However, the respondent failed to maintain the delivery schedule and did not supply the quantity of DBRs within the extended delivery schedule i.e. 31.03.2001. The respondent then sought extension of the delivery period vide its letter dated 12th April 2001. The respondent was yet to supply 24 numbers of DBRs. In view of request of the respondent, the petitioner, vide its letter dated 30th April 2001 extended the delivery period up to 31st July 2001 subject to the conditions viz. that the respondent shall be liable for liquidated damages for delay in supply of the stock after the expiry of the contract delivery period AND that the petitioner

(purchaser) shall be entitled to benefit of any decrease in price on account of reduction in or remittance on custom duty, excise duty, sales tax etc for the additional quantity AND in case the lower rates were finalized/ accepted against Chitranjan Locomotive Works (CLW) tender No.702001/039 opened on 7th November 2000, the same shall be applicable for the supplies made on or after 31st March 2001. A provisional **payment @ Rs.5,47,000/-** per number was to be made for all supplies made on or before after 31st March 2001. The respondent did not protest to these conditions and supplied the balance 24 numbers of DRR within the extended period. The Union of India vide its letter dated 3rd October 2001 informed the respondent that CLW Tender No.70/01/39 had since been finalized and the extension of delivery period from 1st April 2001 to 31st July 2001 for additional quantities was subject to without liquidated damages but subject to denial clause as already mentioned in the letter dated 30th April 2001 and it informed the rates as accepted in CLW tender was Rs.4,66,000/- per unit instead of Rs.5,48,000/- per unit. After this letter of 3rd October 2001 of Union of India, the respondent wrote a letter dated 15th November 2001 in which reference of petitioner's letter dated 30th April 2001, 7th November 2001 and 3rd October 2001 was given and it was specifically mentioned that the letter dated 3rd October 2001 was received and acknowledged and protest was made against reduction of price to Rs.4,66,000/- from 5,48,000/- for the balance supplied quantity and the petitioner was asked to restore the original price for 24 Nos. of DBRs delayed supplied. The petitioner made payment in respect of 24 number of pieces @ Rs.4,66,000/- instead of Rs.5,48,000/-. The respondent thereafter raised a dispute about price of 24 Nos. of DBRs which was referred to the Arbitrator.

4. The learned Arbitrator observed that vide letter dated 30th April 2001

while granting extension the petitioner provided for liquidated damages for delayed supply as per the original contract and also gave conditional extension at the quoted price for Chitranjan Locomotive Works but concluded that while condition of levying damages was in accordance with the contract but condition of price variation was applied unilaterally by the petitioner. The learned Arbitrator relied upon **Arosan Enterprises Limited v Union of India 1999 9 SCC 449** wherein the Supreme Court observed that when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default howsoever in such a case does not make a contract voidable. The learned Arbitrator observed that the contract between the petitioner and the respondent did not become voidable due to supply of 24 DBRs after 31st March 2001. A failure of the claimant to supply 24 DBRs was subject to paragraph 702 of the IR Indian Railways standard conditions of the contract and if the reasons indicated for extension of time beyond 31st March 2001 were not admitted as the reasonable ground, on IRS 800, a default on the part of the claimant in complete delivery shall be established. The purchaser under such circumstances without prejudice to his other rights could recover from the claimant liquidated damages @ 2% of the prices of the store which claimant failed to deliver. The Arbitrator, therefore, allowed the claim of the respondent of the price of DBR @ Rs.5,48,000/- for 24 Nos. DBRs.

5. There is no doubt that under the contract the period for delivery could be extended and in that sense it cannot be said that time was the essence of the contract. The petitioner in this case, at the request of respondent extended the period for delivery of the initial 180 DBRs, subject to standard conditions as provided in the contract. In the meantime, the petitioner had

requirement of 54 more number of DBRs and in terms of the contract placed order for the 30% more quantity for i.e. 54 DBRs vide letter dated 15th September 2000 and provided the period of delivery of these DBRs as 31st March 2001. If the supply had been completed within 31st March 2001 and the additional quantity had been delivered, the respondent would have been entitled to the price of the DBRs as agreed between the parties. Since the respondent could not fulfill the contract and could not deliver the entire quantity within this period, it prayed for extension of the period for delivery. In the meantime, another of the petitioner's division had a requirement for DBRs and it issued an open the tender. The petitioner found that there was downfall in the prices of DBRs and the prices quoted in the bid for the same item was much less than the price at which this item was earlier being purchased. In the subsequent tender the price of the same item was quoted as Rs.4,66,000/- in a competitive bid in which the respondent had also participated. This supply of DBR under the new contract was to start from 1st April 2001. It was optional for the petitioner to extend the time or to refuse to do so for supply of balance 24 number of DBRs and procure its balance requirement also under new contract. The petitioner gave option to the respondent that if it wanted to supply the balance 24 Nos. of DBRs, it would have to supply the same at the price at which the same was available to the petitioner under the new contract. The petitioner made this clear at the time of extending the time. The respondent was at liberty to reject this extension of time and say that it was not prepared to supply DBRs at the price quoted in the subsequent tender. The respondent did not question the extension of time by the petitioner subject to this condition and supplied the material. The real issue before the Arbitrator was whether supplying this material without demur and without questioning the extension of time subject to new price

clause, amounted to acceptance of the new price by the respondent or not. It has been the case of the petitioner from the very beginning that delivery of the remaining 24 number of DBRs by the respondent was on the terms and conditions given in the extension letter. The respondent by its very conduct had accepted those terms and conditions and such acceptance by conduct was recognized in the Contract Act as valid acceptance. Section 8 of the Contract Act reads as under:

“Acceptance by performing conditions, or receiving consideration -

Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.”

6. It is noteworthy that in the instant case, the respondent had not protested against extension of time subject to price clause mentioned in the letter dated 30th April 2001. Vide letter dated 30th April 2001, the petitioner had made it clear to respondent that only provisional payment @ Rs.5,47,000/- per unit will be made for all supplies after 31st March 2001 and the price applicable would be the same as is finalized by the petitioner against CLW tender number 70/01.039 opened on 7th November 2000. The respondent was very well aware of the price for this item under CLW tender since the respondent itself was one of the tenderer and the respondent had received the letter on 7th March 2001 from the petitioner making a counter offer of Rs.4,66,000/- per DBR which was the price quoted in the tender. If the respondent was not willing to supply the balance number of 24 DBRs on this reduced price, the respondent was at liberty to raise protest and could refuse to accept the condition. The failure of the respondent to refuse the conditional extension and accepting the condition by supplying 24 DBRs after

getting additional extension of time showed that the respondent had accepted the condition.

7. In *Bhagwati Prasad Pawan Kumar v. Union of India 2006 (V) SCC 311*, the appellant lodged two claims before the Railways in respect of two consignments. By its letter, the Railways only partially admitted the claims and enclosed two cheques in favour of the appellant of the amount admitted by the Railways. The said letter contained following conditions:

“In case the above offer is not acceptable to you, the cheque should be returned forthwith to this office; failing which it will be deemed that you have accepted the offer in full and final satisfaction of your claim.

The retention of this cheque and/or encashment thereof will automatically amount to acceptance in full and final satisfaction of your above claim without reason and you will be stopped from claiming any further relief on the subject.”

On receipt of the above letter along with the cheques, the cheques were got deposited and the appellant wrote to the Railways two letters stating therein that the claim were placed under protest. The appellant, however, also wrote letters protesting against the reduction of his amount of his claim and also asked the Railways to remit the balance amount. The Supreme Court in *Bhagwati Prasad’s* case (supra) observed as under:

“19. It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle. Each case must rest on its own facts. The courts

must examine the evidence to find out whether in the facts and circumstances of the case the conduct of the “offerree” was such as amounted to an unequivocal acceptance of the offer made. If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand, if the evidence discloses that the “offerree” had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act.

20. Coming to the facts of this case, if the appellant, before encashing the cheques, had sent the communication dated 20.8.1993, it could perhaps be argued that by retaining but not encashing the cheques, it did not intend to accept the offer made in the letter of the Railways dated 7.4.1993. At the same time if the evidence disclosed that it encashed the cheques and later sent a protest, it must be held that it had accepted the offer unconditionally by conveying its acceptance by the mode prescribed, namely – by retaining and encashing the cheques, without reservation. Its subsequent change of mind and consequent protest did not matter.”

8. In *General Manager Northern Railways & Anr. v. Survesh Chopra JT* 2002 (2) SC 445, the Supreme Court observed as under:-

“15.....Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under section 55 of the Contract Act, (ii) the

employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

9. In the present case, the petitioner had put respondent to notice that the extension of time for supply of 24 DBRs was being granted subject to the condition that the price payable shall be same at which the DBRs was now available to the petitioner and the respondent despite this condition provided in the contract accepted the performance and supplied 24 DBRs. I, therefore, consider that respondent by accepting conditional extension of time could not have raised the claim for these 24 DBRs at old price.

10. In today's era of fast-changing technology, the technology changes so fast that certain products having electronic components and items like computers, laptops and other goods become obsolete in a number of days and months with the introduction of new technology. There are also instances where with the entry of a competitor, the price of product falls sharply or there is a sharp reduction in the price due to economy of scales. A product which is today available for Rs.50,000/- may be available in next month for Rs.20,000/- due to intense competition or due to development of the next stage in technology. In this fast-changing scenario of technology and competition, a contractor can gain merely by delaying the supply of goods. If he has agreed to supply the goods within a time span at a particular rate, looking into fall in prices, he by merely delaying the supply can have

enormous profits. If the employer/purchaser had issued new tenders for the same items for subsequent period and comes to know that the same product was now available at a considerable low rate, then the employer is within his right to put a condition while extending the time period of supply of product that he would accept the product only at the then prevalent prices. This is exactly what was done by the petitioner in this case and if this prevalent price was not acceptable to the respondent, the respondent was at liberty not to accept the extension of time and refused to supply the same. But once the respondent had accepted this condition, it amounted to a binding contract between the parties. The learned Arbitrator ignored this contract between the parties and travelled beyond the contract. It is settled law that an Arbitrator cannot write a new contract between the parties. An Arbitrator is a prisoner of the contract entered between the parties and he has to abide by the terms of the contract which was entered into between the parties. In the present case, the Arbitrator awarded old price to the respondent despite the fact that the respondent without any demur and protest had supplied the items after time was extended with a condition of new price at which the product was available. The award given by the arbitrator is thus beyond his jurisdiction being beyond the contract.

11. In view of my above discussion, I consider that the award passed by the Arbitrator was liable to be set aside. The petition in the result is allowed and the award passed by the Arbitrator is hereby set aside.

April 21, 2009
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SHIV NARAYAN DHINGRA J.