

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision : 29.01.2009

+ FAO (OS) No.275 of 2007

UNION OF INDIA ...APPELLANT

Through: Mr. Sanjay Kumar Pathak, Advocate.

Versus

M/s BHARDWAJ ENTERPRISES ...RESPONDENT

Through: Mr.K.B.Soni, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

SANJAY KISHAN KAUL, J. (Oral)

1. The appellant floated tender No.05/DSE-C/95-96 dated 22.03.1996 for supply of 60,000 cubic metres of 65 mm gauge machine crushed stone ballast at Tughlakabad. The respondent was the successful tenderer and was awarded the contract for supply of 30,000 cubic metres of the stone ballast. The award of work was issued on 05.07.1996 though the formal contract/agreement was executed on 09.08.1996.

2. Soon after the date of award of the work on 05.07.1996, there was a hike in the sales tax by the Haryana Government from where the raw material had to be sourced and the rate was increased from 9 to 15 per cent on 09.07.1996. The respondent, faced with the prospect of such imposition, made a representation dated 11.07.1996 requesting for a 12 per cent increase in the awarded rates on account of such levy.
3. The formal acceptance of the tender of the respondent was communicated on 12.07.1996 which ultimately gave rise to the agreement being executed on 09.08.1996.
4. It is the case of the respondent that he made repeated representations in pursuance to the original representation dated 11.07.1996 but there was no response from the appellant.
5. In view of the clause 64 of the General Conditions of the Contract, the respondent invoked the same and the disputes were referred to the Arbitral Tribunal of Mr. A.K.Khanna and Mr. Indra Swaroop and Mr. A.K.Khanna was subsequently replaced by Mr. Sudhir Mathur. Mr. A.K.Mittal was appointed as an Umpire. During the pendency of the arbitration proceedings, the respondent submitted additional claims vide letter dated 29.08.1997. The Arbitral Tribunal made and published the award on 18.08.1998 whereby the respondent's claim was not accepted and a nil award was given.

6. The respondent, aggrieved by the said award, filed objections under Section 34 of the Arbitration and Conciliation Act, 1996 ('the said Act' for short) and in terms of the impugned order of the learned Single Judge dated 16.10.1996, the petition was allowed and the matter was remitted back to the arbitrator for consideration of the supplementary claims. Such direction arose on account of the dual grievance made by the respondent, which are as under:

- i) The supplementary claims had not been adjudicated upon in the award; and
- ii) The findings of the arbitrator that the respondent was not entitled to the increase in the contractual rate on account of the increase of sales tax was fallacious.

7. The appellant has now preferred the present appeal aggrieved by the said Order.

8. Learned counsel for the respondent states that the only point which is sought to be defended is the aspect of the entitlement to increase of rates on account of increase of sales tax and he does not want to defend the finding on the issue of supplementary claims being adjudicated upon. Thus, the direction for remittance of the matter to the arbitrator for consideration of supplementary claims in any case is hereby set aside.

9. The aforesaid leaves the only question to be examined on the issue of the entitlement of the respondent to get an increased rate. At the inception itself, it must be noted that while considering objections under Section 34 of the said

Act, the court does not sit as a court of appeal over the findings of an arbitrator. In fact, in matters of interpretation of a contract, it is the arbitrator who is required to go into the factual matrix and the clauses of the contract to determine the true scope and ambit. This the arbitrator did. However, this does not imply that the court is precluded from considering the matter in case the finding of the arbitrator is contrary to the settled legal position. The impugned order has sought to apply the principles of Section 64-A of the Sale of Goods Act, 1930('the Sale of Goods Act' for short), which reads as under:

"64A. In contracts of sale, amount of increased or decreased to tax to be added or deducted.- (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulations as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such good tax- paid where tax was chargeable at that time.-

- (a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition, and
 - (b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer made deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.
- (2) The provisions of sub-section (1) apply to the following taxes, namely:-

- (a) any duty of customs or excise on goods.
- (b) any tax on the sale or purchase of goods.”

10. A reading of the aforesaid provision shows that in the event of any tax being imposed, increased or decreased, after making of a contract for sale or purchase of goods, the impact of the same shall be borne by the party awarding the contract. However, exception to this principle is set out in the Section itself as it begins with “unless a different intention appears from the terms of the contract”. This aspect has been enunciated in the judgment of the Apex Court in Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.; (2007) 8 SCC 466 where it has been observed that in view of the aforesaid provision, the intention of the parties is to be ascertained from the clauses mentioned in the contract. In the facts of that case, a claim was laid on account of countervailing excise duty which did not exist at the stage when the contract was entered into. It was thus pleaded that the contractor could not have imagined the levy of countervailing duty was an event which could come into existence and thus in view of provisions of Section 64-A of the Sale of Goods Act, the awarding party must bear the financial implications of the countervailing duty. The Supreme Court considered the clauses of the contract and took note of the fact that the contract laid down that all taxes, duties and levies had to be borne by the seller and thus there was no doubt that the levy had to be borne by the seller who could not escape from the situation. The material aspect taken note of was that the contractual

obligations and rights in respect of the price escalation clause provided that price quoted for the entire work was to remain “firm and fixed” till the complete execution of the work and thus it was held that the claim for reimbursement even of higher burden of the customs duty due to fluctuation in exchange rate was not tenable.

11. In view of the aforesaid principles, we have to re-look to the contract itself. The agreement dated 09.08.1996 clearly stipulates :

“ The above rates are complete accepted item rate and nothing extra will be paid on any account whatsoever the case may be.”

12. The aforesaid clause has to be read with clause 20 of the tender conditions mentioned in the tender documents, which reads as under:

“20. The rate quoted by the contractor/contractors should be an all inclusive through rate, i.e., the rate for the material delivered at site. No lead lift, sales tax, royalty or any other taxes that may be levied by the Government or the local bodies will be paid. They will also themselves arrange and for such working facilities as they may need (e.g. land for labour camps, contractors office, access to the site of work, etc.). The contractor will be deemed to have included this element of royalty of compensation in their through tender rate and will not be entitled to any extra payment. They are advised to see that site at work before tendering.”

(emphasis supplied)

13. The special conditions, instructions and specifications in the tender conditions contain the following clauses:

“ 6. All possible fluctuations in the rate for labour materials general conditions and other possibilities of each and every kind connected with execution of the work, due to any cause whatsoever should be considered before quoting the rates and no claims whatsoever on this will be entertained afterwards.

.....

10. Any other taxes, royalty, octroi etc. whatever leviable maybe included in the rates. No claim for control or any other taxes etc.will be entertained by Railways at any later stage and on any ground whatsoever.”

(emphasis supplied)

14. In view of the aforesaid clauses, we find force in the contention of the learned counsel for the appellant that in the absence of any price variation clause, the intent of the contracting parties was clear that the contract was a fixed price contract providing for no variation and thus if any variation arose whether on account of increase or decrease in rates of taxation, the impact of the same would be on the contractor. Unfortunately for the respondent, in the present case, there has been an increase in the sales tax which naturally has resulted in a higher amount being borne by the respondent.

15. Clause 20 of the tender conditions clearly stipules that no sales tax as “may” be levied by the Government or local bodies will be paid. Thus, it not only envisages the existing position but also covers the possibility of a future tax being levied on that account. The remaining clauses also make it abundantly clear that the appellant had clearly absolved

itself of the responsibility of paying any tax on any account whatsoever and the respondent agreed to the said contract.

16. We may also take note of the fact that though in the present case, the sales tax increase arose just four days after the date of awarding of the contract on 05.07.1996, the formal agreement was signed on 09.08.1996. Other than making a representation on 11.07.1996, the respondent did not, at the time after signing of the agreement dated 09.08.1996, put any conditions arising from the increase of sales tax.

17. Learned counsel for the respondent did strenuously try to contend that once the representation of the respondent was pending, the respondent expected a favourable consideration of the same. Learned counsel also sought to rely upon a circular of the appellant dated 17.03.1987 dealing with the General Conditions of Contract – Price Variation Clauses – amendment thereto, to contend that the price variation clause would apply in the case of the respondent in view of clause (vi) of the same, which is as follows:

“ (vi) For all extension of time granted to the stipulated date of completion of work, the price variation clauses will be applicable except extension (s) granted under clause 17(4) of the General Conditions of Contract in respect of the contracts where time was the essence of the contract.”

18. We, however, find that this clause cannot be read in isolation. The circular itself provides in clause (i) that the price variation clause will not apply if the price variation is

up to 5 per cent. Further, clause (ii) makes it clear that the price variation clause would be applicable only to contracts where the stipulated period of completion is more than one year. In the present case, the stipulated period of completion of the contract was ten months and thus this circular has no application whatsoever to the case of the respondent.

19. Learned counsel also sought to rely on clauses 17(2) of the General Conditions of the Contract, which reads as under:

“ (2) Delay and extension of time – If in the opinion of the Engineer the progress of work has at any time been delayed by any act or neglect of the Railways employees or by any other contractor employed by the Railways under sub-clause (4) of clause 20 of these conditions or by strikes, lockouts, fire, unusual delay in transportation, exceptionally inclement weather, unavoidable casualties or any causes beyond the contractor’s control as by the reasons of proceedings taken or threatened by or dispute with adjoining or neighbouring owners or public authorities arising otherwise than through the contractors own default etc. or by delay authorized by the engineer pending arbitrator or in consequence of the contractor not having received in due time necessary instructions from the Railways for which he shall have specifically applied in writing to the Engineer or his authorized representatives or by any other cause which the Engineer shall decided to justify the delay, then the time of completion of the works may be extended for such reasonable time as the Engineer on behalf of the Railway may decide.”

(emphasis supplied)

20. Learned counsel for the respondent submits that such clause would apply to the case of the parties on account of his representation dated 11.07.1996 remaining unattended.

21. We are unable to accept this plea of the learned counsel for the respondent for the reason that the representation of the respondent was on account of increase in incidence of sales tax which has nothing to do with the clause in question. This clause deals with a situation where there are unforeseen events or the conduct of the appellant delaying the contract. The reference to necessary instructions in this clause is in the context where the respondent may have sought instructions on a particular aspect of execution of the contract in respect of which there was a delayed response on the part of the appellant which led to delay in performance of the contract. The claims of the respondent arising from increase in incidence of sales tax can hardly effect the performance of the contract in any manner.
22. The contention of learned counsel for the respondent that as a consequence of the aforesaid, the contract is deemed to have been extended beyond the period of one year and thus clause (vi) of the circular dated 17.03.1987 would apply, cannot be accepted and the rigours of clause (ii) would instead apply as the contract was only for a period of ten months.
23. Learned counsel for the respondent referred to the judgment of the Supreme Court in Tarapore & Co.V.State of M.P.; 1994 (1) Arbitration Law Reporter 341, which has also been referred to by the learned Single Judge in the impugned order, as also to Food Corporation of India v. A.M.Ahmed & Co. and Anr; (2006) 13 SCC 779. In Tarapore

& Co.V.State of M.P. case (supra), the question was the impact of increase in the rates of minimum wages. What the contract provided was that the wages to be paid were not to be less than fair wages and the fair wages had not been notified. It was thus construed that when the minimum wages were increased, there was certainly an obligation on the part of the contractor to pay such minimum wages which was to be construed as the fair wages under the contract. It is obvious from these facts that this judgment has no application to the facts of the present case. In Food Corporation of India v. A.M.Ahmed & Co. and Anr's case (supra), learned counsel for the respondent referred to the observations of the Supreme Court to the effect that escalation was a normal and routine incident arising out of the gap of time in this inflationary age in performing any contract of any type. The matter, once again, pertained to the payment of wages and the stipulation not to pay less than minimum wages. The escalation was by way of statutory wage revision and the arbitrator found the claim sustainable as the delay was on account of the party awarding the contract. As observed above, once again the principle is the same which would not have any application in the facts of the present case which has to be dealt with on the basis of the terms of the contract agreed to between the parties.

24. In view of the aforesaid position, we are unable to sustain the impugned order which is set aside and objections filed by the respondent to the award are dismissed.

25. The appeal is accordingly allowed leaving the parties to bear their own costs.

CM 9951/2007
CM 11101/2007

In pursuance to the Order dated 27.07.2007, the appellant has deposited the awarded amount of Rs.4,23,198/-. The said amount be released to the appellant.

The applications stand disposed of.

SANJAY KISHAN KAUL, J.

JANUARY 29, 2009
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SUDERSHAN KUMAR MISRA, J.