

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

% **Judgment reserved on: 23.01.2009**
Judgment delivered on: 02.02.2009

+ **FAO(OS)NO.2 OF 2009**

Kay Bee Alums P. Ltd Petitioner
Through: Mr. Shiv Khorana, Advocate

versus

Union of India Respondent
Through: Nemo

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIPIN SANGHI

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

VIPIN SANGHI, J.

1. This appeal is directed against the judgment dated 3.10.2008 passed by a learned single Judge of this Court in O.M.P No.211/2001. By the impugned judgment, the learned single Judge has allowed the objections preferred by the respondent UOI against the Arbitrator's award dated 26.3.2001, made by Shri B.L.Nishad, then Additional Learned Advisor to the Government of India, Ministry of Law, Justice

and Company Affairs, in favour of the appellant herein. Resultantly, the said award stands set aside.

2. The appellant had made five claims before the Arbitrator of which claim nos. 1 and 3 to 5 were rejected. Claim No.2 for Rs.3,10,865/- towards excise duty @ 10%, with interest @ 15% p.a from the date of the award had been allowed by the Arbitrator. The counter claims preferred by the respondent-UOI were rejected. The respondent preferred objections to the award under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') on the ground that the award of Rs.3,10,865/- towards 10% excise duty is contrary to the terms of the agreement. As aforesaid, these objections were allowed, and the award set aside.

3. The relevant facts may be stated at this stage to appreciate the challenge raised by the appellant before us. The appellant entered into a rate contract for supply of Alumina Ferric Grade to the respondent. The clause pertaining to excise duty as provided in the agreement read as follows:-

“Excise duty. The Central excise duty shall be charged extra at 10% on basic price which shall remain firm and fixed. No ED will be paid extra irrespective of turnover. Statutory variation, if any, shall be buyer's account.”

4. The general conditions of contract further provided:

“Excise Duty.

The prices are inclusive / exclusive / exempted of excise duty as indicated in the schedule to prices. While submitting the excise duty bills the contractor will furnish the following certificates on the bills itself:

“Certified that the excise duty charged in this/these bills are not more than that what is/are payable under the provisions of the relevant act or to the Rules made thereunder.”

Certified that the amount of Rs _____ claimed as excise duty in this bill is in accordance with provisions of the rules in all respects and that the same has been paid to the excise authorities in respect of stores covered by the bills under this contract.....”

5. The appellant, subsequent to the aforesaid agreement obtained exemption from payment of excise duty. Vide letter dated 31.5.1997 addressed to the respondent, it desired upward revision of the contract price by 10% on the ground that the respondent was obliged to pay the cost along with 10% towards excise duty, as according to the appellant, the payment of 10% towards excise duty was a “firm” and “fixed” contract. Merely because the appellant had obtained excise duty exemption, according to the appellant, the respondent could not seek to derive the benefit of that exemption and the appellant was entitled to retain the said benefit for itself. The appellant, consequently, sought the upward revision of the contract price by 10%. Upon learning of the exemption obtained by the appellant from payment of excise duty, the respondent vide communication dated 4.6.1997 amended the rate contract so as to provide for “nil excise duty”. The respondent, therefore, did not agree to the appellant

charging an additional 10% towards price of the goods. On 18.6.1997, another amendment to the rate contract was issued whereby excise duty from 1.3.1997 to 31.3.1997 was made payable at 8% on basic price and w.e.f. 1.4.1987 the excise duty was stated to be "nil".

6. In paragraph 8 of the claim petition filed before the Arbitrator, the appellant stated *"it be further added that the claimant is entitled for excise duty benefit due to non availability of MODVAT benefit and therefore required to be compensated to an equivalent of 10% of the rate contract price which is required to be merged and the rate thus arrived at is required to be declared as firm and final."* The first claim made before the Arbitrator was to *"amend the clause 5 of the rate contract by making it that excise duty of 10% be merged in the quoted price"*.

7. The Arbitrator rejected claim No.1. The learned single Judge, observed that the making of the aforesaid claim no.1 shows that even according to the appellant, without the amendment in the rate contract, the appellant was not entitled to the sum of Rs.3,10,865/-. However, the Arbitrator proceeded to award the amount of Rs. 3,10,865/- under claim no.2. In these circumstances, the learned single Judge held that there is an inherent contradiction in the award inasmuch as, on the one hand the Arbitrator held that the claim for amendment of the rate contract so as to increase the price of the

goods by 10% could not be allowed by him, on the other hand the Arbitrator awarded the amount of Rs.3,10,865/- towards 10% excise duty. The learned single Judge also noted that on the arbitrator's record, the appellant had failed to produce any document to show that excise duty at the rate of 10% had in fact been paid by it for the period in question. He took note of the fact that even according to the appellant, it had not paid excise duty at the rate of 10%. In paragraphs 11 and 12 of the impugned Judgment, the learned single Judge held as follows:-

"11. It was held in **K.P. Poulouse v State of Kerala** AIR 1975 SC 1259 the Apex Court held that if the arbitrator arrives at inconsistent conclusions it amounted to misconduct within the meaning of Section 30 of the 1940 Act. Again in **UOI v Pundari Kakshudu & Sons** AIR 2003 SC 3209 it was held that award was liable to be set aside when on the one hand there was award of damages, suggesting that party to be guilty of breach and a finding to the contrary, the award was liable to be set aside for inconsistencies. This court recently in **UOI v Sanghu Chakra Hotels Pvt Ltd** 2008 (3) Arb. LR 255 (Delhi) held a mutually contradictory award to be contrary to public policy within the meaning of Section 34 of the 1996 Act.

12. There is nothing on the record to show that the respondent No. 1 raised any excise duty bills on the petitioner as provided in the contract as quoted above. Moreover, the correspondence and the claim petition show that it was the respondent's own case that since it was not billing for the excise duty at 10%, which the petitioner had agreed to pay, the contract price should be increased by 10%. It is thus obvious that no such bills would have been raised. The counsel for the respondent No. 1 has, of course, argued that the matter was not pleaded and considered before the arbitrator as before this court. It is urged that the only plea before the arbitrator was that the petitioner was not liable for excise duty owing to the amendment to the rate contract and the arbitrator has allowed the claim for the reason of the said amendment having not been consented to by the respondent. Even if that be so, under the un-amended agreement, the

respondent No. 1 was to become entitled to excise duty only if paid to the excise department and not otherwise. The respondent having neither pleaded nor proved any payment of excise duty to the excise department, was under the terms of the agreement not entitled to the excise duty and I thus find the award to be contrary to the terms of the agreement and liable to be set aside on this ground as well. The counsel for the petitioner, Union of India, has rightly relied upon **Hindustan Zinc Ltd. v. Friends Coal Carbonisation**, 2006, (4) SCC 445 reiterating that an award against the terms of the contract would be patently illegal and open to interference by the court under Section 34(2) of the Act.”

8. The submission of learned counsel for the appellant is that the appellant was entitled to recover 10% extra on basic price on account of excise duty, irrespective of whether or not the same had been paid by the appellant. This submission is based on the aforesaid clause dealing with excise duty. While making the aforesaid submission, learned counsel for the appellant has conveniently failed to take note of the plain language used in the aforesaid clause, as well as the general conditions of contract which has also been extracted herein above. The only interpretation that can be given to the aforesaid two clauses is that the basic price was to remain “firm and fixed” and the appellant/supplier was entitled to reimbursement of excise duty to the extent of 10% and no more. There is no minimum rate of reimbursement of excise duty fixed in the contract, to which the appellant would be entitled even without incurring the liability towards excise duty. The payment of excise duty to the appellant was by way of a reimbursement. Excise duty is an indirect tax which is passed on to the buyer by the manufacturer. The element of excise duty could

not be charged or recovered unless it was incurred. The contract clearly provided that *“Statutory variation, if any, shall be buyer’s account.”* Therefore, it is clear that the benefit of any exemption/reduction in excise duty was liable to be passed on to the buyer/respondent. From the general condition aforesaid, it is clear that excise duty could not be recovered by the supplier appellant, unless the same is paid and duly certified. Learned counsel for the appellant was repeatedly asked whether the appellant had, in fact, paid the excise duty sought to be recovered, and produced documents in support thereof before the Arbitrator. However, he did not answer this question and kept on insisting that the appellant was entitled to recover excise duty at the rate of 10%, irrespective of whether or not the same was charged to the appellant, or paid by it. Since excise duty is paid to the government, the same is bound to be accounted for and documented. Had the amount claimed been in fact paid towards excise duty, there would have been no difficulty in establishing the same by producing challans/receipts of payment. Mere self serving statements showing computation of the amount claimed, relied upon by the appellant could not constitute evidence to establish payment of the amount towards excise duty.

9. For the aforesaid reasons, we find no merit in this appeal and we accordingly reject the same. As noticed hereinabove, the only interpretation to which the aforesaid two clauses are open, is that the

appellant could recover (upto a maximum of 10% excise duty on the basic price which was firm and final) only that much amount towards excise duty as it had actually incurred. No material, it appears, was produced either before the Arbitrator, or before the learned single Judge to show that the amount of Rs.3,10,865/- was, as a matter of fact incurred by the appellant towards excise duty, but not paid by the respondent. Therefore, there is not only a contradiction in the award, as rightly held by the learned single Judge, the award is also contrary to the express terms of the contract. The same has deservedly been set aside.

10. Before parting with this case we think it appropriate to express our anguish at the tendency exhibited by the appellant in not only preferring an wholly frivolous claim before the Arbitrator, but also in preferring the present appeal against a well reasoned judgment of the learned single Judge, setting aside the award of the Arbitrator. Even if the appellant had any misconception about the merits of its claim while preferring its claim before the Arbitrator, the learned single Judge had in simple words explained the correct position in his impugned judgment. Therefore, it cannot be said that this appeal has been preferred bona fide. In our view, the claim made by the appellant was wholly unreasonable and unsustainable in law, and defied basic commonsense. We, therefore, impose cost of Rs.10,000/- on the appellant for wasting judicial time of this Court by preferring the

present appeal and pressing the same. The costs should be paid to the Prime Minister's Relief Fund within four weeks.

11. We must also express our anguish at the manner in which the Arbitrator, Mr. B.L.Nishad has dealt with the aforesaid claim of the appellant. Mr. B.L.Nishad at the relevant point of time was the Additional Legal Advisor to the Government of India, Ministry of Law, Justice and Company Affairs, Department of Legal Affairs at Sashtri Bhawan, New Delhi. The award made by him betrays complete lack of understanding on the part of the Arbitrator of the law, and his non-application of mind to the dispute raised before them. The claimant had claimed the amount of Rs.3,10,865/- on account of excise duty at the rate of 10%. However, no documents had been filed by the claimant/appellant to show that it had actually paid excise duty to the tune of Rs.3,10,865/-, as claimed by it. The claim has been allowed only on the ground that the two amendments to the contract, above referred to, were not made at the request of the claimant. What has been failed to be noticed is that the amendments to the contract were irrelevant, and even on the terms of the original contract the appellant was not entitled to recover anything on account of excise duty when, as a matter of fact, the appellant had not even been subjected to payment of excise duty to the aforesaid extent. Considering the fact that the Arbitrator came from a legal background, we would have expected the Arbitrator to deal with the issues raised

before him with greater understanding and application of mind, which seems to be absent in this case. The appeal stands disposed of in the aforesaid terms.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

February 02, 2009
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