

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

Reserved on: 08.04.2013
Pronounced on: 18.04.2013

+ **FAO (OS) 280/2009**

M/S. DAULAT RAM INDUSTRIES Appellant
Through: Sh. Dhruv Mehta, Sr. Advocate
with Ms. Tamali Wad, Advocate.

Versus

UNION OF INDIA Respondent
Through: Sh. Krishna Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT

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1. The Appellant firm's claim had been accepted, and award made in its favour, and against the respondent (hereafter "employer"), in arbitration proceedings. The employer preferred a petition objecting to the award under Section 34 of the Arbitration and Conciliation Act, which was allowed by a learned Single Judge of this Court. Consequently, the present appeal.

2. By the Purchase order dated 22.7.1999, the Appellant, M/s. Daulat Ram Industries agreed to supply 180 nos. of Rheostatic Dynamic Braking Resistors (DBR) with other accessories to the

Union of India (UOI) at the rate of Rs.5,48,000.00 + Excise Duty 16% + Central Sales Tax 4% + freight, for each DBR and the associated accessories; it was also agreed that these were subject to a warranty of 24/36 months, delivery of 60% of quantity by 31.03.2000 and 40% of the quantity between 01.04.2000 and 30.4.2000 but not later than 30.4.2000. Clause 19 entitled the purchaser, Union of India to exercise option to procure an enhanced quantity of 30% over and above the contracted amount, which was exercised by letter dated 15.09.2000. As a consequence, the appellant had to supply 54 additional items, by an extended period ending on 31.3.2001. In the meanwhile, the original contract delivery period was extended, at the appellant's request, by the employer/Union of India, through a letter dated 06.06.2000. This extension of Delivery Period in respect of the originally contracted quantity (180 items) was granted by the purchaser i.e. Union of India upto 31.12.2000 with Liquidated Damages. The supply of 180 nos. – the initially contracted quantity – and the associated accessories was completed within the extended Delivery Period i.e. 31.12.2000.

3. In the meanwhile, even during the currency of this contract, the appellant participated in a tender floated by Chittaranjan Locomotive Works (hereafter “Chittaranjan Loco tender”) as per specifications for the same item, and quoted a rate of Rs.5.78 lakhs + taxes, packing, freight charges, Price Variation Clause and warranty of 12/18 months. The Chittaranjan Locomotive Works made a counter offer to the appellant for supply of the material (in the tender opened on

17.11.2000) of Rs.4.66 lakhs plus duties, Price Variation Clause, Rs.9000/- as freight and warranty of 12/18 months. In response to this counter offer, the appellant by its letter of 9.3.2001, offered to supply at Rs.5.48 lakhs plus duties, etc. and warranty of 24/36 months which is identical to the contracted rate in Railway Board contract.

4. Of the 54 Dynamic Braking Resistors, (the increased quantity in terms of the letter of Railway Board dated 15.9.2000, exercising its option under Clause 19) 30 items were delivered by the appellant within the time fixed, i.e. 31.3.2001. It sought extension – which was granted – for the supply of the balance 24 items, through letter dated 30.4.2001. The employer/Union of India granted extension up to 31.7.2001 by letter which in para 4 indicated that the extension would be subject to the condition that if the Chittaranjan Loco tender was finalized for lower rates after 30.4.2001, that rate would apply for supplies made during the extended period. As a matter of fact, the balance 24 units were supplied during the extended period. The appellant, by its letter of 1.8.2001 requested the employer to regularize the extended delivery period (in respect of the initial and additional contracted quantity) up to 31.12.2000 without payment of liquidated damages. The employer/Union of India, by letter of 3.10.2001 indicated that no liquidated damages would be recovered from the amount payable for the balance additional quantity (24) supplied by 17.7.2001, provided the consideration was Rs.4.66 lakhs plus duties, Price Variation Clause, Rs.9000/- as freight.

5. The resultant dispute which arose between the parties, encompassed the question of what was correctly payable in addition to other issues, such as the justification for deduction of Rs.25 lakhs made by the employer/Union of India from the running bills submitted by the appellant. Since these disputes were not resolved *inter se* by the parties, the appellant invoked the arbitration clause. The Sole Arbitrator by his award, held the Appellant/claimant entitled to payment to the extent of Rs.21,60,958.20 (Rupees twenty one lakh sixty thousand nine hundred fifty eight and paise twenty only). The Union of India preferred objections before the Court, contending that the award was contrary to public policy and Indian law, in as much as the appellant had accepted the extension given for the supply of the balance additional quantity, in terms of the employer's letter dated 30.4.2001, which had clearly indicated that the unit cost would be in accordance with what was to be finalized under the Chittaranjan Loco tender. The Court accepted those contentions, and held that the award was contrary to law and set it aside. The appellant has consequently approached the Division Bench.

6. The appellant argues that the learned Single Judge failed to see that there was no discretion with the employer/Union of India to unilaterally revise the consideration in respect of the supplies made, in terms of the contract, or in the general terms and conditions, i.e. the Indian Railways Standard Conditions of Contract (IRS) which was to be considered as part of the contract. Counsel particularly relied on the letter of 15.9.2000, which, while increasing the quantity to be supplied from 180 units to 234 units, stipulated in effect that the cost

of the increased supplies would be the same, by stating that the total cost was increased from Rs.9,86,40,000/- to Rs.12,82,32,000/-. That letter also stated that all other terms and conditions of the contract would remain unaltered. In these circumstances, the respondent/Union of India could only have sought recourse to the terms of the contract, and recovered liquidated damages in the event of any loss caused to it due to delayed supply, but could not have unilaterally revised the cost price of the balance units to be supplied, downwards.

7. It was argued that in the absence of any contractual term, or legal provision enabling one party to change the terms of contract, without consent of the other, it was not open to the respondent to pay lower consideration in respect of a part of the contract, on the pretext that the appellant did not protest the condition in this regard, indicated in the letter of 30.4.2001. It was argued in this context that even that letter did not, in fact, indicate any price; the cost price was finally indicated after the contract was performed, i.e. on 3.10.2001, when the entire supplies were completed. Counsel further argued that in the absence of a firm price, there was no concluded contract, which superseded the previous terms. It was highlighted that the learned Single Judge erred in not seeing that there could have been no fresh contract through the letter dated 30.4.2001, since the price had not been agreed; such contract would be void for uncertainty. In these circumstances, the previous agreement which stipulated the price – in the letter dated 15.9.2000, was acted upon, and bound the parties.

8. Learned counsel for the respondent/Union of India argued that the impugned judgment is in order, and does not disclose any error of

law, or appreciation of fact, calling for interference. It was argued that when the appellant sought extension for supply of the balance additional items, and was given the extension conditional upon revision of the unit cost, with its linkage to the Chittaranjan Loco tender, it was aware of this fact. It chose to accept that downward revision, since it had bid in that tender process. Consequently, having accepted that offer, and acted upon it, the appellant could not complain that the contract term was contrary to law, since the finalization of the Chittaranjan Loco tender was not to its advantage.

9. It was argued that the extension granted to the appellant was on the condition that the unit price would be different for such balance quantity. To that extent, there was no uncertainty in the contract. It was argued that the award was clearly contrary to law and unjustified to the extent it directed the respondent to pay over Rs.21 lakhs, when all the materials on record suggested that the appellant elected to and acquiesced for payment of a lower unit cost, in line with the finalization of the Chittaranjan Loco tender.

10. The relevant part of the award made in the appellant's favour reads as follows:

“5.0 Reason for award:

5.1 The essence of dispute in this case, as would appear from the above, is that a lower price was unilaterally applied by the respondents based on the lower contracted price obtained in CLW's tender for a similar (not identical) stores, with different terms and conditions, which came to the notice of the respondents after the delayed supplies of 24 nos. Dynamic Braking Resistors were completed by the claimant.

5.2 It is a matter of record that the material in the subject contract were as per specification No. CLW/ES/R-29-Alt.J as against the material under Chittaranjan Locomotive Works contract being as per specification No.CLW/ES/R-29/K with VAPCON blower with resisters or VDM/Germany and motor from ABB. The warranty/guarantee in Chittararijan Locomotive Works contract was for 12/18 months and that in the subject contract was 24/36 months. The payment in Chittaranjan Locomotive Works contract was 98% as against 95% in subject contract against proof of dispatch in both the cases.

5.3 It is further reflected from records that the contracted price obtained in Chittaranjan Locomotive Works tender was based on the counter offer by Chittaranjan Locomotive Works and the rates offered by the claimant in the Chittaranjan Locomotive Works tender were same as that in the subject contract.

5.4 The respondent's counsel vide para 3 of written submission has quoted the judgment in case of Kulupara Sriramulu vs A.S. Sathyanarayana AIR 1968 SC 1028 as under:

“Acceptance must be signified by some act or acts agreed on by the parties or from which the law raised presumption of acceptance”.

He has contended that the new condition imposed vide letter dated 30.4.2001 although not accepted formally by claimant can be construed to be the acceptance by the act of supply of material by the claimant. This does not sound very convincing as the case is not identical to a contract having been formed by his signifying acts of fall of hammer in an auction or compliance of the requirements in a reward notice for a lost article to be deposited back to its owner. Further, it is also noted that

acceptance has been signified by express formal documents jointly signed as envisaged in IRS 3603 at previous stages in the same contract.

5.5 Indian Railways Standard Conditions of Contract condition 0700 which stipulate time and date of delivery being the essence of the contract also envisages extension of delivery. Indian Standard Conditions of Contract condition 0800 also envisages extension for time of delivery arising from any cause which the purchaser may admit as a reasonable ground for extension. The contention of respondents counsel that the right of representation was available during the extension granted overlooks the fact that even the respondents got the knowledge of lower rates on 13.9.2001 and the copy of the purchase order placed by Chittaranjan Locomotive Works was received on 28.9.2001 as indicated in para 12.0 of respondent's written brief. It is a matter of record that while granting extension vide letter dated 30.4.2001 the respondent had provided for liquidated damages for the delayed supplies vide para 2 of the letter which was part of the original contract and lower prices (if obtained) in the Chittaranjan Locomotive Works tender vide para 1 & 4 which came to the knowledge of the respondents on 13.9.2001 and got applied unilaterally vide respondent's letter dated 3.10.2001.

5.6 The counsel for claimant sited the apex court judgment In the matter of Arosan Enterprises Limited Vs UOI (1999(9)SCC 449).

“Incidentally, the law is well said on this store on which no further dilation is required in this judgment to the effect that when the contract itself provides for extension of time, the same cannot be turned to be the essence of contract and default

however in such a case does not make the contract voidable either”

5.7 Further the apex court’s observation as given in Pollock and Muller’s ‘Indian Contract and Specific Relief Act’ cited by counsel for claimant highlights “time being the essence of contract” It would be observed from para 0702 of Indian Railways Standard Conditions of Contract conditions that the established contract between the claimant and the respondent vide mutual acceptance signified through signature on the Purchase Order dated 22.7.99 and amended for enhancement of 30% of quantity at the same terms and conditions and notified vide respondent’s letter dated 15.9.2000 did not become voidable due to supply of 24 Dynamic Braking Resistors after 31.3.2001 . The failure of the claimant to supply 24 Dynamic Braking Resistors by 31.3.2001 was subject to para 0702 of Indian Railways Standard Conditions of Contract and if the reasons indicated for extension beyond 31.3.2001 is not admitted as reasonable grounds under IRS 800 the default on the part of the claimant in completing the delivery within the contracted period would be established. The purchaser may without prejudice to his other rights recover from the claimant the agreed liquidated damages and not by way of penalty a sum equivalent to 2% of price of any stores (including element of taxes duties freight) which the claimant failed to deliver within the period fixed for delivery in the contract or as extended, for each month or part of a month during which the delivery of such stores may be in arrears as the delivery thereof was accepted after expiry of the aforesaid period.

6.0 Award:

6. 1 Accordingly, the claim of M/s. Daulat Ram Industries is allowed subject to application of Liquidated Damages as per Indian Railways Standard Conditions of

Contract 0702(a). Based on the records available, the amount of award has been worked out by calculating the Liquidated Damages for the deliveries made after 31.3.2001 and the claim awarded would thus be Rs.21,60,958.20 (Rupees twenty one lakh sixty thousand nine hundred fifty eight & paise twenty only) (details at Annexure OI) against the claim of Rs.23,74,195.20 made vide para 33(a) of the Claim Petition.”

11. The learned Single Judge, in the impugned judgment, was persuaded to hold that the appellant's conduct, in not protesting the downward revision, indicated by the respondent/Union of India, when it extended the time for delivery of the balance of additional quantity (24 units) bound it to the lower amount, ultimately indicated by the respondent, based on the Chittaranjan Loco tender finalization. It was additionally reasoned that the arbitrator could not write or alter the terms of contract entered into voluntarily between the parties.

12. The above discussion would show that there is no dispute about the facts pertaining to the award of contract, the extension of time granted for supply of the basic or initial quantity (180 units), exercise of option by the purchaser/Union of India to buy 30% extra quantity, by letter dated 15.9.2000 (i.e 54 additional items). Significantly, this letter- issued in terms of clause 19 of the contract, which enabled the option – expressly stated the quantity and also that “other terms and conditions” of the contract would remain the same. In other words, the terms including the amount payable, towards consideration, for each item, were fixed. That being the case, the question is whether the extension for supply of balance additional items (24 remaining out of 54 units, 30 having been supplied by the time agreed, i.e. 31.3.2001)

could be an occasion for the respondent/Union of India to indicate another price in respect of an already concluded contract. There is no doubt that the Union of India, in its letter of 30.4.2001, indicated that it would accept the balance 24 units at the price *to be settled in respect of another contract, i.e the Chittaranjan Loco tender*. Equally, the appellant did supply the balance 24 items after this was made known. That seems to have been the decisive factor with the learned Single Judge, who held that the fresh consideration could be indicated and that the appellant could not complain or fall back on the original consideration agreed. On this aspect, this Court is of the opinion that the principle of election, or estoppel could not have been invoked in the circumstances of the case. Having opted to purchase the additional items for a particular known price on 15.9.2000, the contract for those quantities stood concluded. The appellant in fact acted on that contract – indivisible so far as 54 additional units were concerned – and even supplied 30 units. The respondents, therefore, could not have, at the stage of considering the issue of extension of time for supply, imposed a fresh unknown price. No stipulation in the contract, or the IRS was brought to the notice of this Court, in support of such action. As far as the appellant's action in not protesting the respondent's intimation that it would accept the additional items at a price to be indicated later, is concerned, this Court notices that the letter of 30.4.2001 itself mentioned a provisional price of Rs.5.47 lakh per unit. Besides, the materials on record show that the price for the Chittaranjan Loco tender was finalized and intimated to the appellant only on 3.10.2001 after the entire supplies had already been made

earlier in July 2001. On the date of the grant of extension and the so called counter offer, therefore, the consideration itself was unknown. Thus, the offer itself was an uncertain one, and it could not be said that the counter offer led to a concluded contract, because the consideration was unknown to the parties.

13. Section 29 of The Indian Contract Act is as follows:

“29. Agreements void for uncertainty

Agreements, the meaning of which is not certain, or capable of being made certain, are void”

Illustration (f) to the above provision reads as follows:

“f) A agrees to sell to B “my white horse for rupees five hundred or rupees one thousand”. There is nothing to show which of the two prices was to be given. The agreement is void.”

In *Nicolene Ltd. v. Simmonds* (1953) 1 QB 543, a contract for sale of a quantity of reinforcing steel bars was expressed as subject to “*the usual conditions of acceptance*”. The seller repudiated the contract whereupon the buyers claimed and were awarded by the trial judge damages for the breach of contract. On appeal, the seller contended that the contract was not concluded there being no *consensus ad idem* in regard to the conditions of acceptance. It was held that, there being no “*usual conditions of acceptance*”, the condition was meaningless and should be ignored. Dealing with the relevant clause, Denning L. J. observed,

“that clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without

impairing the sense or reasonableness of the contract as a whole, and it should be so rejected. The contract should be held good and the clause ignored”.

Then, the Court pointed out that:

“the parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them and it would be most unfortunate if the law should say otherwise”.

The Court also held that in such cases then, one would find

“defaulters all scanning their contracts to find some meaningless clause on which to ride free”.

14. In the present case too, the mention of an uncertain and unascertainable consideration, at the time of extension could not be held to be decisive as regards the consideration payable for the balance of the additional units to be supplied (24). The facts reveal that the consideration was finally conveyed after the contract was performed, belying the respondent’s stand that the price was ascertainable as on 31.3.2001. The learned Single Judge, in our opinion, fell into clear error in overlooking this aspect, and ignoring that no term of the contract empowered the respondent to unilaterally alter the term of a concluded contract, which had even been performed substantially, by the supply of 30 out of the 54 additional items. Therefore, this Court has no doubt that the award in this case did not disclose any manifest error of law, or was not contrary to the public policy in India, as to warrant interference under Section 34. The impugned judgment and order is consequently set aside; the award is restored, and shall bind the parties. The post award interest

shall be in terms of Section 31(7) of the Arbitration Act. The appeal is allowed in these terms.

**S. RAVINDRA BHAT
(JUDGE)**

**SUDERSHAN KUMAR MISRA
(JUDGE)**

APRIL 18, 2013