IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.06.2016

DELIVERED ON : 30.06.2016

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

O.P.No.557 of 2008

Union of India,
rep. by its General Manager,
OCF, Avadi,
Chennai - 600 054.

.. Petitioner

Vs.

1. M/s.Sunil Industries Limited,
   315, Rewa Chamber New Marine Lines,
   Mumbai - 400 020.

2. Sri.M.Sathyanarayana,
   Sole Arbitrator,
   AGM/HVF, Avadi,
   Chennai - 600 054.

.. Respondents

For Petitioner : Mr.K.S.Jeya Ganeshan, CGSC

For Respondents : Mr.H.Prosper

O R D E R

1. This is a Petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 1996 Act) to assail the award dated 17.07.2006.

2. By virtue of this award, the 1st respondent has been awarded a sum of Rs.8,38,312/-, albeit, without any interest.

2.1. The learned Arbitrator has been arrayed as second respondent in the present proceedings. To my mind, there was no necessity of impleading the arbitrator as party to the present proceeding. Since, arguments in the matter were heard finally, it is deemed unnecessary, at this stage, to pass any order deleting the Arbitrator from the array of parties.

2.2 However, what is required to be is that the Arbitrator is an Officer of the Petitioner, i.e., the Union of India (in short UOI).

2.3. For the sake of convenience, the petitioner will be referred to hereafter as UOI.

3. Briefly, the 1st respondent's claim before the learned Arbitrator was for release of the amount, which was deducted by the UOI towards "additional flag allowance". Being aggrieved, the 1st respondent raised a dispute, which, as indicated above, adjudicated upon by the learned Arbitrator.

4. Thus, the background, in which, the present Petition is filed, is, broadly as follows:

4.1. UOI had issued seven (7) supply orders in favour of the 1st respondent for supply of cloth material, described as:, "drill cotton Disruptive PAT VAT PTD 142 CMS (Vr) No.4" (hereinafter referred to as 'fabric'). The fact that the 1st respondent supplied the fabric in issue is not in dispute. The dispute really arose when UOI via the Ordinance Clothing Factory, Avadi, (in short OCF, Avadi), which was the vendee in this case, deducted monies towards additional flag allowance.

4.2. The flag allowance, as was explained to me, over which, there was a consensus between the counsel for the parties, is an allowance extended by the vendor, (in this case, the 1st respondent) to the vendee, (in this case OCF, Avadi) towards any visual defects found in the cloth material supplied by it.

4.3. The fact that the 1st respondent had allowed adjustment of some amount of flag allowance is not in dispute. What is objected to, by the 1st respondent, is the deduction made by the UOI towards additional flag allowance.

5. Therefore, what is required to be noticed, in the first instance, is the details of the supply orders, supplies made, the flag allowance allowed by the 1st respondent and the quantum of additional flag allowance adjusted by the UOI.

5.1. The details, in respect of the same, are culled out herein below from the tabulated chart described as: "Statement of Claim Amount", which was filed by the 1st respondent, before the learned Arbitrator.

S.O. No.	***Flag Allowance allowed by Sunil Industries***		***As per statement submitted by Sunil Industries Ltd.***	
	Qty (Mtrs)	Value (Rs.)	Amount claimed against Additional Flag allowance	
			Qty (Mtrs)	Value (Rs.)
0201 (Annexure 'A')	895.50	78174.32	4157.92	406210.00 Less Amount already paid 95519.00 Balance Amount 310691.00
0389 (Annuexure 'B')	258.00	22092.80	1390.08	119963.00
0420 (Annexure 'D')	176.50	14010.57	960.87	76274.00
0446 (Annexure 'E')	331.80	28634.34	2294.67	198032.00

S.O. No.	***Flag Allowance allowed by Sunil Industries***		***As per statement submitted by Sunil Industries Ltd.***	
0393	247.90	15924.14	1656.42	106402.00
0251	22.00	1427.81	255.76	16599.00
0266	49.00	3111.84	162.99	10351.00
	1978.70	163375.82	10878.71	838312.00

6. Aggrieved by the deduction of moneys, as quantified above, towards additional flag allowance, the 1st respondent filed a claim before the learned Arbitrator.

7. As alluded to above, UOI appointed its own Additional General Manager as the Arbitrator in the matter. The learned Arbitrator, as noticed, at the outset, allowed the claim of the 1st respondent.

8. The UOI, being aggrieved, filed the instant action on 12.10.2006. Upon notice being issued, a reply was filed on behalf of the 1st respondent.

Submissions of Counsels:

9. Counsel for parties have advanced their arguments based on the material on record. The UOI was represented by Mr.K.S.Jeya Ganeshan, while the 1st respondent was represented by Mr.H.Prosper.

10. On behalf of the petitioner, Mr.K.S.Jeya Ganeshan, broadly, made the following submissions.

10.1. It is quite common, for defects to occur in the manufacture of textiles. The defects could be in the fabric itself or even occur in the form of variation in the width. Therefore, there are defects which cannot be avoided by the manufacturer. Consequently, such defects are quantified, and thus, reflected in the form of flag allowance by the manufacturer.

10.2. At times, these defects become known, only, at the time of receipt of the fabric and, therefore, the vendee makes adjustments by way of additional flag allowance. These adjustments are made based on mutual discussion between the parties.

10.3. Learned Arbitrator failed to take into account the aforesaid aspect and, therefore, erred in directing refund of the amount deducted. The Arbitrator ought to have understood the complexity of the matter and, therefore, appreciated the practical difficulty in stating the percentage of additional flag allowance in the tender itself.

10.4. The choice, which was available with the UOI was between rejecting the entire consignment and, the acceptance of the consignment, albeit, with allowances. The methodology followed by the UOI ensured timely delivery of fabric to the armed forces and, thus, in turn, benefited the 1st respondent, in as much as it prevented the rejection of the entire consignment of fabric.

10.5. The Arbitrator failed to take into account the communication sent to the 1st respondent, via, fax dated 31.05.2003. By virtue of the said fax, the 1st respondent was made cognizant of the of the defects in the fabric, and therefore, in response to the same, the 1st respondent in its communication dated accepted the deduction of free flag allowance, to the extent of 1%. The learned Arbitrator lost sight of this aspect of the matter and thus, committed an error in law and of fact.

11. On the other hand, Mr.H.Prosper, who appears on behalf of the 1st respondent, says that the fabric was supplied as per the tender specification. It was stated that the supplies were made in the year 2002-2003. Upon unwarranted deduction being made towards

additional flag allowance, a dispute was raised by the 1st respondent in 2005. Though the award was passed on 17.07.2006, to date the 1st respondent had not received the moneys so awarded. While the petition was filed on 12.10.2006, it was numbered only in 2008. The case papers were served upon the 1st respondent after eight (8) years, in February, 2016. Resultantly, UOI has wrongfully enjoyed the moneys, lawfully payable to the 1st respondent without having to pay compensation, as interest is not factored in the award.

12. Insofar as the merits of the matter are concerned, learned counsel submitted that usual flag allowance of 1978.70 metres, (approximately) amounting to Rs.1,63,375.82, as per policy, was allowed. The deduction by the UOI of additional flag allowance, was not permissible, being contrary to the terms of the contract, entered into between the parties, and, if allowed, would amount to a double deduction, which was against the trade practice.

12.1. The UOI was required to communicate any defect/deficiency found in the fabric, and not, make unilateral deduction towards additional flag allowance from invoices submitted against supplies made by the 1st respondent. In this behalf, counsel for the 1st respondent relied upon the letters dated 28.12.2002 and 18.01.2003.

12.2. The reliance placed by the UOI on the 1st respondent's letter dated 10.06.2003 was erroneous, for the reason, that the adjustment was agreed to only for one (1) out of the seven (7) supply orders, being supply order No.0420/CA/2002-2003, dated 29.11.2002.

12.3. Further more, the 1st respondent had attempted to make deduction towards additional flag allowance, whereas, it was ostensibly aggrieved by the width of the fabric supplied. According to UOI, the fabric supplied had to have a width of 142 Cms. and that, which the 1st respondent had supplied had a width of 138 Cms. The variation in the width, according to the 1st respondent, was on account of "selvedges"; which is that part of the fabric on which the name of the manufacturer is printed.

12.4. This aspect of the matter was discussed between the parties, whereupon, the UOI agreed that the stand of the 1st respondent was correct and that, if, selvedges were included the width of the fabric supplied by the 1st respondent, would be 142 Cms. For this purpose, reliance was placed on the communication dated 14.03.2003, issued by UOI.

12.5. Therefore, the submission made on behalf of the UOI, that the deduction towards additional flag allowance was made, on account of the defect in the fabric supplied, was clearly erroneous, as what was sought to be done was, in effect, to seek compensation for the alleged failure on the part of the 1st respondent to supply fabric of the requisite width.

Reasons:

13. I have heard the learned counsel for the parties and perused the record.

13.1. According to me, what is emerged from the record and the submissions made on behalf of the parties is:

i) That the 1st respondent was required to supply fabric with the width of 142 cms.

ii) The 1st respondent, had, as per trade practice, allowed adjustment toward flag allowance, ie., for visual defects in the fabric.

iii) The 1st respondent alleges that UOI had made the impugned deduction under the head "additional flag allowance", to compensate itself for supply of fabric of width less than 142 cms.

iv) The tender document, admittedly, did not make any provision for deduction of "additional flag allowance".

14. In the background of these facts, therefore, the question which arises is: whether the UOI's approach and action in deducting monies towards additional flag allowance was correct?.

14.1. In order to come to a conclusion, one way or other, it would be necessary to 1st establish that the deduction towards additional flag allowance was made by the UOI to compensate itself against fabric supplied by the 1st respondent of a width less than the specified width, i.e., 142 cms.

14.2. The answer to this poser lies is in the communication dated 13.09.2002 addressed by UOI to the 1st respondent. The relevant extract of the letter is set out below, for the sake of convenience:

"No.QAS/0201/2002-03 Dt: 13.09.2002.

To
M/s. Sunil Industries,
315, Rewa Chambers,
New Marine lines,
Mumbai - 400 020.

Sub: Supply of Drill Cotton Disruptive Pattern

Vat Printed 142 cms (V-4) against this
Factory S.O.No:0201CA2002-03
dt.19.07.2K2

Ref: Your challan No: CS/9/08/02 dt.17.08.2002
for qty. 23603.50 metres.

* * * * *

The subject material received vide challan under reference has been cleared on the basis of sampling inspection. <u>During Inspection, the width of the material found ranging from 138 cms to 141 cms. As per terms and conditions of the S.O. the subject store having width less than 142 cms is not acceptable. Metres 684.20 have been claimed extra flag allowance to compensate the lesser width.</u> However when the lot will be taken for use, we shall revert back on the subject & if any defect/deficiency is found the same will be notified in accordance with the warranty/Guarantee.

(SURESH CHANDRA)
JOINT GENERAL MANAGER
for GENERAL MANAGER."

(Emphasis is mine)

14.3. A perusal of the aforesaid communication would show clearly that the petitioner chose to claim additional flag allowance only to compensate itself towards supplies of fabric made by the 1st respondent, which had width less than 142 cms. If that be the case, quite clearly, the 1st respondent is right in his submission that since there was no provision in the tender for additional flag allowance, the only choice that UOI had, was to reject the fabric in its entirety and not make adjustment in the invoices. Furthermore, it appears that the 1st respondent's submission, that it supplied fabric of requisite width, ie., 142 cms, is also correct, if one were to peruse the communication, i.e., the fax dated 14.3.2003, sent by UOI to the 1st respondent. For the sake of convenience, the said fax is also extracted hereunder:

" 14-03-03

To

M/s. Sunil Industries,
315, Rewa Chambers,
New Marine lines,
Mumbai - 400 021
Maharastra

Dear Sirs,

Sub: Supply of Cloth Drill Cotton Dist. Pat Vat Ptd 142 cms (V.No.4)

Ref: 1) S.O.No:0201/CA/2002-03, dt.19.07.2002
2) Your Fax/Letter No.Nil Dt:22.10.2002.

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With reference to letter cited at (2) above it is stated that the following amendment is hereby issued as per the details given below:-

AGAINST COLUMN NO. 9) DESCRIPTION OF GOODS ORDERED SELVEDGES:-

FOR: CLOTH DRILL COTTON DISTRUPTIVE PAT

VAT PTD 142 CMS (EXCLUDING SELVEDGES) V.NO.4

READ: CLOTH DRILL COTTON DISRUPTIVE PAT

VAT PTD 142 CMS (V.NO.4)

All other entries remain unchanged.

Yours faithfully,

sd/-
(S.K.BANERJEE)
JOINT GENERAL MANAGER/PV
for GENERAL MANAGER."

14.4. A perusal of the aforesaid fax would show that in respect of one of the supply orders, UOI appears to have accepted the 1st respondent's position that selvedges had to be included in determining as to whether the fabric supplied was of requisite width, ie., 142 cms. The 1st respondent's stand is that this yardstick was applicable to the other supply orders as well, and therefore, the fabric were not returned, which, the UOI, would have rejected had this measure not been adopted.

14.5. To my mind, this submission appears to be tenable, as the UOI has not placed anything before me, which would establish the contrary.

15. The principal submission advanced on behalf of UOI, was, that, the Arbitrator had overlooked the practicality of the matter, and

that, the choice which was available with it was either to reject the fabric or to accept the same, albeit, with adjustments towards additional flag allowance.

15.1. In support of this argument, as noticed above, the UOI has referred to its own fax dated 31.05.2003 and the written communication of the 1st respondent dated 10.06.2003.

15.2. In my view, the submission made on behalf of the UOI that practicality should override contractual terms cannot be accepted. The fact that the contract did not provide for adjustment towards additional flag allowance is accepted by the UOI. If that be the case, then, the UOI could have made no deduction on that score.

15.3. The reliance by the UOI on the two documents referred to above, i.e., the fax dated 31.05.2003 and the communication dated 10.06.2003 would not help its cause, as they pertain to only one of the seven (7) supply orders. The supply order, qua which, the 1st respondent accepted the adjustment of 1% additional free flag allowance was the supply order No.0420-CA/2002-2003, dated 29.11.2002.

15.4. Insofar as the other supply orders were concerned, admittedly, there is no such communication in place. When I put this aspect to the counsel for the 1st respondent, he submitted that the 1st respondent had to agreed to the said adjustment, as the release of his payment was clogged, and therefore, he had no choice in the matter. In any event, it was the submission of the learned counsel for the 1st respondent that this could not affect the illegality of the deduction made towards additional flag allowance without the consent of the 1st respondent.

15.5. I am inclined to agree to this submission made on behalf of the 1st respondent. The fact that payments were clogged is revealed in the following extract of the letter dated 10.06.2003, on which, reliance was placed by the UOI to demonstrate that the 1st respondent had accepted adjustment towards additional flag allowance.

> *"....Now we request you to kindly arrange to accept the material and release our payment against above despatch vide our Bill* ***No.SI/11/4/2003 dated 28.04.2003 for Rs.19,84,500/- at the earliest."***

15.6. The Arbitrator, in his award, has, broadly come to the same conclusion, which is that tender made no provision for adjustment towards additional flag allowance. This is reflected in the following extract from the award.

> *"....Since the Purchase Officer of OCFA has not clearly indicated the Free Flag Allowances at the stage of tendering and no specific percentage of allowances are mentioned in Tender documents or in IS specification referred at later stage including the same in Supply Order or recovering at the time of payment is not legally correct. If the material is found bad in quality or Flag Allowances found to be more, that quantity should be rejected and payment for passed quantity only should have been allowed. On the contrary, while clearing M.I Slip, the material rejection column shows as NIL, Material Accepted column shows Quantity Accepted, quantity against Flag Allowance and Total quantity found on receipt as reflected in acceptance column. For example three numbers of copies of sentenced MI slip/Tr.Vrs are enclosed as Exhibit-VII......"*

16. Having regard to the aforesaid, I am of the view that there is no merit in the petition. Accordingly, the petition is dismissed, albeit, with costs of Rs.10,000/-. The awarded amount and the cost so

quantified will be paid by UOI to the 1st respondent within a period of two weeks from the date of receipt of a copy of this order.

sl 30.06.2016

RAJIV SHAKDHER,J.

sl

Pre-Delivery order in

O.P.No.557 of 2008

Dated: 30.06.2016