IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 22.06.2017

Pronounced on: 06.11.2017

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P. No.614 of 2011

Union of India,
rep. by The Controler of Stores,
Southern Railway,
Joint Office, Ayanavaram,
Chennai 600 023. .. Petitioner

Versus

1.M/s.Safe Systems (India) Pvt. Ltd.,
New Delhi 110 020.

2.H.S.Mushathick .. Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 12.08.2009 of the Sole Arbitrator viz. the second respondent herein and to direct the first respondent to pay the cost of this petition to the petitioner.

For petitioner : Mr.P.T.Ramkumar

For Respondents : Mr.G.Balasubramanian for M/s.Poovayya &Co.

ORDER

This Original Petition challenges an award passed by the Arbitrator dated 12.08.2009.

2.An open tender was issued by the petitioner, Southern Railways for the supply of emergency light fitting for coaching application, LED type from ICF approved suppliers. A quotation offered by the first respondent was accepted vide purchase order No.11/06/5035/1/41022 dated 10.04.2007 for a total supply of 1010 numbers of the product of a total value of Rs.58,22,353/-. The purchase order contained the terms agreed upon by the parties that included, inter alia an Option Clause reading thus:

> *2.Quantity to be ordered:*
>
> *(a)Railway reserves the right to cancel the tender or order either for full or part quantity tendered without assigning any reason. The rates quoted by the Tenderers for full quantity would be taken as valid part quantity also.*
>
> *(b)Wherever necessary, the quantity to be ordered can be split by the purchaser within two or more sources for ensuring better availability of material keeping in view the vital/critical nature of item, quantity to be procured, delivery requirements capacity of the firms and past performance of the firms.*
>
> *(c)The purchaser reserves the right to increase and/or decrease the order quantity by a quantity not exceeding 30% of the ordered quantity on the same price and terms and conditions during the currency of the contract, with a suitable extension in delivery period.*

3.During the tenure of the contract, the Option Clause was exercised by the Railways and the order placed upon the petitioner increased from 1010 numbers to 1313 numbers by Modification of Purchase Number (MOP) Letter No.000523 dated 03.08.2007 (erroneously referred to as 30.11.2007 in the original petition). Subsequently and in the course of an enquiry conducted by the Deputy Chief

Vigilance Officer, it was revealed that the first respondent had obtained a contract from the South Central Railway for the supply of identical items at a lower rate of Rs.4,648/- per light fitting as against Rs.5,764.71 quoted to the Southern Railways. Letter dated 31.08.2007 was thus issued proposing to exercise the minus (-) 30 Option Clause quoting the aforesaid reason which was followed up letter dated 13.09.2007 proceeding to exercise the option of reduction. The quantity ordered on 03.08.2007 thus stood reduced from 1313 numbers to 707 numbers by MOP Advice No.000669 dated 13.09.2007. This was objected to by the supplier, the first respondent herein, mainly on the ground that the Railways cannot, while invoking the Option clause apply the plus (+) as well as minus (-) options concurrently. According to the first respondent the option clause could be invoked only once and in the present case had been invoked seeking an upward modification on 03.08.2007. This resulted in an arbitrable dispute that was referred to arbitration at the instance of the first respondent in terms of clause 8 of the arbitration agreement. The terms of reference before the Arbitrator were as follows:

Terms of reference
Firm's claims
Railway to withdraw the Modification Advice No.000669 dated 13.09.2007 issued for exercising the (-) 30% Option Clause.

4.The specific argument before the Arbitrator was to the effect that the Option Clause, once invoked for increasing quantity could not be revoked. The argument of the Railways, on the other hand was that there was no restriction on the application of the option clause and hence no error in the methodology followed. The first respondent also contended that based on the increased requirement of the

Railways, additional raw materials had been procured and the subsequent reduction of purchase resulted in great loss and prejudice. This was denied by the Railways as being bereft of any material or evidence to substantiate the statement. The claim of the first respondent was accepted by the Arbitrator by Award dated 12.08.2009 holding that the second modification on 13.09.2007 reducing the quantity was incorrect and that the contractual terms provided only for a single modification, either upward or downward.

5. The Arbitrator thereafter arrived at a via media solution permitting the first respondent to supply the residual quantity of the material as per the original purchase order dated 03.08.2007 at a revised rate of Rs.5386/-. The Arbitrator notes that during the proceedings for arbitration, the Railways had changed the specifications of the product and stopped purchase of the earlier model for which orders had been placed with the first respondent. The Arbitrator also notes that ICF had called for tenders for supply of the product with revised specifications and an entity by the name of IC Electricals had submitted a quotation for supply. He thus concludes that IC Electricals, a sister concern of the first respondent, could be called upon to supply the remaining materials as per the original order placed on the first respondent. As far as the rate was concerned, he fixes the same at Rs.4886/- as per the quotation of the first respondent to ICF and an additional sum of Rs.500/-, arriving at a cost of Rs.5386/-. He also concludes that only a single modification may be effected to the option clause and as such the second modification reducing the supply from 1313 to 707 was not in order. The Railways has challenged the award on both counts, contending that the interpretation of the option clause was erroneous and that the Arbitrator exceeded the terms of reference.

6.Heard Mr.P.T.Ramkumar, learned counsel appearing for the petitioner and Mr.G.Balasubramanian, learned counsel appearing for the respondents.

7.The Conditions of Contract of supply of stores provides under Additional Special Conditions, para 2c as follows:

> *'the purchaser reserves the right to increase and / or decrease the ordered quantity by a quantity not exceeding 30% of the ordered quantity on the same price and terms and conditions during the currency of the contract with the suitable extension in the delivery period'.*

8.This is reiterated in the IRC conditions of contract: 3800 in the following terms:

> *3800.Increase or decrease of quantities*
> *The purchaser shall be entitled at any time to increase or decrease the approximate total quantities of each description of stores shown in the said contract by not more than 30 per cent and will give reasonable notice in writing of any such increase or decrease to the contractor.*

9.A perusal of the terms and conditions agreed to by the parties as well as the IRS conditions that form part and parcel of the contract terms, leads one to the inference that the parties envisage more than one increase or decrease to the quantities supplied during the tenure of the contract. Article 3800 of the IRS conditions has to be read in tandem with 2c of the tender conditions. 2C uses phrase 'increase and/or decrease the order quantity'. The use of the word 'and' clearly indicates that the parties could agree to both increasing and decreasing the orders which, evidently will have to be done at different points in time. The agreement between the parties thus appears to permit the purchaser to effect multiple modifications in the quantities ordered during the tenure of the contract. The conclusion of the Arbitrator to the contrary thus, in my view, amounts to an erroneous interpretation of the option clause in the agreement between the parties. The Arbitrator arrives at the above conclusion without any discussion or rationale in this regard.

10.Then again, the Arbitrator proceeds to accept the offer of the supplier to supply the residual quantity as per the original purchase order and at the revised rate of Rs.5386/-, unilaterally. There is no basis for, or agreement expressed by the Railways for the rates fixed by the Arbitrator. The original rates as agreed by the parties is for a sum of Rs.5764.71 that was reduced to Rs.4,648.05. The Arbitrator by observing that he intended to protect the interest of both parties, proceeds to fix the rate unilaterally. As rightly pointed out by Mr.Ramkumar, this goes beyond the terms of reference agreed to between the parties noticed elsewhere in this order. The provisions of section 34(2) that set out the grounds for challenge read as follows:

(2) An arbitral award may be set aside by the Court only if—
(a) the party making the application furnishes proof that—
(i) a party was under some incapacity, or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside

11. In the present case, though the Arbitrator frames issues relating to the interpretation of the option clause, the conclusion with respect to the said issue is wholly non-speaking and is vitiated as such. The Arbitrator proceeds then to unilaterally deal with and award the supply of the remaining material under the original contract to a third party. There is absolutely no sanction in law to have proceeded so in this regard and such conclusion is vitiated as being in excess of jurisdiction exercised by the Arbitrator. The Original Petition thus stands allowed. No costs.

06.11.2017

vga/msv/sl
Speaking order/Non speaking order
Index:Yes/No

Dr.ANITA SUMANTH,J.

Vga/msv/sl

Pre-deliivery judgment in
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