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

Reserved on : 27th September, 2018
Date of decision :10th October, 2018

\+ **O.M.P. 531/2008**

UNION OF INDIA ..... Petitioner
Through: Mr. R.V. Sinha and Mr. A.S. Singh, Advocates. (M:9868230464)

versus

BHARAT BATTERY MANUFACTURING COMPANY PVT LTD. & ANR ..... Respondents
Through: Mr. Rajesh Banati, Mr. Ankit Banati and Mr. B.K. Goswami, Advocates. (M:9810294894)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition challenges the impugned award dated 24th June, 2008 passed by the Learned Sole Arbitrator – Justice K.S. Gupta (Retired). The brief background of the case is that a tender was called by the Union of India for supply of batteries. The Respondent submitted its offer on 7th October, 2002. The batteries were "secondary lead acid portable" of 6V 170 AH and 12V 75AH, for which the Respondent quoted a price of Rs.2070 and Rs.1871 per battery respectively. The supplies were for Defence requirements. The offer given by the Respondent on 7th October, 2002 was considered by the Petitioner and vide letter dated 26th March, 2003, the Respondent was called upon to give its best reduced revised rates. The Respondent thereafter submitted its revised offer vide letter dated 8th April, 2003 and reduced the prices to Rs.1829 and Rs.1749 for the 6V and 12V

batteries respectively. Supplies were made by the Respondent against various purchase orders.

2. Disputes arose between the parties because the Respondent claimed price variation as per clause 12 of Schedule A, of the contract, which was refused by the Petitioner.

3. The Learned Arbitrator considered the matter and held that price escalation was liable to be granted. The operative portion of the award reads as under:

> *"…In the statement (Annexure-C24), details of Rs. 42,33,891/- being the differential amount due to escalation in rate based on Hindustan Zinc Ltd.'s price circulars (Ex. C-10 to C-18) have been set out. Respondent has not lead any evidence showing any inaccuracy in this statement. Claimant is, thus, entitled to the said amount under the price variation clause.*
>
> *Though the Rate Contract does not provide for payment of any interest still in view of the ratio in Secretary, Irrigation Department, Govt. of Orissa and Ors. Vs. G.C. Roy, (1992) I Supreme Court Cases 508 , the claimant is entitled to interest on the above amount which is quantified @ 9% p.a. As may be seen from the said statement the interest has been calculated from the respective date(s) of raising the bills. First bill was raised on 12.8.2004 while the last on 13.5.2006. In the facts and circumstances of case, the claimant is awarded interest from 13.5.2006.*
>
> *Accordingly, award of Rs. 42,33,891/- with interest @ 9% p.a. from 13.5.2006 till date of realization of amount is passed in favour of the claimant, and against the respondent. Respondent will further pay share of arbitration fee paid by the claimant, stamp duty and Rs. 15,000/- as lawyer's fee to the claimant."*

4. The only question raised and argued by the learned counsel for the

Petitioner, while challenging the award, is that there was no price variation clause in the contract with the Respondent and hence the amount under the said price variation clause could not have been awarded.

5. It was also submitted that the fact that the claim for price variation was raised after the entire contract period was over, shows that the Respondent was well aware that such a clause did not exist and the claim was an afterthought.

6. On the other hand, learned counsel for the Respondent submits that the rate contract, which was initially issued, had inadvertently omitted the price variation clause. The fact that it exists is clear from the tender, the offer letter, and also letter dated 2nd July, 2004 with which the price variation clause was sent to the Respondent. The Respondent further argues that the belated raising of this claim is an untenable submission inasmuch as immediately after the rate contract was placed upon it, the Respondent had written to the Petitioner informing of this omission and had called upon the Petitioner to incorporate the same into the rate contract.

7. In rejoinder, Ld. counsel for the Petitioner submitted that the letter dated 2nd July, 2004 attaching the price variation clause is without authority of law. He submits that no amendment can be made into the rate contract and, the same, if any had to be in writing. By a unilateral letter, such an amendment could not have been added. He also submitted that the issuance of this letter is with the condition that it is "without prejudice to the terms and conditions of the contract". Thus, the letter cannot be read as overwriting the rate contract. He relies upon Article 299 of the Constitution to argue that any contract entered into by the Government has to be with the authority of the President of India and not without authority, by any officer's

whims and fancies.

8. Having heard the counsels for the parties, the dispute is in a very narrow compass. The only question is as to whether the price variation clause existed in respect to this tender or not. A perusal of the Notice Inviting Tender (*hereinafter 'NIT'*) shows that in clause 8, which dealt with the technical requirements of batteries, the following was clearly specified:

> *"8. A) This R/C will be meant primarily for meeting Defence requirements but certain Civil Indentors may also purchase the batteries against above item. For Civil Indentors however the supplies will be made conforming to Defence Specifications.*
> *b. The tenderers are requested to quote the prices on firm and fixed basis for all elements except for Lead. In case of Lead the prices are variable only as per provision of price variation clause as per Appendix 'A' of the Tender Enquiry based on M/s. Hindustan Zinc Ltd's prices of Lead of purity of 99.99% @ Rs. 36,000/- per M.T., Ex- Smelter point prevailing during the month of June, 2002 in accordance with price variation formula mentioned in Appendix-A.*
> *c. <u>Uniform price variation factors as indicated in the tender enquiry will only be admissible. Tenderers asking for higher variation factors may run the risk of their offer being ignored or else the price will be loaded for the sake of equitable comparison.</u>*
> *<u>d. Tenders with any other price variation clause are liable to be ignored straightway</u>."*

Thus, right at inception, the NIT had a price variation clause. Further, in Appendix X to the NIT, a detailed manner of determining the variation in price was also provided. Clauses (a) and (c) of Appendix X read as under:

> *"a) In case variation in the price of finished products is desired due to variation in the price of lead the price variation should be allowed in the manner*

indicated below. No variation on any account is permissible.

…

c) (i) Price variation will only be allowed to the extent of the actual increase/ decrease in the basic price of lead excluding Excise duty &Sales tax. Whenever two or more rates are announced by the Hindustan Zinc Ltd., during particular month, weighted average for particular month and not the average of two or more price shall be taken into account for working out quarterly average price of lead for the sake of price variation."

9. The understanding of all persons/entities who responded to the tender was that the same had a price variation clause. In the offer letter dated 7th October, 2002, the Respondent agreed to the price variation clause as contained in Annexure X. The offer clearly specifies the escalation, which is one of the conditions of the offer, as under:

"Escalation: Prices quoted for the batteries are based on the lead price (99.99% purity) Rs. 36,000.00 per M.T., Ex-smelter point (excluding packing, forwarding, Sales Tax and Excise Duty) as declared by Hindustan Zinc Ltd. for Actual Users and for every increase/ decrease of Rs. 100.00 (and complete multiple of Rs. 100/- in the price of lead, exclusive of Central Excise Duty and Sales Tax etc., the price of each battery will vary (upward/downward) at the rate as under:-

Item	*Type of Battery*	*Variation factor exclusive of Excise Duty on account of fluctuation in lead price for each slab of Rs.100/-*
01	*6V 170AH No.2, D.S. Cat pt. No.Z9/6140-000043*	*Rs.1.94*

02	*12V 75AH No.2, D.S. Cat. Pt. No.Z9/6140-000047*	*Rs.1.73*

The price variation will be determined and adjusted on the basis of Lead price ruling in the quarter preceding to the quarter in which the Batteries are tender for inspection. The dates the batteries are tendered for inspection will be treated as the date of delivery for the purpose of price variation. Whenever two or more rates are announced by Hindustan Zinc Ltd. during particular month weighted average for particular month shall be taken into account for working out quarterly average price of Lead for sake of price variation."

10. When the Petitioner responded to this offer on 26th March, 2003, it called upon the Respondent to consider reasonable prices in the neighbourhood of the rates as indicated in Annexure A. The relevant portion of the said letter is set out herein below:

"Dear Sirs,

With reference to above, it is informed that the prices quoted by you have been considered to be on higher side. Deptt. considers reasonable price in the neighbourhood of rates as indicated in the enclosed Annexure-'A'. Certain other terms and conditions quoted by you in your tender which are unacceptable have also been indicated in the enclosed Annexure-'A' alongwith the terms which may be considered by the Deptt.

...

Annexure A to the said letter is very significant and is set out herein below:

Item no.	*Description of stores (Def Cat No.)"*	*Counter offer rate of E.D. and ST) F.O.R. Destination with*

		M.C. Note.
1.	*Battery Secondary Lead Acid Portable 6V 170 AH No.2 (Z 9/6140-000043)*	*Rs.1829.00*
2.	*Battery Secondary Lead Acid Portable 12V 75 AH No.2 (Z 9/614-000047)*	*Rs.1749.00*

NOTE: *<u>The above rates are based on HZL prices of Lead of purity 99.99% @ Rs.36,000/- M.T. as per price variation Clause of the tender enquiry as agreed by you.</u>*

Thus, even while responding to the initial offer made by the Respondent, the Petitioner called upon the Respondent to submit a revised price, but, with a price variation clause. The revised offer was thereafter submitted by the Respondent on this basis.

11. The revised offer also mentioned that the prices of lead were based on Hindustan Zinc Limited's price of lead "*<u>as per price variation clause of the tender enquiry</u>*." Thereafter on 5th May, 2003, the final order was placed through rate contract number AM-5/RC-14100105/072003/WT BTYS/DEF/2003-04/75/BHARAT/COAC/185 Dated 05 MAY, 2003 which reference the tender enquiry, the quotation date and the revised offer dated 8th April, 2003. Schedule A of the rate contract also contained the price variation clause in the following terms:

> *"12. PRICES (PRICE VARIATION CLAUSE)*
> *The above rates are based on HZL Prices of Leas purity 99.99% @ Rs.36,000/- per M.T. ex-smelter, prevailing in the month of June-2002 excluding packing forwarding, Sales Tax & Excise*

Duty as mentioned in price variation clause as per Schedule 'B' of this Rate Contract."

12. However, in Schedule B, which was attached with the rate contract, no details regarding the manner in which price variation would be determined were given. The Respondent immediately noticed the absence of the said clause, and on 17th June, 2003 wrote to the Petitioner that in the price variation clause, the variation factor of batteries had not been incorporated. It issued a reminder on 28th June, 2004. In response to the reminder letter, the Petitioner issued a letter dated 2nd July, 2004 attaching therewith schedule B i.e. the price variation clause and the formula to determine the same. The said letter reads as under:

"To

M/s The Bharat Battery Manufacturing Co. Pvt. Ltd.,
238 A, Acharya Jagdish Chandra Bose Road,
Kolkota-700020.

Sub: This office Rate Contract No.AM-5/RC-14100105/07200/WT Btys/Def/2003-04/75/Bharat/COIAC/185 dt.5.5.2003 on you.

Ref: Your letter No.271/820/2004-2005 dt.28.6.04.

Dear Sirs,

Please refer to your letter cited above regarding price variation formula and slab factors not mentioned in the subject R/C. In this connection please find enclosed schedule B which contains complete price variation formula along with variation factor.

This is, however, without prejudice to the terms and conditions of the contract.

Yours faithfully,
(P.C. Sharma)
Asst. Director (Supplies)
For Director Generaol of Supplies & Disposals"

It is interesting to point out that this letter is issued by the Assistant Director, Supplies, who had also issued the initial rate contract. Schedule B attached to this letter merely prescribes the formula for calculating the price variation as mentioned in schedule A. According to Ld. counsel for the Petitioner, since the original rate contract did not contain schedule B, the Arbitrator erred in granting the price escalation. This submission is completely without any merit inasmuch as every document which has been issued by the Petitioner, as well as the offers submitted by the Respondent contain the price variation clause. The NIT, the initial offer, the request of the Petitioner to submit a revised offer and the revised offer submitted by the Respondent - all contain the price variation clause. There is a reference to price variation even in schedule A to the rate contract. Only the formula for calculating the price variation was missing, which was thereafter given to the Respondent vide letter dated 2nd July, 2004.

13. The legal submissions made by the counsel for the Petitioner that no amendment could have been executed to the rate contract as this would be contrary to Article 299, are without any basis. The Learned Arbitrator has clearly concluded that all the letters written by the Respondent were on the record of the Department. The price variation clause was an integral part of the contract. The General Conditions of Contract of Government of India (Amended up to 30th June, 1991) clearly contain a clause defining the term `contract' as under:

> *"(c) "Contract" means the invitation to tender, instructions to tenderers, tender, acceptance of tender, particulars and the general and special conditions specified in the acceptance of tender and includes a repeat order which has been accepted or acted upon by*

the contractor;"

14. Thus, in order to arrive at a conclusion as to whether the price variation clause existed or not, no single document can be considered in isolation, but the documents have to be read as a whole. There is no doubt from the chronology of events and the correspondence exchanged between the parties that the price variation clause existed.

15. Admittedly, the Respondent made a large amount of supplies of batteries to the Petitioner right till the last date of the contract. The claims and the calculations which form the basis of the claim have not been questioned before this Court. The Respondent has placed on record the monthly notification/circulars issued by Hindustan Zinc Limited containing the price of lead. It is on the basis of these circulars that the price variation is sought. Thus, there is no merit in the petition. The same is dismissed. All pending I.As are also disposed of.

PRATHIBA M. SINGH, J.
JUDGE

OCTOBER 10, 2018
Rahul