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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 3132 of 2018

- Cuprum Bagrodia Limited A Company Registered Under The Companies Act, 1956 Having Its Registered Office At 14/18, Ezra Street World Trade Centre, Kolkata 700001 (India) Through Its Authorized Representative Charu Gopal Kundu

---- Petitioner

Versus

1. South Eastern Coalfields Ltd, (A Subsidiary Of Coal India Limited) Registered Office Seepat Road, Bilaspur (Chhattisgarh) Through Its Chairman & Managing Director.
2. The Director (Technical), South Eastern Coalfields Ltd. (A Subsidiary of Coal India Limited), Registered Office Seepat Road, Bilaspur, Chhattisgarh.
3. The General Manager (P And P) South Eastern Coalfields Ltd., (A Subsidiary Of Coal India Limited), Registered Office Seepat Road, Bilaspur, Chhattisgarh.
4. V.K. Malhotra, IAS (Retd.) IEM HGF2, Peri (Gateway Tower, D81 Sector-44, Noida 201304 (Uttar Pradesh)
5. Uday Shankar Dutt, IPS (Retd.), Iem, 0461, Ats Village, Sector 93-A, Noida 201304 (Uttar Pradesh)
6. S Srinivasan, IEM, Flat DS-107, Block Number 5, 5^{th} Floor, Kendriya Vihar, VBB Road, Yelahanka, Bangalore- 560064

---- Respondents

For Petitioner	:	Shri Ashish Shrivastava, Advocate.
For Respondent/SECL	:	Shri Vivek Chopda, Advocate.

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice
Hon'ble Shri Justice Parth Prateem Sahu

Order on Board

Per Ajay Kumar Tripathi, Chief Justice

10.01.2019

1. Heard counsel for the Petitioner and counsel for the Respondent/SECL.

2. The preliminary objection raised against the maintainability of the writ application in the given background and dispute is unsustainable, therefore, the matter was heard on merit and decided.

3. Petitioner a registered company under Companies Act has filed the writ application challenging the communication dated 26.10.2015 made by the South Eastern Coalfields Limited (“SECL”), in which the decision of the Independent External Monitor (“IEM”), Shri Uday Shankar Dutt dated 17.09.2015 was annexed. The IEM chose to dismiss the complaint or grievance raised against the Respondent-SECL authorities, so the writ.

4. Global tender notice was invited on 30.07.2007 by SECL under two bid system for production of High Wall Mining technology with an associated equipments (HM package) for cutting and loading of coal without blasting, initially at Sharda OC mine and subsequently in other suitable mines, on hiring basis.

5. The Petitioner-Company was 'L-1' and their bid was accepted. However, it seems that the SECL entered into some kind of negotiation with the Petitioner-Company on the price, for which evidence is available in the writ application. There were several rounds of price negotiation, but some kind of finality was reached between the parties only on 15.07.2008, when the revised price of Rs.897/- per ton of coal was agreed upon. This fact would be evident from Annexure P/6 to the writ application.

6. The contract had been worked after its award and agreement. There was provision for price variation for which certain formula had been indicated in the agreement. The price variation was applicable broadly under three heads i.e. Petroleum, Oil & Lubricants (POL) (HSD only), spare parts and labour variation, which reads as under:

"3.1 **<u>Adjustment of POL (HSD) component</u>:**

Price variation for increase or decrease in cost of POL (HSD) shall be as per the following formula:

$$Vd = \frac{Pd}{100} * R * \frac{(F1-F0)}{Fo}$$

Where,

Vd	=	Increase or decrease in the cost of working during the quarter under consideration due to changes in rates for fuel and lubricants.
Pd	=	15 (a constant)
R	=	Total value of work done during the quarter under consideration.
F0	=	The average official retail price of High Speed Diesel (HSD) at the consumer pumps of IOC at Sharda mines of SECL **<u>on the day of submission of bid</u>**.
F1	=	The average official retail price of High Speed Diesel at the consumer pumps IOC at Sharda mines of SECL for the 15th day of the middle calendar month of the quarter under consideration.

3.2 **<u>Price variation for spares parts shall be as per the following formula</u>**:

$$Vs = \frac{Ps}{100} * R * \frac{(R1-R0)}{R0}$$

Where,

Vs	=	is the increase or decrease of total cost of work under consideration.
Ps	=	15 (a constant)
R	=	is the total value of work done during the quarter under consideration.
R0	=	is the RBI wholesale index for **<u>on the day of submission of bid</u>**.
R1	=	is the average RBI wholesale index for the quarter under consideration for billing.

3.3 **<u>Price variation for labour component shall be as per the following formula</u>**:

$$Vw = \frac{Pw}{100} * R * \frac{(L1-L0)}{L0}$$

Where,

Vw	=	is the increase or decrease of total cost of work under consideration.
Pw	=	15 (a constant)
R	=	is the total value of work done during the quarter under consideration.
L0	=	is the RBI consumer price index for industrial worker **<u>on the day of submission of bid</u>**.
L1	=	is the average RBI consumer price index for industrial worker for the quarter under consideration for billing.

<u>NOTE</u>

i. The price for 1st production year shall be as per the quoted rate i.e. without any price adjustment due to above price variation clause.

ii. The price for 2nd production year onward shall be as per the rate of 1st production year plus price adjustment due to above price variation clause. However in any of the contract production year, the price shall not be more than the price worked out considering the 80% of the notified basic sale price of coal prevailing in that quarter. In case if it is more, then the price payable to contractor shall be limited to the amount worked out by multiplying the actual production made in that particular quarter and 80% of the notified basic sale price of coal prevailing in that quarter. Price variation shall be worked out on quarterly basis."

7. A claim was lodged by the Petitioner-Company before the SECL that since there was a clause for price variation under the three components and the formula itself indicated that the average official retail price of HSD at consumer pumps of IOC at Sharda Mine of SECL, 'on the day of submission of the bid', was one of the factors indicated in the formula as FO, therefore, they were entitled to its benefit.

8. Even in relation to the price variation of spare parts, the RBI wholesale index on the day of submission of the bid or in the case of labour component the RBI consumer price index for industrial worker on day of the submission of the bid was one of the component in the said formula, for working out the price variation, during the subsistence of the contract.

9. The word "on the day of the submission of the bid", therefore has bearing on the dispute which has come up for consideration before the High Court after the claim of the present Petitioner was rejected by the Independent External Monitor (IEM).

10. The decision of IEM annexed with the communication contained in Annexure P/1, took note of the factual background of the dispute such as the date of submission of the bid was 01.12.2007, the bids were opened on 04.12.2007 as scheduled but there was negotiation on the price bid. A new offer on the price bid was made by the Company first on 26.06.2008 and thereafter finally on 15.07.2008 (Annexure P/6), which formed the basis for award of the contract.

The contract agreement was signed on 05.03.2010 between the Respondent-SECL and the Petitioner. In terms of Clause 3.1 of the contract relating to escalation and escalation formula, a claim was made against the Respondent-Company for price escalation.

11. The Respondents, however, refused to extend the benefit of price escalation on the basis of so-called date of bid. However, they did offer to consider such claim against them w.e.f. 15.07.2008 when the price bid was finally negotiated and agreed upon which in turn formed the basis for award of the contract. It was urged before the IEM that the clauses on rate and price variation will have to be considered from the point of view when the bid was finally accepted and not in terms of the formula which had envisaged the date of submission of the bid to be the referable point.

12. While assailing the communication as well as the decision of the IEM dated 17.09.2015, submission is made on behalf of the Petitioner that claim for escalation was in conformity with terms of the provisions of the contract dated 05.03.2010 and they had right to do so. Besides other things, the main argument or contention on behalf of the Petitioner-Company is that the terms and conditions of the contract is binding upon the parties. Since the words in the contract, especially, in the formula which have been provided for in the agreement on price escalation is unambiguous that one of the components would be based 'on the date of submission of the price bid', the claim for escalation made by the Petitioner against the three components ought to be calculated from 01.12.2007, if not surely from 04.12.2007 when the bid was opened and accepted by the Respondent-SECL.

13. It is further argued that the Respondents cannot shift the milepost by shifting the date to 15.07.2008 on the ground or plea that it was on that date that the negotiated revised price bid was finally accepted by the Coal Company.

Emphasis is made that the terms and conditions of the contract must be understood on plain reading of the words used therein and since there is no confusion or mischief, therefore, the golden rule should be adopted for interpreting such clause.

14. The argument on behalf of the Respondents in support of the decision of the IEM is that there is no controversy as to the terms and conditions laid down in the contract. The formula for calculation of price escalation is also not a matter of dispute, but the expression “on the date of submission of bid” has to be understood within the realm of the Contract Act.

15. Obligations or liabilities flow from the contract only after it is entered between the parties. No doubt, the terms and conditions of the contract bind the parties. Arguing further, it is contended that there was an invitation to offer by issuance of the NIT. There was an offer thereafter made by the Petitioner-Company, but the offer with regard to the price on the date of submission of the bid did not remain constant. Accepted position is that after the submission of the bid and its opening on 04.12.2007, the Petitioner-Company and SECL have entered into the various rounds of negotiation as to what the final revised price bid would be. It was only on 15.07.2008 that the negotiated price of Rs.897/- per ton of coal was agreed upon and thereafter, a 'Letter of Intent' was issued on 31.03.2009 and the agreement was executed between the two on 05.03.2010.

16. Stand of the Respondent-Coal Company is that if the initial bid amount of the Petitioner-Company stood as it was, on the date of the bid the same would have been accepted by the Respondent. The price bid 'on the date of submission' would have become the referable date. But in this case there was offer, but there was no acceptance on that date therefore there was no concluded contract between the parties on the initial offer. There was negotiated settlement of the price which carried on for significant amount of

time and crystallized only on 15.07.2008. The word "the date of submission of the bid", therefore will have to be understood to mean 15.07.2008 since that was the final offer made by the Petitioner-Company and that was final price negotiated between the two which became the bid price, therefore in the given facts of this case the date of submission of the bid cannot be read to be "04.12.2007" but "15.07.2008" as the final offer made by the Petitioner-Company was accepted by the Respondent-SECL and the offer and acceptance culminated into an agreement and execution of the contract between the parties.

17. Taking further, the argument on behalf of the Respondents is that any benefit or right or claim made on the basis of the contract can only be made provided the contract is finally entered into the parties and it became a concluded contract binding between the parties. There was no contract entered between the parties on the basis of the price bid initially offered on 04.12.2007. The price bid here would transfix itself to 15.07.2008, when the offer and acceptance was reached and the price dated 15.07.2008 became the bid price as also the basis for issuance of letter of intent, as well as execution of the contract.

18. The facts being such and since the contract could not have been worked prior to acceptance of the final price bid i.e. offer made by the Petition-Company to the Respondents, the Respondent-Coal Company has very fairly accepted 15.07.2008 as the date of submission of the bid. Whatever obligation by way of price escalation will flow in favour of the Petitioner-Company from the said date and the Respondent-SECL accepts that position.

19. Even though the order of the IEM may not be very happily worded, but so far as the conclusion reached by the IEM is concerned, the same is a correct view taken. Claim or price escalation will have to be calculated treating 15.07.2008 as the date for submission of the bid for the Petitioner.

20. In view of the above, we do not find any infirmity in the final opinion which has been expressed by IEM that the terms and conditions of the contract will bind the parties, but since 15.07.2008 offer was the final offer on the price bid of the Petitioner-Company, the first submission of the price bid on 04.12.2007 was never acted upon as it was only an offer not followed by any acceptance.

21. The communication dated 26.10.2015 contained in Annexure-P/1 as also the decision dated 17.09.2015, i.e. the order of the IEM, therefore does not require any interference. Writ application, therefore, stands dismissed.

22. It goes without saying that Respondent-SECL, however, do have an obligation to calculate and pay the price variation due to escalation from the date 15.07.2008, if they have not done so already.

Sd/-

(Ajay Kumar Tripathi)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge

Brijmohan