16.6.2023
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Ct. no. 652
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CO 3444 of 2019

Atma Metchem Private Limited
Vs.
Ordinance Factory, Katni

Mr. Aritra Basu
Mr. Abhidipto Tarafdar
Ms. Suranjana Chatterjee ...for the petitioner

Ms. Ashima Roy Chowdhury
...for the Opposite party

Assailing an order dated 30th July, 2019 passed by the Chairman, West Bengal State Micro and Small Enterprises Facilitation Council (in short Council) in Case no. 88 of 2017, present application under Article 227 of the Constitution of India has been preferred. By the impugned order, the Council was pleased to direct that the issue regarding delayed payment would be taken up for hearing but there would be no hearing on liquidated damages (in short LD) and Rate revision (in short RD denial) clause as it was imposed as per work order (WO).

The brief facts in the present case is that on 29th June, 2015 the opposite party floated a notice inviting tender for supply of Zinc base alloy ingot and the petitioner participated in the said tender and was awarded the contract. The purchase order for supply of 118.736 MT of zinc alloy was issued in favour of the petitioner. The petitioner tendered earnest money deposit a sum of Rs. 5,54,000/- to the opposite party. In addition to that petitioner also tendered a sum of Rs. 24,60,000/- as performance guarantee to the opposite party. The petitioner alleged that the purchase order which was served to the petitioner on 19th November, 2015, deviated from the original terms of the tender. As per the purchase order, the petitioner was directed to deliver 20 MT in the month of November, 2015 and 35-40 MT per month starting from the month of December, 2015. According to petitioner such deviation and/or alteration was under immense pressure due to the change in the time frame for delivery of the materials. The petitioner further alleged that the petitioner vide its letter dated 21st January, 2016 highlighted the fact of non-availability of zinc in the local market resulting in an adverse impact on the remaining supply of zinc within the limited time frame. Initially the opposite party made payment of 80 MT of zinc supplied by the claimant to the opposite party but with regard to the payment of remaining supply, the opposite party arbitrarily and unlawfully deducted money inter alia on account of alleged late delivery. The petitioner in this context submits that at the time of taking delivery of 1st and 3rd Batch of the consignment the opposite party never raised any objection and accepted the consignments without any complaints whatsoever.

The opposite party increased the ordered quantity of 50% which was in fact contrary to the “option clause quantity” as provided in the original tender and as such the opposite party acted in contravention to the provision laid down under the Procurement Manual and also under General Financial Rule, 2005 which does not permit to the buyer to exercise unilateral discretion to operate the “Option Clause Quantity” beyond the said period. It is further alleged in this context, that the petitioner’s consent was never sought for, while increasing the quantity of supply and as such, such an act was completely arbitrary and the opposite party had in fact, acted in violation of the clauses set forth in the Procurement Manual and General Financial Rules, 2005. He further alleged that the opposite party was aware about the scarcity of raw materials in the local market, yet the opposite party wrongfully increased the supply quantity on the allegation of alleged delayed payment and wrongfully deducted payment which was due to the petitioner to the tune of Rs. 15,26,694/-.

The petitioner requested on several occasions to waive liquidated damages imposed by the opposite party upon the petitioner for alleged delay in supply and as reconciliation failed, the petitioner was compelled to make a reference to the Council under the Micro Small and Medium Enterprises Development Act, 2006 (in short MSMED Act). In the said reference the petitioner prayed before the Council for awarding a sum of Rs. 15,26,694/- against the respondent. The opposite party has filed opposition against the said claim. On 30th July, 2019, the Council took up the case for its consideration and after recording the submission of the respective parties, the Council passed the impugned order stating that no hearing would be conducted on the issue of LD and RR.

Learned counsel for the petitioner argued that the issue of LD and RR denial is intrinsically related to the petitioner's claim and unless the petitioner is permitted to place documentary evidence or to make oral submission on such issues, it would not be possible for the petitioner to prove that the deduction made by the buyer is arbitrary and not in accordance with law. The Council ought to have given an opportunity to adduce the documentary evidence on the said two important issues namely LD and RR to prove that the opposite party is not entitled to impose liquidated damages and rate revision clause upon the petitioner. He further submits that immense injustice would result to the petitioner, if the petitioner is completely denied from adducing documentary evidence as well as oral argument on the said two issues. In fact, the Council has acted with material irregularity in passing the order impugned.

Learned counsel for the petitioner further argued that from the documents supplied by the opposite party it is evident that they have extended delivery period. The

Council practically violated the principle of *audi alteram partem*. In this context, he relied upon Section 24 of the Arbitration and Conciliation Act and Section 74 of the Indian Contract Act. He further submitted that section 74 which deals with compensation for breach of contract where penalty stipulated for is not applicable in the present context. According to the petitioner's contention there was never any breach of contract and no actual damage was caused to the purchaser and as such imposition of liquidated damages is arbitrary, capricious which the petitioner wants to establish. In this context, he further relied upon judgment of ***Kailash Nath Associates vs. Delhi Development Authority and Another,*** reported in **(2015) 4 SCC 136** and an unreported judgment passed by the Division Bench of this court in ***Videsh Sanchar Nigam Limited vs. Shapoorji Pallonji and Company Limited.*** Accordingly, he has prayed for setting aside the impugned order.

Learned counsel for the opposite party Ms. Roy Chowdhury has drawn my attention to the various terms and conditions of purchase order including term no. 14A and also clause 10 of Standard condition of Tender Enquiry. She further submits Clause 10 deals with liquidated damages which states that the Buyer at his discretion withhold any payment until Completion of contract and buyer may also deduct from the seller liquidated damages in case of delayed delivery.

Moreover clause 15(i) of Special denial clause, which states, in case of delayed delivery, without prejudice to the right to recover liquidated damages, increase in prices, taxes, duties etc taking place during the delayed period, will be denied to the seller. She further submits that the petitioner started supply of material i.e. Zinc Alloy from the month of December 2015 instead of November, 2015 and he could not supply materials within stipulated delivery period and hence after operating of 50% option clause order, quantity enhanced from 118.736 MT to 178.104 MT, that additional quantity of 59.368 MT should have been supplied from May, 2016 to June 2016 by the petitioner. She further contended in this context, that price verification clause is very clear and there is no ambiguity in this. The rate of SHG Zinc is to be decided on average MMR landed price of SHG Zinc one month prior to the month of receipt.

She further submitted that bill claimed by the petitioner for the first and third consignment were in correct. Petitioner by a letter dated 21st January, 2016 had requested to extend delivery period up to 31st March, 2016 as the firm had failed to deliver the total quantity within the stipulated period i.e 29th February, 2016 and on it's request the delivery period was extended till March, 2016 and exercising of 50% option clause was taken in the third week of February, 2016. The firm made no communication to regret to supply the enhanced quantity of option clause at that time. Moreover there was no news regarding the scarcity of Zinc in the Indian or global market.

In view of above, the court below has rightly observed that since LD and RR clause has been rightly imposed upon the opposite party in terms of work order, there is no need to hear on those two issues and as such he has rightly fixed the next date of hearing only on the issue of delayed payment made by the buyer.

I have considered the submissions made by both the parties. At the outset, the decision of the council needs to be quoted:-

> *"Decision of the Council:- It was decided that both the parties should follow the clauses of the work order. It was found that the application of the PV clause and RR denial were as per the work order and the Supplier's arguments are not tenable but it was also found that buyer unit received the materials but did not make payment in time and there were delays over several days between receiving and accepting the materials. So it was decided that as per MSMED Act, buyer unit should make payment within 45 days, which buyer unit failed to do so, the instant matter would be taken up for next hearing on the delayed payment issue and there would be no hearing on LD and RR denial clause as it was imposed as per W.O."*

The object of stating above both side case in details is to depict that several factual issues involved in relation to the claim of amount by the petitioner, which are inter-connected. The newly amended proviso to section 24 (I) makes it clear that the Council is duty bound as far as possible to conduct oral hearings for the presentation of evidence or for oral argument on day to day basis. Here the terms "hearings for the presentation of evidence" is significant in the context of factual dispute between the parties. It is the duty of Council to hear both the parties and examine the evidences that are likely to be placed by the parties in support of their aforesaid respective contentions and after hearing both the parties it will decide the issue in controversy. It is legitimate expectation of the parties that the council would not only hear them but also consider their documents in connection with the issues in controversy, since the same is a requirement under section 18 read with section 24(2) of the Act. let us come back to the present case. Section 73 stipulates when a contract has been broken, the party who suffers by such breach is entitled to receive such compensation for any loss caused to him, which the party knew, when they entered into the contract and section 73 is to be read with section 74 which deals with penalty, stipulated in the contract, as in the present cases, provided the contract has been broken by a party. Mr. Basu strenuously argued that here was no breach of contract on his part though there is no dispute about proposition of law that when a contract has been broken, if sum is named in the contract as the amount to be paid in case of breach of such contract,, the party complaining of such breach is entitled, whether or not actual loss is proved to have been caused or not. In this context Mr. Basu heavily relied upon observation made by Apex court in ***Kailash Nath Associates case (supra)*** where it is held in paragraph 43.6 as follows:-

> "**43.6.** The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded."

Be that as it may for the present context, I do not require to go into the merits of the claim, but if the impugned order of council is considered it is devoid of any reason. The council recorded that both the parties should follow the clause of work order and there is no dispute over the said proposition, but when it recorded that the LD clause and RR denial were applied in the present context as per the work order and supplier's arguments are not tenable and for which there will be no hearing on LD and RR denial clause, it must assign reason for such conclusion specially in the context of documents and submissions raised by the petitioner.

This order of denial of hearing on the issue of LD and RR denial amounts to the violation of the principle as laid down in Section 24 of the Arbitration and Conciliation Act, 1996, specially where it is specific case of the petitioner that such deduction has been made arbitrarily and without following provision of the MSMED Act as well as term and conditions of the work order entered by and between the parties. The council is duty bound to consider whether the imposition of LD and RR clause by the opposite party was justified or not. The council has also not discussed whether the petitioner has made any breach of contract or not and if he had made any breach of contract then how such breach of contract occurred and whether any ascertainble damages were sustained to the purchaser for such alleged breach of contract. It is the specific case of the petitioner that the deduction has been made wrongfully since there is no delay in delivery nor there is any breach of contract. In such circumstances it is not understandable why the council had declined to hear the petitioner on the issue of imposition of liquidated damages and rate revision clause imposed upon the petitioner by the opposite party.

In, ***Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and others,*** reported in **(2010) 3 SCC 732,** it has been held that the settled legal proposition is that not only an administrative order but also a judicial order must be supported by reason recorded in it. The Apex court further held that hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice-delivery system to make known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice. Not only that Apex court in this context reminded that absence of reasons render the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Paragraph 42 of this judgment runs as follows:-

> "thus *it is evident that the recording of reasons is a principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as to why his application has been rejected."*

A co-ordinate bench of this court in ***Uniworth Resorts Limited vs. Ashok Mittal & Ors.*** reported in **2007 SCC Online Cal 532** observed in paragraph 12, that the judicial order of such nature need to meet the twin tests of "why" and "what". It is the "why" that sustains the "what". Reasons are the safeguard against the *ipse dixit* of the decision making process. They discuss how the judicial mind has been applied to the matter in issue and convey the nexus between the matters that have been considered and the conclusion based thereon.

In the present context, the cryptic order does not disclose as to why the issue relating to imposition of LD clause and RR denial clause shall not be heard in spite of the fact that the petitioner's specific contention is that there is no occasion to impose such clauses upon the petitioner.

In view of above discussion, order impugned is not sustainable and accordingly, the order impugned is hereby set aside.

C.O. 3444 of 2019 is accordingly allowed. The Council is directed to hear both the parties in terms of Section 24 of the Arbitration and Conciliation Act on the issue of liquidated damages as well as rate revision denial clause in terms of work order along with issue of delayed payment at the earliest and to pass a reasoned order.

It is made clear that I have not gone into the merits of allegation and the council will consider the aforesaid issues in dispute without being influence by any observation made herein.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)