OCD-2

ORDER SHEET

AO-COM/27/2024
WITH
CS-COM/590/2024

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
(Commercial Division)

SUA EXPLOSIVES AND ACCESSORIES LTD.
VERSUS
COAL INDIA LIMITED

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE BISWAROOP CHOWDHURY
Date : 17th February, 2025.

Appearance:
Mr. Siddhartha Mitra, Sr. Adv.
Ms. Sananda Mukhopadhyay, Adv.
...for the appellant

Ms. Akanksha Mukherjee, Adv.
Mr. Pradipta Basu, Adv.
Mr. Nilankan Banerjee, Adv.
...for the respondent

1. The appeal is arising out of an order passed by the learned Single Judge in GA No. 34 of 2018 filed by the plaintiff for return of the original bank guarantees along with interest and other reliefs. The basis of the application appears to be the decision of the Hon'ble Supreme Court on 2nd November, 2017 in which one of the issues that came up for consideration was the deduction from the bills of the appellant before the Honb'e Supreme Court relying upon the

powder factor. That there was a concluded contract between the plaintiff and the defendant for supply of specified explosives non-permitted, large dia and small dia explosives, cast, booster, detonators, non-electronic detonators and detonating fuse to the defendant is not in dispute. The contention of the plaintiff appears to be that the subsidiaries of the defendant withheld certain payments and claimed deductions from the bills of the plaintiff for the powder factor. The plaintiff only supplied accessories and such accessories have no role to play for the achievement of powder factor as the accessories served the purpose of only igniting the main explosives. The defendant could not have withheld the bank guarantees.

2. The defendant contested the suit by filing written statement. The defendant has also filed an affidavit in the said interlocutory application.

3. In order to avoid any controversy with regard to the stand of the defendant, either taken in the written statement or in the affidavit-in-opposition to the said application, it is necessary to set out the relevant paragraphs on which both parties have relied, namely paragraphs 13A, 13B, 13C and 13D of the amended written statement and paragraphs 9 and 10 of the affidavit affirmed on 27th February, 2018.

4. Paragraphs 13A, 13B, 13C and 13D of the amended written statement read as follows:-

"13A. Three contracts were separately entered into with the plaintiffs for two different periods i.e. 2005-06 and 2006-07 for the supply of explosives and accessories. In so far as the supplies under the contract of 2006-07 is concerned, there was no dispute and as such, there was no claim of either of the parties against each other. The said contract came to an end and consequently, the bank guarantee which was furnished against the security deposit under the said contract were released in favour of the plaintiff.

13B. But in so far as the contract of 2005-06 is concerned which is the subject matter of the present suit, dispute raised with regard to the determination of the penalty by reason of not achieving the powder factor by the plaintiff in respect of the supplies made by them. There was various other suppliers like the plaintiff in different parts of the country who had also supplied the explosives and accessories during this period i.e. 2005-06 and similar question had arisen with regard to the determination of penalty by the defendant. The right of the defendant to deduct from the bill of supplies on account of powder factor was challenged and the matter had ultimately gone to the Hon'ble Supreme Court of India. The said issue is now pending for adjudication by the Hon'ble Supreme Court of India. Although the present plaintiff is not a party to the pending matter before the Hon'ble Supreme Court of India but since the issue is same and identical that this defendant could not calculate the penalty on such account and accordingly, the determination is kept pending. The plaintiff is aware of such issue before the Hon'ble Supreme Court of India and nevertheless has suppressed the same in the plaint.

13C. By virtue of the pendency of the said issue, the bank guarantee which was furnished by the plaintiff against the security deposit under the contract of 2005-06 was also consequently could not be released. The supply although have been made by the plaintiff, but the completion certificate could be issued at the instance of the defendant and consequently, the bank guarantee could not be released. It was mentioned that the bills with regard to the supply for explosives and accessories have been duly paid to the plaintiff.

13D. In respect of contract of 2005-06, there was further claim of the defendant as against the plaintiff on account of excess payment made on account of the price of the explosives and accessories for the extended period of contract i.e. 1st March, 2006 to 30th June, 2006 which the defendant was entitled to deduct from the running account bills of the plaintiff. Such adjustment would only be made after finalization of the issues before the Hon'ble Supreme Court of India."

5. Paragraphs 9 and 10 of the affidavit affirmed on 27th February, 2018 read as follows:

"9. I say that fact of the case before the Hon'ble Supreme Court in the case of (Indian Explosives Ltd. & Anr. –Vs- Coal India Ltd & Ors) being Civil Appeal No. 1561 of 2009 though identical with the present one was slightly different than that of the present case and the same is accordingly not applicable in the present case. In the instant case under litigation, the penalty clause was very much part of the Agreement dated 5th August, 2005 and Coal India Ltd had exercised its right for commensurate deduction of cost for explosives and accessories because of the non-achievement of powder factor thereof.

10. I say that the agreement which was entered into between the parties in the instant case, being Agreement dated August 5, 2005, was slightly different than that of the agreement

which was before the Hon'ble Supreme Court in Civil Appeal No. 1561 of 2009. Xerox copy of the Agreement dated 5th August, 2005 which was entered into between the parties in the present case is annexed hereto and marked with the letter-A. In the matters before the Supreme Court, the challenge was regarding provision for deduction as penalty for non-achievement of mine-wise powder factor introduced after the entering into the Running Contract dated 18.05.2005 (for supply of Bulk Loading explosives) by way of a Supplementary clause vide letter dated 05.08.2005. The main prayers in the writ petitions, which ultimately reached the Hon'ble Supreme Court, were to quash the said letter and refrain the CIL authorities from taking any step in pursuance of or in furtherance of the said letter dated 05.08.2005. Apart from this, a prayer was made directing the respondent authority to refrain from enforcing the proposed condition of powder factor and/or to make it a condition of any contract as long as the very basis of the same being arbitrary and irrational. It was in the light of this that in the amended written statement, it was mentioned that said issue was pending adjudication by the Hon'ble Supreme Court of India and that the issue is same and identical. But the Hon'ble Supreme Court, while mentioning the introduction of supplementary clause unilaterally which had amounted in novation of the contract could not be done unilaterally and hence violates Article 14 of the Constitution, nowhere declares the very clause of deduction to be arbitrary. Hence, it has to be deemed that the prayer for quashing the condition of deduction based on non-achievement of mine-wise powder factor to be arbitrary, was rejected. In the said matter, the unilateral novation was declared violation of Article 14, the Hon'ble Supreme Court directed that all consequential benefits should be conferred on the appellants in the said case without delay. The plaintiff herein do not fall in such category and hence is not entitled to any relief as claimed in the present application i.e., GA No. 34 of 2018 banking upon the judgment of Hon'ble Supreme Court dated 2.11.2017."

6. The aforesaid paragraphs would prima facie show that the defendants tried to make out a distinction between the cases decided by the Hon'ble Supreme Court and the matter that is required to be decided in the suit. In terms of our direction dated 8th January, 2025 by which the respondent was directed to disclose the authenticity of the internal communication dated 20th September, 2018 and if the firms named in the said documents have received the benefit thereunder, in paragraphs 5 and 6 of the said affidavit, the respondent has stated as follows:-

> "5. I say that the subject matter of the present suit and the appeal is relating to supply of cartridge explosives and its accessories to all subsidiaries of Coal India Limited. There were two running contracts of similar nature of two periods, one is dated 5th August, 2005 i.e., the first contract and 10th August, 2006 being the second running contract. Both of these running contracts are exclusively concerning with the supply of cartridge explosives. Therefore, the subject matter of the present appeal has got no connection and/or relation with the supply of bulk explosives which is appearing at page 258 of the paper book.
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> 6. There is another major difference between the running contract dated 18th May, 2005 as referred to in page 258 of the paper book and the running contracts dated 5th August,

> 2005 and 10th August, 2006 appearing at page 751 (Volume – VII) and Page 859 (Volume-VIII) of the paper book respectively. The major difference is in the supply of bulk loading explosives contract at page 258 of the paper book originally did not contain powder factor clause which was incorporated by a supplementary agreement which was considered by the Hon'ble Supreme Court as novation, whereas, the running contract for supply of cartridges dated 5th August, 2005 and 10th August, 2006 did contain the powder factor in original contract itself and there was no question of novation. Therefore, the application of the judgment and order of the Hon'ble Supreme Court dated 2nd November, 2017 had no application in the running contracts dated 5th August, 2005 and 10th August, 2006 which are the subject matter of the present suit and the appeal."

7. In the background of the aforesaid pleadings, we need to assess the judgment under appeal.
8. The learned Single Judge was of the prima facie view that the "powder factor" was very much in the agreement from the inception but it is not the only clause that may be required to be taken into consideration in order to decide the claim of the plaintiff as it appears that the said agreement was entered earlier and the ground of challenge before the Hon'ble Supreme Court was imposition of a liability on the basis of introduction of a new clause resulting a unilateral novation of the contract.
9. We are in agreement with the learned Single Judge that in the summary procedure, this issue cannot be decided.

10. Under such circumstances, we dismiss the appeal. However, there shall be no order as to costs.

11. The affidavit filed on behalf of the respondent is taken on record.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)

R.Bhar/kc