
(2014) 09 OHC CK 0040
In the Orissa High Court
Case No : W.P. (C) No. 12934 of 2007

Bengal Tools Limited

APPELLANT

Vs

Mahanadi Coalfields Limited

RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:

Citation : (2015) 3 BC 393

Hon'ble Judges : Amitava Roy, C.J;B.R. Sarangi, J

Bench : Division Bench

Judgement

Amitava Roy, C.J.—Appalled by the perceived wrongful invocation of the Price Fall Clause contained in the Terms and Conditions governing the transaction of the Belt Conveyors to the opp. party-Mahanadi Coalfields Limited (for short, hereinafter referred to as "MCL"), the petitioner is before this Court questioning the decision for recovery of excess payment made and also disallowance of its balance payment of 20% of the price of the supplies made.

2. We have heard learned Mr. Ashok Mohanty, learned Senior Counsel for the petitioner and Mr. Sanjeet Mohanty, learned Senior Counsel for the opp. party-MCL.

3. A brief outline of the pleaded facts would be necessary to appropriately comprehend the issues.

4. The petitioner had responded to the notice inviting tender dated 10.12.2004 of the opp. party-MCL inviting sealed bids from the eligible suppliers for supply of Trunk Belt and Pony Conveyors, etc. as per the technical details and schedule of requirement elaborated therein.

Sans unnecessary details, suffice it to mention that eventually, on the culmination of the process undertaken by letter dated 23.01.2006 under Annexure-3 to the writ petition, opp. party placed purchase order in favour of the petitioner for supply of Belt Conveyors as mentioned herein below:

5. The terms and conditions embodied in the purchase order carried amongst others, the Price Fall Clause, as hereunder:

"Price Fall Clause: The price charged for the stores supplied against this order by you shall in no event exceed the lowest price at which you sell or offer to sell the stores identical description to any other organization during the period of the contract.

If the supplier at any time during the period of contract reduces the sale price, sells or offers to sell such stores to any other organization at a price lower than the price chargeable under this contract, the supplier shall forthwith notify such reduction of sale price to the undersigned and the price payable under the contract for stores supplied after the date of coming in force of such reduction in sale price, shall stand correspondingly reduced."

Thereby the supplier was required to ensure that the charge for the stores supplied against the order would in no event exceed the lowest price at which it would sell or offer to sell the stores of identical description to any other organization during the period of contract. Thereby, it was made obligatory for the supplier to notify the reduction on sale price or its offer to sell such stores at lower price to any other organization, to the opp. party, and that the price payable under the contract would accordingly stand reduced to the same extent. Clause 15(f) of the Terms and Conditions of the contract being relevant is also quoted hereunder:

"15(f): Wherever under this contract a sum of money is recoverable from and payable by the supplier, Coal India Ltd. and its subsidiary companies shall be entitled to recover such sum by appropriating in part or in whole, by deducting any sum or which at any time thereafter may become due on the supplier in this or any other contract should this sum be not sufficient to cover the full amount recoverable, the supplier shall pay to the Coal India Ltd. and its subsidiary companies on demand the remaining balance. The supplier shall not be entitled to any gain on any such purchase."

6. In terms of this clause, whenever under the contract involved, a sum of money was recoverable from and payable by the supplier, the Coal India Ltd. and its subsidiary companies were authorized to recover the same by appropriating in part or in whole by deducting any sum which, at any time thereafter, might become due from the supplier under the contract or any other contract and in case the sum deducted was not sufficient to cover the full amount recoverable, and, further if the sum so deducted was not sufficient to full recovery, the supplier was required to pay the Coal India Ltd. and its subsidiary companies on demand, the remaining balance.

7. According to the petitioner, it supplied Belt Conveyors in terms of the purchase order on or before 13.1.2007 and the opp. party released 80% of the payments and 20% remained outstanding in spite of repeated requests, so much so that on the date of the institution of this petition an amount of Rs. 1,03,666,76/- was

due and payable by the opp. party. The petitioner has averred further that during execution of the purchase order dated 23.1.2006, it had participated in another process initiated by the NIT dated 20.6.2006 issued by the South Eastern Coalfields Limited, Bilaspur-respondent no. 6 (for short, hereinafter referred to as "SECL") for supply of Belt Conveyors and had been awarded the work by purchase order dated 17.2.2007.

8. While the matter stood at that, the MCL by its letter dated 1.8.2007 (Annexure-6) to the writ petition intimated the petitioner that it had quoted lower price for supply of Belt Conveyors of similar/higher specifications compared to the same commodity to be supplied to it, which thus attracted Price Fall Clause, for which its dues could not be settled as the matter was under investigation. Thereby the petitioner was further reminded of its obligation under the said clause to inform the MCL about the reduction of its sale price for supply of Belt Conveyors to SECL. It was required to explain as to why penal action should not be initiated against it for violation of Price Fall Clause and to effect recovery of the excess amount paid from its (MCL) outstanding dues and/or by other subsidiaries of Coal India Limited Order PSU/Govt. organization.

9. To this, the petitioner submitted its explanation on 20.8.2007, in essence, to emphasize that the Belt Conveyors supplied to the MCL and SECL were different in specifications and descriptions and thus the Price Fall Clause was not invocable. It thus requested the MCL to clear its outstanding dues together with interest.

10. According to the petitioner, there was a lull thereafter for which by its letter dated 14.9.2007, the petitioner reiterated its request for release of its payment of the balance amount against the supplies made. By its letter dated 20.9.2007 impugned in the instant proceeding, the MCL conveyed to the petitioner that as per broad parameters of the specifications, the commodities supplied to the MCL and SECL were the same and thus it had been decided to enforce the Price Fall Clause in its letter and its spirit. Setting out the details of the payments already made and the sum payable on the application of the Price Fall Clause, it was intimated to the petitioner that an amount of Rs. 1,36,50,559.55 had been paid in excess for which recovery would be made. The MCL also communicated that the pending bills of the petitioner for the balance 20% of the supplies had been disallowed.

11. Opp. parties nos. 1 to 5 in their counter while admitting that by the supply order dated 23.1.2006, the petitioner was required to supply Gate (4 sets) and Pony (16 sets) Belt Conveyors at total basic price of Rs. 5,04,01,937.80, which together with the taxation duties, freight and insurance, did sum up to Rs. 6,32,96,5905.86 and that it (petitioner) had supplied all the Belt Conveyors by 30.1.2007 averred that 80% of the dues amounting to Rs. 5,32,16,205/- was paid leaving an outstanding of 20% of the amount payable. The balance was withheld as it was to be paid after the commissioning of the Belt Conveyors on 90 days after receipt thereof at the stores whichever was earlier. 12. According

to the opp. party, there was some failure reports of the Belt Conveyors and thus the 20% of the payment was not released. It was stated further that the Vigilance Department of the MCL vide its letter dated 30.4.2007 had brought to the notice of the Material Management that during the contract period the petitioner and M/s. Hindustan Udyog Limited had offered lower price to SECL for supply of Gate Belt Conveyors and Pony Belt Conveyors, whereafter on due enquiry, it transpired that the petitioner, in fact, had offered lower price to SECL for Gate Belt Conveyors and Pony Belt Conveyors of same/similar/higher specifications. Imputing that the act of offering lower price by the petitioner to the SECL for supply of Gate Belt Conveyors and Pony Belt Conveyors of same/similar higher specification did amount to violation of the Price Fall Clause, a show cause notice dated 1.8.2007 was issued to it as to why penal action would not be taken for recovery of excess amount paid in terms of the said clause. The opp. party admitted that in response to the notice dated 1.8.2007 the petitioner had submitted its reply on 20.8.2007 stating in substance that the reason for price difference between the MCL and the SECL was because of difference in specifications of the commodities supplied, and thus the Price Fall Clause was not attracted. The opp. party averred that the Tender Committee of the MCL on a consideration of the said reply held that the broad parameters of the specifications of the supply order dated 23.1.2006 issued by the MCL and those of the SECL were the same with minor differences in respect of which no substantial financial involvement did ensue. It was concluded that the petitioner had violated the Price Fall Clause and thus in terms thereof an amount of Rs. 1,36,50,559.55 was recoverable from it. It was decided as well that the petitioner was not entitled to the balance 20% of the amount towards supply as it received the above amount in excess. Accordingly, the letter dated 20.9.2007 was issued.

13. Apart from the rejoinder filed by the petitioner to the said counter reiterating the averments made in the writ petition, it also filed an additional affidavit to bring on record a Chartered Engineer's Report recording the following opinion:

"Conclusion: It is hereby confirmed that after detailed study of the documentary evidences and technical specifications and on the conventional Drawing of the MCL specified Pony Conveyors and SECL specified Pony Conveyors, the cost of the ready to supply assemble MCL conveyors are comparatively much higher than the cost of assembled SECL conveyor.

It is further being confirmed that the MCL specified conveyors are much volumetric, robust in appearance and heavier in weight which finally implies that cost wise it is much more than the SECL specified conveyors. By no mean, MCL Pony Conveyors of the subject order be said to be identical with SECL Pony Conveyors."

14. The expert opinion therefore, according to the petitioner, authenticated that the Pony Conveyors supplied to the MCL and the SECL by the petitioner were not identical on the basis of their specifications and the documentary evidence

pertaining thereto.

15. Mr. Ashok Mohanty, learned Senior Counsel, has emphatically urged that a comparison of the supplies made by the petitioner to the MCL and SECL would indicate in no uncertain terms that the commodities were not identical and thus the Price Fall Clause was inapplicable. He also has further argued that in this view of the matter, the order of recovery was not only per se void, the decision to deny payment of the balance 20% of the petitioner's outstanding dues, was also illegal. Mr. Mohanty has maintained that the impugned decision is also violative of the principles of natural justice and is liable to be adjudged non est in law. According to him, a bare perusal of the impugned order would indicate patently that the MCL itself was uncertain as to the applicability of the Price Fall Clause as it indicated to "broad parameters" not comprehended in the said clause. Referring to the Chartered Engineer's Report, the learned Senior Counsel insisted that the factual foundation of the impugned order had been rendered non-existent and thus the same is liable to be quashed. He persistently argued, that as in any view of the matter, the impugned decision has the potential of visiting the petitioner with adverse civil consequences the same could not have been taken without complying with the principles of natural justice.

16. Per contra, Mr. Sanjeet Mohanty, learned Senior Counsel for the opp. party, has argued that on a purposive interpretation of the Price Fall Clause as had been intended by the parties, the impugned decision had been taken, as the supplies made by the petitioner to the MCL and SCL were identical as per the description and specifications involved. He argued that as prior to the decision taken, the petitioner had been issued a notice to show cause, to which it had responded and, as its reply had been duly considered before applying the Price Fall Clause, the plea of want of fairness is misconceived. The learned Senior Counsel submitted that the Chartered Engineer's Report not having been forwarded along with the show cause submitted by the petitioner, the same cannot, at this stage, be taken note of. According to the learned counsel for the petitioner, not only the contract involved is non-statutory in nature, but also is a concluded one and thus, in the facts and circumstances of the case, no interference of this Court is called for. That in terms of the Clause 15(f) of the Terms and Conditions of the purchase order, it was permissible for the MCL to inform the Coal India Ltd. and its subsidiary companies to recover any money payable by the supplier has been highlighted. It has been argued that intimation to that effect, as given in the letter dated 1.8.2007 asking the petitioner to explain why penal action should not be initiated against it, thus cannot be faulted with, and, as the impugned order is a reasoned one, it ought not to be repudiated as cryptic as well.

Mr. Mohanty, learned Senior Counsel for the opp. party, has placed reliance on the decision of the Apex Court in *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, ; *State of Orissa Vs. Dhaniram Luhar, Pimpri Chinchwad Municipal Corporation and others v. Gayatri Construction Company*

and another, (2008) 8 172; and that of the Orissa High Court in Umakanta Sahoo and another v. Sakuntala Sahoo and 17 others, 2008 (II) OLR 742.

17. We have duly analyzed the pleaded facts and the documents as well as the arguments advanced. The existence of the Price Fall Clause is a matter of record. That the petitioner had completed the supplies in terms of the supply order dated 23.1.2006, it is also an admitted fact. In course of the arguments, our attention has been drawn to the supply order dated 17.2.2007 issued by the SECL in favour of the petitioner to supply Belt Conveyors of the description/specification as set out therein. Though it was endeavoured on behalf of the parties to impress upon us the aspect of identicalness and otherwise of the different items supplied, we are of the view that in the face of the Chartered Engineer's Report and in the absence of necessary expertise, no final conclusion in this regard ought to be recorded in the instant proceeding. Undoubtedly, the impugned decision was taken by the MCL on 20.9.2007 directing recovery of an amount of Rs. 1,36,50,655.55 by applying the Price Fall Clause, proceeding on the premise that on broad parameters of specifications, the commodities supplied by the petitioner to both the MCL and SECL were the same and on that count as well balance 20% payment was also disallowed. Prior thereto, by a communication dated 1.8.2007 addressed to it (petitioner) was afforded an opportunity to explain as to why penal action ought not to be taken as per the Price Fall Clause.

18. A bare reading of the notice dated 1.8.2007, however, does not disclose the proposed action of withholding 20% of the amount. The reply/show cause is also focused on the applicability of the Price Fall Clause vis-?-vis the commodities supplied by it to the MCL and SECL. No response was provided by it on the aspect of 20% of its outstanding dues.

19. Be that as it may, as the impugned decision is founded on the premise that the goods supplied by the petitioner to MCL and SECL when adjudged by their descriptions/specifications were identical so as to attract the Price Fall Clause, we are of the considered opinion that to ensure even handed justice, more particularly, in the face of the Chartered Engineer's Report laid by the petitioner that it would be expedient and in fitness of things that the matter be remitted to the opp. party-company for fresh scrutiny of all relevant facts bearing on the identicalness or otherwise of the goods supplied by the petitioner to the MCL and SECL and to determine on the basis thereof the applicability of the Price Fall Clause. As the Chartered Engineer's Report per se records a finding that the goods supplied were not identical, this document in course of the fresh exercise would also be taken note of. In order to provide a quietus to the lingering controversy, we are of the view that a opportunity to the petitioner to participate and cooperate in the process should be given. The opp. party-company would duly notify the petitioner of the exercise to be undertaken, as ordered, and complete the same within a period of four weeks from the date of receipt of a certified copy of this order. The petitioner would lay a certified copy of this order with the Chief General Manager (MM), MCL, District-Sambalpur, Odisha, within a

week herefrom, whereafter the process, as ordered, would be undertaken and completed within the time frame fixed.

Needless to say that the decision arrived at would be communicated to the petitioner forthwith thereafter.

Dr. B.R. Sarangi, J.

I agree.