(2010) 12 DEL CK 0204

In the Delhi High Court

Case No : CS (OS) 2253 of 1997

Eicher Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 16-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9

Citation : (2010) 12 DEL CK 0204

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Pramod B. Agarwala and Abhishek Baid, for the Appellant; None, for the Respondent

Judgement

S. Ravindra Bhat, J.—The Plaintiff seeks a decree for Rs. 64,71,615.62/- with interest. Briefly, the case set out in the suit is that the Plaintiff is a company engaged inter alia in making supplies; to various government departments and agencies. The Plaintiff responded to a tender enquiry issued by the Ministry of Defence - Director General of Supplies and Disposal. Its bid was accepted and on 04.09.1990, the third Defendant issued a supply order under which 2500 Enfield motor cycles were to be delivered to them by the Plaintiff. The material terms of the contract are as follows: -

2. DURATION OF THE RATE CONTRACT

The Rate Contract shall remain in force for the period from 1.5.90 to 30.4.91. All supply orders placed during the currency of R.C. shall be executed in accordance with the terms and conditions of the Rate Contract."

11. DELIVERY SCHEDULE

Supplies to commence within one week from the date of receipt of order as per demand. Delivery to Army indenters against bulk orders will be @ 200 motorcycles approximately per month. For Civil indenters; an agreed schedule of delivery will be worked out with indenters. The delivery up to 50 M Cs against bulk order and small quantity indents will be completed within four weeks.

As is apparent, the Plaintiff had to deliver 2500 motor cycles and accessories before 30.04.1991. The supply order was on the basis of the existing rate applicable till 30.04.1991.

2. It is contended that the Defendants issued another supply order for a subsequent period being No. B-27302/OS-4A dated 04.09.1990 for supply of another 2500 Enfield motor cycles before 31.03.1992 subject to a maximum of 400 vehicles (average of 100 vehicles per month) between September, 1990 and December, 1990 and the balance 2100 vehicles were to be supplied between 01.01.1991 and 31.03.1992. This agreement has been produced as Ex. PW-1/1. It is contended that since the quantity of 2500 motor cycles were to be supplied beyond the period 01.04.1991 and completed by 31.03.1992, but the order was nevertheless placed on the basis of the prevailing rates. The Plaintiff sought a revision in the rates in the form of a query on 12.10.1990. The material portion of the said letter Ex.-PW-1/3 is as follows: -

The above supply order has been placed by you against current Rate ContractNo.AM-7/RC-2487/Motorcycles/90-91/77/Enfield/DCOAM/155 dated 11/16-7-90. This Rate Contract is valid from 1st May, 1990 to 30th April, 1991. Since as per the terms of your supply order we will be delivering major quantity after the expiry of the current Rate Contract, we will be approaching you subsequently to issue an amendment to the supply order covering the supplies to be made between 1.5.1991 to 31st March, 1992 as per the terms and conditions of the new Rate Contract which will come into force from 1-5-91.

3. The Plaintiff submits that this issue was followed up by a subsequent letter dated 23.11.1990 marked as Ex.-PW-1/4. The material portion of the said letter is as follows: -

We had submitted that the current Rate contract No. AM-7/RC-2487/ Motorcycles/90-91/77/Enfield/DCOAM/155 dated 11/16-7-90 as specified in the supply order is valid only up to 30th April, 1991. The delivery period is up to 31st March, 1992. An amendment may please be issued to the supply order confirming that the terms and conditions of the current R/C will be valid only up to 30-4-1991 and during the remaining delivery period the terms of the supplies will be governed by the R/C to come into force with effect from 1st May, 1991.

4. The Plaintiff submits that on 21.01.1992, the fourth Defendant acting on behalf of the Defendants issued the requisite amendment, the effect of which was to increase the rates in respect of the motor cycles to be supplied for the period 01.05.1991 to 31.03.1992. That amendment is marked as Ex.PW-1/6; pertinently it records as follows: -

2. The subject Supply Order may please be amended as under: -

Para 1 against Rate Contract No.

For: - AM-7/RC-2187/Motor Cycles/90-91/77/Enfield/DCOAM/155 dated 11/16.7.90.

Read: - Supply of Motor Cycles made up to 30 Apr 91 will be governed under the DGS&D Rate Contract No. AM-7/RC-2487/Motor Cycles/90-91/77/Enfield/ DCOAM/155 dated 11/16 Jul 90 as amended vide DGS&D Amendment No. 2 vide their A/L No. AM-7/RC-2487/Motor Cycles/90-91/77/Enfield/DCOAM/155/ Amdt/1304 dated 15 Mar 91. Supplies of Motor Cycles made w.e.f. 1.5.91 to 31.3.92 will be governed under DGS&D Rate Contract No. AM-7/RC-2795/Motor Cycles/91-92/77/Enfield/COAM/225 dated 14 Jun 91 as amended vide DGS&D No. A/L No. AM-7/RC-2795/Motor Cycles/91-92/77/Enfield/DCOAM/255/ Amdt/1377 dated 23.11.91.

The Dy. Controller of Account

This is issued with the

Deptt. of Supply

approval of Ministry

Shastri Bhawan< /p>

of Defence, Finance

26, Haddows Road Madras - 600 006

(0-3) vide their ID No.

37/03/91 dt. 16. Jan 92

5. It may be mentioned that this letter was issued by the Director BTW (S) on behalf of the Additional Director General of Supplies. The original order dated 16.7.1990 - RC No. 155 was issued by the Joint Director General of Supplies.

6. The Plaintiff further relies upon a letter dated 23.11.1991, which refers to a letter issued by the Additional D.G. (OS) taking cognizance of the amendment. That letter was written to the Pay & Accounts Office of the Department of Supplies. The same has been produced as Ex. Pw-1/7; it reads inter alia as follows: -

3. We placed a Supply Order for 2500 Motor Cycles on M/s Enfield India Vide our B/27202/OS-4A dated 04 Sep 90. The firm immediately represented that they would supply a laid Qty in the current R/C at that time and balance supplies w.e.f. 01 May, 1991 will be governed by the new Rate Contract.

4. We issued an amendment to the Supply Order with approval of Ministry of Defence Finance vide our letter No. B/27202/OS-4A dated 21 Jan 92 (copy enclosed).

5. Please admit bills of the firms for all supplies made after 01 May 91 as per the New Contract No. AM-7/RC-2795/Motor Cycles/91-92/77/Enfield/COAM/225

dated 15 Jun 1991.

7. The Plaintiff submits that despite the above facts and despite having received the entire supply of 2500 motor cycles units including the supplies made during the disputed period - 01.05.1991 to 31.03.1992, the Defendants did not release the entire agreed payment and tried to settle the accounts according to the original understanding embodied in the supply order of 16.07.1990, i.e. Ex. PW-1/1. The Plaintiff relies upon the various meetings and letters said to have been addressed to the Defendants in this regard. Particular reliance is placed upon a letter dated 08.09.1993. The letter appears to have been written by Ministry of Defence and has been produced and marked as Ex.-P-2. It mentions about payment of differential amounts to the Plaintiff and to a meeting to be held in that regard. The Plaintiff also relies upon the agenda for the said meetings originally scheduled for 14.09.1993. It is submitted that after a long period of inaction, the Defendant repudiated the Plaintiff''s claim on 24.07.1996. The said letter has been produced as Ex.P-3. The Plaintiff relies upon a legal notice dated 29.01.1997 marked as Ex. PW-1/11, claiming amounts constituting the balance of what was paid to it and what were according to it in its reckoning and its entitlement. In these circumstances, the Plaintiff seeks a decree for the amount of Rs. 64,71,615.62/-.

8. The Defendants resist the suit and contend that prices, terms and conditions were negotiated and finalized by the third Defendant, which included the rates for the prescribed period, which is normally one year. It is submitted that various organizations of the Central Government are authorized to place supply orders for specific quantities and also outline the delivery period, in line with the rate, and contract terms. It is, therefore, stated that if the delivery period is unacceptable, a usual mechanism is to arrive at a mutual acceptable delivery schedule by the organization concerned and the contractor.

9. The Defendants do not deny the supply order dated 16.07.1990. It is averred inter alia as follows: -

It is a well known and established practice that a supply order is placed only against an already concluded rate contract. Once a supply order is placed against a particular rate contract till completion of supplies, the terms and conditions of that particular rate contract alone can govern that supply order. As such, subsequent rate contract No. 225 dated 14.6.1991 cannot have any bearing on the supply order dated 4.9.1990.

10. It is further stated that letter dated 24.02.1992 alleged to have been issued by Director General Ordinance Services office to the Pay & Accounts Officer, Madras is nothing but an extension of the contention of the letter dated 21.01.1992 mentioned in the above para. As already stated, the Director General Ordinance Service Organization or Ministry of Defence were not authorized to decide the price payable for supplies received through DGS & D rate contract. DGS&D under the Department of Supply, Ministry of Commerce is the authority

competent, who concluded the rate contract and they alone are the authority to negotiate the price and decide the exact amount payable etc. As such, the letter of 24.02.1992 from Director General Ordinance Services to Pay & Accounts Officer, Madras has no legal authority. Hence, the question of giving any reasons for declining payment does not arise.

11. It is reiterated that irrespective of the date of supplies, the prices payable are strictly in terms of rate contract No. 155 during whose validity, the Supply order was issued. The competent authority, on behalf of the purchaser, i.e. DGS&D was neither approached by the Plaintiff for higher price nor were they entitled for higher price. No such proposal was ever accepted. Since the supply order was not issued against Rate Contract No. 225, there was no question of applying any terms of Rate Contract No. 225. The supply order was issued against Rate Contract No. 155. Rate Contract No. 155 clearly indicates details of the Organization that concluded the rate contract and nowhere in the rate contract No. 155, it is stated that the prices are negotiable by any direct demanding officer. No benefit has accrued to the Union of India as due payment was promptly paid to the Plaintiff for the stores supplied strictly in terms of contractual arrangements.

On the basis of the above pleadings, the following issues were framed:

1. Whether the suit is bad for misjoinder of parties? OPD

2. Whether the Defendant Nos. 4 and 5 are personally liable to the Plaintiff? OPP

3. Whether the Defendants are not liable to make payment for the supplies made by the Plaintiff? OPD

4. Relief.

ISSUE No. 1

12. This issue was framed at the behest of the Defendants. Apparently, it is on account of impalement of Defendant No. 4&5 in the suit. They were at the relevant time officials of the Government. These Defendants were apparently imp leaded on account of the specific allegations made against them. The Plaintiff''s contention in the suit is that depositions taken by the first three Defendants about lack of authority of the fourth and fifth Defendant requires adjudication and that if so, the said Defendant Nos. 4&5 are personally liable for the suit claim.

13. The suit was taken up in the regular course as part of the final hearing matters. In the circumstances, the Court is empowered to deal with the case since the pleadings, evidence and all the materials are part of the record. It is a cardinal principle of civil law that no suit is defeated on account of mis-joinder of parties. This is apparent from a consideration of Order I, Rule 9 CPC which specifically states as follows: -

9. Misjoinder and nonjoinder No suit shall be defeated by reason of the

misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

(Provided that nothing in this rule shall apply to nonjoinder of a necessary party.)

14. Besides the above legal position, it is apparent that the Plaintiff was duty bound to implead the said fourth and fifth Defendants, since the allegations were leveled against them and a decree too has sought. In the circumstances, the issue is answered in negative and in favour of the Plaintiff. The suit is maintainable as against the said two Defendants.

Issue Nos. 2 and 3:

15. It is apparent from the previous discussion that the contracts entered into by the Plaintiff were for two distinctive periods - i.e. 04.09.1990 to 31.03.1992 (R.C.-155 dated 16.07.1990) and R.C.-225 dated 02.06.1991 for the subsequent period between 01.04.1991 to 31.03.1992. The terms of the previous contract, i.e. No. 155 required supply of 400 motorcycles in the period between September to December 1990, and the entire quantity of 2100 motorcycles was to be supplied between 01.01.1991 to 31.03.1992. The rates prescribed were as applicable for the period 01.05.1990 to 30.04.1991. The Plaintiff had sought clarification through its letter dated 12.10.1990 (Ex. PW-1/3) that the major quantity of the supplies were to be effected after the expiry of the rate contract period, i.e. 31.03.1991. In the circumstances, the Plaintiff sought for amendment to the Supply Order covering the supply for the period and allowing it with the terms of the new rate contract, which was to replace the existing one with effect from 01.05.1991. The relevant extract of that letter dated 12.10.1990 reads as follows:

XXXXXX XXXXXX XXXXXX

The above supply order has been placed by you against current Rate Contract No. AM-7/RC-2487/Motorcycles/90-91/77/Enfield/DCOAM/155 dated 11/16-7-90. This Rate Contract is valid from 1st May, 1990 to 30th April, 1991. Since as per the terms of your supply order we will be delivering major quantity after the expiry of the current Rate Contract, we will be approaching you subsequently to issue an amendment to the supply order covering the supplies to be made between 1-5-91 to 31st March, 1992 as per the terms and conditions of the new Rate Contract which will come into force from 1-5-91.

XXXXXX XXXXXX XXXXXX

16. The Plaintiff followed-up the request again by another letter dated 23.11.1990 (Ex. PW-1/4), the material part of which reads as follows:

XXXXXX XXXXXX XXXXXX

We had submitted that the current Rate Contract No. AM-7/RC-2487/ Motorcycles/90-91/77/Enfield/DCOAM/155 dated 11/16-7-90 as specified in the supply order is valid only up to 30th April, 1991. The delivery period is up to 31st March, 1992. An amendment may please be issued to the supply order confirming that the terms and conditions of the current R/C will be valid only up to 30-4-1991 and during the remaining delivery period the terms of the supplies will be governed by the R/C to come into force with effect from 1st May 1991.

XXXXXX XXXXXX XXXXXX

17. The relevant part of the amendment received by the Plaintiff from the Defendants'' office reads as follows:

XXXXXX XXXXXX XXXXXX

2. The subject Supply Order may please be amended as under:

Para 1 against Rate Contract No.

For: AM-7/RC-2187/Motor Cycles/90-91/77/Enfield/DCOAM/155 dated 11/16.7.90.

Read: Supply of Motor Cycles made up to 30 Apr 91 will be governed under the DGS&D Rate Contract No. AM-7/RC-2487/Motor Cycles/90-91/77/Enfield/ DCOAM/155 dated 11/16 Jul 90 as amended vide DGS&D Amendment No. 2 vide their A/L No. AM-7/RC-2487/Motor Cycles/90-91/77/Enfield/DCOAM/155/ Amdt/1304 dated 15 Mar 91. Supplies of Motor Cycles made wef 1.5.91 to 31.3.92 will be governed under DGS&D Rate Contract No. AM-7/RC-2795/Motor Cycles/91-92/77/Enfield/COAM/225 dated 14 Jun 91 as amended vide DGS&D No. A/L No. AM-7/RC-2795/Motor Cycles/91-92/77/Enfield/DCOAM/255/ Amdt/1377 dated 23.11.91.

XXXXXX XXXXXX XXXXXX

18. The above letter was marked to all the concerned authorities, including the Deputy Controller of Accounts (DCA), Department of Supply with a specific note that it was issued with the approval of the Ministry of Defence, by their Finance. The endorsement, marking this letter to the DCA reads as follows:

XXXXXX XXXXXX XXXXXX

10. The Dy. Controller of Account This is issued with the approval of Ministry Deptt. of Supply of Defence, Finance (8-3) vide their ID No.

Shastri Bahwan 37/03/91 dated 16 Jan 92.

26 Haddows Road

Madras-600 006

XXXXXX XXXXXX XXXXXX

19. The Defendants'' representative, who appeared in support of this case, i.e. Sh. Anil Bhatia, Deputy Director, DGS&D, in his deposition was shown the said

letter of 21.01.1992. Significantly, he did not deny the letter or that it was marked to all the Competent Authorities. The queries put to him and the replies provided to it read as follows:

XXXXXX XXXXXX XXXXXX

Q.7. Mr. Bhatia, kindly see letter dated 21.1.1992 at page 55. This is an amendment to the supply order with a copy to DGS&D. This was issued pursuant to the request for amendment because supplies were to be made beyond the rate contract period. The supplies were completed by 31.3.1992. Did the DGS&D ever objected to this amendment prior to the completion of the supplies.

Ans. The DDO is not authorized to issue such letter which involves change of rates. Hence this letter has no locus standi. The letter also does not state any where that they have taken approval of DGS&D.

Q.8. Mr. Bhatia, my question was - did DGS&D ever objected to this amendment prior to the completion of the delivery of the motor cycles and is that document on court record?

Ans. There is no document recording DGS&D''s objection to this amendment on court record.

XXXXXX XXXXXX XXXXXX

20. In this background, the Plaintiff received a letter from the office of the Addl. Director General Ordnance Services, Major General Mohinder Singh dated 24.02.1992; the said letter was marked as Ex. PW-1/7; it reads as follows:

XXXXXX XXXXXX XXXXXX

3. We placed a Supply Order for 2500 Motor Cycles on M/s. Enfield India vide our B/27202/OS-4A dated 04 Sep 90. The firm immediately represented that they would supply a laid Qty in the current R/C at that time and balance supplies wef 01 May 91 will be governed by the new Rate Contract.

4. We issued an amendment to the Supply Order with approval of Ministry of Defence Finance vide our letter No. B/27202/0S-4A dated 21 Jan 92 (copy enclosed).

5. Please admit bills of the firms for all supplies made after 01 May 91 as per the New Contract No. AM-7/RC-2795/Motor Cycles/91-92/77/Enfield/COAM/225 dated 15 Jun 1991.

6. Please ack.

XXXXXX XXXXXX XXXXXX

21. The Plaintiff has also relied upon Ex. P-2 and its annexure, which refers to an internal meeting between the officials of the Government to resolve the queries and demands of the Plaintiff for applicability of the new rates for the period

01.05.1991 in respect of the supplies made up to 31.03.1992, in terms of the first Supply Order, i.e. RC-155. The Defendants'' argument is one of denial, stating that the contract period has no co-relation with the rates which are fixed on an early basis. In other words, if the supplies in a particular contract extend beyond the financial year for which the rate is fixed, the contract particulars would remain constant and would not vary, having regard to the fluctuation in the rates fixed by the concerned Department. As an argument, having regard to the prescribed procedures and the standard terms of the rate contract, which the Defendants enter into in their normal course of business, there could be no scope for confusion or dispute. However, in this case, the Plaintiff has relied upon two letters written contemporaneously with its demands made on 12.10.1990 and 23.11.1991, whereby the rates were enhanced for the later period, i.e. 01.05.1991 to 25.03.1992 in respect of the first contract. Those letters are marked as Ex. PW-1/6 and Ex. PW-1/7. There appears to have been no dispute at the time they were proved on behalf of the Plaintiff; the Defendants'' witness too did not deny that they were issued by the concerned officers. In other words, the Defendants do not dispute the genuineness of the letter but instead impeach its efficacy, claiming it to be not binding. In the denial queries made to the Defendants'' witness, all of what was stated was that the concerned officers lacked the authority to issue such amendment, committing payment of the higher amount for the concerned period, i.e. 01.05.1991 to 31.03.1992.

22. In this case, the Defendants'' arguments about the manner - continues for the higher rate for the subsequent period - not being applicable, having been proved. There is not positive evidence, apart from the statement of DW-1, in the form of extract of any Manual or guideline, indicating the method of issuing amendments, where one of the contracting parties seeks change of terms. The Defendants have also no produced any rules of business which govern such rate contract, and indicate the delegated authorities empowered to alter the existing commitments. The Defendants, on the other hand, do not also doubt the genuineness of the two letters - issued by the two different officials - committing payment of higher rates for the later period between 01.05.1991 to 31.03.1992 to the Plaintiff in respect of the earlier contract, R.C.-155. The Court also notices that the onus of proving that the Defendants are not liable to make payment for these supplies, was upon them. However, they have not led any evidence or advanced any cogent much less convincing submissions in this regard. In these circumstances, the Court finds that Issue No. 3 has to be answered against the Defendant Nos. 1 to 3.

23. So far as Issue No. 2 is concerned, it is held that Defendant Nos. 4 and 5 cannot be held to be personally liable to make any payments to the Plaintiff. The Plaintiff did not lead any evidence to show that the letters issued by them were malafide or meant to cause any pecuniary or other loss to the Plaintiff of the kind, which would entitle the latter to claim damages.

24. In view of the above discussion, Issue No. 3 is held in favor of the Plaintiff

and against Defendant Nos. 1 to 3. For the same reason, Issue No. 2 is held against the Plaintiff.

Issue No. 4:

25. In view of the discussion in the previous part of the judgment, it is held that the Plaintiff has proved entitlement for a decree in the sum of Rs. 28,15,136/-, as the deficiency for the supplies made during the period 01.05.1991 to 31.03.1992. The Plaintiff has claimed 24% interest, including the amount arising out of such calculation, while computing the total claim of Rs. 64,71,615.62/-, at the time of filing of the suit. However, no basis for claiming such amount has been given. In this view of the matter, this Court is of the opinion that the Plaintiff is entitled only for the Principle amount of Rs. 28,15,136/-, together with pendent lite interest @ 10% from the date of filing of the suit, i.e. 17.10.1997, till its realization.

26. For the above reasons, the suit is decree for the sum of Rs. 28,15,136/- with 10% pendent lite and future interest from the date of the suit, i.e. 17.10.1997 till the date of payment. Defendant Nos. 1 to 3 shall bear costs of the proceedings, as well as the counsel''s fee, quantified at Rs. 55,000/-.