(2009) 03 DEL CK 0302

In the Delhi High Court

Case No : FAO (OS) No. 234 of 2000

Equipment Conductors and Cables Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Citation : (2010) 7 RCR(Civil) 2448

Hon'ble Judges : Vipin Sanghi, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Rajesh Banati, for the Appellant; Nemo, for the Respondent

Final Decision : Allowed

Judgement

Mukul Mudgal, J.—This appeal by the claimant challenges the judgment of the learned Single Judge dated 06.04.2000, whereby the award has been partially set aside.

2. In response to a notice inviting tender dated 22.12.1986 the appellant claimant submitted its tender which included the MODVAT clause. According to the said Clause any variation under the MODVAT scheme during the currency of the contract was to be to the account of the respondent. However, this Clause was not acceptable to Union of India and vide letter dated 15.01.1987 the appellant agreed to withdraw the Clause regarding variation on account of MODVAT. The appellant?s rate contract was accepted vide letter dated 15.06.1987 for supply of AAC/ACS conductors during the period 30.04.1987 to 31.12.1987. The said rate contract specifically provided that the prices are variable as per tender enquiry based on the raw material-EC grade aluminium?s basic price plus excise duty. The rate contract permitted excise duty on supply of AAC and ACS based on actual, as applicable at the time of supply.

3. The respondent placed the supply order bearing No. 2074 dated 02.09.2007 on the appellant under the rate contract. In the meantime, the price of EC grade aluminium was increased by the Government from Rs. 22,187.55 inclusive of

excise duty to Rs. 27,151.64 inclusive of excise duty entailing the difference of Rs. 4964.09. However, the respondent allowed the price difference of Rs. 4393/- only thereby leaving a difference of Rs. 571.05 per metric ton. This claim and another claim towards balance 2% price against the supply orders were accordingly referred to arbitration. Similarly, in respect of purchase order No. 5253 dated 07.12.1987 the claimant claimed Rs. 1,32,134.54 towards the difference in the price increase and excise duty, which was not granted by the respondent apart from claiming the 2% balance price of Rs. 64,398.49 and interest thereon. The claimant relied upon circular No. 1374 dated 27.07.1987 from the Cable Conductor Manufacturers Association of India showing the increase in price in this regard. The arbitrator allowed the claims made by the appellant. So far as the claim towards balance 2% price is concerned, the same has been upheld by the learned Single Judge as well and has attained finality. It is the claim resulting from the price increase, which has been denied by the respondent in respect of the aforesaid two purchase orders, which was allowed by the arbitrator and which has been set aside by the learned Single Judge by the impugned judgment, which forms the subject matter of the present appeal.

4. The learned arbitrator while allowing the aforesaid claims, inter alia, observed as under:

The circular dated 8.6.88 referred to in the Pleadings and a copy of which has been supplied by the claimants has been gone through and duly considered. The circular has been issued by DGS&D and addressed to the claimant contractor in which it is stated as under:

Consequent upon increase in price of FC Grade Aluminium Ingots w.e.f. 19.1.88 announced by the Govt., the following revision in the prices is hereby authorized in terms of the Clause 12(a) of the R/C. I. Prices increase payable w.e.f. 18.2.88 in Alum. Prices for AAC conductors:

Item A(i) For: Rs. 2229.47 Read: Rs. 2330.21 A(ii) FOR: Rs. 4321.16 Read: Rs. 4519.88

Note: The increase in respect of (I) above shall be applicable for stores tendered for inspection on or after 18.2.89 and where the original on refixed D.P. in the S/ Order is on or after 18.2.88.

After having gone through the pleadings of the case as well as other documents available on the file and after having heard arguments from both the parties, it appears that the claim of the Claimant-contractor are justified on the following grounds:

i) The claimants claim for price increase in respect of both the supply orders, is in accordance with the price variation clause. Moreover, the claimant has not received MODVAT benefit while paying excise duty on finished goods....

5. As aforesaid, the learned Single Judge has reversed the findings of the arbitrator so far as the award on the claims relating to difference payable on

account of increase in the cost of the raw material and excise duty is concerned. The finding of the learned Single Judge in this respect reads as follows:

In respect of 1st supply The petitioner claims that the price of the EC Grade Aluminium was increased by government from Rs. 22,187.55 inclusive of excise duty to Rs. 27,151.64 giving an increase of Rs. 4,964.09 whereas against this the respondent has allowed the difference @ Rs. 4,393/- only and the balance amount @ Rs. 571.05 per M.T has not been wrongly not allowed. The petitioner has claimed the balance on this difference as under:

1. Amount of difference on which increase Rs,571.05 per MT was not allowed by the respondent

2.Weight of aluminium consumed per km. 144 kg.

3.Quantity supplied 500.00 kms.

4.Total increase on 500 kms. 57.09 x 144 x 500 1000 = Rs. 41,118.48

For this, circular No. 1374 dated 27.7.1987 from the Cable Conductor Manufacturers Association of India placed on record is relied. Obviously, the petitioner wants to claim excise duty also on this increased basic price which they are not entitled under the contract. This claim is not justified and legally tenable for the reason that the price exclusive of excise duty on raw material and the excise duty @ 20% was payable on the end product to be supplied only. The respondent was not liable to pay the excise duty on the basic price. As already noticed, the basic price w.e.f. 1.3.1987 was raised from Rs. 3,689/- to Rs. 4,321.16 per km. Had it not been the price payable, the petitioner would not have claimed the price at this basic price in the three bills submitted for the supply besides 20% excise duty as noticed above. If the claim of the petitioner is accepted, that will amount to charging Excise duty on the basic price which as specifically agreed in the contract was not payable. The learned arbitrator has obviously not considered the contract and the other relevant material placed on record. In fact, both the parties have taken ambiguous and rather misleading stand in their pleadings before the arbitrator. The arbitrator in awarding claims contrary to specific terms of the contract has misconducted in law and the award to this effect is not warranted in law. This error is patent on the record. This part of the award is thus liable to be set aside. The other claim of the petitioner is similarly for the difference in price in respect of second supply which is claimed as under:

a) Difference on which the price increase was not allowed by the respondent Rs. 2,249.75 PMT

b) Weight of Aluminium consumed By the respondent 144 kg.

c) Actual quantity 407.868 kms. d) Total price increase 2249.75 x 144 x 407.868 1000 = Rs. 1,32,134.54

For this circular No. 1409 dated 8.2.1988 from Cable conductor Manufacturers

Association has been relied. Reliance on this Circular is also misplaced. As already noticed, the price increase in the basic price was increased from Rs. 4,321.16 to Rs. 4,519.88 w.e.f. 18.2.1988 besides Excise Duty of 20% plus 5% Special Duty on 20% Excise Duty. As already noticed, petitioner had also claimed the price against this supply @ Rs. 4,519.88 per km + 21% Excise Duty. And as per contract the basic price is exclusive of Excise Duty (paid under MODVAT) but payable on the end product/goods to be supplied. The petitioner had claimed and was paid what was actually payable to the petitioner on the escalated price except balance of 2% of the bill amount. This claim of the petitioner is also against the specific terms of the contract between the parties and the learned arbitrator has given his award against the terms of the contract between the parties which is not warranted in law. This error is apparent on the record. This part of the award thus is also liable to be set aside.

6. The submission of learned Counsel for the appellant is that the arbitrator had given his reasons while making the award in favour of the appellant and the arbitrator had interpreted the terms of the contract in a plausible way. It was not open to the Court while hearing objections to the award to sit as an appellate forum and to re-examine the claim on its own according to its own understanding of the contract between the parties. If the view taken by the arbitrator was a plausible view, the same could not have been interfered with.

7. The learned Arbitrator returned a finding of fact that the appellant claimant had not received MODVAT benefit while paying excise duty on finished goods. It appears that this aspect has not been considered by the learned Single Judge, who has proceeded to examine the claim afresh on his own. In our view the approach of the learned Single Judge in this case was not correct, inasmuch as, he proceeded to step into the shoes of the arbitrator, rather than examining the award by application of recognized principles. The finding of fact that the MODVAT benefit was not availed of by the claimant/appellant has not been noticed by the learned Single Judge and whichever way the issue is looked at, the exchequer suffered no loss.

8. Accordingly, we are satisfied that the learned Single Judge has unjustifiably interfered with the finding of fact recorded by the arbitrator and has not even dealt with the said finding. The judgment of the learned Single Judge in respect of the award on Claim Nos. (a) & (d) is set aside. The award dated 18.06.1998 is consequently made Rule of the Court. The award on claim Nos. (a) and (d) is restored. The decree be drawn up as per the award.

9. The appeal stands allowed and is disposed off.

