

(1992) 02 DEL CK 0008

In the Delhi High Court

Case No : Suit No's. 1823A of 1984 and 1849A of 1991 and Interim Application No. 2275 of 1985

General Marketing and Manufacturing Co. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 14-02-1992

Acts Referred:

Citation : (1992) 22 DRJ 286

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : A.N. Parekh, Poonam, A.P. Aggarwal and Y.R. Sharma, for the Appellant;

Judgement

Jaspal Singh, J.

(1) The award has a chequered past and since it is necessary for appreciating the dispute in the right perspective to relive it, let me do it first.

(2) On March 4, 1971 the petitioner-company entered into a Rate Contract with the Union of India through the Director General of Supplies and Disposals, New Delhi. The petitioner was to supply spare parts for the "Terex" make of earthmoving and construction equipments for the period from February 17, 1971 to February 16, 1974. However, disputes arose between the parties and consequently an arbitrator was appointed who by his award of July 29, 1977 dismissed the petitioner's claim. Not satisfied, the petitioner filed objections. One of the main objections revolved around clauses I(c)(ii) and I(e) of the Terms and Conditions regarding Custom Duty. Since that objection is still a live-wire, let me first reproduce the said clauses. They are as under:

"1(C)(II) If during the currency of the rate contract the customs authorities revise the procedure of assessment of customs duty and issue fresh assessment orders indicating percentage of loading to be added to net C.I.F value for calculating the amount of customs duty, you will intimate the same to this office and the

conversion factor will be reworked out accordingly on the basis of revised rate of customs duty thus arrival Opo This new conversion factor will come into effect 12 weeks after the date of announcement of revised procedure of assessment by customs authorities. However, against the supplies made during these 12 weeks, while preferring bills you will furnish a certificate of your internal auditor/accountant to the effect that the items billed for are from stores on which customs duty has been paid by you on the old rates. The stipulation made in clause I(e) will not however be applicable in this case while working out the revised conversion factor."

"1(E)ELEMENT Of Mark Up And Miscellaneous Charges The elements of misc. charges and Mark Up allowed in the conversion factor will not be subject to revision upward or downward as the case may be in the event of any variation in exchange rate and/or customs duty, during the three (3) years currency of the Rate Contract. "

(3) The underlined portion of Clause I(c)(ii) makes it clear that clause I(e) of the Terms and Conditions stood deleted and consequently clause I(e) was not applicable to the instant contract. However, on May 25, 1971 the respondent wrote a letter to the petitioner making certain amendments in the Contract dated March 4, 1971 and one of them related to the deletion of the lines underlined by me in clause I(e) (ii) thereby making clause I(e) applicable to the Rate Contract. What, however, is of significance is that the petitioner in its letters dated July 8, 1969 and March 18, 1970 had specifically stated that no unilateral amendment would be made but this is precisely what was done by the Union of India by its letter dated May 25, 1971. Not that the petitioner sat over it. By its letter dated June 21, 1971 it informed the respondent that the amendment leading to the deletion of the sentence in question from Clause I(c)(ii) was not acceptable. This was followed by a notice dated October 6, 1975 to the Director General of Supplies and Disposal complaining about the unilateral deletion and requesting for referring the dispute to arbitration in terms of Clause 18A of the Rate Contract read with clause 24 of the General Conditions of Contract Form No.DG S & D-68 (Revised). This ultimately led to the appointment of Dr.Bakshish Singh as the sole arbitrator who made and published the award on July 29, 1977. Consequent upon the making of the award, the petitioner filed objections. The main objections were that the arbitrator had not allowed the petitioner to produce a letter dated February 23, 1973 which was a material document and, secondly that no finding had been given on the effect of unilateral deletion of the last sentence from Clause I(c)(ii) of the terms and conditions of the Rate Contract. The objections were decided by Sultan Singh,J. in Suit No.755 A of 1977 on November 23, 1979. As far as the first objection was concerned, it was held that the arbitrator had misconducted himself and the proceedings by shutting out the letter. However, what was said on the second objection is more material. While holding that no relief could be allowed or disallowed to the petitioner without specifically adjudicating upon the question whether the deletion of the last sentence from Clause I(c) (ii) of the terms and conditions was

justified or not, the Court set aside the award and referred the matter again to arbitration. The court also observed:

"THIS is a case where the Union of India unilaterally amended the contract by deleting the sentence and adding a term which was never agreed to or accepted by the petitioner at any time up to 4th March, 1971."

(4) This, then, is the background. Consequent upon the order of Sultan Singh, J. referred to above, Mrs. R. Laxmanan was eventually appointed as the sole arbitrator who on October 19, 1984 made and published the award which too has invited objections under Sections 30 and 33 of the Arbitration Act from the claimant. Since the objections, which have led to the present order, revolve around the deletion of the last sentence in clause I(c)(ii), as referred to above, I feel it desirable to first refer to the award so as to make it clear as to how the question has been dealt with by the Arbitrator. She observes: India & Anr.

"I find that the last sentence of clause I (c) (ii) has the effect of rendering the provision of clause I(e) in-effective in this case. Clause I(e) has been included in the contract consciously and by the last sentence of clause I(c)(ii), clause I(e) stands in-effective. Therefore, apparently an error has been committed by the respondent. I find that the error or mistake committed by the respondent in this case is the inclusion of the last sentence of clause I(c)(ii), which is also evident from the letters exchanged between the claimant and the respondent before the contract was concluded. The respondent corrected the error by an amendment of 25.5.71. This amendment was objected to by the claimant as unilateral amendment. However, after raising this objection they made supplied under protest vide their letter dated 21.6.71, The respondent vide letter dated 7.1.72, made clear that the request of the claimant to re- instate the last sentence of clause I(c)(ii) cannot be acceded to. By letter dated 2.11.72, the claimant informed the respondent inter alias that unless they withdraw the amendment pertaining to clause I(c)(ii) of 25.5.71. The claimant, however, again supplied the stores to the respondent and by this conduct, they have also acted upon the above mentioned amendment issued on 25.5.71."

(5) The finding, as expected, came under heavy shelling at the hands of Mr. A. N. Parekh, Senior Advocate, and I do feel the ammunition has not gone waste. It need hardly be mentioned that the Union of India could not amend the Contract unilaterally. It could not, for, the parties had to be ad idem. And, as far as the present case is concerned, the claimant had been lodging its protest. However, the arbitrator, in a manner which is ingenuous and with reasons which are convoluted, come to the rescue of the Union of India. She regards, as if it was for her to so regard, that an "error had been committed" by the Union of India by including the last sentence of Clause I(c)(ii), which had made clause I(e) "ineffective" and that the "respondent corrected the error by an amendment of 25.5.71." Significantly not a word is said on whether the Union of India had any power to unilaterally correct "the error". Mercifully, she does notice the protest made by the claimant in a letter of November 2, 1972 wherein it was asserted

that unless the amendment was withdrawn, supplies would not be made from November 15, 1972. However, it is here, that she extricates the Union of India, from the "error" so ruefully found to have been committed. Says the arbitrator that since even after November 15, 1972 supplies continued to be made Therefore, by "this conduct" the claimant also "acted upon the above mentioned amendment issued on 25.5.1971." Thus with one stroke of pen, the long, tenuous conduct of the claimant opposing such amendment laid bare by letters, for example, of March 18, 1970, July 8, 1970, June 21, 1971 and several other letters was set at naught. What the arbitrator has ignored is that the protests were loud, unambiguous and continuous. True, the parties to an agreement may vary its terms by a subsequent agreement. The question is, where is that agreement? In any case, where is that intention? Mere factum of continued supplies would not suffice, for, the supplies were under protest. What the arbitrator totally lost sight of is the fact that even before November 15, 1972, the claimant had been making supplies and at the same time registering its protests, meaning clearly that the intention to accept the amendment was never there, and that the factum of supplies made furnished no such intention. The fact that the protest to unilateral amendment continued to be real and alive is further borne out from the letter of Union of India dated November 23, 1973 which was specifically referred to by Sultan Singh, J. in his above-noted order and which was before the arbitrator but for reasons best known stands ignored. The following two sentences picked up from the letter could have been of assistance to the arbitrator:

(6) Before we consider to allow you revised conversion factor you are requested to let us know the date from which they will be effect live. You are also requested to work out the same for our consideration."

(7) What is of further significance is that the arbitrator has also completely ignored the statement made on behalf of the claimants by N.D.Bhagwan on August 7, 1982 wherein the reason for continued supplies is given and an assertion of continuous protests is made. Unfortunately the arbitrator has also ignored letters dated January 25, 1973, December 25, 1973, April 30, 1973, December 8, 1973 and the subsequent notice by the claimants. In all these communications protest was lodged against the unilateral amendment. The letter of December 8, 1973 particularly shows that the protest was alive and under active consideration. How could all this material evidence be avoided? And, since it has been avoided, and for no reason whatever, cannot it be said that the arbitrator has misconducted herself and the proceedings leading to substantial miscarriage of justice?

(8) This, however, is still not the end of the matter. The arbitrator, to my mind, avoids to come into grip with the question Sultan Singh, J. while remitting the award posed succinctly:

"In the instant case the arbitrator has not enquired into the main dispute relating to the deletion of the last sentence from clause I(c)(ii) of the terms and

conditions attached to the rate contract. In the present case no relief can be allowed or disallowed-to the petitioner without specifically adjudicating upon the question whether the deletion of the last sentence from clause I(c)(ii) of the terms and conditions was justified or not"

(9) The award having been remitted on this issue, how could it be avoided? And since it has in fact been avoided, what is this if not misconduct? In short, the award stands set aside. It is remitted back to the arbitrator to be appointed by the Director General of Supplies and Disposals, New Delhi for fresh decision particularly in the light of this order. The arbitrator shall be appointed within a period of two months from the date of this order. The petitioner shall be entitled to costs of these proceedings. Counsel"s fee Rs.300.00 .