

(2020) 03 CAL CK 0006

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 23273 (W) Of 2019

M/S IDL Explosives Limited And Another

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 04-03-2020

Acts Referred:

Citation : (2020) 03 CAL CK 0006

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Aniruddha Chatterjee, Kushal Chatterjee, Iftekar Munshi, Pradip Kumar Dutta, Aniruddha Mitra, Nikhil Kumar Roy

Final Decision : Dismissed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioners have come up with the instant writ petition against the invocation of a Price Fall Clause in an agreement between the petitioner no.1

and the respondent no.2 for supplying cartridge explosives and accessories to all subsidiary companies of the respondent no.2. The said Price Fall

Clause is quoted below:

Price Fall Clause:

7.1 Price Fall clause: As per enclosed Pre-Contract Integrity Pact Clause No.7 which reads as under;

â??The BIDDER undertakes that it has not supplied/is not supplying similar product/systems or subsystems at a price lower than that offered in the

present bid in respect of any other Ministry/Department of the Government of India or PSU and if it is found at any stage that similar product/systems

or sub systems was supplied by the BIDDER to any other Ministry/Department of

the Government of India or a PSU at a lower price, then that very price, with due allowance for elapsed time, will be applicable to the present case and the difference in the cost would be refunded by the BIDDER to the BUYER, if the contract has already been concluded.â??

7.2 In case the price of a product is reduced for any supplier due to invocation of â??Price Fall clauseâ?? or any other reason, the same lower price

shall also be applicable for the other suppliers who are having parallel RCs against this tender. If any supplier does not accept the lower price, CIL

shall have the right to delete the item from the scope of RC of such firm and procure explosives/accessories from other existing supplier/Reserve RC

holders.â??

2. It is submitted by learned counsel for the petitioners that the petitioner no.1 entered into the said contract, upon the offer of the petitioner being

accepted by the respondent no.2, for the period from May 31, 2017 to May 31, 2019, subject to renewal. As per the agreement, the petitioner was to

supply a particular type of explosives to the subsidiary companies of the respondent no.2 with certain specifications as stipulated in the contract.

3. By a letter dated October 31, 2019 bearing reference: CIL/C2D/Cart Explo & Accy/201-719/IDL/A-409, the respondent no.2 considered the

explanation furnished by the petitioner no.1 to the allegation raised by the respondent no.2 that the petitioner no.1 had violated the Price Fall Clause

and intimated to the petitioner no.1 that the said Price Fall Clause incorporated in Clause No. 7.1 of the RC (Running Contract) was thereby invoked,

so as to make the lower price of SCCL (Singareni Collieries Company Limited) applicable to the petitioner no.1 against the said RC. Accordingly the

chart showing the difference in prices, invoking the Price Fall Clause, was mentioned in the said letter. The writ petitioner challenges the said letter

dated October 31, 2019 and the invocation of the Price Fall Clause.

4. It is the contention of the petitioners that it was not the petitioner no.1 but M/s GOCL (Gulf Oil Corporation Limited), in its independent capacity,

which entered into the contract with SCCL. Although M/s GOCL acted as the nominee of the present petitioner no.1 to supply the products in the

contract with the respondent no.2, since the petitioner no.1 was prohibited by the bar contained in clause 7 of the said RC, the petitioner no.1 did not

enter into such contract but instead referred M/s GOCL, in the independent

capacity of the latter, to the SCCL for that purpose.

5. M/s GOCL, in its own capacity, entered into a subsequent contract with the SCCL, with which the petitioner no.1 had no direct connection.

6. It is submitted that since clause 7 of the RC between the petitioner and the respondent no.2 contemplates that the bidder itself (the petitioner) has

not/is not supplying similar product/systems or sub-system at a price lower than that offered in the bid with the respondent no.2, the Price Fall Clause

is not at all applicable to the petitioner no.1 since the petitioner no.1 never entered into such agreement, as prohibited under clause 7.

7. Learned counsel for the petitioner places reliance on a letter dated April 3, 2017, issued by the Government of India, Petroleum and Explosives

Safety Organization, given to the petitioner no.1, which clarifies that the Class-2 Explosives, namely, Aquadyne and Energel, were authorized in favour

of the petitioner no.1 firm and that Aquadyne-G and Energel-G were authorized in favour of the firm M/s GOCL. It was further specified in the letter

that the said explosives were of different brands held by the respective firms under the list of authorized list of explosives. On the strength of such

letter, it is argued that the petitioner no.1 did not have the authorization to supply the products which were given to the SCCL, but only M/s GOCL had

such authorization and as such, in view of the difference in the brands as indicated in the letter dated April 3, 2017, under no circumstances could it be

argued that the petitioner no.1 was supplying similar products to the SCCL.

8. That apart, relying on the respective charts showing the differences between the specifications of the explosives supplied to the respondent no.2

and SCCL, it is argued on behalf of the petitioners that the velocity of detonation for the products supplied differed in the case of the respondent no.2

and the SCCL, which made a qualitative difference between the two products. As such, labelling the two products as similar, which is a prerequisite

of invoking the Price Fall Clause, is also incorrect.

9. Learned counsel for the petitioners, on such score, relies upon several relevant Firm Orders, annexed respectively at page 133 and pages 137 to 140

of the writ petition, to indicate that it was M/s GOCL, under P.O. No.7600007429, which supplied the said products.

10. Under such circumstances, it is argued by learned counsel for the petitioners that the Price Fall Clause was wrongly invoked by the respondent

no.2, thereby rendering the impugned letter dated October 31, 2019 void and invalid in the eye of law.

11. Learned counsel appearing for the respondents, on the other hand, relies on several documents relating to purchase pertaining to the contract with

the SCCL, annexed at pages 105 to 114 of the writ petition, wherein the present petitioner no.1 was shown as the vendor under P.O. No.7600007428.

12. By placing certain clauses of the contract itself with the SCCL, beginning at page 115 of the writ petition, learned counsel for the respondents

argues that the SCCL specifically communicated to the petitioner no.1 that the offer given by the petitioner no.1 was being accepted and accordingly

SCCL was placing the order on the petitioner no.1 and its opted Firm M/s GOCL for supply of the explosives concerned, during the period from

August 3, 2018 to August 2, 2020, a substantial period of which coincided with that of the contract between the petitioner no.1 and the respondent

no.2.

13. It is further submitted that, even as per the letter dated April 3, 2017, issued by the Government of India, Petroleum and Explosives Safety

Organization, the products supplied to the respondent no.2 and the SCCL were similar in nature, being of Class-2 category of explosives, but only

differing in brands.

14. As such, it is argued that the products supplied to the respondent no.2 and to SCCL were similar, thereby attracting the Price Fall Clause.

15. Next referring to clause 35 of the contract between the petitioner no.1 and the SCCL, it is submitted that the same provided that on placing the

order, the SMS/SME supplier shall submit an agreement between the supplier and their opted firm for the items (LDC and Accessories) opted by the

SMS/SME supplier stating that, they take the responsibility for the performance of the opted items and further SCCL will not be a party to the

disputes/differences, if any, that may crop up between them regarding supply/performance of the products mentioned thereinabove.

16. It is argued that the said clause indicates categorically that M/s GOCL was nothing but an opted firm, that is, an agency of the supplier, being the

petitioner no.1 itself, thereby rendering the petitioner no.1 liable to pay up as per the Price Fall Clause in the RC between the petitioner no.1 and the

respondent no.2.

17. Further relying on one of the Firm Orders, on which the petitioner no.1 also relies, annexed at pages 133 to 135 of the writ petition, it is argued by

the respondents that the subject of the said order indicated that the same was placed against the P.O. No.7600007428 dated July 28, 2018, placed on

the petitioner no.1, although the order was apparently placed to M/s GOCL.

18. The terms and conditions Nos. 9 to 13 of the said Firm Order stipulated that the items thereunder would be as per the terms and conditions of Firm

Order No. 7600007428 dated July 28, 2018 placed on the petitioner no.1, thereby exposing the fact that the order had been placed on the petitioner

no.1, as whose agent M/s GOCL was operating.

19. That apart, the contract between the SCCL and the petitioner no.1, it is argued, cast responsibility upon the petitioner no.1 with regard to supply of

the materials and it was clear from the documents annexed to the writ petition that it was the petitioner no.1 which, through its opted firm, M/s GOCL,

had been supplying the products to the SCCL. Since the products were similar, the impugned letter dated October 31, 2019, whereby the Price Fall

Clause was invoked against the petitioner no.1, was fully justified and lawful.

20. A perusal of the Price Fall Clause, being Clause 7 of the agreement between the respondent no.2 and the petitioner no.1, shows that it was the

bidder therein, that is, the petitioner no.1, which undertook that it had not and was not supplying similar products/systems or sub-systems at a price

lower than that offered in the bid floated by the respondent no.2. The product, to fall within the mischief of the Price Fall Clause, had to be supplied to

any other Ministry/Department of the Government of India or PSU.

21. There is no doubt that SCCL is a Government company and as such, falls within the definition of a PSU (Public Sector Undertaking), which is, by

definition, a Government-owned Corporation in which the majority of the company equity is owned by the Central or State Government or partly by

the Central Government and partly by the State Government.

22. There is also no doubt as regards the price at which the explosives were supplied to SCCL being lower than that at which those were being

supplied to the respondent no.2.

23. The petitioners' primary contention is that it was not the petitioner no.1 which supplied such products to SCCL, but M/s GOCL, in its

independent capacity, was the vendor in the said transactions and the relevant contract was awarded by SCCL independently to M/s GOCL. As such, the petitioner no.1 is in no way connected with such supplies.

24. It has also been argued by the petitioners that the products supplied to the respondent no.2 and the SCCL were not similar.

25. Considering the first submission of the petitioners first, a perusal of the documents pertaining to the purchase, which were relied on by both parties, explicitly indicates that the orders were placed for substantial amounts on the petitioner no.1 itself, under P.O. No. 7600007428.

26. Even from the documents relied on by the petitioners themselves, taking for example the Firm Order annexed at page 133 of the writ petition, it is

seen that although the order was placed on M/s GOCL, the supply of the said order was procurement of Accessories etc of SCCL against P.O.

No.7600007428 dated July 28, 2018, placed on the petitioner no.1. Even the terms and conditions incorporated in the said Firm Order, annexed at page

134 of the writ petition, at least insofar as condition nos. 9 to 13 are concerned, were stipulated to be as per the terms and conditions of Firm Order

No. 7600007428 dated July 28, 2018, which was placed on the petitioner no.1 itself.

27. That apart, the contract of SCCL for the supply of the products was entered into with the petitioner no.1-company, bearing Order No.7600007428

dated July 28, 2018, as divulged from the annexure at page 115 of the writ petition. It is evident that all the orders placed on M/s GOCL were pursuant

to the said contract entered into between the SCCL and the petitioner no.1 and not with M/s GOCL directly.

28. Rather, the contract dated July 28, 2018 specifies that the offer of the petitioner no. 1 was accepted and accordingly SCCL was placing the order

on the petitioner no.1 and the opted firm of the petitioner no.1, namely M/s GOCL. All the subsequent orders were placed with M/s GOCL on the

basis of such contract.

29. Paragraph no.35 of the contract between the SCCL and the petitioner no.1 stipulates that, on placing the order, the supplier shall submit an

agreement between the supplier and their opted firm for the items opted by the supplier, stating that they take the responsibility for the performance of

the opted items, and further that SCCL would not be a party to the disputes/

differences, if any, that may crop up between them regarding supply/performance of the products-in-question.

30. The said clause ought to be read with the terms and conditions starting at page 134 and ending at page 136 which stipulate, in particular in term no.

17, that payment shall be made to M/s GOCL subject to the latter raising invoices for supply made against the Formal Order which shall be routed

through the petitioner no.1, on whom Firm Order No. 7600007428 dated July 28, 2018 was placed, for supply of explosives and accessories to OC

projects of SCCL. The said term also stipulated that the petitioner no.1, being the supplier of explosives, should take responsibility for other terms and

conditions of the order, including the ones following thereafter, pertaining to quantity, payment, deduction/adjustments etc.

31. Term no. 18 referred to the same order placed on the petitioner no.1. Term no. 21 mentioned that the said Formal Order 7600007429 dated July

28, 2018, placed on M/s GOCL, was effective and co-terminus with the Firm Order No. 7600007428 placed on the petitioner no.1.

32. Hence, it is crystal clear from the materials on record relied by both sides that, contrary to the contention of the petitioners, it was the petitioner

no.1 who entered into the contract-in-question with the SCCL and M/s GOCL was merely an agency acting as an opted firm of the petitioner no.1.

Even the payment was routed through the petitioner no.1, which also undertook responsibility regarding the fulfillment of the terms and conditions of

the purported contract with M/s GOCL. So it was the petitioner no.1-company which entered into the contract for supply of explosives with SCCL,

since the thin camouflage of wedging M/s GOCL in between the petitioner no. 1 and SCCL can easily be pierced on the basis of the materials on

record.

33. Taking up the second question argued by the petitioners, the communication dated April 3, 2017 by the Government of India, Petroleum and

Explosives Safety Organization, relied on by the petitioners themselves, clearly says that both Aquadyne and Energel on the one hand, and

Aquadyne-G and Energel-G on the other, were both Class-2 Explosives, but merely of different brands, for which the petitioner no.1 and M/s GOCL

were respectively authorized.

34. As such, to bypass the rigour of the Price Fall Clause and the restrictions on

the petitioner no.1 to supply Aquadyne-G and Energel-G, which are authorized only in favour of M/s GOCL, it was the petitioner no.1 which entered into the contract with SCCL and undertook all responsibility not only regarding finance but also on all other aspects of the contract as supplier.

35. As iterated above, the communication dated April 3, 2017 itself, Aquadyne and Energel on the one hand and Aquadyne-G and Energel-G on the other, are merely different brands of the same category of explosives, that is, Class-2 Explosives.

36. As such, since the Price Fall Clause did not contemplate exactly same, but â?? similarâ?? product/systems or sub-systems being supplied, it is clear as daylight that the petitioner no.1, through the agency of M/s GOCL, has been supplying similar products to the respondent no.2 and SCCL respectively, merely the brands of the explosives being different.

37. As far as the difference in the velocity of detonants of the respective products supplied to the respondent no.2 and SCCL are concerned, although the petitioners seek to draw a distinction between the two, it is seen from the respective agreements and the tables as provided in the impugned letter to the petitioner no.1 dated October 31, 2019, that although the velocities were numerically different for the SCCL and the respondent no. 2, but the specifications enumerated in the two contracts provided for sufficient margin of difference for the velocities of the products supplied to the two companies having a common zone between themselves .

38. Regarding non-cap sensitive/column explosives, the velocity of detonation for respondent no.2 was ≥ 3500 m/s, whereas, for SCCL, the same was 4000 ± 500 m/s.

39. As far as the velocity of detonation of cap sensitive/booster explosives are concerned, the velocity was ≥ 4000 m/s for the respondent no.2 and 4500 ± 500 m/s for SCCL. Hence, it is clear that there may very well be a situation that the zones of velocity supplied to SCCL and the respondent no.2 could coincide, since the SCCL's velocity could come down up to 3500 m/s, at which figure the same would be equivalent to the velocity of the explosives supplied to the respondent no.2 in case of non cap sensitive/column explosives.

40. Similarly, SCCL's velocity for cap sensitive/booster explosives was 4500 ± 500 , which theoretically could be brought down to 4000, which

was the figure for the contract with the respondent no.2 as well, although leaving a leeway of $\hat{??}>=\hat{??}$.

41. As far as the other specifications are concerned, apart from velocity of detonation, the same were exactly similar in respect of both the contracts.

42. Hence, it does not require to be an expert in explosives to ascertain at the first blush that there could not be any qualitative difference between the products supplied to SCCL and respondent no.2 merely on the ground of differing velocities of detonation, which could, at certain levels, match each other.

43. Therefore, it is obvious that products similar in technical specifications were supplied by the petitioner no.1, through its opted firm M/s GOCL, both to the respondent no.2 and the SCCL, thereby patently violating the Price Fall Clause in the agreement between the petitioner no.1 and the respondent no.2.

44. In such view of the matter, the respondent no.2 was absolutely justified in issuing the impugned letter dated October 31, 2019 and in invoking the Price Fall Clause in respect of the petitioner no.1-company. Thus, there is no scope of any interference with the impugned letter and/or the invocation of the Price Fall Clause as contemplated in the agreement between the petitioner no.1 and the respondent no.2.

45. Accordingly, W.P. No. 23273(W) of 2019 is dismissed on contest, without any order as to costs.

46. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.