
(1991) 06 BOM CK 0033

In the Bombay High Court

Case No : Appeal No. 707 of 1987 in Writ Petition No. 794 of 1981

Prakash Cotton Mills Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 21-06-1991

Acts Referred:

Citation : (1991) 56 ELT 315

Hon'ble Judges : S.P. Bharucha, J;M.F. Saldhana, J

Bench : Division Bench

Advocate : Mr. A.H. Mahto, instructed by N. Chagla and Co, for the Appellant;
Mr. V.N. Lokur, Mr. G.E. Vahanvati, Mr. M.G. Vasudev, instructed by Mulla and
Mulla and Craigie Blunt and Caroe, for the Respondent

Judgement

Saldanha, J.—This is an appeal directed against a judgment and order of Pratap, J. (as he then was) dated 24th/25th July, 1985, dismissing the Original Writ Petition No. 794 of 1981 filed by the present appellants. We consider it essential to set out the few facts and dates which are of some consequence.

2. The original first petitioner is a private limited company and the second petitioner is a shareholder and director thereof. The second respondent to the petition is the Chief Controller of Imports and Exports who is the licencing authority appointed under the Imports (Control) Order, 1955. The third respondent is the registering authority specified under the Import (Control) Hand Book of Rules and Procedures published by the first respondent - Union of India - and are specified as the registering authority for cotton textiles. As such registering authority, the third respondent is entrusted with the duties and functions of registering and deregistering exporters. The first respondent promulgates the import policy which is published in the form of book known as "the Red Book". Along with the Red Book is also published a companion publication viz., the Import Trade Control Hand Book of Registers and Procedures under which importers are divided into four broad categories. The Hand Book prescribes the procedure for registration and it is in keeping with these

regulations that the first petitioner, in February 1975, applied for registration with the third respondent i.e. the Export Council, hereinafter referred to as TEXPROCIL. It is undisputed that the petitioners were granted such registration on 20-3-1975.

3. The third respondent served a show cause notice dated 4-3-1977 on the present petitioners asking them to show cause as to why they should not be deregistered. The show cause notice has been annexed to the petition and it essentially proceeded on the basis that the present petitioners have committed a breach of Clause 33 which reads as follows :

"Prohibition to amend terms :

No additions, deletions, alterations, amendments, etc., shall be valid and binding unless the same are mutually agreed to between the parties and the same are countersigned by them in token of such acceptance, provided further that such additions etc., shall always be in conformity with the essential terms and conditions of the Texprocil Standard Contract No. 1."

In substance, what was alleged against the petitioners was that they had entered into a contract dated 18-10-1975 with M/s. Kedarnath Kishanchand Pvt. Ltd., and that the contract form used for purposes of this contract had been represented by the petitioners to be in conformity with the standard contract as prescribed by the third respondent. It had been pointed out to the third respondent by virtue of a dispute having arisen between the parties that the contract form in the present case materially differed from the standard contract form as prescribed. The third respondent had proceeded on the footing that the petitioners had acted not only in breach of Clause 33 but furthermore, that they had breached the declarations and undertakings given by them to the third respondent which, inter alia, prescribed that the petitioners would act in conformity with all rules, regulations and directions of the third respondent.

4. In view of the controversy that has come up in the present litigation, it would also be useful to reproduce the material part of the declarations and undertakings given to the third respondent by the petitioners which are as follows :

"I/we hereby declare that the above information is correct to the best of my/our knowledge and belief. I/we also undertake to abide by the conditions subject to which registration/membership is granted."

"We hereby solemnly declare the above stated information to be true and correct and undertake without reservation to :

(i) abide by the terms of the registration certificate granted to us on all our exports.

(ii) use the import licences for the purpose for which they are issued and under the terms and conditions under which they are issued.

(iii) agree to abide by any code of conduct that may be prescribed by the Registering Authority.

(iv) furnish without fail quarterly returns of exports including Nil returns to the Registering Authority by the 15th day of the month following the quarter.

We further understand that our registration is liable to be cancelled in the event of breach of any of the undertakings mentioned above."

In response to the show cause notice, the petitioners initially asked for inspection which appears to have been given. It is, however, necessary to reproduce the subsequent course of the litigation that ensued which has been summarised by the learned Single Judge as follows :

"The third respondent by order dated 2nd May 1977 (Exhibit G) deregistered the first petitioner with immediate effect. The petitioners appealed against this order. Even while this appeal was pending, the petitioners filed in this Court Writ Petition No. 943 of 1977. This Court passed the following order thereon :

"Mr. Rana states that as suggested by Court on the last occasion, he has moved the 2nd respondent-Council for a review to deregister the petitioners."

Mr. Cooper on behalf of the 2nd respondent-Council states that the application for review will be considered on merits. In view of this arrangement, the petition is allowed to be withdrawn."

6. The third respondent accordingly heard the petitioners. By order dated 9th January 1973 (Exhibit I) the third respondent confirmed the previous order of 2nd May 1977 (Exhibit G). Against this order of 9th January 1978 the petitioners filed appeal before the second respondent as also Writ Petition No. 45 of 1978 in this Court. The appeal was dismissed on 26th July 1978. The petitioners subsequently amended their writ petition No. 45 of 1978 by including therein challenge also to the rejection of their above appeal. In the meanwhile the Appellate authority by its order dated 2nd December 1978 cancelled its order of 26th July 1978 dismissing the above appeal and restored the said appeal for hearing. As at this stage, there were before the appellate authority two appeals of the petitioners, one filed on 9th May 1977 against order dated 2nd May 1977 (Exhibit G) and the other filed on 14th February 1978 against order dated 9th January 1978 (Exhibit I) both orders being of the third respondent. After hearing respective parties the appellate authority by its order dated 6th March 1979 (Exhibit J) allowed these appeals, set aside both the impugned orders and sent back the proceedings to the third respondent for rehearing the petitioners in pursuance of the show cause notice dated 4th March 1977 and for passing appropriate orders, which should be a speaking order, after giving a personal hearing to the petitioners.

7. Therefore the petitioners filed in this Court Writ Petition No. 1288 of 1979 challenging the original show cause notice of 4th March 1977. The said petition has been placed for hearing along with this petition. The petitioners also filed

Writ Petition No. 2402 of 1979, against, so I understand at the Bar, the third respondent not considering the petitioners' request for renewal of registration. This latter writ petition was rejected on 20th January 1980.

8. Pursuant to the appellate order dated 6th March 1979, the proceedings once again came up before the third respondent. After hearing the petitioners and after providing them with due opportunity, the third respondent, in view of the petitioners' regret and remorse, took a rather lenient view of the matter and by its order dated 15th February 1980, held that the first petitioner should be deregistered not for the entire period but only a few months viz., for the period 2nd May 1977 to 1st January 1978, it was further held that for the period subsequent to 1st January 1978, the first petitioner should be treated as having been registered. While making this order, the third respondent also observed that for the leniency shown, the third respondent was influenced by the statement made by the petitioner's Counsel and repeated in the first petitioner's letter dated 25th January 1980 inter alia to the effect that the first petitioner has tried to make amends and that they want a fresh chance to remain as a member of the Council and prove themselves worthy of it. The order concluded with the hope -

"We sincerely trust that Prakash Cotton Mills will implement this assurance made by it."

However, regardless of the leniency shown to it as also of its own regret and remorse and the consequent hope based thereon supra by the third respondent, the petitioners challenged the above order by preferring against the same an appeal to the second respondent. The said appeal was dismissed on 17th January 1981. Hence this petition."

5. The learned Single Judge has recorded the finding that the petitioners had submitted a request to the third respondent which, to our mind, is necessary to be reproduced in this judgment. This was contained in the letter addressed by the attorneys for the petitioners, dated 25th January 1980 and it is in the following terms :

"(a) Our clients had been penalised and punished sufficiently ... In the overall circumstances of the case, this august body should drop the matter ..."

(b) "Having regard to the situation it was respectfully pointed out that this august body should desist from imposing the extreme penalty ..."

(c) "Having regard to all circumstances, it can never be contended, and in fairness it has not been contended, that there has been any willful misrepresentation on the part of our clients".

(d) "Our clients have suffered sufficiently financially in the form of lacs of interest. In the facts and circumstances ... this august body will graciously discharge the Show Cause Notice and give our clients a fresh chance to remain as the member of the Texprocil and prove themselves worthy of it."

(e) "We pray that broad and sympathetic view be taken of the whole matter and at the highest it would be terms (Sic) as a bona fide error of a judgment which ought to be overlooked."

6. The learned Single Judge has come to the conclusion that having expressed regret and remorse and having virtually requested the third respondent to take a lenient view and to give the petitioners a chance to make amends and the third respondent's Counsel having very graciously and magnanimously agreed to the request conveyed to them and having confined the period of deregistration only to the dated between 2-5-1977 and 1-1-1988 that any challenge to that order was thoroughly unjustified. This is precisely the view taken by the appellate authority and the learned Single Judge has proceeded to record not once but several times in the course of his judgment that the litigation indulged in by the petitioners after the passing of that order cannot be justified under any circumstances.

7. However, since the matter was argued on merits, the learned Single Judge has proceeded to deal with the submissions advanced before him and has proceeded to record the finding that even on merits, the petitioners have no case. Briefly stated, the learned Single Judge has examined the alterations that were alleged to have been made by the present petitioners in the Standard Form of Contract and has come to the conclusion that these alterations are very sweeping, that they are material and that the overall effect of these alterations is that the original contract form as prescribed by the third respondent has been not only altered but completely mutilated and that, consequently, the show cause notice issued to the petitioners and the action that emanated thereafter were wholly and completely justified. It is against this order that the present appeal has been filed.

8. Mr. Mahto, learned Counsel appearing on behalf of the appellants has, in the first instance, submitted that Clause 33 which is the bedrock of the show cause notice served on the present petitioners essentially pre-supposes a situation whereby the alterations or variations in the standard contract form are so sweeping and of material consequence, that they alter the essential structure of the original contract. He submits that a reading of Clause 33 pre-supposes a situation whereby minor alterations and amendments are permissible and it is, therefore, his submission, that the only requirement under Clause 33 is that such alterations must be agreed to between the parties in token of which, they should have countersigned the contract. The extension of his argument is that on the facts of the present case, where it can be demonstrated that the parties have countersigned the original contract form, that the basis of the show cause notice itself is unjustified. As a corollary to his argument, he has submitted that the findings of the learned Judge which are to the effect that the alterations are of a material nature are unjustified and that these are liable to be set aside.

9. For purposes of dealing with this argument, it would be necessary for us to reproduce in some detail the material alterations that have been alleged against

the present petitioners. At Exhibit "E" to the original petition, at page 67 of the paper book, the appellants have annexed the form of the original contract entered into between the parties. This is a printed form on which appears the heading in bold letters "TEXPROCIL STANDARD CONTRACT NO. 1". It is undisputed that the contracts between the parties were required to be governed by the terms and conditions of such standard contracts and it is further undisputed that such standard contracts had to be in the form as prescribed by the third respondent. The initial complaint made by M/s. Kedarnath Kishanchand Pvt. Ltd., of which the third respondent took cognizance was that it was misrepresented to them by the petitioners that the contract form which was shown to them and on the basis of which they acted was in fact the Standard Contract Form No. 1 as prescribed by the third respondent. We have carefully checked Exhibit "E" with the standard contract as prescribed by the third respondent, virtually clause by clause, and we shall reproduce a few of the salient alterations that have been brought to our notice little later. Suffice it to say that the amendments are neither minor nor inconsequential nor immaterial but in our judgment, they have virtually and vitally changed and altered several of the material clauses of the original contract in the prescribed form and there can be no doubt from the type of alterations that have been incorporated that this has been done to the complete advantage of the petitioners. The alterations were, therefore, neither inadvertent nor were they minor alterations but to our mind, these were deliberate and what is of utmost seriousness is the fact that having made these alterations in the standard contract form, the petitioners had re-printed the standard contract form as a result of which the parties with whom they had entered into the contracts would be misled in the belief that they were entering into the TEXPROCIL prescribed standard contract.

10. Mr. Vahanvati, learned Counsel appearing on behalf of the third respondent has handed over to us the "Texprocil Standard Contract No. 1" which is a printed document on which the variations have been reflected. We have taken this document on record (marked "X") and we are reproducing below some of the material variations :

"Clause 9 - the word "orally" has been added in the clause casting an obligation on the seller (i.e. the petitioners) being required to notify the buyer of the number of packages likely to be ready for delivery ..."

By the insertion of the word "orally", the entire purpose of this provision has virtually been nullified.

"Clause 12 - With regard to the delivery in installments, the original seller was obliged as follows :

"The seller shall supply the goods approximately in equal lots per month."

The term "shall" has been altered to read "may" for purposes of obviously securing an advantage to the sellers who are the original petitioners.

"Clause 13 - In this clause, the petitioners had added the words "copy of overseas contract" at two places. In addition to this, in the concluding sentence of this clause prescribing the time-frame, the words "from the day such demand was made "have been deleted."

There can be no dispute about the fact that clause 13 has thereby been materially altered.

Clause 15 - While dealing with the scrutiny, the following sentence has been added :

"In cases where the seller has called upon the buyer to inspect the goods before their being packed in bales, the buyer shall not be entitled to invoke the provisions of this clause."

As a result of the addition of this sentence, Clause 15 has virtually been changed.

Clause 19 - The following sentence has been completely deleted from Clause 19 :

"Nothing herein contained shall be deemed to require the buyer to abandon his other rights including his right to receive, in case of breach on the part of the seller, damages on the basis of the difference between the contract price and the market price as on the date of breach."

The following sentences have been deleted from Clause 21 :

"The seller declares that the seller is aware of the consequences of the breach of and obligation under the said scheme and the said allotment."

"... whether under the provisions of the said scheme or by reason of any violation of any of the terms and conditions of the said allotment ..."

"... but nothing herein contained shall restrict the liability of the seller only to the damages payable under other clauses it being agreed and understood between the parties that the amount, if any payable under this clause shall be in addition to the damages or compensation payable under any other clause or by virtue of this contract."

The variations that have taken place as a result of the deletion of material parts of this clause, in our judgment, constitute substantial variations of the original terms of the contract.

Clause 26 - The petitioners have added the following clause in sub-clause (b) :

"... and all other losses and damages the seller may suffer on account of non-receipt of the goods to the destination contracted for."

This is a material addition which was not originally provided for in Clause 26.

Clause 28 - While dealing with the force majeure, the petitioners have carried out certain modifications and it is for this purpose that we are reproducing below Clause 28 as it originally stood and Clause 28 in its modified form :

"Clause 28 : Force Majeure (as it originally stood) : The seller is not responsible for delays in delivery or non-shipment due to strike, lock-out, space not available for shipment, unforeseen accidental break-down of the machinery in the seller's mill, civil commotion, warlike conditions or any other force majeure condition. The seller should, however, invariably give notice of this fact to the buyer within a reasonable time of the occurrence of the event and in any case before the due date of delivery, duly accompanied by a certificate from the Regional Millowners' Association certifying that the delay in delivery or non-shipment is caused by the aforesaid conditions. The buyer on being informed of such force majeure conditions affecting manufacture of the contracted goods or any portion thereof and also being intimated in writing of the time reasonably required to effect the delivery of the portion remaining to be manufactured the buyers shall have the option of either accepting the whole or the belated portion without any abatement in price or cancel the contract in respect of the goods remaining to be manufactured. Shall it, however, become impossible for the seller in terms of this clause to manufacture the goods and deliver the same even if the buyer is agreeable to accept late delivery, the seller shall be entitled to claim cancellation of the undelivered portion and no claim for damages shall lie against him for non-delivery or non-shipment."

Clause 28 : Force Majeure : (With the modifications carried out by the petitioners) :

"The seller is not responsible for delays in delivery or non-shipment due to strike, lock-out, space not available for shipment, unforeseen accidental break-down of the machinery in the seller's mill, civil commotion, warlike conditions, reason beyond the control of the sellers, or any other force majeure condition. The seller may, however, invariably give notice of this fact to the buyer within a reasonable time of the occurrence of the event and in any case before the due date of delivery, duly accompanied by a certificate from the Regional Millowners' Association certifying that the delay in delivery or non-shipment is caused by the aforesaid conditions if so required by the buyers. The buyer on being informed of such force majeure conditions affecting manufacture of the contracted goods or any portion thereof and also being intimated in writing of the time reasonably required to affect the delivery of the portion remaining to be manufactured the buyers shall have the option of either accepting the whole or the belated portion without any abatement in price or cancel the contract in respect of the goods remaining to be manufactured. Shall it however, become impossible for the seller in terms of this clause to manufacture the goods and deliver the same even if the buyer is agreeable to late delivery, the seller shall be entitled to claim cancellation of the undelivered portion and no claim for damages shall lie against him for non-delivery or non-shipment."

To our mind, the sole purpose of having modified this clause was entirely in order to protect the sellers, viz., the present petitioners.

11. The learned Single Judge has also taken serious note of the fact that fact

that a clause has been interpolated as Clause 34 and Clauses 34, 35 and 36 have been reprinted as Clauses 35, 36 and 37 respectively. The clause interpolated by the petitioners as Clause 34 reads as under.

Clause 34 : Notwithstanding anything contained in any of the clauses hereinabove :

(a) The sellers shall endeavour to deliver the contracted goods as per delivery schedule. However, in the event of any delay or non-delivery of the goods or any portion thereof under this contract for any reason whatsoever, the sellers shall not be liable in any manner to the buyers. The buyers shall however, continue to remain bound to take delivery of the goods under the above contract even beyond the delivery period provided the buyers had not given notice in writing to the sellers at least 15 days prior to the expiry of the last delivery of his intention not to take delivery of the remaining portion of goods after expiry of the contract period.

(b) If the sellers do not receive the amount of incentive due to them in terms of the contract or import licence under the Export Promotion Scheme in force at the time of the contract for any default on the part of the buyers or for any reason whatsoever, the Buyers agree to reimburse or compensate to the sellers to the extent of short-fall. The buyers further agree to nominate the sellers for import of Coal-tar Dyes and other licences against export of the contracted goods and apply to the authorities for payment of cash incentives and issue of import licences to the sellers. The buyers shall export the goods without any further process and such exports shall be made only to the destination stated in the contract.

(c) The buyers shall submit to the sellers within one week from the date of the contract true copies of the Foreign Buyers Contract and Quota allocations and other authorisations for export from Texprocil or any other competent authorities.

(d) The sellers shall hand over the Original Textile Committee Certificates only after the payment of the sellers' invoices, by the buyers. The sellers shall, however, furnish true copies of the Textile Committee's Certificates to the buyers if so required by the buyers.

(e) The sellers shall have option to submit invoices to the buyers from time to time for such quantity or quantities as are ready for delivery from time to time. If the buyers fail to make payment within 8 days or to take delivery of such goods within 8 days from the date of payment the sellers shall have the option to refuse delivery of the goods to the buyers and/or deliver the said goods to any other buyer or otherwise appropriate the same. In the event of sellers exercising such option the buyers shall have no claim against the sellers save and except for the refund of the amount paid by the buyers to the sellers and the sellers shall refund without interest the amount paid by the buyers for such goods, after adjusting any of their dues or claim against the buyers under the contract or any other contract.

(f) The prices mentioned in the contract are ex-Mill prices and the buyers shall be liable to pay to the sellers the excise duty or any other duty, levy, cess or tax as may be levied by the Government, local or other authorities at the time of delivery or even subsequently if levied or demanded by any such authorities from the sellers with retrospective effect.

(g) If the buyer is unable to export the goods to the destination stated in the contract within 3 months from the date of delivery of such goods to the buyers, the buyers shall forthwith intimate of the same to the sellers and sellers shall have option either (1) to take back the goods or the portion thereof not so exported at the invoice value thereof and without any addition thereto whether for interest, godown rent, insurance or any other charges whatsoever, after such examination of the goods as the sellers consider necessary and for such examination the buyers shall afford full opportunity or (2) to claim from the buyers and be paid the difference between the invoice value and the ex-mill price of the goods for the local market and all other losses and damages than the sellers may have to suffer on account of non-export of the said goods by the buyer to the destination state in the contract.

(h) In the event of the buyers committing any default or breach of any of the terms of this contract, the sellers shall be relieved of all their obligations to the buyers under this contract or any other contract or contracts that may be subsisting between the sellers and the buyers."

There can be no manner of doubt in our mind that the submission advanced on behalf of the petitioners that the alterations or variations, if any, were minor or immaterial is devoid of substance.

12. As indicated by us earlier, the show cause notice served on the present petitioners proceeds on the basis that a breach of Clause 33 has been committed by them. The concluding part of Clause 33 very clearly prescribes that whatever additions, deletions or amendments or alterations, if they are to be treated as valid and binding and even if mutually agreed to between the parties, must be countersigned by them in token of their acceptance and shall always be in conformity with the essential terms and conditions of the Texprocil Standard Contract Form No. 1. Having indicated in detail the material alterations and variations in the contract, it is essential to observe that we are entirely in agreement with the findings recorded by the learned Single Judge even on merits that a breach of Clause 33 has in fact been established vis-a-vis the present petitioners. We are also in agreement with the observations of the learned Single Judge that having regard to the breaches that have been committed, that the penalty imposed on the present petitioners by the third respondents as confirmed by the order in appeal was extremely lenient. In this view of the matter, we do not propose to interfere with the findings of the learned Single Judge which we hereby confirm.

13. We consider it equally necessary to deal with the observations made by the

learned Single Judge with regard to the conduct of the petitioners in having challenged the order passed by the third respondent in spite of their having expressed regret and remorse. In the course of the hearing, it was contended by the learned counsel appearing on behalf of the petitioners before us, that the petitioners had neither expressed regret nor remorse at the time of the hearing before the third respondent. We have, for this purpose, reproduced in this judgment, the exact wording of the letter of the petitioners' attorneys, and in our opinion, there can be no doubt whatsoever about the fact that the solitary ground on which the third respondent took a lenient view of an otherwise extremely serious case, was only on the basis of the regret and remorse expressed and on the basis of the request made to the third respondent that the petitioners would behave themselves in future and they should be given a change to do so. The learned Single Judge has also recorded some strong observations which, in our judgment, were fully justified with regard to the conduct of the petitioners in the course of the correspondence entered into by them with the third respondent, in the course of the hearing of the various proceedings and in the course of the litigation. We are entirely in agreement with those observations and not propose to add to them.

14. In this view of the matter, the appeal fails and accordingly stands dismissed. The appellants shall pay to the respondents costs of the appeal in two separate sets.