(2001) 12 DEL CK 0150

In the Delhi High Court

Case No : C.W. No. 3763 of 1982

Siemens India Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 05-12-2001

Acts Referred:

Citation : (2002) 140 ELT 62

Hon'ble Judges : Usha Mehra, J;C.K. Mahajan, J

Bench : Division Bench

Advocate : Hemant Malhotra and K.J.S. Kalia, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Usha Mehra, J.—Mandamus has been sought by the Siemens India Limited thereby directing the respondent Union of India to allow full "cash assistance" and "replenishment benefits" in respect of contract placed on them by the Municipal Corporation of Greater Bombay for supply and installation of electrical equipment under the IDA loan. The benefits have been claimed with effect from the date of the submission of tender till date of final execution of contract. Directions have also been sought to quash or nullify the effect of notifications dated 6th December, 1975 and 5th November, 1979 whereby government notified that the benefits would be applicable prospectively and not retrospectively.

2. In order to appreciate the challenge raised, we may have a glance to the facts of this case. Government of India announced benefits under the Replenishment Scheme including cash assistance for encouraging supply of indigenously manufactured goods to Indian buyers to enable them to obtain indigenously the requisite goods at an internationally comparable price. The Scheme was in fact promulgated to enable the indigenously established manufacturers to compete with international manufacturers situated outside India in order to prevent the import of the said goods into India and thereby to save large amount of foreign

exchange. Therefore the incentives.

3. That the petitioner carried on business dealing. In manufacturing, supply and installation of electrical machinery, plants and their components and accessories etc. The Bombay Municipal Corporation invited global tenders for supply of electrical equipments required for their Bhatsai Water Supply Project. This project was being financed through an IDA loan. The tenders comprised of supply and erection of various electrical equipments. The project was to augment the supply of water to Greater Bombay. Petitioners submitted offers against tender enquiries on 7th March, 1975. According to petitioner he quoted lower price because while quoting prices he took into account the monetary value of all the export incentives including cash assistance to be available as per the then existing policy. Petitioner to be sure of it wrote a letter on 12th April, 1975 seeking Government''s confirmation that the "cash assistance" as per the rates then prevailing would be made available on registering the contract as per the policy of the Government. He has informed vide letter dated 23.4.1975 that the benefits as available to exports against the registered contracts would be available to him as well. The offer/ tender of the petitioner was accepted by the Bombay Municipal Corporation on 25th August, 1975. As per the procedure laid down in the circular petitioner was required to register the contract with the State Bank of India. He accordingly registered his contract with State Bank of India on 23rd September, 1975 i.e. within the prescribed period. From 1st April, 1975 the rate of "cash assistance" were drastically reduced by the Government, Therefore, petitioner sought confirmation from the Engineering Export Promotion Council about the export benefits. The said Council confirmed vide letter dated 25th October, 1975 that IDA contracts would qualify for grant of cash assistance with other facilities as per the scheme of registration of contracts. The Engineering Export Promotion Council vide notification dated 6th December, 1975 intimated that the date of submission of the tender would be taken as the crucial date for determining the rate of cash assistance provided there was no price variation between the date of submission of tender and acceptance of the same.

4. The decision of the Government dated 6th December, 1975 according to petitioner did not meet his requirement and he, Therefore, personally discussed the matter with the official of the Council who informed him that petitioner''s point of view has been referred to the Ministry of Commerce with the request to accord protection even to contracts entered into prior to 5th December, 1975. While the case of the petitioner was pending the Government raised another objection with regard to the protection of such benefits to the petitioner and that was price variation clause in the contract. The Government of India brought another amendment to the import policy vide public notice dated 5th November, 1979 according to which petitioner and similarly situated persons whose contract were already registered with the bank prior to 5th November, 1979 found it difficult to get benefits because the notification said that the amendments in the Appendix-20 would be applicable from the date of issue of the notice i.e. 5th November, 1979 meaning thereby that benefit of protection in respect of

contracts with price variation clause were to be available only to those contract which were registered with the bank on or after 5th November, 1979. This according to the petitioner was against the previously declared policy of the Government and amounted to discrimination. Thus petitioner was made to suffer loss of Rs. 73.04.929.78P because the pending claims of the petitioner with regard to the "cash assistance" and "replenishment benefits" were denied to him by the respondent. Aggrieved by this action the present writ petition was filed.

5. In spite of opportunities given no counter affidavit was filed by the Union of India nor any one on behalf of the Union of India was present when arguments were heard. Therefore, we heard the learned We have heard counsel for the petitioner only and examined the record produced by him. Notification issued by the Government of India dated 6th December, 1975 clearly stipulated that in respect of contracts for supplies made against the IDA aided projects in India under the procedure of international competitive bidding, "the date of submission of tender will be taken as the crucial date for determining the "cash assistance" rate due, provided there is no price variation between the date of submission of the tender and acceptance of the same and subject to other conditions. In case where there is a variation at the time of acceptance of the tender, only the later date i.e. date of acceptance of the tender will be crucial date." Clause-4 of the said notification provided that the decision announced in this letter would apply prospectively i.e. to the contracts entered into on or after 5th December, 1975. Hence on the date the tender was submitted the crucial date for determining the benefits was the date of submission of tender. It was only when the variation in the price was noticed that the date of acceptance of the tender was to be reckoned as the crucial date.

6. In the case in hand the petitioner participated in the global tender and submitted offer against the tender on 7th March, 1975. The offer of the petitioner was accepted by the Bombay Municipal Corporation on 25th August, 1975. Acceptance of the offer tentamounted to concluded contract. Admittedly petitioner''s contract was an IDA loan contract. Therefore, as per the policy of the Government dated 6th December, 1975 which was to be made applicable to the contracts entered into on or after 6th December, 1975, the crucial date for considering the benefit was the date of offer. But this notification dated 6th December, 1975 was not applicable to the petitioner. His offer was prior to December, 1975 and its acceptance was also prior to the issuance of the notification dated 6th December, 1975. Therefore, so far as petitioner is concerned he could not take advantage of notification dated 6th December, 1975. He was governed by the public notice dated 8th December, 1969 pursuance to which he gave the tender. Sub-clause (v) of para 3 of the said notification dated 8.12.69 provided that for the purpose of determining the date of contract, the date on which all the terms and conditions had been finally settled would be deemed as the crucial date of contract. Therefore, this petitioner could not have claimed the benefit i.e. "cash assistance" etc. from the date he made the offer. As per the notification applicable to him, he was entitled to the benefits from the

date the concluded contract came into existence. That date was 25th August, 1975 and not March 1975. It is not his case that replenishment benefits and cash assistance from the date of concluded contract has not been given. Hence his first prayer cannot be allowed. Benefits due to him had been worked out as per the public notice dated 8th December, 1969 applicable to the petitioner. He entered into the contract fully aware of the terms of the government notification dated 8.12.69 which governed his contract. Respondents had made it clear to the petitioner that he would be eligible to claim import replenishment as admissible under the policy and the policy was the public notice No. 196-ITC(PN)/69 dated 8th December, 1969. It clearly indicated that he would be entitled to benefits from the date the concluded contract came into existence. The same was worked out by the Department and accordingly paid to the petitioner. The public notice date 6th December, 1975 having not been applicable to the petitioner no benefit could be drawn by the petitioner from the said public notice. Moreover, petitioner was aware of this fact that the public notice dated 6th December, 1975 was not applicable to him. This is apparent and so reflected in his letter dated 2nd February, 1976 Annexure-I. The petitioner acknowledged vide the said letter that the public notice dated 6th December, 1975 did not fully met his requirements. His problem pertained to the period prior to 5th December, 1975, Therefore, requested that the matter be taken up with the Ministry of Commerce to accord recognition even to contracts entered into prior to 5th December, 1975 for determining "cash assistance". Similarly the public notice dated 5th November, 1979 amended the Appendix-20 and added Clause (d). In that public notice a para was inserted clarifying that price variation clause would apply if it was relating to material/ labour cost based on fixed parameters spelt out in the contract itself and not subject to any negotiation after signing of the contract. The parameter was not to relate to any export incentives and subject to the condition that modification would apply on or after 1st April, 1979. Thus this notification was not to apply retrospectively. That the existing contracts containing price variation clause for any reason other than those specifically covered under import policy could not be eligible for registration of contracts and benefits under the scheme. Since the notification was to be applicable prospectively and not retrospectively, Therefore, no benefit could be drawn by the petitioner. Furthermore when the incentives were worked out by the Department and paid it was made clear to the petitioner that in case the petitioner was not satisfied with the decision of the respondent the petitioner was at liberty to file an appeal as provided in Hand Book of Rules and Procedure, 1980 and 1981. The petitioner was put to notice with the provisions of filing an appeal and that no further representation would be entertained. But the petitioner instead of availing the efficacious remedy of filing the appeal approached this court. Ordinarily we would have dismissal the writ on this count but since this writ petition was pending after admission for almost 10 years, we preferred to dispose of the same on merits. While calculating the amount admittedly respondent took FOR value of originally contracted price and worked out the percentage of "cash assistance" on the basis of import policy as applicable to the petitioner. No discrimination has been caused to the petitioner by not making the notification dated 6th December, 1975 and 5th November, 1979 retrospective, rather if these notices were made effective retrospective then in each concluded contract crucial date for determining the incentive would change. It was to avoid that the government made the operation of those notification prospective. We see no infirmity in the same.

7. For the reasons stated above, we find no merits in the petition. Same is accordingly dismissed but with no order as to costs.

