

MANU/DE/0601/1985

Equivalent/Neutral Citation: AIR1986Delhi158

IN THE HIGH COURT OF DELHI

Suit No. 261A of 1978

Decided On: 04.03.1985

Punj Sons Pvt. Ltd. **Vs.** Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

R.N. Aggarwal, J.

Counsels:

For Appellant/Petitioner/Plaintiff: A.S. Chandhiok, J.P. Singh and Sushil Chauhan, Adv.

For Respondents/Defendant: Anil Sapra, Adv.

ORDER

R.N. Aggarwal, J.

1. The relevant facts for the decision of this suit are that on 1st May 1969 the petitioner-objector Messrs Punj Sons Private Ltd., New Delhi, entered into a contract with the claimant Union of India for the supply of 8420 milk containers 20 liters quantity. The containers according to the contract were to be coated with "hot dip tin coating". On 13th May 1969 the petitioner wrote to the Director General of Supplies and Disposals for the issue of quota certificate for tin which is to be used for hot dip tin coating of the milk containers. The petitioner on 2nd June, 1969 addressed a communication to the Director General of Technical Development for the issue of release orders for procurement of tin ingots. The petitioner wrote in the letter that they had a contract with the Director General of Supplies and Disposals for supply of 8420 milk containers of the capacity of 20 litres and for the execution of the said contract 5 metric (sic) of tin ingots were urgently required for hot dip tin coating of the containers. The office of the Director General of Supplies and Disposals recommended to the Director General of Technical Development for the issue of the release orders for the procurement of tin ingots. The arbitration record shows that thereafter the correspondence continued between the parties but the Director General of Technical Development or the M.M.T.C did not pass any order for the release of the tin ingots.

2. On 21st August, 1970 the petitioner wrote to the Director General of Supplies and Disposals that they understand that the release orders for tin ingots can only be issued to them after a provision to this effect is made in the A/T by the department and, therefore, requested that the necessary amendment may be made in the A/T. On 24th September, 1970 the Respondent replied that there was no stipulation in the A/T for assistance for Procurement of tin ingots and that on an ex gratia basis the request could be considered provided price reduction is made. The department, further, wrote that the above was without prejudice to the rights and remedies available to the purchasers under the terms of the contract.

3. On 15th October, 1970 the petitioner replied that in view of the increase in the price of raw materials as well as labour it is not possible for them to offer any price reduction and pleaded that the quota certificate for tin ingot may be issued. On 28th November,

1970 the Respondent cancelled the contract and wrote to the petitioner as follows:

As you have failed to supply the stores against the subject A/T. the same is hereby cancelled at your risk and expense. The extra cost involved in the repurchase of the store will be intimated to you separately and you will be liable to pay the same on demand.

This is, however, without prejudice to the rights and remedies of the purchaser under the contract.

4. The relevant facts further are that in December, 1970 a risk purchase tender was floated by the Respondent. The petitioner submitted their tender and quoted the rate at Rs. 65/- per container. Another party also made a similar offer. For certain reasons not relevant to the decision of this petition the tenders were not accepted. The Respondent thereafter again invited tenders and a company by the name M/s. Can Manufacturing Company Pvt. Ltd., Bombay made an offer at Rs. 70/- per container but this transaction also did not go through.

5. On 6th December, 1975 the Respondent wrote letter to a number of firms asking the rates on which they had sold/purchased IK E Containers Milk 0306 - 20 Litres as on 15th September, 1970. Only one firm that is Delhi Brass & Metal Works on 6th December, 1975 wrote to the Director General of Supplies and Disposals stating that as on 15th September, 1970 the price was Rs. 90/- per container. The letter is a little important and it reads as under:

With reference to your letter No. SMH-2/10142/510/11-11-68/III/333 dated 21st November, 1975, we give below the price of the container milk 20 litres as required by you around 15-9-70.

1. Container Milk 20 Litres. @ Rs. 90 each (Rupees Ninety each).

This is for your information that this is however, without any commitment from our side.

6. On 13th February, 1976, the Respondent claimed a sum of Rs. 3,13,224/- by way of damages from the petitioner. The said claim was refuted by the petitioner vide their letter dated 24th April, 1976.

7. The disputes were referred to the arbitration of Dr. Bakhshish Singh, Additional Legal Adviser to the Government of India, Ministry of Law. The arbitrator by a non-speaking award awarded a sum of Rs. 3,13,224/- to the Union of India.

8. The petitioner has challenged the legality and validity of the award mainly on the ground that to complete the contract the tin ingots were necessary for the hot dip tin coating for the manufacture of the milk cans and that since the tin ingots were a canalised item and were not available in the market it was not possible to carry out the contract without the government releasing the required quantity of tin ingots and that in spite of earnest endeavours made by the petitioner the petitioners were not able to obtain an order for the release of the required quota of tin ingots from the Director General of Technical Development or the M.M.T.C. and, therefore, the contract became impossible of performance and stood frustrated. The petitioner also pleaded that the Respondent/claimant had never made any risk purchase against the A/T in question and, therefore, had not suffered any loss and, therefore, there was no question of any award of damages in their favour. It was also contended that, the assessment of the

damages at Rs. 3,13,224/- was without any basis.

9. The claimant-respondent in reply to the objections have pleaded that there was no condition or stipulation in the tender or the A/T for arranging release order/ import licence for tin ingots. It is further stated that no understanding was given to the objector in this regard. The Respondent admitted that the ingots were not available but pleaded that the claimant was not obliged under the contract to make available the tin ingots. As regards the risk purchase tender submitted by the objector the claimant admitted that the tender submitted by the objector was the lowest but pleaded that the said transaction did not go through since the objector did not agree to withdraw some inconvenient terms and also did not agree to furnish 10% security deposit in advance. The Respondent has stated that fresh tenders were invited against which the objector firm did not send their tender and the order was placed on M/s. Can Manufacturing Company Pvt Ltd., Bombay at the rate of Rs. 70/- but since it was not a valid risk purchase, therefore, the claim of the Respondent for general damages is legal and valid

10. The objector in their rejoinder pleaded that the milk cans were to be manufactured as per specification No. IND/GS/1182 which stipulated "hot dip tin coating" of the milk cans by using tin ingots and that the tin ingots were essentially required for the manufacture of the store and this being a canalised item prior to acceptance of quotation, it could only be issued to the objector by the Mineral & Metal Trading Corporation of India Ltd., only against the recommendation of the Union of India and/or its department and that since the Respondent failed to obtain the release of the required quantity of the ingots in favour of the objector it became impossible for the objector to perform the contract as the objector could not have obtained this material in the open market. The objector further pleaded that the tin ingots form integral part of the performance of the contract which admittedly could not be procured by the objector from the open market and unless the claimant got the release orders issued it was impossible to perform the contract.

11. On the facts stated above and the contentions raised in the pleadings, the crucial question that requires determination is whether the contract stood frustrated in law. Paragraph 2 of Section 56 of the Contract Act provides:

Contract to do act afterwards becoming impossible or unlawful.-- A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent unlawful becomes void when the act becomes impossible or unlawful.

12. The undisputed facts in the case are that under the contract "hot dip tin coating of the milk cans was essential. The hot dip tin coating was to be done by using tin ingots. The Union of India in their reply to the objections as well as in the affidavit of Shri M.A. Khan dated 9th July 1984 have admitted that tin ingots was not available in the market. The objector has categorically stated that the tin ingots was a canalised item even prior to acceptance of quotation and that the said item could only be issued to the objector by the Mineral and Metal Trading Corporation of India Ltd. on the recommendation of the Union of India and/or its department. The above assertion of the objector has not been disputed by the Union of India. The correspondence between the parties to which I have adverted earlier clearly shows that immediately after the acceptance of the tender the objector had asked the Director General of Supplies and Disposals to obtain the release of the necessary quota of tin ingots for completing the contract. Efforts were made by the Director General of Supplies and Disposals to obtain the release of the required quota of tin ingots but he somehow did not succeed in obtaining the orders of

release from the concerned authority. The objector had requested the Director General of Supplies and Disposals to make an amendment in the A/T but this was also not done because of the reasons already stated in the earlier part of the judgment. It was in these conditions that the objector failed to carry out their obligations under the contract.

13. There is thus no manner of doubt that the contract became impossible of performance because of the non-availability of one of the essential items that is tin ingots, which was essential for the manufacture and supply of the contracted store. The learned Counsel for the Union of India contended that there was no condition or stipulation in the agreement regarding the supply of tin ingots by the claimant and the objector was bound under the contract to supply the contracted store within the stipulated period. I do not agree in this contention. The parties very well knew at the time of entering into the contract that tin ingots was required for "hot dip tin coating" of the cans. It is clear from the record that tin ingots was a canalised item and it could not be procured from the open market without a release order. In the circumstances, the condition of the supply of tin ingots can be implied from the nature of the contract. The objector repeatedly asked the Director General of Supplies and Disposals to obtain the Necessary quota of tin ingots but the Director General or Supplies and Disposals failed to obtain the release of the necessary quota of tin ingots, it is thus clear that the contract became impossible of performance because of the non-availability of the tin ingots and this was beyond the control of the promisor.

14. The contract would be clearly hit by paragraph 2 of Section 56 of the Contract Act.

15. The above view finds support from the case *Sannidhi Gundayya v. Illoori Subbaya* MANU/TN/0238/1926 : AIR 1927 Mad 89. The facts of the said case were that the Defendant therein had contracted with the Plaintiff to deliver certain bags of rice to him. The contract contemplated delivery by railway wagons. As a war measure the Government had imposed wagon restrictions and priority certificates all over the Presidency and this interfered with the free and easy transport of rice. The existence of these restrictions was well known to all the parties owing to the shortage of wagons on account of the enforcement of the rules, the Defendant" was not able to perform the contract and he pleaded impossibility of performance as defence, to the suit A Division Bench of the Madras High Court held:

...the law does not imply an absolute obligation to do what which the law forbids, and the reasonable view to take of the, contract would be that the seller agreed to supply the promised number of bags of rice if after using his best endeavours he was able to secure the necessary number of wagons. The obligation to perform the contract was not therefore absolute, but impliedly conditional

16. For the reasons stated, I am of the view that the contract had become impossible of performance and, therefore, rendered void The award clearly suffers from the legal infirmity mentioned above.

17. Shri Chandhiok, learned Counsel for the objector, next contended that the arbitrator has committed a serious misconduct in assessing the damages on the basis of a letter dated 6th December, 1975 by Delhi Brass and Metal Works stating that the price of a 20 litre milk container as on 15-9-1970 was Rs. 90/-each. There seems to be substance in this contention. The contract was cancelled on 28th November, 1970. Thereafter, the Director General of Supplies and Disposals called for tenders on the basis of risk purchase. The objector had submitted their tender but this for the reasons already

stated was not accepted Thereafter, fresh tenders were called and a tender at the rate of Rs. 70/- per container was received but this also did not mature. On 21st November, 1975 the Director General of Supplies and Disposals adopted a queer method of finding out the rates of supply of the store as on 15-9-1970. A circular was sent to a number of firms asking for rates of milk containers of the description IK E-0306 -- 20 litres k on 15-9-1970. Only M/s. Delhi Brass and Metal Works replied on 6th December, 1975 giving the rate as on 15-9-1970 at Rs. 90/-per piece. The firm in the reply added that this was only for information and it was without any commitment from their side.

18. The above was the only evidence for fixing the damages. The description of the store given in the circular is IK E-0306. The description of the store given in the A/T is IK F-0306 - 20 litres. The Delhi Brass and Metal Works produced no evidence of their having purchased or sold milk containers of the description given in the contract on the alleged date of breach, that is 15th September, 1970. There is no evidence of any actual transaction, having been conducted by the Delhi Brass and Metal Works regarding the store in question as on 15th September, 1970. There has been, in my opinion, a serious misconduct in assessing the damages on the basis of the letter dated 6th December, 1975 written by the Delhi Brass and Metal Works.

19. The claimant in support of their case had examined Shri Jaishi Ram. Shri Jaishi Ram clearly stated that the Union of India had suffered no actual loss. There was no repurchase of the contracted stores.

20. For the reasons stated above, I find that the award is bad and legally not sustainable. I allow the objections and quash the award. I make no order as to costs.

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