MANU/TN/0031/1991

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IN THE HIGH COURT OF MADRAS

C.S. No. 336 of 1975 and O.P. Nos. 314 of 1979 and 275 of 1980

Decided On: 03.01.1990

Easun Engineering Co. Ltd. **Vs.** The Fertilisers and Chemicals Travancore Ltd. and Ors.

Hon'ble Judges/Coram:
A. Abdul Hadi, J.

Counsels:
For Appellant/Petitioner/Plaintiff: K. Chandrasekaran, Adv.

For Respondents/Defendant: M/s. King and Patridge, F.A.C.T. and S. Jayaraman, Advs.

ORDER

A. Abdul Hadi, J.

1. The O.P. No. 72/1980 by the Fertilisers and Chemical Travancore Limited, (Division FACT) Engineering and Design Organization)herein after referred to as FEDO prays for setting aside the Award (filed into Court in O.P. No. 314/1979 by the Umpire, who passed the same on 12-4-1979 in favour of the first respondent herein, namely, Easun Engineering Company Ltd., hereinafter referred to as EASUN) in so far as it has allowed the claims of EASUN and for remitting the matter back to the Second Respondent-Umpire for reconsideration and making a fresh award in respect of the claims of FEDO which have been disallowed in the said Award.

2. The abovesaid award was passed in the following circumstances:

FEDO by its purchase order dt. 5-2-1973 and subsequent amendments to it by letters dt. 3-3-1973 and 7-3-1973 entered into contract with EASUN for the supply and installation of eighteen numbers of Power Transformers etc. But only six transformers were supplied by EASUN and the resultant dispute that arose between the parties was finally referred to the Second Respondent as Umpire by the Order passed by this Court on 19-9-1977 in Application No. 2785 of 1977 in C.S. No. 366 of 1975.

3. As per the amended claim filed by EASUN before the second respondent-Umpire, they had claimed a sum of Rupees 13,07,417/- under Annexure A to their claim, a sum of Rs. 10,30,716/- under Annexure B to their claim and a sum of Rs. 3,06,000/- under Annexure C to their claim, totalling in all a sum of Rs. 26,44,243/-. On the other hand, FEDO had made a counter-claim of Rupees 12,33,325-75.

4. The award states that the abovesaid contract between the parties is a firm price contract and the prices indicated in the contract are firm without any escalation on any account till the contract is completely executed and the equipments are delivered at the project site at Cochin. Such delivery of equipments should commence after ten months from the date of purchase order and shall be completed in the fourteenth month. The

time of delivery is the essence of the contract and FEDO is entitled to liquidated damages for any delay on the part of EASUN. It is also provided that the liquidated damage would not be applicable in case of delay caused due to "force majeure". It was further provided that if EASUN failed to conform to fabrication schedule without sufficient cause, FEDO could terminate the contract and reassign to other suppliers.

5. Fedo terminated the contract by their letters dt. 3-9-1975 and 18-9-1975. It is the case of EASUN that FEDO has terminated the contract unilaterally without sufficient and justifiable reason in spite of the fact that EASUN had discharged their contractual obligations and that FEDO has committed breach of contract. Hence, the above referred to damages were claimed as per Annexures A, B and C to the claim.

6. On the other hand, FEDO's case is that EASUN had failed to perform the contract as per the conditions of the purchase order accepted by them, that FEDO had no other alternative excepting to terminate its contract and that since EASUN has committed breach of the contract, FEDO is entitled to claim damages from EASUN as mentioned above.

7. According to the contract, the delivery should have commenced on 19-10-1973 and completed by 19-2-1974 and the erection and commissioning completed by 19-6-1974. Admittedly, six numbers out of 18 were despatched on various dates commencing from 14-6-19974 to 17-3-1975, the value of the transformers despatched and delivered was about two thirds of the value of the entire transformers, namely, amount Rupees 17,00,000/- and the rest of the transformers namely, 12 were not supplied, though out of them 4 were tested in July and Sept., 1974.

8. EASUN contended that they were prevented from supplying, due to force majeure conditions namely, strikes, power cut and phenomenal increase in the cost of transformer oil due to War conditions etc. It is not in dispute that there was delay in delivering the transformers. It is also not in dispute that FEDO had granted extension of time on several requests made by EASUN till 31-3-1975. That is why, the Umpire has also made it clear in the Award that it is not open to FEDO to depend upon delays for the termination of the contract prior to 31-3-1975. The Award also points out that it is significant that FEDO did not claim liquidated damages for the above delay, in their above referred to counter-claim, probably for the reason that FEDO had condoned the delay and gave extension of time. The Award also finds that the price increase in transformer oil was so enormous the increase having risen to 400% because due to War conditions in the Middle East and the Ordinance by Government of India imposing higher Excise duties. So, after analysing the evidence, both documentary and oral, the Umpire comes to the conclusion that despite the contract being a firm price contract, EASUN was justified in asking for variation of price in transformer oil, in view of the abovesaid force majeure conditions. The Umpire also found that under the contract, even though, as stated above, liquidated damages are provided in favour of FEDO, the relevant clause itself provides that liquidated damages will not be applicable in case of delay caused due to force majeure conditions. As already pointed out, FEDO did not claim liquidated damages and the Umpire also points out in the Award that it is strange FEDO in their written statement white making their counter-claim has not even stated why they were not claiming liquidated damages, in spite of their contention that the termination of the contract was due to delay in the performance of contract by EASUN. The Umpire infers the existence of force majeure condition, also from the abovesaid non-claim of liquidated damages by FEDO.

9. The Award also extracts Clause 18 of the purchase order, which runs as follows:--

> "Clause 18: for Majeure: Neither the supplier nor FEDO shall be considered in default in performance of their obligation under the contract so long as such performance is prevented or delayed because of strikes, war, hostilities, revolution, civil commotion, epidemics, accidents, fire, wind, flood because of any law and order proclamation, regulation or ordinance of Government or because of any Act of God or for any other cause which is beyond the control of the parties affected."

The Umpire agreed with the contention of the EASUN that price in transformer oil was unexpected, unforeseen and beyond their control, and, therefore, it must be deemed to be a force majeure condition. He did not concur with the contention of FEDO that even assuming that there was price increase due to conditions mentioned by EASUN, it would not come within the purview of force majeure clause, as the said clause would apply only so long as such performance is prevented or delayed and that the said increase has not "prevented or delayed" the performance of the obligations by EASUN under the contract. The Umpire came to the said conclusion that because the price increase was not marginal, but was as much as 400% it was caused due to the abovesaid force majeure conditions. Therefore, the Umpire concluded in the award the EASUN had not failed to conform to the fabrication schedule without sufficient cause and FEDO was not justified in terminating the contract unilaterally.

10. Then, regarding the quantum of the claim made by EASUN the award disallowed the claim under Annexure B. So far as Annexure-A claim the Umpire awarded a sum of Rs. 3,68,120/- for the price variation applicable to the abovesaid six transformers delivered to FEDO in accordance with IEMA formula (other than the transformer oil), a sum of Rs. 2,36,584/- for the price increase on oil in respect of the said transformers delivered and a sum of Rs. 1,56,210/- towards 10% retention amount on the six transformers. It has also awarded interest at the rate of 12% per annum on these amounts from the date of the claim, namely, 13-11-1976. The award grants also Annexure-C claim of Rupees 1,91,000/- towards the amount due by FEDO for supplies other than transformers and wages to engineers and overhead 100%, together with interest at 12% per annum from the date of the claim, namely, 13-11-1976.

11. Since the breach of contract was held to have been committed by FEDO, FEDO's counter-claim was disallowed by the Umpire. However, FEDO was held to be entitled to a sum of Rs. 26,961/- towards the facilities and services rendered by FEDO to EASUN with interest at 12% per annum from the date of claim, namely, 19-1-1977.

12. While so, the main attack by the learned counsel for FEDO to set aside the award and remit it back to the Umpire for making an award in respect of FEDO's claim is, that though the Umpire held that the contract in question was a firm price contract, he committed an error apparent on the face of the record by applying the price variation in respect of these six transformers supplied.

13. Learned counsel mainly relied on a decision reported in M/s. Alopi Parshad v. Union of India, MANU/SC/0057/1960 : [1960]2SCR793 . The contract in question in the abovesaid Supreme Court case was a firm price contract, relating to supply of ghee to the Union of India and the price of ghee abnormally rose up due to World War-II and the supplier claimed payment at higher than the stipulated rate on the basis of equity and that was negatived by the Supreme Court. The Supreme Court after referring to S. 56 of the Contract Act, which provides that (Para 21)-

> "a contract to do an act which, after the contract is made, becomes impossible

..... becomes void when the act becomes impossible ....."

no doubt observes that-

> "The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity."

However, the Supreme Court in the above decision itself points out thus:

> "If, on the other hand, a consideration of the terms of the contract in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

It is this latter observation which would apply to the present case. No doubt, here also, the main grievance of EASUN was the increase in the price of transformer oil subsequent to the contract. But the increase cannot be described as anything which would be normal in the ordinary trade conditions. But it was very much abnormal being 400% increase due to certain unexpected War condition. So, it can be safely concluded that "fundamentally different situation", "unexpectedly emerged" as observed by the Supreme Court in the abovesaid passage. Therefore, as concluded by the Supreme Court, the contract ceases to bind the parties at that point, "not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation." The actual decision in the abovesaid Supreme Court case turns on its facts, because the Supreme Court found that there was only a "vague plea of equity" for setting aside the terms of the contract.

14. Further, dealing with the terms 'impossible' under S. 56 of the Contract Act, the Supreme Court in Satyabrata v. Mugneeram, MANU/SC/0131/1953 : AIR1954SC44 observed as follows (Para 9):--

> "The word 'impossible' has not been used in the sense of physical or literal impossibility. The performance of an act may be impracticable and unless from the point of view of the object and which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promissor finds it impossible to do the act which he promised to do". So, in the present case, it can be safely held that the abovesaid abnormal increase in price due to war condition, is an untoward event or change of circumstances which "totally upsets the very foundation upon which parties rested their bargain". Therefore, EASUN can be said to be finding itself impossible to supply the transformers which it promised to do. The abovesaid principle laid down in Satyabrata v. Mugneeram, MANU/SC/0131/1953 : AIR1954SC44 and also in the English decision Templin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co; Ltd., (1916) 2 AC 397 (A) was followed by the Supreme Court in later decisions also reported in Smt. Sushila Devi v. Hari Singh, MANU/SC/0025/1971 : AIR1971SC1756 and Govind Bhai v. Gulam Abbas, MANU/SC/0353/1976 : [1977]2SCR511 . In the circumstances, I do not think that there is any error apparent on the face of the record, in the award passed by the Umpire-Second Respondent.

15. Learned counsel for EASUN also contended that when a specific question of law was referred to the arbitrator and a decision is given by the arbitrator on that question of law, no party to the arbitration will be allowed to set it aside even if the point decided by the arbitrator is erroneous in law. For this proposition, he cited a decision in M/s. Tarapore Ltd. v. Cochin Shipyard Ltd. Cochin, MANU/SC/0002/1984 : [1984]3SCR118 . But, in the present case, as rightly contended by the learned counsel for FEDO, no specific question of law was referred to. The question that was referred to was whether the unilateral termination of the contract by FEDO was justified and whether EASUN was entitled to make the claim made by it, in view of the abnormal increase in the price of transformer oil etc. In deciding that particular question, the Umpire could have decided a point of law incidentally. In such a case, if the arbitrator commits an error of law apparent on the face of the record, it can be corrected by the Court. In the decision in MANU/SC/0002/1984 : [1984]3SCR118 what was specifically referred to the arbitrator was, a pure question of law, and, in such a situation, the Supreme Court pointed out that even assuming that the decision of the arbitrator therein was erroneous, it cannot be corrected by the Court, if there is any error of law apparent on the face of the record. On this point, there can be no dispute. This legal position has been made clear in very many decisions, including MANU/SC/0002/1984 : [1984]3SCR118 itself. So, having held that there is no error apparent on the face of the record, in the award in question, I dismiss this O. P. No. 272/1980, and, in O.P. No. 314/1979 pass a decree in terms of the said award with interest @ 12% p.a. from the date of decree till realisation.

16. C. S. No. 336/1975: This Suit is by EASUN against the first defendant FEDO and the second defendant Indian Bank for (a) declaration that the first defendant is not entitled to call upon the second defendant to make any payment in pursuance of the guarantee bond dt. 24-1-1973 for Rupees 1,45,165/- unless and until the liability, if any, of the plaintiff in respect of the above referred to contract between the plaintiff and the first defendant (which is the subject matter of the abovesaid arbitration) is proved by the first defendant; (b) for declaring that the plaintiff has not incurred any liability in respect of the abovesaid contract and (c) for an injunction restraining the second defendant from making any payment to the first defendant in pursuance of the aforesaid guarantee bond. The parties had referred the dispute involved in the suit to the abovesaid arbitration. By order dt. 19-9-1977 in Application No. 2785/1977 in the suit, the dispute was referred to the said arbitration by the abovesaid Umpire and as stated above, the Umpire filed the Award and decree has been passed in terms of the Award. By virtue of the above referred to the decree of today, in O.P. No. 314 of 1979, no further order is necessary in this suit C.S. No. 336 of 1975 and the suit is disposed of accordingly.

17. Order accordingly.