In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 17188 of 2023
with
W.P.A. No. 17222 of 2023
with
W.P.A. No. 17226 of 2023
with
W.P.A. No. 17231 of 2023

M/s. Kayal Construction
Vs.
The State of West Bengal & Ors

For the petitioner	:	Mr. Subhabrata Datta, Mr. Aranya Saha
For the State in WPA17188 of 2023	:	Mr. Tanay Chakraborty, Ms. Mrinalini Majumder
For the State in WPA 17222/2023, WPA 17231/2023	:	Mr. Somnath Ganguli, Mr. Balarko Sen
For the State in WPA 17226 of 2023	:	Mr. Sk. Md. Galib
Hearing concluded on	:	29.09.2023
Judgment on	:	17.11.2023

Sabyasachi Bhattacharyya, J:-

1. The ambit of the writ petitions is limited. The petitioner participated in tender processes for similar works in all the four writ petitions and turned out to be the successful bidder. As per the relevant Clause of the general terms and conditions for e-tenders, which was treated to be a part of the tender document, the contractor/bidder was to bear Income Tax, VAT, Sales Tax, Royalty, Construction Workers' Welfare

Cess and similar other statutory levy/cess. The petitioner contends that that the said rates were included in the schedule of the contract. It is argued that the rates were quoted by the petitioner and the other bidders as per the rates of taxes/cess payable on the date of the said contract. The schedules of rates were also given accordingly.

2. Subsequently, with the introduction of the Central Goods and Services Tax Act, 2017 (for short, "the GST Act"), the entire tax regime changed. Hence, the petitioner was compelled to bear huge additional taxes which was beyond the contemplation of the contract between the parties and/or the tender.

3. The writ petitions have been filed for refund of the payments made by way of Goods and Services Tax (GST) by the petitioners in respect of the different work orders.

4. Learned counsel for the petitioner argues that the contract is a commercial document between the parties and must be interpreted in a manner to give efficacy to it rather than to invalidate it. The courts, it is contended, have to adopt a pragmatic, and not a technical, approach while interpreting or construing clauses of the contract.

5. In support of such contention, learned counsel cites *Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and another*, reported at *(2018) 11 SCC 508* and *Enercon (India) Ltd. and others v. Enercon GMBH and another*, reported at *(2014) 5 SCC 1*.

6. Next citing *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal*, reported at *(2004) 8 SCC 644*, learned counsel contends that the terms of the contract have to be strictly read and natural meaning to

be given to them. No outside aid should be sought unless the meaning is ambiguous.

7. Learned counsel next cites *Polymat India (P) Ltd. and another v. National Insurance Co. Ltd. and others*, reported at*(2005) 9 SCC 174,* where the same principle was reiterated.

8. By relying on *Director of Income Tax, Circle 26(1), New Delhi v. S.R.M.B. Dairy Farming (P) Ltd.*, reported at *(2018) 13 SCC 239*, it is argued that a beneficial Circular has to be applied retrospectively while an oppressive Circular has to be applied prospectively. It is argued that in the present case, the subsequent introduction of the GST laws cannot be read retrospectively to operate as a binding clause of the contract between the parties.

9. Learned counsel next cites *Sime Darby Engineering SDN. BHD. v. Engineers India Ltd.*, reported at *(2009) 7 SCC 545*, where the Supreme Court observed that a policy decision cannot change the contractual clauses.

10. Learned counsel next argues that a contract is interpreted according to its purpose. Every contract expresses the autonomy of the contractual parties' private will and the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties.

11. In support of such proposition, learned counsel cites *DLF Universal Limited and another v. Director, Town and Country Planning Department, Haryana and others*, reported at*(2010) 14 SCC 1*.

12. Learned counsel next relies on *Delhi Development Authority and another v. Joint Action Committee, Allottee of SFS Flats and others*, reported at *(2008) 2 SCC 672*, in support of the proposition that a definite price is an essential element of a binding agreement and although need not be stated in the contract but must be worked out on some premise as laid down in the contract. A contract, it is argued, cannot be uncertain.

13. Learned counsel appearing for the respondents controverts the arguments of the petitioners and submits that the relevant clause of the contract was specific as to the liability of the contractor/bidder to pay all indirect taxes.

14. It is argued that the GST Act merely replaces the other indirect taxes previously operative such as Sales Tax, Excise Duty, VAT, etc. Thus, there has been no effective alteration in the contract between the parties, which is unambiguous in its terms, merely by introduction of the GST regime.

15. Learned counsel cites *Bipson Surgical (India) (P) Ltd. v. State of Gujarat*, reported at *2018 SCC OnLine Guj 4832*, where a Division Bench of the Gujarat High Court observed that in *Rashtriya Ispat Nigam Limited*, the Supreme Court had observed that the statutory provision can be of no relevance to determine the rights and liabilities between the parties as agreed in contract between the two of them. It is accepted and conventional in commercial practice to shift such liability to the contractor. If a change of taxation was to be read as meaning that the contractor would be liable only to honour his own

tax liabilities and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document.

16. It is argued that the petitioner is, thus, liable to pay taxes under the GST Regime as per the statute; hence, the writ petitions seeking refund of such amounts already paid by the petitioner on account of GST should be dismissed.

17. Heard learned counsel for the parties.

18. The relevant Clause in one the contracts between the parties, by way of illustration, is as follows:

*"**Taxes and Duties to be borne by the Contractor/Bidder:** Income Tax, VAT, Sales Tax, Royalty, Construction Workers' Welfare Cess and similar other statutory levy/Cess will have to be borne by the contractor/bidder and his/her quoted rate should be quoted accordingly after considering all these charges"*.

19. The said clause is by and large the same in all the contracts, with minor variations having no bearing on the issue in contention.

20. In none of the said Clauses is it found that the taxes payable by the contractor/bidder was restricted to operate 'as on that date'. Hence, there is no scope of such restrictive interpretation of the Clause.

21. The argument made by the petitioner that there should not be any retrospective operation of an oppressive Circular is not applicable in the present case, since the respondents do not seek retrospective operation of any Circular or law but merely insist that the petitioner is to pay the taxes in terms of whatever tax regime is in currency at a

given point of time. The payment of GST is insisted upon only from the introduction of the said law. There cannot arise any question of retrospective payment of GST for a period before the enactment of the synonymous statute. Thus, the petitioner's reliance on *Director of Income Tax, Circle 26(1), New Delhi v. S.R.M.B. Dairy Farming (P) Ltd. (supra)* is misplaced.

22. In *Enercon (India) Ltd. (supra)*, the Supreme Court held that courts have to adopt a pragmatic approach and not a pedantic or technical approach. However, such observation was made in the context of an arbitration agreement or arbitration clause and, hence, not applicable here. The said ratio was laid down in respect of cases when the court is faced with a seemingly unworkable arbitration clause. In the present case, the taxation clause in the contract between the parties is unambiguous and requires no external aid for interpretation. In fact, the Supreme Court observed in *United India Insurance Co. Ltd (supra)*, cited by the petitioner itself, that the terms of the contract have to be strictly construed and natural meaning to be given to it. No outside aid should be sought unless the meaning is ambiguous. In the event the interpretation argued by the petitioners is to be accepted in the present case, the terms of the contract would be altered and re-written, which has been deprecated in *Polymat India (P) Ltd. (supra)*, also cited by the petitioner.

23. The relevant clause in the contract contemplates that the contractor/bidder is to quote its rate accordingly after considering "all these charges", thus referring to the taxes mentioned therein. Such

taxes were Income Tax, VAT, Sales Tax, Royalti, Construction Workers' Welfare Cess and "similar other statutory levy/Cess".

24. The argument of the petitioner that a new tax regime has been introduced, imposing additional taxes, is self-defeating. The relevant clause clearly indicates that all indirect taxes are also to be paid by the petitioner. By way of example, VAT, Sales Tax, etc., have been mentioned and similar other statutory levy has also been included in the contract, to be borne by the contractor.

25. The GST Act has merely subsumed the indirect taxes payable by a supplier for the entire service chain and has not introduced any additional set of taxes.

26. Hence, it was not beyond the ken of the petitioner that it was the petitioner's liability to bear all indirect taxes for the service chain and the petitioner/bidder was supposed to quote its rates accordingly by considering such charges. Mere alteration of the taxation regime does not absolve the petitioner of honouring the said Clause.

27. The Division Bench Judgment of the Gujarat High Court in *Bipson Surgical (India) (P) Ltd. v. State of Gujarat* cited by the respondents is apt in the context. The Division Bench held therein that when the rate contract was inclusive of the duties/taxes/levies and there was no clause for variation/price revision in case of revision of any tax, the petitioner shall not be entitled to change the rate contract/revision of price on any ground which otherwise is not permissible as per the terms and conditions of the tender document/rate contract.

28. The price quoted as per the rate contract and accepted by the petitioners/suppliers was inclusive of all duty, levies such as VAT, Excise Duty, etc., and there shall not be any deviation permissible on any ground. Merely because the VAT/Excise Duty has been abolished which was there at the relevant time when the prices were quoted and the rate contract was executed and thereafter has been substituted by the GST, the petitioner cannot be permitted to change the rate contract/rates and cannot be permitted to have the price revision. Hence, from the perspective of the contract between the parties, it is the petitioner/supplier who is to bear taxes in the GST regime as well.

29. Even considering from a different perspective, the petitioner also has a statutory obligation under the GST Act, as a supplier, to bear GST.

30. Under Section 2(105), "supplier" in relation to any goods or services or both shall mean the persons supplying the said goods or services or both and shall include his agent. The present petitioner comes within the said definition.

31. Sub-section (107) of Section 2 defines "taxable person" as a person who is registered or liable to be registered under Section 22 or Section 24 of the Act. Section 22 includes suppliers within persons liable to be registered. Thus, even under the said statute, it is the petitioner who is duty-bound to pay the taxes.

32. In the present case, no new liability is being imposed on the petitioner which was not contemplated in the original contract and the tender document. The petitioner was clearly to bear VAT, Sales Tax and similar other statutory levy, including all indirect taxes payable for the

service chain. The expression "similar other statutory levy/cess" in the relevant clause of the contracts makes it abundantly clear.

33. The GST regime has only introduced a common taxation for the entire supply chain which subsumes and does not add to the previous taxes payable on such count. Hence, the argument that the petitioner is saddled with a new liability beyond the contract is untenable in law and in fact.

34. In view of the above discussions, it is the petitioner who is liable to pay the GST.

35. The petitioner also cites judgments, in particular *Sime Darby Engineering SDN. BHD. (supra)*, to indicate that policy decision cannot change a contractual clause. In the present case, however, there has been no change to the contractual clause. Read as it is, the petitioner is liable under the clause to bear all taxes which have been subsumed by the GST Act. Rather, if the petitioner's interpretation is to be accepted, the petitioner would be entirely absolved of all taxes, which would be tantamount to deletion of the taxation clause altogether and have the effect of the contract being re-written by the court.

36. Autonomy of the contractual parties and their private will and joint intent has been highlighted in *DLF Universal Limited (supra)*. In the same judgment, the Supreme Court has observed that it is not the intent of a single party but the joint intent of both the parties which is to be discovered from the entirety of the contract and the circumstances surrounding its formation.

37. In the present case, there is no reason to deviate from the literal rule of construction, since the plain meaning of the relevant taxation clause in the contracts is unambiguous. Secondly, even if the autonomy of the contractual parties and their joint intent is gathered, the unerring intent was for the contractor/bidder to bear all indirect taxes such as VAT, Sales Tax and the like, which has been merely replaced by the GST Act now.

38. Certainty of price is an essential element of a binding contract as per the *Delhi Development Authority (supra)* and a contract cannot be uncertain. Here, the contract was not uncertain at all and the price was clearly indicated to include the indirect taxes and the taxes indicated in the contract which includes VAT, Sales Tax, etc. and other taxes of the supply chain which has now been replaced by the GST. Thus, the introduction of the GST regime has not taken away the certainty of price. In any event, the petitioner having entered into the contract with open eyes took calculated business risks and cannot subsequently, merely due to change of taxation statutes, seek to challenge the very root of the contract, which has already been acted upon substantially by the parties.

39. Essentiality of price was never an issue between the parties from the inception and, since not taken at the inception of the contract or the tender but only subsequently, cannot be permitted to be agitated by the petitioner in the circumstances of the present case at all.

40. Another element sought to be argued by the petitioner is that in commercial transactions, commercial viability of the contract must be

looked into. Business efficacy is a determinant as per the judgment in *Nabha Power Limited (NPL) (supra)*. Even applying the test of business efficacy and commercial viability, there is no scope to interpret the contract between the parties in line with the petitioner's arguments.

41. The first reason for the same is that the Clause as to liability to pay taxes is unambiguous and clear and there is no option or need for the court to interpret it in its own manner.

42. Secondly, commercial viability is not one-way traffic and business efficacy does not necessarily mean that an unfair advantage has to be subsequently extended to the contractor. The contracts between the parties, even if commercial in nature, laid down all the broad contours and parameters of the transactions. The petitioner agreed fully to it and acted in terms of the same, as did the respondents.

43. All commercial contracts obviously include an element of calculated business risk which includes the enhancement or reduction in taxes. Even if the petitioner argues that the taxes have been enhanced, the same was factored into the original clauses of the contract. Mere replacement of Sales Tax, Excise Duty, VAT and other similar taxes by the GST regime does not change such parameters in any manner. In fact, even Sales Tax, VAT, Excise Duty and other levies specifically enumerated by way of example in the contract can very well be enhanced from time to time by the revenue authorities. If the petitioner argues that mere replacement of GST entitles the petitioner being absolved from such payments, by the same logic it could also claim to be relieved of the liability to pay all taxes just because the

same has been enhanced. Price escalation, being not provided for in the contract, cannot be read into the contract just because a new taxation regime has replaced the earlier one.

44. Hence, none of the logical stratagems sought to be adopted by the petitioner helps the petitioner in any manner insofar as the instant case is concerned.

45. In view of the above discussions, there is no scope of directing refund of the GST paid by the petitioner in respect of any of the work orders/contracts involved in the four connected writ petitions.

46. Accordingly, WPA No.17188 of 2023, WPA No.17222 of 2023, WPA No.17226 of 2023 and WPA No.17231 of 2023 are dismissed on contest without, however, any order as to costs.

47. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)