

(2013) 08 CAL CK 0010

Calcutta High Court

Case No: W.P. No. 17650 (W) of 2013

Indian Jute Mills Association

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Aug. 8, 2013

Citation: (2013) 5 CHN 79

Hon'ble Judges: D. Datta, J

Bench: Single Bench

Final Decision: Allowed

Judgement

D. Datta, J.

The second petitioner is the Secretary of the first petitioner, a company incorporated under the provisions of the Companies Act, 1956. It has been formed to represent the interest of several jute mills in the country. In this writ petition, the petitioners seek the following relief:

- (a) Declaration that the amendment to clause 19 of the general conditions of contract being D.G.S. & D. 68 (Revised) dated May 31, 2013 is not applicable to the members of the petitioner No. 1 relating to supply of jute bags under the Jute and Jute Textiles Control Order, 2000;
- (b) A Writ of and/or in the nature of Mandamus do issue commanding the respondent Nos. 1 to 4 and each of them to issue Supply Orders with payment terms in accordance with the special conditions of contract dated November 29, 1985;
- (c) A Writ of and/or in the nature of Certiorari do issue calling upon the respondent Nos. 1 to 4 and each of them to forthwith certify and transmit to this Hon'ble Court the records of the case culminating in the impugned decision to unilaterally change the payment terms in the Supply Orders on the basis of amendment to clause 19 of general conditions of contract being D.G.S. & D.-68(Revised), so that upon consideration thereof the same are quashed and conscionable justice is rendered to

the members of the petitioner No. 1;

(d) A Writ of and/or in the nature of Prohibition do issue prohibiting the respondent Nos. 1 to 4 and each of them from changing the "payment terms" in the Supply Orders on the basis of the amendment to clause 19 of general conditions of contract being D.G.S. & D. -68 (Revised) dated May 31, 2013 or from withholding 10% or any amount from the pending bills of the members of the petitioner No. 1 on the basis thereof, in any manner whatsoever;

2. Shorn of unnecessary details, the jute mills represented by the first petitioner are under an obligation to comply with orders passed by the Jute Commissioner called "Production Control Orders" (hereafter the PCOs) in exercise of power conferred by paragraph 4 of the Jute Textiles Control Order, 2000 (hereafter the Control Order). The procedure that is followed for production, requisition and supply of jute bags by a jute mill/manufacturer under the Jute Packaging Materials (Compulsory Use in Packaging Commodities) Act, 1987 read with the Control Order is pleaded in paragraph 15 of the writ petition, which reads as under:

15. The procedure followed for production, requisition and supply of jute bags by a jute mill/manufacturer under the said Packaging Act read with the said Control Order, is as under:-

a) The Jute Commissioner in exercise of powers conferred under clause 4 of the said Control Order issues PCOs directing any jute mill/manufacturer to produce such quantities of and classes of jute textiles, as he may specify in his order for the implementation of the Packaging Act and any directive of the Central Government. In the PCOs, the Jute Commissioner also directs the manufacturer to sell the bags to the persons nominated by Director of Supplies and Disposals (hereafter referred to as "D.S. & D.").

b) The said production of jute bags are requisitioned by the D.S. & D. by an order under para 10 of the said Control Order read with notification dated August 31, 2000, called "Requisition Order".

c) Thereafter, a "Supply Order" is issued by the D.S. & D. on the basis of PCO and the Requisition Order, providing the terms and conditions of supply.

d) The Director, Quality Assurance, the Inspection Wing of D.S. & D., is the statutory authority empowered under para 10 of the said Control Order read with the said notification dated August 31, 2000 to inspect the quality of jute bags, prior to dispatch to the consignee, nominated by D.S. & D.. After inspection, the jute bags are dispatched to the consignee.

e) If on receipt of the jute bags, the consignee complains about quality of the same, a joint inspection is held in presence of representatives of the concerned jute mill, consignee, D.S. & D., Bureau of Indian Standards. If on joint inspection the jute bags are found to be defective, the jute mill replaces the same.

f) D.S. & D. deducts amounts from the pending bills of the jute mills in case of complaint about quality of the jute bags.

3. Sub-paragraphs "a" to "d" to paragraph 15 of the writ petition have not been denied by the respondents in their affidavit-in-opposition; according to them the same are matters of record. Insofar as sub-paragraph "e" of paragraph 15 is concerned, it is the specific case of the respondents that there have been numerous instances of complaints lodged by consignees in respect of supply of poor/sub-standard quality of jute bags by various jute mills pursuant to supply orders placed by the office of the Director General of Supplies and Disposals (hereafter the D.G.S. & D.). Regarding sub-paragraph "f", it is pleaded that substantial time is consumed in joint investigation of the complaint of supply of sub-standard jute bags leading to complications and thus the mechanism provided for recovery of price paid is rendered ineffective.

4. It appears that by a letter dated November 29, 1985, the Deputy Director General of Supplies and Disposals, Government of India standardized the terms and conditions in respect of requisition and supply of stocks of B twills and laid down the same for application to each and every requisition order issued from the month of December 1985 and beyond, until further instructions/orders. Clauses 7 and 11 of Schedule B attached to such letter dated November 29, 1985, to the extent relevant, read as follows:

7. Payment: F.O.R.

a) In case of despatch, advance 100% payment will be made against proof of despatch on production of your bill duly and supported by the following documents:-.....

11. Conditions of Contract:

The Supply Order shall be governed by the conditions of the contract as contained in form No. D.G.S. & D.-68 (Revised) entitled conditions of contracts governing contracts placed by the central purchase organization of the Govt. of India (now under Deptt. of Supply), with its subsequent amendments to date excluding clause 24 and special conditions specified herein, 21 days "of grace period" will not be applicable. Clause 4(II) (a) of D.G.S. & D.-68 (Revised) shall not be applicable to the supply order.

In the event of your failure to execute the Supply Order necessary necessitating repurchase at your risk and cost, your offer if any, against repurchase tender enquiry will not be considered....

Clause 19 of form No. D.G.S. & D.-68 (Revised) provided as follows:

19. PAYMENT UNDER THE CONTRACT

(1) The payment of full 100% of price of the stores of each consignment thereof will be made after receipt and acceptance of the stores by the consignee in good condition. Bills are to be submitted in the prescribed form which may be obtained from D.G.S. & D. and are to be supported with inspection note issued by the Inspector and consignee's Receipt Certificate.

(2) Payment will be made In accordance with the instructions given in the acceptance of tender by a cheque or demand draft on a Branch of Reserve Bank of India or State Bank of India transacting Government. business.

5. Since the issuance of the letter dated November 29, 1985, the parties accepted clause 7 regarding payment as a special condition with the result that the terms relating to payment as contained in clause 19 of Form No. D.G.S. & D.-68 (Revised) was never made applicable to the jute mills and, consequently, they continued to be paid in accordance with clause 7 extracted supra. This procedure has been in vogue for quite some time. As and when PCOs have been issued by the Jute Commissioner to the members of the first petitioner, jute bags are produced which are thereafter requisitioned by the D.G.S. & D. and supplied to it. According to the petitioners, it is the Jute Commissioner who is the sole repository of power for fixation of price of jute bags. Despite several representations made by the petitioners from time to time seeking increase of the price of jute bags due to manifold increase in the cost of manufacture thereof, there has been no positive result.

6. In the background of the aforesaid facts, two supply orders dated June 10 and June 12, 2013 were issued to two members of the first petitioner containing different payment terms. While the supply order dated June 10, 2013 provided for 100% payment on proof of inspection and dispatch, the supply order dated June 12, 2013 contained different terms and conditions and is set out below:

9.1 Payment Terms:-

90% payment on proof of inspection and despatch and balance 10% on acceptance of stores by the consignee within 60 days of receipt of the stores. In case of despatch beyond Original (Refixed DP after obtaining DP extension, 2% payment for every month of delay or part thereof subject to maximum of 5% will be withheld till regularization of DP.

7. The petitioners claim to have made subsequent inquiries in the office of the D.G.S. & D. and came to learn that clause 19 of the general conditions of contract being form No. D.G.S. & D.-68 (Revised) relating to payment was revised by correction slips bearing Nos. 34 dated August 21, 2012 and 42 dated May 31, 2013 and that the aforesaid order dated June 12, 2013 was issued on the basis of the said correction slip No. 42. Insofar as it is relevant, clause 1l(b)(iii) of the said correction slip reads as under:-

(iii) 90% + 10% payment for jute firms with 90% against proof of inspection & dispatch and balance 10% on acceptance of Stores by consignee within 60 days of the receipt of the Stores.

8. A representation was immediately addressed by the first petitioner to the Director General (Supplies and Disposals), the second respondent with a request not to implement correction slip No. 42, which did not yield the desired result resulting in presentation of the writ petition.

9. Mr. Sengupta and Mr. Bose, learned counsel representing the petitioners and the respondents respectively have been heard at length.

10. The only question, to my mind, that arises for consideration on this writ petition is whether the amendment to clause 19 of the general conditions of contract being form No. D.G.S. & D.-68 (Revised) by correction slip No. 42 would apply in respect of orders for supply of jute bags in pursuance of the PCOs that are issued particularly when clause 19 in original was never applied.

11. It has not been disputed that since the issuance of letter dated November 29, 1985, payment terms have been regulated by clause 7 of Schedule B appended to such letter meaning thereby that advance 100% payment was being made on proof of dispatch based on production of the documents as required thereunder. Clause 7 was construed by all concerned as forming a special condition which would override clause 19 of the general terms and conditions of contract being D.G.S. & D.-68 (Revised). I accept Mr. Sengupta's submission that apart from the fact that the general conditions would not apply since there are special conditions relating to payment, clause 19 in original not having been applied at any previous point of time, a fortiori, any amendment to clause 19 would also not apply. I find no force in the contention of Mr. Bose that the amendment of clause 19 having been effected in exercise of legislative functions, the Court ought to stay at a distance. I am afraid, the decision cited by him reported in Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., has no application in the facts and circumstances of the present case. It is true that price fixation has been treated to be a part of legislative functions but here, there is no question of price fixation at the instance of the D.G.S. & D.. Price fixation of jute bags is the domain of the Jute Commissioner and all that the letter dated November 29, 1985 provides for is the stage at which payment would be released. While in terms of clause 7 100% payment on dispatch is the requirement, clause 19 (since amended) provides for payment in two stages at 90% and 10%. That, in my view, is not a legislative function being performed but a pure administrative decision having regard to the exigencies of a particular situation. Since the respondents by their actions over the last two decades or more have treated clause 7 to be a special condition, the concerned department of the Government of India ought not to have unilaterally decided upon a change in the terms and conditions of payment and thrust it upon the petitioners to comply with the same. The action in this regard is arbitrary and violative of Article 14 of the

Constitution.

12. The pleading in the affidavit-in-opposition that the impugned decision was arrived at after hearing the version of all those who might be affected is not quite correct. The minutes of proceedings produced by Mr. Sengupta bears reflection of the objections voiced by the petitioners' representatives, as when they were called upon to respond. There is no evidence to suggest that the objections were found to be without merit and not creditworthy. The opportunity to object that was extended did not serve the purpose for which it was intended.

13. Be that as it may, I hold that correction slip No. 42 would have no application in respect of compliance of the PCOs, the requisition and supply orders issued by the D.G.S. & D. and that the petitioners are entitled to the relief claimed in this writ petition.

14. There shall, accordingly, be orders in terms of prayers "a", "b" and "d" of this writ petition. However, this order shall not preclude the respondents to proceed in accordance with law, if they seek to change the terms and conditions of payment. In such eventuality, the petitioners shall have the right of audience and their views shall be given due consideration. The writ petition stands allowed to the extent mentioned above. There shall be no order as to costs.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.