

A **BRITISH MACHINERY SUPPLIES COMPANY**

v.

UNION OF INDIA AND ORS.

DECEMBER 17, 1992

B **[KULDIP SINGH AND P.B. SAWANT, JJ.]**

C *Handbook of Import-Export Procedures, 1980-81—Paragraphs 72, 151 and 152—G.P. Sheets/Coils—Import of—Through canalised agency Steel Authority of India (SAIL)—Pricing Committee increasing the price—Supply of materials at increased price prevalent on date of release—Not on date of registration with SAIL—Validity of—Price increase—Whether arbitrary and discriminatory—Non-supply of Materials by SAIL due to foreign supplier invoking force majeure clause in the contract—Effect of.*

D **The appellant applied to the Steel Authority of India Limited (SAIL) for supply of 600 Metric tonnes of G.P. Sheets/Coils of 0.45 m.m. gauge. SAIL registered the demand of the appellant for 300 metric tonnes only. Thereafter SAIL sent a telegram offering the appellant 62 metric tonnes. The appellant accepted the offer and complied with the formalities. The supplies were to be made latest by 31.3.1981. But it was not made as Scheduled. On 16.12.1981, a meeting of the Pricing Committee resolved to increase the price of the imported G.P. Sheets/coils by about Rs.800 per metric ton and this was communicated to SAIL on 8.2.1982.**

F **Meanwhile on 12.1.1982 SAIL further offered 59 metric tonnes of G.P. Sheets/Coils. On 1.2.1982 the appellant accepted the offer and complied with the other formalities. On 16.3.1982 SAIL wrote to the appellant that the Government of India has decided to increase the release price of G.P. Sheets/Coils imported, by Rs. 800 per metric ton.**

G **On 19.4.1982 SAIL offered another 211 metric tonnes of G.P. Sheets/Coils at increased price. The appellant accepted the offer but protested against the increase in price @Rs. 800 metric ton.**

H **Later SAIL informed the appellant that the foreign suppliers had invoked force majeure clause in the contract due to fire and had not supplied 62 metric tonnes of G.P. sheets/coils and therefore the said**

supply could not be made. As regards the increase in price, SAIL informed the appellant that it was binding both on SAIL as also actual users like the appellant. The appellant pointed out that certain concerns were supplied the material even after 8.2.1982 and were not charged the increase in price of Rs. 800 per metric ton, and the appellant should also be supplied material without being charged the increase in price. Since SAIL refused to do so, the appellant filed Writ Petition before the High Court and contended that the appellant having registered the demand and opened its letter of credit prior to 8.2.82, it was not liable to pay the increased price; that SAIL was treating the appellant discriminately and that the increase in price itself was arbitrary. The High Court rejected all the three contentions and dismissed the Writ Petition.

Aggrieved by the High Court's judgment, the appellant preferred the present appeal.

In addition to the contentions raised before the High Court, it was contended before this Court that had the material been supplied to the appellant in time by SAIL when it was supplied to others, the increase in price would not have affected it.

Dismissing the appeal, this Court

HELD: 1. SAIL being only a canalising agency has to abide by the decisions on pricing taken from time to time by the Pricing Committee. SAIL has no authority to fix the price. In fact, if it releases items at prices other than the price fixed by the Pricing Committee, it would be committing a breach of the Government Policy. Hence at the time of the release of an item SAIL has to release it at the price fixed by the Pricing Committee. The application made by the appellant for registering itself for the imported G.P. sheets/coils makes it clear that the appellant is bound by the said policy. Admittedly, the release of the material in favour of the appellant is after 8.2.1981. [696-D,F]

2.1. The Pricing Committee met on 8.12.1981 for the first time to consider the increase in the price wherein a tentative decision to increase the price by Rs. 800 per metric ton was taken. It again met on 16.12.1981 to finally approve the said decision and it was resolved formally that the price would be increased by Rs. 800 per metric ton. The minutes of the meeting were circulated by the Ministry of Steel and Mines on

A 2.1.1982 and formal orders were issued in that behalf by the Chief Controller of Imports and Exports on 30.1.1982. The said orders were received by SAIL on 2.2.1982 at its Head Office in New Delhi, and on 8.2.1982 by its office at Calcutta and were implemented on the same day. SAIL could not increase the price unless formal written orders of the Government were received by it which it did on 8.2.1982. [697-D-F]

B 2.2. Between 16.12.1981 and 8.2.1982, certain parties were supplied the material at the old rate. However, even in respect of the said parties, supplementary invoices were raised in order to recover the increase in price of Rs. 800 per metric ton for the supplies made to them during that period. [697-G,H]

C 3. The foreign suppliers of G.P. Sheets could not supply the material since there was a fire and the supplier had invoked the *force majeure* clause of the contract. It is in these circumstances that the supply of 62 Metric Tonnes of G.P. sheets could not be made to the appellant. Hence the appellant cannot make a grievance in that behalf. [696-G,H]

D 4. Pricing is a part of the package of the import and export policy. It is not for the Court to decide whether the prices of particular items should be increased or lowered or fixed at particular rates. The Government of India and its Pricing Committees appointed to determine the prices for the commodities, have to take several factors into considerations including the indigenous market conditions of the material concerned and the effect of the prices on the production, availability and prices of the goods which are produced with the help of such imported material, and the price of the very same material or substituted material or its substitutes in the indigenous as well as international markets. However, it is evident from records that there was a need to increase the price of G.P. Sheets/coils. [698-C-E]

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5421 of 1983.

F From the Judgment and Order dated 18.11.82 of the Delhi High Court in C.W.P. No. 1685 of 1982.

G Bishambar Lal and Ms. Geetanjali Mohan for the Appellant.

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Joseph Vallapally, Harish Salve, G. Venkatesh Rao, C.V. Subba Rao, A
M.P. Sharma and D.N. Mishra for JBD & Co. for the Respondents.

The Judgment of the Court was delivered by

SAWANT, J. The appellant is an actual user of various items of steel B
as well of G.P. sheets/coils. The import of G.P. sheets/coils under the policy of the Government of India is canalised through the Steel Authority of India Limited [SAIL]. On 14.1.1981, the appellant applied to the SAIL for the supply of 600 metric tonnes of G.P. sheets/coils of 0.45 mm gauge. On 17.3.1981, the SAIL registered the demand of the appellant for only 300 metric tonnes of G.P. sheets/coils. On 13.11.1981, the SAIL sent a telegram C
offering the appellant 62 metric tonnes of G.P. Sheets/coils of 0.45 mm thickness subject to the appellant's acceptance reaching it before 19.11.1981, and also required the appellant to open an irrevocable letter of credit. By its telegram of 16.11.1981 the appellant conveyed its acceptance and on 26.11.1981 opened an irrevocable letter of credit in favour of the SAIL for a sum of Rs. 64,000. This demand of the appellant for the year D
1980-81 was to be supplied latest by 31.3.1981.

2. According to the appellant, during the period from April 1981 to November 1981, ignoring the claim of the appellant, the SAIL supplied imported G.P. sheets/coils to some parties but did not supply any quantum E
of G.P. sheets/coils to the appellant.

3. On 16.12.1981, a meeting of the Pricing Committee resolved to increase the price of the imported G.P. sheets/coils by about Rs.800 per metric ton. This decision of the Pricing Committee was communicated to the SAIL on 8.2.1982. F

4. In the meanwhile, on 12.1.1982, the SAIL offered to the appellant, 59 metric tonnes of G.P. sheets/coils of 0.5 mm thickness subject to the appellant's acceptance reaching the SAIL latest by 25.1.1982. The SAIL also required the appellant to establish an irrevocable letter of credit, although the requirement of the appellant was for G.P. sheets/coils of 0.45 mm thickness. On 24.1.1982, the appellant accepted the said offer and on 1.2.1982, opened an irrevocable letter of credit in favour of the SAIL for a sum of Rs. 3,10,000. G

5. By its letter of 16.3.1982, the SAIL wrote to the appellant that the H

- A Government of India had decided to increase the release price of G.P. sheets/coils imported/to be imported by Rs. 800 per metric ton.

6. By its letter of 19.4.1982, the SAIL offered another 211 metric tonnes of G.P. sheets/coils and required the appellant to confirm the acceptance by 30.4.1982 and also to establish a fresh letter of credit covering 106.5 per cent of C&F value plus Rs. 800 per metric ton (towards increase in release price of imported G.P. sheets/coils). On 2.5.1982, the appellant accepted the offer of 211 metric tonnes of G.P. sheets/coils but protested against the increase in price of Rs. 800 per metric ton and requested for allowing the opening of irrevocable letter of credit at the actual price.
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7. It appears that by its letter of 8.5.1982, the SAIL informed the appellant-company that the foreign suppliers had invoked the *force majeure* clause in the contract due to fire and had not supplied 62 metric tonnes of G.P. sheets/coils of 0.45 mm thickness, and therefore, the said supply could not be made. As regards the increase in price by Rs. 800 per metric ton, the SAIL wrote to the appellant that the release price of imported G.P. sheets/coils had been increased by the Pricing Committee constituted under the Import Trade Control Policy for the year 1981-82 and as such the increase was binding both on the SAIL as well as the actual users like the appellant. The SAIL, therefore, asked the appellant to take necessary action to enhance the value of the letters of credit established by them to enable the respondent-SAIL to release material to the appellant when it arrived in India.
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8. According to the appellant, the SAIL had supplied to certain concerns, viz., Irshad Enterprises, Best Trunk House and Steel House, G.P. sheets/coils on 20.2.1982, 22.2.1982 and 28.2.1982 respectively without charging the increased price of Rs. 800 per metric ton. Since the SAIL refused to supply the material except at the increased price, the appellant approached the Delhi High Court by way of a writ petition raising three contentions. The first contention was that the appellant having registered its demand and opened its letter of credit prior to 8.2.1982, it was not liable to pay the increased price of Rs. 800 per metric ton. The second contention was that the SAIL was treating the appellant discriminately inasmuch as they had supplied others G.P. sheets/coils at the non-enhanced price. The last contention was that the increase in price itself was arbitrary and the
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reasons given for the increase were neither germane nor justified. The High Court rejected all the three contentions and dismissed the petition. Hence this appeal. A

9. In addition to the contentions raised before the High Court, the appellant has raised one more contention before us, viz., that although the appellant's demand was registered, during the relevant period, it was ignored by the SAIL and others were supplied the material during the period from April 1981 to November 1981. Had the material been supplied to the appellant during the said period, the increase in price would not have affected it, assuming that the increase was justified. B

10. We find no substance in any of the contentions. In the first instance, as paragraph 65 of the Import Policy for the year 1980- 81 shows, in the case of the items listed in Appendix 8 of the Handbook of Import-Export Procedures - 1980-81 [which include the present material], the eligible actual users had to register their 12 months' requirements with the canalised agency - which is the SAIL in the present case - together with earnest money calculated at 2 per cent of the sale value of the quantity registered or Rs.50,000 whichever is less. Paragraph 66 states that the canalising agency would take financial cover as it considered necessary before arranging the imports. Paragraph 72 states that there would be a Pricing Committee under the chairmanship of the Chief Controller of Imports and Exports for determining/prescribing the selling price of canalised items from time to time. Paragraph 73 states that imports, distribution and pricing of the items would be governed by the concerned policy of the Government. It may be added here that on the Pricing Committee, representative of the SAIL was only an invitee member. C D E

11. Paragraph 151 of the Handbook on Import Policy - 1980-81 states that under the Import Policy - 1980-81, a canalising agency is expected to take into account the availability of indigenously produced material before imports are arranged. It further stated that no person registering his requirement with the canalising agency will have the right to ask for a particular brand or make. Paragraph 152 then states as follows: F

"152. An Actual User, while registering his requirements for allotment of a canalised item, should indicate to the canalising agency the phased programme of delivery on a quarterly basis - or monthly if so laid down by the G H

A canalising agency. The canalising agency will scrutinise such registration and indicate within a period of 90 days, the arrangements it would be able to make for effecting supplies. In case, the canalising agency does not (a) give any such indication for a period of delivery at least three months ahead from the date of registration or (b) effect deliveries as registered with it and for which it has or could have taken financial cover as laid in the Import Policy, 1980-81, the Actual User may approach the CCI&E (Monitoring Committee), New Delhi, for appropriate relief by way of direct imports."

C 12. It is clear from paragraph 72 of the Import Policy that the Government of India had constituted a Pricing Committee for determining/prescribing the selling price of the canalised items from time to time. There are various considerations which go into revising the price of the canalised items, from time to time. The Pricing Committee is independent of the SAIL whose representative is only an invitee member to the Committee's meetings, and the SAIL being only a canalising agency has to abide by the decisions on pricing taken from time to time by the Pricing Committee. The SAIL has no authority to fix the price. In fact, if it releases items at prices other than fixed by the Pricing Committee, it would be committing a breach of the Government Policy. Hence at the time of the release of an item the SAIL has to release it at the price fixed by the Pricing Committee. It is not disputed that the appellant was bound by the Import Policy. In fact, the application made by the appellant for registering itself for the imported G.P. sheets/coils makes it clear that the appellant is bound by the said policy. Hence, the appellant cannot make any grievance that they had to pay the price of the material as was prevalent at the time of the release of the material. Admittedly, the release of the material in favour of the appellant is after 8.2.1981.

G 13. As regards the contention that the appellant was not supplied 62 metric tonnes of G.P. sheets, as has been explained in the counter-affidavit filed on behalf of the SAIL, the foreign suppliers of the said material could not supply the same since there was a fire and the supplier had invoked the *force majeure* clause of the contract. It is in these circumstances that no supply of the material could be made to the appellant. Hence the appellant cannot make a grievance in that behalf. The contention that during the

period from April 1981 to November 1981, others were supplied whereas the appellant was ignored the same is untenable. As has been pointed out on behalf of the SAIL in its counter-affidavit, all the said suppliers had registered their demands prior to 8.2.1982. They have also given the dates on which the said concerns had registered their demands which bear out the truth of their statement made in the counter-affidavit.

14. The contention that three enterprises, viz., M/s. Irshad Enterprises, Best Trunk House and Steel House were supplied the material at non-enhanced price, the respondent-SAIL in its counter-affidavit has pointed out that in respect of M/s. Irshad Enterprises, a sum of Rs.20,000 had not been charged through inadvertent mistake in calculation. It had no relevance whatsoever to the increased price of Rs. 800 per metric ton. As soon as the the said mistake was discovered, a debit note was raised against the said party to recover the amount. It has also been pointed out that the increased price of Rs. 800 per metric ton had been charged from all the said three parties and the allegation in that behalf is baseless and incorrect. As regards the contention that the appellant had registered its demands prior to 8.2.1982, as has been stated above, the Pricing Committee met on 8.12.1981 for the first time to consider the increase in the price wherein a tentative decision to increase the price of Rs.800 per metric ton was taken. It again met on 16.12.1981 to finally approve the said decision and it was resolved formally that the price would be increased by Rs.800 per metric ton. The minutes of the meeting were circulated by the Ministry of Steel and Mines on 2.1.1982 and formal orders were issued in that behalf by the Chief Controller of Imports and Exports on 30.1.1982. The said orders were received by the SAIL on 2.2.1982 by its head office in New Delhi, and on 8.2.1982 by its office at Calcutta and were implemented on the same day. The SAIL could not increase the price unless formal written orders of the Government were received by it which it did on 8.2.1982.

15. As regards the contention that between 16.12.1981 and 8.2.1982, certain parties were supplied the material at the old rate, it is pointed out on behalf of the respondent that till 8.2.1982 they could not charge the price at the enhanced rate. However, even in respect of the said parties, supplementary invoices were raised in order to release and recover the enhanced price of Rs. 800 per metric ton for the supplies made to them during that period. In fact, as against the amount of Rs. 2,36,895 [approx.]

A being the total value at the rate of Rs.800 per metric ton, an amount of Rs.80,868 has already been recovered from the said five parties to clear 101,085 metric tonnes of G.P. sheets/coils sold during the said period. From the remaining 8 parties, an amount of Rs.1,56,027/- is due on account of the said increase, the quantity involved being 195,034 metric tonnes. One of the reasons why the said amount has yet to be recovered is that the concerned eight parties are not regular customers of the SAIL and have not come forward for further imports through it. However, the counter-affidavit states that the SAIL is taking all necessary steps available to it in law to realise the aforesaid amount from the said eight parties as well.

C 16. Coming to the last contention, viz., that there is no justification for increase in the price, suffice it to say that it is not for the Court to decide whether the prices of particular items should be increased or lowered or fixed at particular rates. The Government of India and its Pricing Committees appointed to determine the prices for the commodities, have to take several factors into considerations including the indigenous market conditions of the material concerned and the effect of the prices on the production, availability and prices of the goods which are produced with the help of such imported material, and the price of the very same material or substituted material or its substitutes in the indigenous as well as international markets. Pricing is a part of the package of the import and export policy. It does appear, as has been stated in the counter-affidavit filed on behalf of the respondent-SAIL that at the relevant time there was a need to increase the price of G.P. sheets/coils.

F In the circumstances, we are of the view that the justification or the relevance of the increase in the price cannot be attacked by the appellant.

17. In the result, the appeal fails and is dismissed with costs.

G.N.

Appeal dismissed.