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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 244/2010

Judgment pronounced on April 10, 2012

POWER GRID CORPORATION OF INDIA Petitioner
Through: Mr.S.B.Upadhyay, Advocate.

versus

L.S. CABLE Respondent
Through: Mr.Sanjay Bansal, Advocate

**CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI**

G.S.SISTANI, J. (ORAL)

1. Power Grid Corporation of India (petitioner herein) has filed the present petition under Section 34 of the Arbitration & Conciliation Act, challenging the award dated 09.01.2010 passed by the arbitrator. The facts of the case as noticed by the learned arbitrator are as under:
2. That the respondent is a multi-national corporation registered under the Korean laws and has its project office in India at New Delhi. Respondent is engaged in the business of manufacturing, installing and commissioning of power underground cables and has taken up such projects in many countries. The petitioner is a Government company and Central Transmission Utility notified under Section 38 of the Electricity Act, 2003. The petitioner invited tenders for Over Head Fabric Optic Cable in 4 packages, namely 1A, 2A, 1B and 2B

inter alia for the installation, testing and commissioning of the optic fibre cabling and associated hard wares. The subject matter of the dispute before the learned arbitrator was with respect to packages 1B and 2A only. The petitioner was in the process of constructing a worldwide back-bone telecommunication network to connect the main cities in India. The scope of work for the aforesaid contracts included survey, planning, design, engineering, supply, installation, termination, testing and commissioning of optic fibre cabling, all associated hardware, accessories fittings, in line splice enclosures etc. and also fibre optic project cabling and fibre optic distribution panel. The invitation to bid was issued on the 14th of July, 2000. Pursuant thereto the respondent submitted its bid on 27th of February, 2001 after having obtained the necessary bid documents along with conditions of contract, technical specifications, and bind forms/ price schedules etc. The respondent submitted its bid on 27.02.2001 duly filled as required by instructions to the bidders (hereinafter referred to as ITB) which in terms require the bidder to quote prices for “installation services” separately. Paragraph 11.4 (d) of the ITB provided as under:

(d) “Installation Services shall be quoted separately (Schedule No.4) and shall include rates or prices for all labour, contractor’s equipment, temporary works, materials, consumables and all matters and things of whatsoever nature, including operations and maintenance services, the provision of operations and maintenance manuals, training etc. where identified in the bidding documents, as necessary for the

proper execution of the Installation services, including all taxes, duties, levies and charges payable in the Employer's country as of twenty eight (28) days prior to the deadline for submission of bids."

3. The respondent's bid were "fixed price bid" for PDT 1B and PDT 2A projects. The bids were opened on 27th February, 2001 itself and the respondent was declared to be the successful bidder. Accordingly, two contracts were awarded to the respondent by the petitioner vide brief notification of award dated 10.04.2003. Both the contracts consisted of "off-shore contract" and "on-shore contract". The subject matter of the present proceedings relate to the on-shore contract. This was followed by post bid discussions held between 14.04.2003 and 28.04.2003. Two separate but inter-linked agreements were signed on 22.05.2003 containing almost identical terms.
4. On June 20, 2003 the Government of India issued a notification whereby "Commissioning and Installation" was brought under the service tax net. The government fixed 1.7.2003 as the date from which the levy of service tax on the said service was to come into effect.
5. The respondent sought an opinion of M/s.Ernst & Young, from their tax consultant on the question whether the services rendered by the respondent were covered by the notification dated 20.06.2003. They were advised that the contracts in question were covered by the aforesaid notification and hence the same were liable for imposition of service tax on the commissioning and installation services

rendered by the respondents. In view of the issuance of the notification and the legal opinion obtained by the respondent, in its invoices in relation to installation work executed after 1.7.2003 the respondent included service tax at the applicable rate. These invoices have been brought on record for different periods apart from the service tax returns etc. Though the invoices included the service tax element, petitioner paid only the principal amount and not the service tax claimed by the respondent which it had paid directly or through its sub-contractor. By May, 2006 the service tax dues amounted to Rs.3.30 crores approximately. The negotiations and meetings brought about no result. Ultimately by their communication dated 25.05.2006 the petitioner formulated two options for processing the claims of the respondent. This was however, not acceptable to the respondent and by its communication dated 21.09.2006 respondent refused to accept either of the options and claimed full reimbursement. The letter evoked no response from the petitioner, and therefore the respondent wrote to the petitioner to convey its final decision regarding the reimbursement of the amount of service tax paid by it. By its communication dated August 20, 2007 the petitioner returned the original service tax bills contending that the claims were not acceptable for the reasons that all the activities were scheduled for completion as per the approved L2 network of the LOA prior to effective date of service Tax Act, i.e. 10.09.2004.

6. In this background the respondent called upon the petitioner to settle the dispute relating to refund of the amount paid by way of service

tax failing which the respondent would be compelled to take necessary legal action. However, there was no response from the petitioner. On 22.05.2008 the respondent invoked clause 6 of the general conditions of contract (hereinafter referred to as G.C.C.) and as provided, referred the matter to the named adjudicator. Unfortunately, the named adjudicator by his reply dated 26.07.2008 expressed his inability to act as an adjudicator. The respondent again wrote to the petitioner on June 09, 2008 requesting that another adjudicator may be jointly appointed, but this request also was not responded to. Under these circumstances, the respondent applied to the Supreme Court under Section 11(6) of the Arbitration and Conciliation Act, praying that the court may be pleased to appoint an arbitrator. The Hon'ble Supreme Court vide its order dated 29.01.2009 appointed a former Judge of the Supreme Court, as the sole arbitrator to adjudicate the disputes which have arisen between the parties.

7. After the pleadings were filed, following matters were formulated for consideration of the tribunal:
 - (i) Whether having regard to the provisions of the Contract and scope of works, the “installation and Commissioning” works executed by the claimant are covered under clause 2.6 of the Notification dated 20.06.2003 issued by the Ministry of Finance, Govt. of India, or any other notification issued by the competent authority or any Act, Rule, Regulation etc. enacted, framed or issued by the competent authority?

- (ii) Whether having regard to scope of Works under the Contract the petitioner is liable to pay/ reimburse/ refund the amount of applicable Service Tax on the payments made by the petitioner for installation and commissioning works executed by the Claimant under the Contract?
- (iii) If 2 is answered in the affirmative to what amount is the respondent entitled?
- (iv) Whether the contract is a firm price contract and if so the liability to pay service tax is on the petitioner, or is to be borne by the respondent.

8. Mr. Uppadhyay, Learned Senior Counsel for the petitioner submits that the award passed by Learned Arbitrator is against the public policy of India and is liable to be set aside. It is submitted that the Learned Arbitrator has failed to appreciate that as per Section 68 of The Finance Act, it is the service provider (respondent herein, namely the Claimant in the impugned award) who is primarily liable to bear the burden of service tax and the liability of the said burden may be transferred to the service recipient (petitioner herein) only when the contract between the parties so provides. It is further submitted by the Learned Counsel for the petitioner that there is a failure on the part of the Learned Arbitrator to appreciate the combined effect of the bid documents, Special Conditions of Contract and the provisions of the agreement which provides as follows –

- (i) The Claimant, respondent herein, has quoted its bid on the fixed price basis;

(ii) The Claimant (respondent herein) is liable to bear the burden of all taxes, duties, license fees etc;

(iii) The Claimant (respondent herein) has to include in its bid price all duties and levies for any items used for their consumptions or dispatch directly to the employer from their sub supplier;

(iv) Any taxes, duties and levies additionally payable will be to the contractors account and no separate claim shall be entertained by the employer;

(v) By Circular dated 28.12.2002 that is, prior to signing of the agreement, the Minister of Finance and Company Affairs, Department of revenue of the Government of India has modified that the services rendered by the consulting engineers shall be taxable within the concept of service tax;

(vi) The contract price was firm and fixed and as stipulated in Appendix -2 to the contract it was not subject to any price adjustment for the entire duration of the contract.

9. It is next contended that the provisions of the contract binding upon the parties, does not provide that the petitioner has to bear the burden of service tax, as the service recipient. Learned Counsel for the petitioner further submits that since the payment of service tax is the prime responsibility of the service provider under Section 68 of The Finance Act, 1994, the burden of payment of service tax cannot be shifted to the Power Grid Corporation in absence of specific provision in the contract and since there is no specific provision of the contract, the petitioner was not liable to bear the burden of service tax.
10. Mr. Uppadhyay, Learned Senior Counsel for the Petitioner further submits that there is a failure on the part of the Arbitral Tribunal to

appreciate the various provisions of the General Conditions of Contract as well as the Special Conditions of Contract. In support of his arguments, Learned Counsel for the petitioner draws attention of this Court to some relevant provisions of the contract in question which are reproduced as under:-

“Clause 9 of the Special Conditions of Contract modifies Clause 11 of the General Conditions of Contract which now stands as “The contract price shall be a firm price basis and shall not be subject to any alteration except in the event of a change in the facilities. The contract price shall be adjusted on account of variation in quantity in accordance with Clause 39 of GCC read in conjunction with Clause 31 GCC.”

11. The term “facilities” is also defined in Clause 1.1 GCC to mean the plant and equipment to be supplied and installed as well as the installation services to be carried out by the contractor under the contract.
12. Clause 12 of the Special Conditions of Contract which is in modification of Clause 14 of the General Conditions of Contract, and more particularly Clause 14.2 GCC as modified in the SCC states that in case of contract for domestic supplies and services, the contractor shall be entirely responsible for payment of all taxes, duties, license fees etc incurred until delivery of the contracted supplies to the employer.
13. Clause 14.5 GCC as modified by Clause 12 SCC further provides as follows:- GCC 14.5 – In case of local supplies and services, all customs duties and levies, duties, sales tax payable on equipments, components, sub assemblies, raw materials and any other items used

for their consumption or dispatched directly to the employer from their sub supplier (that is, sale in transit at concessional rate) shall be included in the bid price and any such taxes, duties, levies additionally payable will be to contractor's account and no separate claim on this behalf will be entertained by the employer. Employer, shall, however, issue requisite sales tax declaration forms.

14. Attention of the Court was also drawn to Clause 36 of the General Conditions of Contract, which provided for the effect of change in law and regulations subsequent to the signing of the Contract which was modified by Clause 28 of the Special Conditions of Contract and is the relevant Clause upon which the resolution of the present controversy depends, which reads as under –

“Changes in laws and regulations (GCC Clause 36) GCC 36.1 – If, after the date twenty eight (28) days prior to the date of bid submission, in the country where the site is located, any law, regulation, ordinance, order or by law, having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the contractor and / or the time for completion, the contract price shall be correspondingly increased or decreased, and / or the time for completion shall be reasonably adjusted to the extent that the contractor has thereby been affected in the performance of any of its obligation under the contract. However, these adjustments, would be restricted to direct transactions between the employer and the contractor and not on procurement of raw materials, intermediary, components etc by the contractor. Further, no adjustment of the contract price shall be made on account of variation in deemed export benefits. Notwithstanding the foregoing such additional or reduced costs shall not be separately paid or credited if the same has

already been accounted for in the price adjustment provisions where applicable, in accordance with the Appendix -2 of the contract agreement”.

15. Further, elaborating his arguments Learned Counsel for the petitioner submits that the provisions of the Contract, do not provide that it is the petitioner who has to bear the burden of service tax as the service recipient, thus there is a failure on the part of the Learned Tribunal to appreciate that the petitioner has relied upon Clause 36 GCC as modified by Clause 28 of SCC providing for the effect change in laws and regulations. It is further contended that even this Clause does not fasten the liability of service tax upon the petitioner for the following reasons-

(i) If because of the imposition of service tax, the cost and expenses of the contractor increases or decreases it has to be reasonably adjusted to the extent that the contractor has thereby been affected in the performance of any of its obligation under the contract. However, in the present case, it is further provided that any additional reduced cost shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable in accordance with Appendix -2 to the contract agreement.

(ii) The Appendix II to the contract agreement does not provide for applicability of price adjustment provisions hence the change in law imposing service tax would not be on account of the respondent in terms of Clause 26 GCC read with Clause 28 of the Special Conditions of Contract.

(iii) Even if the taxes and duties do not form the component of contract price, these are definitely the factors that increases and decreased the cost and expenses and since such increase or decrease in the cost and expenses can be accounted for only in accordance with the price adjustment formula, wherever

applicable, the additional burden of service tax would not be payable by the respondent because the price adjustment formula does not apply in the present case by virtue of Appendix II to the Agreement.

16. It is next contended by the Learned Counsel for the petitioner that the Tribunal has also failed to appreciate that such eventuality is not unforeseen in a construction contract and therefore, the respondent itself submitted a no due certificate dated 02.02.2009 certifying that they have received all payments in respect of the contract in question and have no claims whatsoever, pending with the Power Grid, they also confirmed that they would have no claim against the contract in question in future.
17. In support of his arguments Mr. Uppadhyay, Learned Senior Counsel for the Petitioner places reliance on **Numaligarh refinery Ltd Versus Daelm Industrial Company Ltd** reported in **2007 (8) SCC 466= 2007 (4) RAJ 257 SC, Para 10**, wherein the Hon'ble Supreme Court of India, while taking into account the various provisions of the bid conditions held that there was no scope for giving any benefit of subsequent fluctuation on the exchange rates. Once the price is fixed there is no provision for giving any benefit for the fluctuation in terms of the contract and in that case the claimant cannot raise the claim for excess payment made toward the custom duty.
18. Further reliance is placed on **Union of India Versus Bhardwaj Enterprises** reported in **2009 (157) DLT 444; Para 10 to 16**, wherein the Division Bench of Delhi High Court has held that the subsequent increase in the sales tax after the awarding in the contract

would not be payable since the price valuation clause was not applicable and the intent of the contracting parties was clear that the contract was a fixed price contract providing for no variation whether on account of increase or decrease in the rates of taxation.

19. Reliance is also placed on **Ajudia Distillery Versus Delhi Administration** reported in **1998 (1) RAJ 316 (Delhi)** wherein similar view was expressed that enhancement in price on account of increased export duty would not be payable to the contractor in absence of any specific provision in the contract. (Para 5, 9 &10).
20. Learned Counsel for the petitioner also places reliance on **Poonam Investment Company Private Ltd Versus ONGC** reported in **1988 (1) RAJ 491**, wherein a Division Bench of the Bombay High Court had held that in a fixed / lump sum price contract, the claim of the contractor for increase in the cost of the lifts were not valid.
21. Further elaborating his arguments, it was argued by the Learned Counsel for the petitioner that the impugned award dated 09.01.2010 was delivered on the admissibility of the claim of service tax. Attention of the Court is drawn to the fact that, subsequently to the rendering of the award, the Government of India, Ministry of Finance in the Department of Revenue, Central Board of Excise and Customs issued a clarification dated 24.05.2010 by which the taxability of service tax with respect to laying of electric cables was taken away from Section 65 of The Finance Act, 1994. In support of this argument the said clarificatory circular, being circular no 123/5/2010 – TRU has been filed by the petitioner as Annexure R/1 with the rejoinder. Attention of the Court was drawn by the Learned

Counsel for the petitioner to the relevant Para 4 of the said circular which reads as follows - “that the pending disputes/ cases may be decided based on the clarification contained in the said circular”. Pursuant to the said circular as on the date there is no service tax payable on laying of electric cables. In support of his said argument Mr. Uppadhyay, Learned Senior Counsel for the Petitioner places reliance on **Suchitra Components Ltd Versus CCE** reported in **2007 (8) ELT 321 (SC)** wherein the Hon’ble Supreme Court of India has held that a “beneficiary circular has to be applied retrospectively”. Relying upon the above observation of the Apex Court it is further requested by the Learned Counsel for the petitioner to the Court to consider the said circular and pass an appropriate order authorizing the petitioner to seek the refund of the payments against the service tax from the competent authority on behalf of the respondent if this Hon’ble Court upholds the award.

22. It is next submitted by the Learned Counsel for the Petitioner that in the impugned award, the Learned Arbitrator has allowed a sum of Rs. 15, 80,089/- as interest upon interest which is not permissible in law. In support of his argument Learned Counsel for the petitioner places reliance on **State of Haryana Versus S.L. Arora** reported in **2010 (3) SCC 690** wherein it has been held that interest on interest or compound interest is not permissible under Section 31 (7) of The Arbitration and Conciliation Act, 1996 (26 of 1996) (“the said Act” for short) since the expression “sum directed to be paid by an arbitral award” in Section 31(7) (b) of the said Act refers to an award of sum on substantive claim that is, principal amount awarded and it does

not refer to interest awarded on the principal amount. Relying upon the observation of the Apex Court in the cited case it is submitted by the Learned Counsel for the petitioner that a sum of Rs. 15, 80,089/- is not admissible against the petitioner.

23. It is next contended by the Learned Counsel for the petitioner that in the said decision the Apex Court has further held that the grant of interest at the rate of 18% post award till the actual payment is also the discretion of the arbitration and cannot in all cases be allowed as an imperative of the statute. (Para 24.6, pg 701)
24. Mr. Uppadhyay, Learned Senior Counsel for the Petitioner further argues that the cost of Rs. 35, 00,000/- imposed upon the petitioner is too exorbitant and takes into account many extraneous events such as fees paid to M/s Ernst and Young Pvt Ltd. Etc which cannot be allowed since the petitioner had raised frivolous objections to the claim and has issue of interpretation of certain provisions of the contract and applicable law which had material bearing in the arbitral proceedings. It is next contended that the defence taken by the petitioner was neither imaginary nor vexatious.
25. It is further argued that in any case Section 28 (1) (a) of The Arbitration and Conciliation Act, 1996 (26 of 1996) mandates the Arbitrator to decide the arbitral dispute in accordance with the substantive law for the time being in force in India. Sub section 3 of Section 28 of The Arbitration and Conciliation Act, 1996 (26 of 1996) also provides that in all cases the Arbitral Tribunal can decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transactions. It is

next contended that the present case is not only contrary to the terms of the contract but also negates the substantive provisions of law enumerated in the Finance Act, 2002 regarding the payability of service tax.

26. It is further submitted by Mr. Uppadhyay, Learned Senior Counsel for the Petitioner that in the impugned award, Learned Sole Arbitrator ignoring the contractual and legal provisions had awarded the amount in question. It is next submitted that the impugned award is patently unjust, against the public policy, and otherwise bad in law and the same is accordingly liable to be set aside in terms of Section 28 and 34 of The Arbitration and Conciliation Act, 1996 (26 of 1996) read with the decision of the Hon'ble Supreme Court of India in **DDA Versus R. S. Sharma** reported in **2008 (13) SCC 80**.
27. Mr. Sanjay Bansal Learned Counsel for the respondent in support of his arguments submits that the present objection petition deserves to be dismissed as the petitioner has failed to explain as to on which specific grounds provided under Section 34 (2) of The Arbitration and Conciliation Act, 1996 (26 of 1996) the impugned award should be set aside. The Learned Counsel for the respondent further submits that the impugned award is a speaking and well reasoned award which is legally sustainable and fully justifiable. It is next contended that the claims awarded are within the purview of the agreement and not in conflict with the public policy of India.
28. It is further argued by the Learned Counsel for the respondent that the law with regard to section 34 of The Arbitration and Conciliation Act, 1996 (26 of 1996) is well settled and the jurisdiction of the

Court to set aside an arbitral award is very limited and as such the Court while dealing with the objections against an award under section 34 of the said Act does not function as a Court of appeal against the award. He next submits that in the light of the well settled law with respect to Section 34 of the said Act the arguments which were raised by the petitioner against the claims, before the arbitral tribunal, cannot be reiterated in the objection petition, before this Court unless such arguments fall within the ambit of Section 34 (2) of the said Act.

29. Mr. Sanjay Bansal, counsel for the respondent next that the scope of judicial review of the award passed in the Arbitral proceedings, is limited to Section 34 (2) of The Arbitration and Conciliation Act, 1996 (26 of 1996) and the grounds taken by the petitioner in the present OMP does not fall under any of the provisions of section 34 (2). In support of his argument Learned Counsel for the respondent places reliance on the **Fiza Developers Versus ACMI** reported in **2009 (11) SCALE 371** wherein it has been held by the apex Court that the scope of enquiry under Section 34 is restricted to consideration whether any ground mentioned in Section 34 (2) exist for setting aside the award. Further reliance is placed on **ONGC Versus Saw Pipes** reported in **2003 (5) SCC 705** & **Gail Versus Bansal Contractors** reported in **2010 (10) AD (Delhi) 291** wherein it has been held that the arbitral Tribunal is the master of facts and the award made by it cannot be interfered with except on specific grounds provided for under law.

30. Mr. Sanjay Bansal, counsel for the respondent elaborating his

arguments further submits that the petitioner in his objection petition had advanced the arguments which had already being argued before the arbitrator. He next contends that it is only after considering the evidence on record that the Learned Arbitrator had given his detailed findings on each and every point and the same are now again raised by the petitioner before this Court. In support of his plea the attention of the Court was drawn by the Learned Counsel for the respondent on the below reproduced relevant portions which are raised by the petitioner in his objections against the impugned award –

- (a) Under Section 68 of the Finance Act the primary responsibility of payment of service tax is upon the service provider hence Power Grid cannot be made liable to pay service tax unless so provided in the contract;
- (b) Technical Consultancy Services was within the service tax net since July 1997, hence the contractor was aware that service tax is applicable on the contract before signing of the contract;
- (c) Contract was a firm price contract hence the price was not subject to alteration except in the event of change in facilities, in view of Appendix-2 to the contract;
- (d) That the interest awarded by the arbitrator under sub clause (c) is award of interest on the interest which is not permissible in law;
- (e) The cost awarded under clause (d) to the tune of Rs. 35 lacs is exorbitant and it includes payment made to E & Y the Chartered Accountant firm for opinion;
- (f) As per ground J of the objections raised by the petitioner the respondent (namely, the Claimant in the award) submitted no dues certificates dated 2.2.2009 certifying that they have received all the payments. As such no claim is maintainable against the petitioner (respondent therein).

31. It is next submitted by the Learned Counsel for the respondent that although the primary liability of paying the service tax to the Government is upon the service provider but the ultimate burden of this taxation is upon the user of the service. This situation is explained by the Learned Counsel for the respondent with the help of an illustration which says that as in the case of electricity or telephone services the concerned organization pays the service tax to the government but recovers it from the user in the bills. Similarly, in the case between the Claimant (respondent herein) and the Respondent (petitioner herein), the respondent (Claimant therein) has deposited the service tax and charged it in its invoices to the petitioner particularly in terms of Clause 36 of the agreement as this tax has been imposed by change of law on 20.6.2003 that is, after signing of the agreement on 22.5.2003.
32. Attention of the Court is also drawn by Mr. Sanjay Bansal Learned Counsel for the respondent on the fact that as per the second argument of the petitioner, the same has been dealt with by the Learned Arbitrator in detail from para 28 onwards of the award in question and the Learned Arbitrator has after considering the material placed on record by the parties, had given a definite finding on the said point in question which is now again reiterated by the petitioner herein in his objection petition. Learned Counsel for the respondent further submits that as far as the issue of “firm price contract” is concerned the same has also been dealt with by the Learned Arbitrator in detail from para 38 onwards which is also now

again reiterated by the petitioner here in his objection petition.

33. Mr. Sanjay Bansal Learned Counsel for the respondent next submits that as far as the arguments of the petitioner with regard to interest and costs is concerned the same is covered under Section 31 sub section (7) of The Arbitration and Conciliation Act, 1996 (26 of 1996) wherein the power to fix the same has been given to the Arbitrator. He further submits that as far as the last argument of the petitioner regarding the no dues/claims in view of an alleged letter dated 2.2.2009 is concerned the same is a twisted statement of fact as the dispute has already been referred to the Arbitration by that time with the consent of the parties on 29.1.2009. In support of his arguments the Learned Counsel for the respondent relies on list of dates and submissions filed before the Arbitrator.
34. It is therefore submitted by Mr. Sanjay Bansal Learned Counsel for the respondent that the award in question is a speaking and well reasoned award, legally sustainable and fully justifiable, awarding the claims which are within the purview of the agreement, accordingly the same is not in conflict with the public policy of India and is not liable to be set aside as prayed by the petitioner. It is next submitted that as the objections raised against the award by the petitioner does not fall within any of the specific grounds mentioned in Section 34 (2) of The Arbitration and Conciliation Act, 1996 (26 of 1996) and in the light of the well settled law with regard to the interference by the Court with an arbitral award which is very limited, the present objections raised by the petitioner deserves to be dismissed

35. The bone of contention between the parties is the payment of service tax. Admittedly, on 20.06.2003 the Government of India issued a notification whereby commissioning and installation was brought under the service tax net. The Government fixed 01.07.2003 as the date for levy of service tax. This was a date subsequent to the signing of the agreement between the parties which was on 22.05.2003. Admittedly, payment of service tax has not been included in the contract signed between the parties, as the same was not in existence on the date of signing of the agreement. The case of the petitioner before the learned arbitrator and as argued before this court is that clause 9 of the GCC read with Article and Appendix 2 of the contract agreement clearly stipulates that the contract price shall be “fair price basis” and shall not be subject to alteration except in the event of change in the facilities. However, there is no denial to the fact that Government of India on 20.06.2003 issued a notification bringing the work of commissioning and installation within the ambit of service tax w.e.f. 01.07.2003.
36. Mr.Upadhyay, counsel for the petitioner has argued that since the agreement between the parties was on fair price basis, there was no responsibility of the petitioner either to pay or refund the service tax, which already stands paid by the respondent. As per the award the evidence was led in the matter and the arbitrator has also relied upon the opinion of M/s.Ernst & Young. The learned arbitrator has noticed that the last date of submission of bids by the respondent was 27.02.2001 and the bids were open the same day. The instructions to the bidders provided in Clause 11.4 (d) are as follows :

“11.4 (d) Installation Services shall be quoted separately (Schedule No.4) and shall include rates or prices for all labour, contractor’s equipment, temporary works, materials, consumables and all matters and things of whatsoever nature, including operations and maintenance services, the provision of operations and maintenance manuals, training, etc. where identified in the bidding documents, as necessary for the proper execution of the installation services, including all taxes, duties, levies and charges payable in the Employer’s country as twenty-eight (28) days prior to the deadline for submission of bids.”

37. As per clause 11.4 (d), the bidders were required to quote separately for installation services and also was required to include in its bid taxes, duties, levies, etc. as on 28 days prior to the deadline for submission of bids. Accordingly, the bid could only include those taxes, duties, levies which exist as on 30.01.2001. Taking into consideration the fact that on the said date, service tax had not been levied, the respondent could not have included service tax in its bid as the notification was issued by the Government of India only on 20.06.2003 and levy of service tax on commissioning and installation was to be effected from 01.07.2003. The respondent admittedly has been raising invoices to the petitioner including the service at the prescribed rates. It is also not in dispute that the respondent has paid the service tax.
38. Counsel for the respondent has relied upon the definition of “contract price” in Article 2 of the Agreement as also on the General Conditions of Contract and the Special Conditions of Contract and

submitted that it did not preclude the inclusion of ‘such other sums, as may be determined in accordance with the terms and conditions of the contract’.

39. The sum and substance of the argument of Mr.Bansal, counsel for the respondent is that the contracts have to be carefully scrutinized to find whether apart from the contract price mentioned in the contract any other sum was payable in accordance with the terms and conditions of the contract. Counsel for respondent has relied upon clause 36 of General Conditions of Contract as modified by clause 28 of the Special Conditions of Contract and submitted that even the modified clause supported the claim of the claimant. Counsel further submitted that though clause 14.4 of the General Conditions of Contract was omitted by clause 12 of the Special Conditions of Contract that did not preclude the claimant from relying upon clause 36 of General Conditions of Contract as modified by Special Conditions of Contract.
40. The learned arbitrator has given a detailed finding on this issue, while relying upon various clauses of the agreements, the General Conditions of Contract and the Special Conditions of Contract as also Appendix-1 to the contract. While particularly relying upon clause 36 of the General Conditions of Contract, as modified by Clause 28 of Special Conditions of Contract, the arbitrator has held as under:

“48. In order to appreciate the rival contentions one must understand what is meant by the contract price being firm and fixed. When tenders are invited, bidders are expected to quote

their rates and price having regard to all the instructions contained in the ITB given to bidders. After taking everything into account a bid is made by a bidder. All the bids are thereafter scrutinized and one of the bidders is declared successful having made the best bid. It would be unfair to other bidders if subsequent to the acceptance of the bid the bidder is permitted to make any alteration in the contract price quoted by him. Therefore, as a normal rule, contract price must remain firm and fixed unless there be any other provision in the contract agreement which permits any modification in given circumstances. Obviously, the situations in which such modifications may be allowed, generally speaking, must be fair to all concerned and must apply to all the bidders. The GCC and SCC were available to the bidders even before they submitted their bids, and one can therefore assume that they had knowledge of their contents. So understood, the fixed price under the agreement cannot be changed unless there be any other provision in the agreement permitting such change in given circumstances. As the definition of contract price in the agreements in question would suggest, the fixed price has been defined with a condition that the contract price shall include “such other sums as may be determined in accordance with the terms and conditions of the Contract”. Thus, a contractor who has made a bid must take into account his costs, expenses, etc. apart from the tax, charges, levies, etc., payable. After taking into account all the relevant circumstances he must make his bid which may be permitted to be modified before acceptance, but will not be permitted to be modified after his bid has been accepted. Therefore, the contract price remains unchanged, meaning thereby, firm and fixed. Even if the bidder is able to satisfy the concerned authority that he had on account of ignorance or by inadvertence failed to take into account certain cost, expenses, tax liability etc. which he was entitled to take into account while making the bid, he will not be permitted to change the contract price and he must suffer the consequences. If he is allowed to change his bid price after its acceptance, that will be clearly violation of the fair bidding process. However, as observed earlier the question is whether apart

from the contract price specified in Article 2, there is anything in the terms and conditions of the contract which entitles the bidder to any other sum in addition thereto.

49. This takes us to a consideration of clause 36 of the GCC as modified by clause 28 of SCC. Clause 14.4 of the GCC stands deleted by modification by the SCC. This provision provided inter-alia for equitable adjustment of the contract price in the event of a new tax being imposed during the course of the performance of the contract, in accordance with clause 36 of GCC. Thus even when clause 14.4 existed as a general condition of the contract, it referred to equitable adjustment being made in accordance with clause 36 of the GCC. Therefore, if clause 36 applies, the mere fact that clause 14.4 has been deleted, will make no difference. On a careful scrutiny of clause 36 as modified, there appears to be no doubt that if after the relevant date any new law is enacted imposing a tax which affects the costs and expenses of the contractor, the contract price shall be correspondingly increased. In the instant case all the conditions mentioned in the first part of the clause are fulfilled because service tax was levied w.e.f. July 1, 2003 whereas the bid was submitted on 27.2.2001 and relevant date for taking into account all existing taxes, levies etc. was 30.1.2001.

50. The second part of the clause emphasizes that the adjustments would be restricted to direct transactions between the employer and the contractor and not on procurement of raw materials, intermediary components etc. by the contractor or on account of variation in deemed export benefits. In the instant case these conditions are not attracted to defeat the claim of the contractor because the liability to pay service tax arises on account of taxable services rendered by the contractor to the employer. If at all, this is in the nature of a direct transaction between the employer and the contractor and no third party is involved. We then come to the last part of the clause which says that additional costs shall not be separately paid or credited if the same has already been accounted for in

the price adjustment provisions where applicable, in accordance with Appendix 2 to the Contract Agreement. For the applicability of this part of the clause it is envisaged that:

- a) There are price adjustment provisions which are applicable to the contract in question;
- b) In accordance with the said provisions the additional cost has already been accounted for, and
- c) It is so provided in Appendix 2 to the Contract Agreement.

It is not disputed that there are no price adjustment provisions applicable to the contract in question. Appendix 2 to the Contract Agreement says in so many words that the contract price shall remain firm and fixed and shall not be subject to price adjustment for the entire duration of the contract. Reading Appendix 2 to the Contract Agreement in letter and spirit, it is clear that there are no price adjustment provisions applicable to the contract in question in accordance with Appendix 2 to the Contract Agreement. Obviously, therefore, the additional cost has not been accounted for in accordance with the price adjustment provisions and consequently has not been separately paid or credited.

51. To me it appears that the last part of clause 36 of the GCC which refers to Appendix 2 to the Contract Agreement does not intend to defeat the claim arising out of levy of a fresh tax after the relevant date. It only provides against dual payment, one under clause 36 and the other in accordance with the price adjustment provisions. This is only fair because if Appendix 2 to the Contract Agreement provided for price adjustment provisions to be applicable in such cases, there could be no justification for a separate claim being made under clause 36 of the GCC.

52. Learned counsel for the Respondents submitted that since there is no provision for price adjustment in Appendix 2 to the Contract Agreement the additional cost by way of new

taxes levied cannot be paid to the contractor. In my view the approach is wholly erroneous because the last part of clause 36 will deny to the contractor any additional amount on account of added tax liability, only if under the relevant price adjustment provisions he has already been benefitted and the additional cost has been accounted for. If there are no such price adjustment provisions then the contractor must get the benefit of clause 36 if he fulfills the conditions enumerated therein. I am, therefore, of the view that reading together the various provisions of the contract there is no escape from the conclusion that the contractor is entitled to the benefit under clause 36 on account of subsequent levy of tax, which did not exist on the relevant date, in the absence of any price adjustment provisions in the contract in accordance with the Appendix 2 to the Contract Agreement.

53. There is no dispute in the instant case that the contract awarded is on a fixed price basis. Clause 11.6 (b) of the ITB referred to adjustable price. If a contractor bid for adjustable price, the price quoted by him was subject to adjustment during performance of the contract to reflect the changes in the specified items in accordance with the procedure specified in Appendix 2 to the Contract Agreement. Those four items were:

- a) Cost of labour,
- b) Cost of material
- c) Transport components and
- d) Contractors equipment.

In the instant case the bidder has not chosen the alternative of adjustable price but has bid on fixed price basis and, therefore, the question of applying the adjustable price formula does not arise. However, clause 11.6 of the ITB while dealing with the adjustable price refers to Appendix 2 to the Contract Agreement and provides for adjustment only in respect of these four items. There is force in the contention of leaned counsel for the claimant that even if it were assumed

that there existed a price adjustment formula it could only be in respect of the four items specified above. However since we are concerned with a fixed price bid, this need not detain us any further.

54. Learned counsel for the Respondent has cited authorities before me in support of the contention of that where the price is fixed and firm the contractor cannot raise a claim for additional payment made towards any tax levied after the signing of the agreement. In my view the authorities cited by him do not lay down any such broad principle of law in absolute terms. It all depends on the facts of each case and the provisions of the contract agreement. Even if the price is fixed but there is a provision for additional payments being made on account of certain events that take place subsequently, the additional payment cannot be denied, because clearly the intention of the parties was to make such additional payment over and above the fixed price.”

41. I have carefully gone through the reasoning of the learned arbitrator, who has taken into consideration the contract signed between the parties and other material which is placed on record. There is no infirmity in the award passed by the learned arbitrator, which requires interference by this court.
42. In the case **ONGC v Saw Pipes** (2003) 5 SCC 705 the Apex Court has held that the court would interfere only when the award is patently illegal and on a bare reading it shocks the conscience of the Court. In the case of **McDermott** (2006) 11 SCC 181, the Apex Court has held that the Scope of interference by the court in an award is very narrow under Section 34 of the Arbitration & Conciliation Act, 1996. The provisions for the supervisory role of courts for review of the arbitral award is only to ensure fairness and

intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc., so the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified in case parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. In the case of **Vijaya Bank v. Maker development Services Pvt Ltd**, reported at (2001) 3 Bom CR 652, a Division Bench of Bombay High Court, has held that merely erroneous decision is not in violation of public policy of India and the same would not be set aside under Section 34 of Arbitration and Conciliation Act. The learned arbitrator has rightly come to the conclusion that the service tax is liable to be refunded by the petitioner to the respondent. The judgments cited by counsel for the petitioner are not applicable to the facts of this case.

43. As far as the submission made by counsel for the petitioner is concerned that the Arbitrator has come to an incorrect calculation and has granted compound interest, there is force in the said argument. As per the Award the petitioner had been awarded Rs.3,15,86,084 as principal amount. Interest is to be calculated on the said amount and not on Rs.3,77,96,859/- as per Para C of the Award and, thus, the interest amount stands reduced from Rs.15,80,089/- to Rs.14,11,503/-.
44. Another objection, which has been raised by Mr.Upadhyay, pertains to the award of costs in the sum of Rs.35.00 lakhs to the respondent. Although the Arbitrator has based his findings on the basis of details of expenses incurred by both the parties and there is no reason to

interfere in the same, however, I am of the view that the fee payable to M/s.Ernst & Young, consultant, should not be included in the costs of arbitration proceedings and accordingly the costs is reduced from Rs.35.00 lakhs to Rs.30.00 lakhs. As far as the other objections raised by the counsel for the petitioner is concerned, I find no force in the submissions made by the counsel in support of the objections raised. No grounds to interfere with the same are made out, accordingly, apart from the above two modifications, all other objections to the award are dismissed.

G.S.SISTANI,J

APRIL 10, 2012

msr