

* IN THE HIGH COURT OF DELHI AT NEW DELHI
F-31 & F-32 (Reportable)
+ O.M.P. 408/2005

LYALLPUR IRON TRADERS Petitioner
Through: Mr. A.N. Chaudhary & Mr. B.K.
Sharma, Advocates.

Versus

STEEL AUTHORITY OF INDIA LTD. & ORS. Respondents
Through: Mr. Siddharth Yadav, Advocate.

AND
O.M.P. 439/2005

STEEL AUTHORITY OF INDIA LTD. Petitioner
Through: Mr. A.K. Bajpai, Advocate.

Versus

LYALLPUR IRON TRADERS Respondent
Through: Mr. A.N. Chaudhary & Mr. B.K.
Sharma, Advocates.

CORAM: JUSTICE S. MURALIDHAR

	<u>ORDER</u>
%	19.01.2012

1. Both these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') are directed against the impugned Award dated 28th July 2005 of the Arbitral Tribunal ('Tribunal').
2. O.M.P. No.408 of 2005 is filed by M/s Lyallpur Iron Traders, Ghaziabad, U.P., the Claimant before the Tribunal and O.M.P. No.439 of 2005 is filed by Steel Authority of India Ltd. ('SAIL') the Respondent before the Tribunal. In the present judgment M/s Lyallpur Iron Traders is referred to as the

Petitioner.

3. The Tribunal rejected the claims of the Petitioner as being barred by laches. However, it stated that in view of the repeated use of the word 'diversion' in the work orders issued by SAIL, which led to confusion and ultimately to the dispute being referred to the Tribunal, SAIL was liable to pay the costs of the arbitration including the lawyer's fees.

4. Aggrieved that its claims were rejected, the Petitioner has filed O.M.P. No.408 of 2005. To the extent that it has been made liable to bear the costs of arbitration and the lawyer's fee incurred by the Petitioner, SAIL has filed O.M.P. No. 439 of 2005.

5. The dispute between the parties arose out of a contract dated 31st October 1996, valid up to 4th September 2001, entered into between the Petitioner and SAIL whereby the Petitioner was appointed as Handling Contractor for handling iron and steel materials in SAIL's stockyard at Guldhar, Ghaziabad, U.P. The contract provided for transportation of materials from one place to another. The rates for such transportation from the public booking point, Ghaziabad Railway Station by Railway Wagons placed for unloading to the stockyard at Guldhar, Ghaziabad were provided in Schedule 2(a). In terms thereof the freight charges were Rs.95 per tonne for transportation of steel materials. The explanation under Schedule 2(a) indicated that transportation under the said operation was inclusive of "concerned loading/unloading operations at the receiving/discharging ends respectively in case transportation by a truck/trailer." Clause 2.4 of the explanation stated: "in case of operational constraint in accepting booking at public booking point mentioned at 2(a), rates as quoted subsequently at Operation No.10 would be

applicable.” The expression ‘public booking point’ was defined in the contract reads as under:

“Public Booking Point” shall mean the Railway goods shed where Railway wagons are placed for unloading and/or booking of goods including iron & steel materials. (This goods shed may not be a public booking point in the strict literal sense).”

6. Schedule 10 set out the rates for transportation of iron and steel materials from any public point other than that mentioned in Schedule 2(a) of the contract. In the column “description of work” the word ‘diversion’ is used. The task is described as: “bring back iron & steel materials to our stockyard/warehouse/godowns at Guldhar, Ghaziabad from any point within/outside the city and unloading.” Explanation 10.1 states “this involves loading of materials into vehicles from any point within the municipal limits of Ghaziabad transportation, passing over the weighbridge at stockyard, and unloading and stacking at stipulated places in the stockyard/godown/warehouse.” Further, Explanation 10.4 reads as under:

“10.4 This operation would also cover materials brought from any public booking point other than the one mentioned at Operation No.2(a), which might get closed for Railway booking due to operational exigencies.”

7. The rate for the work described under Schedule 10 was Rs.22 per tonne per kilometer inclusive of transportation. It has been explained by SAIL, both before the Tribunal and this Court, that although the rates quoted in the tender under Schedule 10 was Rs.22 per tonne per kilometer it was subsequently reduced, by a letter dated 11th September 1996, to Rs.12 per tonne per kilometer.

8. Before the Tribunal the Petitioner filed a claim on 27th August, 2004
O.M.P. No. 408 & 439 of 2005

against SAIL for a sum of Rs.1,13,56,847.33 payable against supplementary bills raised by it for transportation of iron and steel under Schedule 10 “since all such transportation were ‘diversions’ in terms of the aforesaid Schedule 10.” The case pleaded by the Petitioner in para 8 of the statement of claim was as under:

“After complying with the written and oral instructions from SAIL in transporting iron & steel materials to Respondents’ stockyard/warehouse at Guldhar, Ghaziabad from public Booking point at Ghaziabad Railway Station to SAIL’s Stockyard at Guldhar, Ghaziabad as referred to in Schedule 10 of Schedules of Operations & Rates, the Claimant raised Bills for all such transportations for payment in terms of the rates prescribed/agreed in Schedule 10 of the Schedule of Operation & Rates since all such transportations were “Diversions” in terms of the aforesaid Schedule 10. It will appear from the aforesaid Schedule 10 that the rate for “Diversions” of Materials shall be paid at the rate of Rs.22.00 per ton/per Km. Since all such transportations referred to above were admittedly “Diversions” within the meaning of Schedule 10, the claimant raised Bills from time to time for each such transportations for payment at the rate of Rs.22.00 per ton/per km basis as prescribed in schedule 10. But, the Respondent No.3 did not settle the claimant’s Bills in full i.e. in terms of the rates referred to in Schedule 10 aforesaid. The Claimant’s representative, when sent for by the Branch Manager Respondent No.3, explained the basis for raising the bills at the rate of Rs.22.00 per ton/per km basis, the Respondent No.3, though admitted that all such transportations were “Diversions” within the meaning of Schedule 10, but did not pay the full amount as claimed in the Bills on the ground that sub-clause 10.4 of the Explanation to the aforesaid Schedule 10 did not permit payment on the basis of per ton/per km rate. The Respondent No.3 contended that the payments towards the aforesaid Diversion charges would be governed by sub-clause 2(a) of Schedule 2 of Schedule of operations & Rates i.e. at the rate of Rs.95.00 per ton (and not per km basis). Thus, even though the Respondent No.3 admitted that all such transportations were “Diversions” within the

meaning of Schedule 10, yet he refused to settle the Claimant's bills amount in full in terms of the rates prescribed in Schedule 10 and made only part payments of the bills amount as per the rates prescribed in Schedule 2(a) of Schedule 2 i.e. at the rate of Rs.95.00 per ton (and not per ton per km basis). Thus on that ground a very substantial amount of Rs.1,13,56,847.33 (Rs. one crore thirteen lacs fifty six thousand eight hundred forty seven & paise thirty three only) still remains to be paid by Respondents. A Xerox copy of each such bills dt. 10.8.2001 and 15.4.2002 in the form of Supplementary Bills submitted to the Respondent No.3, are annexed herewith and marked collectively as Annexure 'D'. From the Bills, it will appear that the claimant had very clearly given the full particulars of its claim relating to the Quantity, Diversions, the name of the concerned party etc and had claimed only the difference between the initial bill amount and the amounts paid by the Respondent No.3 since the Respondent No.3 had already paid on the basis of per ton only and not per ton per Km basis. Therefore, the supplementary bills of the claimant were all based on the basis of the claimant's claim on per ton per Km basis only as per the rates stipulated/agreed under Schedule 10. There is no dispute regarding the distance covered in such "Diversions" for which the Respondent No.3 has already paid. Thus the Respondents have made only short payments and has violated/ignored the contractual stipulations in making payments at the rates agreed in Schedule 10 aforesaid and has thus committed breach of contract."

9. According to the Petitioner the claims referred to in the supplementary bills were related to those situations which Respondent No. 3 (Branch Manager, Branch SAIL Office, SAIL, Ghaziabad) himself instructed the Petitioner to divert the materials from the public booking point at the Ghaziabad Railway Station to the Respondent's stockyard at Guldhar on account of the customers' refusal to take the materials or for reasons other than the closure of bookings by Railways due to Railways' operational

exigencies. The copies of the written instructions of Respondent No.3 in that behalf during the contract period were annexed with the statement of claim. Reference was made to the letter dated 4th April, 2003 from the Warehouse Manager of SAIL repudiating the claims of the Petitioner and advising it to go for arbitration.

10. SAIL contested the claim before the Tribunal and pointed out *inter alia* as under:

“On the basis of the rates revised by the Claimant, he used to raise his bills and the Respondents used to pay the handling charges after deduction on account of taxes at source and the claimant used to accept the same. Thus, during the total tenure of 4 and a half years of the contract, claimant continued to follow this practice and accept the amounts paid by the Respondent No.3 which were the amounts raised by the claimant in his Bills as per schedule 2 of the contract. AT no point of time during the continuance of the contract did the claimant raise any claim as per schedule 10 of the contract, and it is only an afterthought that the claimant has now tried to draw mileage from some un-intentional use of word “diversion” in some of the correspondence by the Respondent. It is pertinent to mention that the claimant has never claimed transportation charges on per km/per tonne basis as is evidence from the original bills submitted by the claimant during the original tenure of the contract. For the first time the issue of payment as per Schedule 10 was raised only on 10.08.2001. Even otherwise, major part of the claim is barred by law of limitation, as the claimant had filed its application for adjudication of disputes before ICA on 27.8.2004 as communicated by letter of ICA dt. 02.09.2004, copy of which is annexed and marked as **Annexure R-2.** Therefore, the part of the claim which pertains to period beyond 26.8.2001 only would be within the period of limitation. The claim for an amount of Rs.1,28,287,559.77 is time barred.”

11. Even as regards the claims for the period beyond 26th August, 2001, it

was pointed out by SAIL that by implication and conduct of the parties the work mentioned in Schedule 10 stood excluded from the purview of the contract and that since the payments were made in full by SAIL against the bills submitted by the Petitioner, the question of part payment did not arise. It was further pointed out by SAIL as under:

“In none of the letters annexed to the statement of claim as Annexure C the Respondent directed/instructed the claimant to diver the materials in terms of explanation 10.4 of Schedule 10 of the contract. Instructions were issued for transportation of the material from Public Booking Point at Ghaziabad Railway Station to Respondents Stockyard at Guldhar, Ghaziabad as per Schedule 2 of the contract, accordingly these instructions were very clearly understood and executed by the claimant. The claimant thereafter correctly raised its Bills and the same were cleared and paid by the Respondent as per rates indicated at Schedules 2(a) and 1(d) of the contract on the basis of work actually done. In fact under Schedule 3(a) of the contract, the claimant was to lift/load from unloading points from public booking point at Ghaziabad Railway Station and transport and unload/place for stacking at stipulated places in Company’s Stockyard at Guldhar, Ghaziabad. The claimant had made claims for this operation and had been duly paid for the same by the Respondent against all the bills raised by it during the contract period.”

12. SAIL denied that the Petitioner ever raised a single bill in terms of the rates prescribed/agreed in Schedule 10 during the contract period of 4 ½ years. It was contended that the raising of supplementary bills by the Petitioner was an afterthought as this has been raised during the extended period of the contract when the claimant came to know that he was not getting any further contract. It was submitted that Schedule 10 was not applicable to the operation undertaken by the Petitioner. SAIL had applied Schedule 2(a) of the contract and paid the bills raised by the Petitioner on that basis.

13. On the basis of the above pleadings the Tribunal framed the following major issues for consideration:

“(i) Whether the payments for the disputed claims come under the Schedule 2 or Schedule 10 of Part II of the contract?

(ii) Whether the limitation period of three years will apply to individual bills or whether the period starts from the time when the final bill was preferred”

14. In the impugned Award dated 28th July 2005 the Tribunal decided the issues as under:

“The majority of the arbitral tribunal came to the conclusion that a plain reading of the contract showed that the work done clearly pointed to coverage of the work done under Schedule 2(1) of the contract and this appeared to be confirmed by the behavior of the parties over the period of the contract. Even if one were to take a view that the claim is not technically barred by limitation – guilty of laches. However, it is equally clear that the repeated careless and irresponsible use of the word ‘diversion’ has been the prime cause of this litigation and dispute and SAIL must be held to account for this appropriately.

The minority view was that SAIL must be held strictly accountable for repeated use of the word ‘diversion’ in the work orders issued to the contractor and must be asked to pay per km rates applicable to cases of diversion; there was some Schedule 2, in terms of change in consignee and urgency of deployment. However, per kilometer rates for diversion could be at the lower rates of Rs.12 per km, which the claimant appears to have accepted as per documents in his claim petition.

The matter was further discussed among the members of the arbitral tribunal and it was agreed that keeping in view the behavior of the parties as evidenced by the terms of the

contract, the clear and unambiguous nature of the periodical bills submitted by the Claimant and acceptance of payments without entering reservation or demur, there did not appear to be enough justification to accept the claim made in the supplementary bills or the claim for interest on the amount claimed in the Supplementary Bills. However, in view of the repeated use of the word 'diversion' in the work orders which caused confusion or a misunderstanding of the order by the claimant, when the work was of a nature which would fit into the description in Schedule 2(a) rather than Schedule 10, there is a clear case for determining that the litigation would not have arisen but for the repeated and irresponsible use of this word, which was bound to cause confusion considering the wording of the Schedules. SAIL should therefore, be held to account for causing this litigation and made to pay the costs of the arbitration keeping in view the rates provided for in the Rules of the ICA at the time of the first hearing by the Arbitral Tribunal fixed on 6th January 2005 as also Rs.10,000/- per hearing for the expenses on lawyers fees incurred by the Claimant."

15. Mr. A.N. Chaudhary learned counsel for the Petitioner in O.M.P. No.408 of 2005 submitted that the Tribunal ignored or misread the documents placed on record before it. In particular, it was contended that the work orders/instructions issued by SAIL to the Petitioner clearly use the word 'diversion'. Therefore, the rates in Schedule 10 stood attracted. He placed reliance on the judgment in ***K.P. Poulose v. State of Kerala (1975) 2 SCC 236*** and ***Bharat Coking Coal Ltd. v. Annapurna Construction (2003) 8 SCC 154***. He submitted that when the word 'diversion' is used in so many letters it could not be explained away by SAIL as a mere mistake. He also relied on the decision in ***Delhi Development Authority v. R.S. Sharma (2008) JT 9 SC 362***.

16. On the plea of limitation, Mr. Chaudhary referred to para 10 of O.M.P.

No.408 of 2005 and submitted that the Petitioner had initially submitted a bill on 3rd February 1997 on the basis of the Schedule 10 rates. However, Respondent No. 3 did not accept it. Since this was the initial stage of the contract, the claimant wrote a letter to the then Chief Finance Manager, Northern Railways, SAIL on that date, i.e., 3rd February 1997 itself. Mr. Choudhary contended that the said letter dated 3rd February 1997 had already been filed before the Tribunal and the said letter clearly stated “the circumstances under which the claimant had to withdraw its very first bill dated 3rd February 1997 and was compelled to submit another bill claiming Schedule 2(a) (rates) even for diversion carried out at Schedule 10 rates....”

17. It was further claimed that the Chief Finance Manager by a note dated 6th February 1997 directed Respondent No. 3 to accept and process the bills of the Petitioner as per the contract terms “as will appear from the endorsements made on the claimant’s letter itself.” It was contended that despite the said directions, Respondent No. 3 did not accept the Petitioner’s bills raised for diversions on per tonne per kilometer basis. It was contended that the Petitioner was again compelled to write a letter dated 14th July 1997 to the Chief Finance Manager “which is self-explanatory.” It is claimed that a copy thereof “was already filed before the Arbitral Tribunal and the same is forming part of the records of the Arbitral proceedings.” It was claimed that the Chief Finance Manager on 18th July 1997 made endorsement on the said letter dated 14th July 1997 of the Petitioner, whereby Respondent No. 3 was instructed to accept the bills and process the same as per the contract terms. It is claimed that despite this Respondent No. 3 refused to accept the bills on one pretext or the other and suggested that the Petitioner could raise supplementary bills even later. It is claimed that “the Claimant did not consider it prudent to annoy and incur displeasure of the Respondent No.3’s

Office for fear of the early termination of the Contract in terms of the aforesaid Clause and was compelled to raise Supplementary Bills later but before the expiry of the Contract and ultimately it is a matter of record that the Claimant raised the supplementary Bills for the shortfalls on 10.08.2001 and thereafter though admittedly the Contract expired on 04.09.2001 i.e., not only within the Contract period but also within three years from the date of expiry of the Contract in the hope that the respondents would pay the balance amounts in full as per the claims in the Supplementary Bills.”

18. In reply to O.M.P. No.408 of 2005 SAIL has denied that the claimant ever submitted a bill on 3rd February 1997 as per Schedule 10 rates or that the claimant wrote a letter on that date. The existence or receipt of the letter dated 14th July 1997 is also denied. The specific plea of SAIL in its reply in this regard is as under:

“The allegation of the petitioner regarding non-acceptance of the so called very first bill, dated 3.2.1997 is baseless and denied. In fact, when the petitioner never presented any bill dated 3.2.1997 prepared in accordance with schedule 10, there could not be any non-acceptance of the same.

It is denied that the petitioner brought the issue to the notice Regional Office and or CFM, NR, SAIL.L It is also denied that copy of the said letter was ever filed before Arbitral Tribunal.”

“The contents of paragraph 11 are wrong and vehemently denied. It is reiterated that the so called letter dated 3.2.1997 was never received by the respondent No.1. As such, the question of making note on the same by CFM, on 6.2.1997 does not and cannot arise. The receipt of so called letter dated 14.7.1997 of the claimant petitioner to CFM is also denied. The allegation of refusal to accept the bill is wrong and denied. It is submitted that the petitioner never submitted any bill in accordance with schedule 10 to

the contract. The allegation of threat to terminate the contract (direct or indirect) is also denied. Furthermore, the respondents deny that the petitioners supplementary bills were kept pending for about 2 years. The petitioner has not placed a single document either before the Arbitral Tribunal or before this Hon'ble Court wherein they have at a prior date urged that they are being threatened with premature termination of contract on the pretext of raising plea of claim for enhanced payment as per Schedule 10. The petitioners have not filed letter nos.LIT/SAIL/S/Y/96-97 dated 03.02.1997 and LIT/SAIL/54/97-98 dated 14.07.1997 either before the Arbitral Tribunal or before this Hon'ble Court. Thus, the respondents deny receipt of such letters. Therefore, clearly the storey of the petitioner is fabricated and concocted with ill-intention."

19. Surprisingly, in the rejoinder filed to the aforementioned reply, the Petitioner did not enclose copies of the aforementioned letters dated 3rd February 1997 and 14th July 1997. It also did not deny that the said letters did not form part of the records of the Arbitral Tribunal.

20. Even today the learned counsel for the Petitioner was unable to show that the aforementioned letters dated 3rd February 1997 and 14th July 1997 formed part of the arbitral record. He candidly stated that in the statement of claim filed before the Tribunal there was no reference made to the aforementioned letters. He did not deny that copies of the letters were not annexed to the present petition or even to the rejoinder. He prayed for an adjournment to produce the copies of the aforementioned letters.

21. This Court is unable to accept the above plea of the learned counsel for the Petitioner. Documents which were not referred to in the claim filed before the Tribunal, not produced before it and therefore not forming part of the arbitral record ought not to be permitted to be produced in the present

proceedings under Section 34 of the Act for the first time. The Petitioner had sufficient opportunity in the past over six years when the present petitions were pending to produce the said letters after seeking leave of the Court. The Petitioner has tried to set up an entirely new case for the first time in the present proceedings on the basis of the above two letters with a view to explaining limitation. It is well settled that the issue of limitation is a mixed question of law and fact. It has to be specifically pleaded and proved before the Tribunal. It cannot be urged for the first time in a petition under Section 34 of the Act. Once it is clear that the Petitioner raised running bills, which were paid as and when raised, then the limitation in respect of a claim arising out of a particular bill began running from the date of payment of that bill. The conclusion of the Tribunal that the claims were barred by laches cannot therefore be faulted.

22. It was then submitted by the learned counsel for the Petitioner that only six supplementary bills of the Petitioner would be time barred and that the claim in respect of the remaining bills was within time. As far as this plea is concerned, it requires to be noted that there is no such ground raised in O.M.P. No. 408 of 2005. Being again a mixed question of law and fact, it was neither pleaded by the Petitioner in the statement of claim before the Tribunal nor examined by the Tribunal as such. This apart, the Tribunal has in the impugned Award accepted SAIL's plea that even those supplementary bills which were supposedly within time were in any event raised by the Petitioner during the extended period of contract. The bills raised during the subsistence of the contract applying Schedule 2(a) rates had been paid. The payments were accepted without demur. The Tribunal held that the word 'diversion' used in the work orders in respect of which supplementary bills were raised was misleading but that the transportation work undertaken by

the Petitioner was covered by Schedule 2 (a).

23. The above finding of the Tribunal was based on an appreciation of evidence. It is seen that the work orders/instructions issued to the Petitioner by SAIL used the word “divert” “diverted” or “diversion”. However the task entrusted thereunder was of transportation of iron and steel from the public booking office at the Ghaziabad railway station to SAIL’s stockyard at Guldhar. The parties clearly understood that the work under the contract would be covered by Schedule 2(a) rates. Bills were raised by the Petitioner on that basis and when payment was made, it was accepted by the Petitioner without protest. In the circumstances, the Tribunal’s conclusion that the claims were untenable cannot be held to be contrary to the terms of the contract or to law.

24. However, there was no justifiable reason for the Tribunal to hold SAIL liable for the costs of arbitration and legal expenses incurred by the Petitioner. Once the Petitioner’s claims were held to be untenable in law, costs if any had to be asked to be paid to SAIL by the Petitioner and not vice versa. That part of the impugned Award is therefore liable to be set aside.

25. For the aforementioned reasons the rejection of the Petitioner’s claims by the impugned Award dated 28th July 2005 is upheld and O.M.P. No. 408 of 2005 is dismissed. That portion of the impugned Award requiring SAIL to bear the arbitration and legal costs is set aside and O.M.P. No. 439 of 2005 filed by SAIL is allowed. In the circumstances, there will be no orders as to costs.

S. MURALIDHAR, J.

JANUARY 19, 2012

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