

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

+ **FAO No.367/2013**

% **16th April, 2014**

UNION OF INDIA Appellant
Through: Mr. Jagjit Singh, Advocate.

VERSUS

M/S. JAIN STEEL INDUSTRIES & ORS. Respondents
Through: Mr. Shiv Khorana, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugning the judgment of the court below dated 30.4.2013 by which the objections filed by the appellant/claimant under Section 34 of the Act against the Award dated 28.9.2010 have been dismissed. By the Award dated 28.9.2010, the claims of the appellant/purchaser/Railways were dismissed on account of the

claim of enhanced quantities of $\pm 30\%$ was raised in violation of the circular of the appellant dated 13.4.2006.

2. The facts of the case are that the appellant placed a purchase order dated 19.2.2003 upon the respondent for supply of 2420 MT of item no.1 ISBH and 1760 MT of item no.2 ISBH. These items are steel items which are manufactured by the respondents and are used by the Railways. The original quantity of item no.1 was increased from 2420 MT to 2840 MT and of item no.2 from 1760 MT to 2060 MT vide first amendment issued by the appellant dated 3.4.2003. By the amendment dated 3.4.2003 besides increasing the quantity the delivery period was also extended upto 30.11.2003. Respondent completed the supply of enhanced quantities within the extended delivery period. At this stage, the appellant once again as per the additional clause entitling increase of the quantity to be supplied $\pm 30\%$, increased the quantity of item no.1 to 3692 MT and to 2288 MT for item no.2. This second amendment was brought about by the amendment letter M.A dated 6.11.2003 and delivery period was re-fixed upto 29.2.2004. Since the increased quantity ordered vide M.A dated 6.11.2003 exceeded the prescribed contractual limit of $\pm 30\%$ for item no.1, the respondent protested by means of its letter dated 20.11.2003. The appellant/purchaser/Railways thereafter reduced the quantity upto 30% limit vide M.A dated 6.5.2004.

The respondents however did not agree to comply with the amended purchase order resulting into arising of disputes and consequently the initiation of arbitration proceedings resulting in the impugned Award dated 28.9.2010.

3. By the Award, the arbitrator has rejected the claims of the appellant/claimant/Railways on the ground that the amendments dated 6.11.2003 and 6.5.2004 are neither contractually nor legally tenable in view of the appellant's letter/circular dated 13.4.2006. This letter dated 13.4.2006 of the appellant reads as under:-

“No.93/RS(G)/779/5 Pt.II New Delhi, dt:13-04-2006
The General Manager
All Indian Railways & Production Units.
Metro Railway, Kolkata.
Railway Electrification, Allahabad.
The General Manager (Const.), N.F. Railway, Guwahati.
CAO/Diesel Loco Modernisation Works, Patiala.
CAO/COFMOW, Rly. Officers Complex, Tilak Bridge, New Delhi.
CAO/MTP, Mumbai, Chennai, Kolkata & Delhi.
The Managing Director, Mumbai Railway Vikas Corporation, 2nd
Floor,
Churchgate Station Building, Mumbai-400 020.
The Managing Director, Konkan Railway Corporation Ltd., Raigad
Bhavan,
8th floor, Sector-II, CBD, Belapur, Navi Mumbai-400 614.
The Director General, RDSO, Lucknow.

Sub: IRS Conditions of Contract-Inclusion of Option Clause therein.

Attention is invited to Board's letter No.78/RS(G)/777/1 dt. 31.-12-1979, wherein it had been laid down that the Clause 704 of Appendix III to the Indian Railway Code for the Stores Department (increase or decrease of quantities) may be deleted. However, in respect of purchase or value of more than Rs.5 lakhs per tender a suitable option clause on the same lines may be incorporated as a special condition to the Tender, wherever considered necessary. Subsequently the monetary limit of Tender/Contract for incorporating option clause was revised from Rs.5 lakhs to Rs.10 lakhs, vide Board's letter No.93/RS(G)/779/5 dt.06-09-1993.

The matter regarding option clause again came up for discussing during 61st Periodical Conference of the Controllers of Stores of Railways and Pus with Railway Board held on 15th & 16th June, 2005 at New Delhi. Further, a few irregularities regarding operation of option clause have also been brought to the notice of the Railway Board. In this context, Board after detailed deliberation on the matter has decided that:

(i) The existing instructions are considered as adequate and no further changes in them are considered necessary.

(ii) Quantify variation under option clause against each individual purchase order (even though issued from the same tender) shall not exceed + 30% of the ordered quantity against each purchase order.

(iii) The option clause shall be exercised during the currency of the contract such that the contractor has reasonable time/notice for executing such increase or decrease + 30% option clause can be exercised even if the original ordered quantity is completed before the last date of delivery as clarified vide Board's letter no.2006/RS(G)/779/2 dated 23.03.2006.

This issues with the concurrence of the Finance Dte. of Railway Board.

(Aruna Jain)
Dy. Director Rly. Stores (G)-II,
Railway Board."

4. The issue in the present case in the arbitration proceedings, as also in the objections under Section 34 (including the present appeal) is as to

whether the amendments issued by the appellant dated 6.11.2003 and 6.5.2004 are or are not legally and contractually justified.

5(i) I must concede that on a first reading of the Award it appeared as if the Award was a non-speaking one, however, really the Award cannot be said to be a non-speaking one when we read the Award as a whole. There is no legal or prescribed format of an Award, and as long as all the disputes which arise are stated in the Award alongwith the facts and the reasons are given in the Award justifying passing of the same, the Award cannot be said to be a non-speaking one. Language of each arbitrator differs unless and until the Award is a non-speaking Award in the sense that no reasons can be culled out from the same showing as to what has led to passing of the Award, the Award cannot be said to a non-speaking Award. Difficulty in understanding the Award cannot be equated to the Award being a non-speaking one.

(ii) In the present case, the Award notes the facts with respect to the original purchase order with quantities, subsequent three amendments thereto, extended delivery period thereof, respondent completing the supply of first amended quantities within the extended delivery period upto 30.11.2003, appellant thereafter wrongly issuing an amendment on 6.11.2003 because the amendment so far as item no.1 exceeded the quantity

of 30% of the original contract, and finally the factum of second amendment dated 6.5.2004 being issued by the appellant and the fact that respondent failed to comply with the amended purchase order dated 6.11.2003. The Award also states that respondent is justified contractually and legally in not complying with the amended order because the amended order was in violation of the appellant's circular dated 13.4.2006. Of course, why the letter/circular of the appellant dated 13.4.2006 is violated is not stated very clearly in the Award but since the letter/circular dated 13.4.2006 in its operative portion only contains basically two sub paras being sub paras (ii) and (iii), really the Award does in effect state that the amendment issued by the appellant/Railways dated 6.5.2004 is beyond the currency of the contract or in any case asked the respondent to supply without giving the respondent reasonable time/notice to execute the order for supply of increased quantity.

6. The court below has accordingly observed in its impugned judgment as under:-

“15. The impugned award contained the reasons for the decision in brief. The operative part of the award is in fact in a tabular form with the last of the column containing the reasons for the decision. It can thus not be said that the award contains no reason whatsoever. The reasons stated are reproduced below:-

“The claim could not be substantiated due to the fact that enhancement of quantity vitiates the condition of the Purchase Order (Increase or decrease of Quantities) & in terms of Railway Board's

Letter no.93/RS (G)/779/5/Pt.II dated 13.04.2006 (RBS No.5/2006), which reiterates earlier instructions, with respect to quantity & delivery period in the MA issued dated 01.11.03 & 06.05.04 in the said contract. Hence, MA issued dated 06.11.03 and 06.05.04 are not legally & contractually tenable.”

16. The Ld. Arbitrator has thus clarified that the claim could not be substantiated. The Ld. Arbitrator has referred to a letter dated 13.04.2006 of the Railway Board and thus it is apparent that the same constitutes the basis of the decision. A copy of the said letter is placed on the arbitral record. It pertains to the inclusion of the optional clause in respect of purchase of value of more than Rs.5 lacs per tender. The Board's decision in this respect as contained in the said letter, particularly states by exercising the option clause, the variation in quantity cannot exceed $\pm 30\%$ of the ordered quantity. Further that the option clause can be exercised during the currency of the contract such that the contractor has reasonable time/notice for executing the variation even if the original ordered quantity is completed before the last date of delivery.

17. It is thus clear that the optional clause can be exercised subject to certain conditions, viz., firstly, the variation cannot exceed 30% of the quantity and secondly, sufficient time for delivery should be available to the contractor. As per the facts stated by the petitioner, they admittedly varied the quantity beyond the 30% limit. The petitioner is, however, silent on the delivery period. The respondent states that the delivery period expired on 30.09.2003. The same was extended for the limited extended quantity. These facts have not been controverted by the petitioner. The facts narrated in the award clarify that the delivery period was extended to 30.11.2003. Further, that the amendment dated 03.04.2003, the entire quantity of both the items was supplied during the extended delivery period.

18. The petitioner claims to have exercised the optional clause vide its amendment dated 06.11.2003. Even if, for the sake of argument, it is considered that the petitioner exercised its optional clause for the first time vide the said amendment, the delivery period had ended on 30.09.2003 and even the extended delivery period was expiring within days of the said amendment. Further, the amendment dated 06.05.2004

was made after the expiry of even the extended delivery period. It is worth noting even at the cost of repetition, that the petitioner has concealed these facts.”

7. I completely agree with the aforesaid observations of the court below and which clearly show that the arbitrator has passed the impugned Award dismissing the claims of the appellant/Railways as the amendment of the contract when finally issued on 6.5.2004 was either beyond the extended delivery period or in any case there was no reasonable time within the available delivery period for completing the enhanced supplies.

8. The scope of a court hearing objections under Section 34 is limited and an Award can only be interfered with if the same is illegal (Section 28(1)(a)) or against the contractual provisions (Section 28(3)) or perverse. This is the law as per the judgment of the Supreme Court in the case of *O.N.G.C. Vs. Saw Pipes Ltd., 2003 (5) SCC 705*. Courts hearing objections under Section 34 of the Act do not sit as an appellate court to substitute its own view for that of the arbitrator once arbitrator has taken one possible and plausible view. If the scope of hearing objections under Section 34 is limited then the scope of an appeal against the judgment hearing the objections has to be further limited.

9. In view of the above, I do not find any illegality or perversity in the impugned Award and the impugned judgment, and therefore this appeal is accordingly dismissed, leaving the parties to bear their own costs.

APRIL 16, 2014
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VALMIKI J. MEHTA, J.