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

Reserved on: 20.04.2017

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Pronounced on: 02.05.2017

+ O.M.P. (COMM) 80/2016 and I.A. No. 4265/2016 (stay)

BESCO LIMITED (WAGON DIVISION)

..... Petitioner

Through Mr.Ramesh Singh and Mr.Yuvraj
Duggal, Advs.

versus

UNION OF INDIA

..... Respondent

Through Mr.Deepak Jain, Sr.Standing Counsel
for Railway Board with Mr.Jaspreet
Aulakh, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present petition/objections are filed under section 34 of the Arbitration and Conciliation Act 1996 for setting aside the Award dated 15.2.2016 passed by the Sole Arbitrator.
2. Some of the brief relevant facts are that the respondent on 23.10.2013 issued a tender inviting offers from manufacturers for supply of various types of wagons. The total number of wagons required were 11728. The criteria for allotment to any tender or was stipulated. The petitioner made an offer against the above tender and quoted its rates. The petitioner was not the L-1 tenderer. The respondent issued a counter-offer vide letter dated 2.4.2014 to the petitioner for a total quantity of 1890 wagons at specified

rates/prices. On 2.4.2014 the petitioner accepted the counter-offer and conveyed its acceptance for the supply of 1890 wagons consisting of 1080 BOXNHL, 710 BCNHL and 100 BOBRNHSM1 wagons. Subsequently, contract dated 29.4.2014 was awarded for manufacture of the said 1890 wagons to the petitioner.

3. As per the contract the said quantity of 1890 wagons was to be released to the petitioner in two tranches. The first tranche consisted of supply of 945 wagons. The said second tranche of 945 wagons was to remain withheld and was to be released to the petitioner at the end of six months from the date of receipt of the order upon fulfillment of criterias regarding timely delivery etc. The petitioner successfully completed the supply for the first tranche of 945 wagons. Thereafter on 29.10.2014 the petitioner requested the respondent for release of the withheld quantity of the second tranche of the contract. The respondent on 18.11.2014 released 50% of the second tranche i.e. 473 wagons. On 23.12.2014 the respondent issued to the petitioner the balance order for the second tranche of 472 wagons. In addition on account of its timely performance for the first tranche the petitioner were also issued an order for 208 additional wagons which had been diverted from other manufacturers. However, the petitioner informed the respondent that on account of various hurdles including non-availability of free supply of CTRBs, acute shortage of funds and non-receipt of payments against the supply of wagons the execution of the contract had become totally unworkable. The petitioner hence stated its inability to accept the order for additional 208 wagons which had been offered to them by diversion from other firms. The respondent on 30.1.2015 issued a letter to the petitioner stating that the refusal of the petitioner to accept the additional

quantity of 208 wagons was not acceptable to the Ministry. The respondent took the stand that the said allocation of additional quantity was as per accepted terms and conditions of the contract dated 29.4.2014.

4. As the issue could not be sorted out on 24.3.2015 the petitioner invoked the arbitration clause in terms of clause 18 of the contract and requested the respondent to appoint an Arbitrator. On 17.4.2015 the respondent appointed a Sole Arbitrator. On 23.4.2015 the learned Sole Arbitrator entered reference and scheduled the first meeting of the arbitration proceedings on 12.5.2015. The petitioner sought a declaration that the petitioner's refusal to accept the additional 208 wagons offered by the respondent by way of diversion was legal and valid. Ultimately, before the Arbitrator the controversy revolved around supply of only 132 BOXNHLwagons to which the arbitration proceedings were confined.

5. The learned Arbitrator by his Award dated 15.2.2016 dismissed the claim of the claimant. The learned Arbitral Tribunal held that the petitioners had given their unqualified acceptance to the rates and other terms and conditions including the counter-offer. It also noted that as per the two documents including the contract there were provisions regarding redistribution of quantity. The price of each wagon was stipulated in paras 1.2 and paras 2.1 of the contract dated 29.4.2014. The method for increase in the quantity of wagons was given in para 2.5. Hence the tribunal concluded that the additional quantity ordered to the petitioner was in terms of the agreed terms and conditions. Accordingly the learned Arbitral Tribunal dismissed the claim of the petitioner.

6. I have heard learned counsel for the parties.

7. Learned counsel for the petitioner has relied upon clause 8.1 of the contract dated 29.4.2014 to contend that in case such an additional order was to be placed on the petitioner for additional wagons, the price would have to be settled first. He also relied upon the letter issued by respondent dated 2.4.2014 which was a counter-offer made to the petitioners. He submits that the counter-offer was for 945 wagons at the price that had already been specified. He submits that on 2.4.2014 the petitioners had given their unqualified acceptance to this counter-offer. Hence, the petitioners are bound by this counter-offer and cannot be made to manufacture goods more than the stipulated quantity as stated in the counter-offer. It has been strongly reiterated that they have no objection to supply the diverted quantity but the issue is of the price at which the petitioners are being made to supply the said wagons. He submits that the price cannot be the same. Reliance is placed on judgments of the Supreme Court in *Satya Jain & Ors. vs. Anis Ahmed Rushdie & Ors.*, (2013) 8 SCC 131 and *Rajasthan State Industrial Development and Investment Corporation and Another vs. Diamond & Gem Development Corporation Ltd. & Anr.*, (2013) 5 SCC 470 to contend that normally a term cannot be read into an agreement/contract and that a party cannot claim anything more than what is stated by the terms of the contract.

8. Clauses 2.2, 2.4, 2.5 and 2.6 of the contract dated 29.4.2014 reads as follows:-

“2.2 The above allocation under para 2.1 shall be released to you at the end of six months from the date of receipt of the order (i.e., by 01.11.2014) provided you have supplied at least 50% of the total outstanding RSP orders as on 31.3.2014

(evening) and current orders placed against this tender (detailed at para 1.2 above).

2.4 In case you fail to comply with the condition for release of second tranche as discussed at para 2.2 above, only 50% of the second tranche (i.e. 473 wagons) shall be released and the remaining 50% of the second tranche (i.e. 472 wagons) shall be released to the respective firms in proportion to their supply performance during the period of six months from the date of issue of this contract i.e. May-October 2014 by multiplying percentage compliance with 50% of second tranche. The remaining quantity shall be taken away for redistribution amongst performing units, having more than 100% compliance.

2.5 Quantity available for redistribution shall be distributed amongst eligible wagon manufacturers (with more than 100% compliance) in the ratio of actual supply of wagons made by them against all pending Railway orders even though placed after the current contract, during the specified six months period succeeding placement of current contract.

2.6 For working out the compliance level for release of second tranche of orders, 25% of the order quantity for 'New Design Wagons' would be deducted from total outstanding RSP orders. *However, there are no new design wagons in this e-tender."*

9. The learned Arbitrator rightly relies upon these clauses to conclude that additional quantity could have been ordered in terms of these clauses. A conjoint reading of clauses 2.4 to 2.6 above would show that the entire scheme was that the initial purchase order was for only 50% of the wagons agreed to be ordered. 50% of the balance order was to be made based on the manufacturers' complying with the stipulated conditions. In case of failure to comply with the stipulated conditions, relating to timely delivery, 50% of the 2nd tranche was to be withheld and given to other firms based on their

performance. Clauses 2.4, 2.5 and 2.6 clearly provides that where a redistribution takes place amongst eligible wagon manufacturers, 50% of the second tranche the same shall be distributed amongst eligible manufacturers (which would include the petitioner) in the ratio as stated. It is manifest that the agreement envisaged supply of additional wagons at the agreed price.

10. Learned counsel for the petitioner has not been able to show any clause in the agreement which would warrant an interpretation that the petitioner was entitled to any additional price in case additional quantity was ordered. Reliance of learned counsel for the petitioner on clause 8.1 of the contract is misplaced. The said clause 8.1 reads as follows:-

“8.1 Failure and Termination

If the contractor fails to deliver the vehicles or any installment thereof within period fixed for such delivery in the schedule or as extended or at any time repudiates the contract before the expiry of such period, for any reason whatsoever other than those specified in clause 13 below, the President of India may without prejudice to his other rights:

- (a) Recovery from the contractor as agreed liquidated damages and not by way of penalty a sum as specified in clause 12 below, or
- (b) To cancel the contract or a portion thereof and if so desired to have the vehicles manufactured or authorize the manufacture of the vehicles not so delivered or other of a similar description (where vehicles exactly complying with particulars are not in the opinion of President of India which shall be final readily procurable) at the risk and cost of the contractor.”

11. A mere reading of the clause shows that it deals with a situation where a contractor fails to deliver vehicles within the period fixed. It is in that situation the respondent can cancel the contract and impose liquidated

damages on the contractor or have the vehicle's manufactured at the risk and cost of the contractor. This clause does not entitle the petitioner to claim additional price for additional wagons ordered in terms of clause 2.5 of the Contract.

12. There is also no merit in the submission of the petitioner that as per the counter-offer he had to manufacture only 1890 wagons and not any additional quantity. Clause 8 of the said counter-offer dated 2.4.2014 reads as follows:-

“Option Clause: The purchaser reserves the right to increase/decrease the ordered quantity upto 30% of the ordered quantity during the currency of the contract on the same price and terms and conditions with suitable extension in delivery period for the optional quantity”

13. Hence, the respondents had the right to increase the ordered quantity by 30% on the same price and terms and conditions. Admittedly, the petitioners have given an unqualified acceptance to this counter-offer. An order for 1890 wagons had been made on the petitioner. The additional quantity ordered which was the subject matter of the arbitration proceedings, namely, 132 wagons was well within the said stipulated clause of the counter-offer which is binding. It may be noted that the contract also refers to this counter-offer dated 2.4.2014.

14. The general principles for deciding objections under Section 34 of the Act have been reiterated recently by the Division Bench of this Court in *M/s.National Highways Authority of India v. Progressive Constructions Ltd., 2017 SCC OnLine Del 7867*. This court held as follows:

“40. An award would be set aside if it was contrary to (a) the fundamental policy of Indian law; (b) the interest of India or (c)

justice or morality or (d) if it was patently illegal. In *ONGC Ltd. vs. Saw Pipes Ltd.* (supra) the Supreme Court made it clear that it was open to the Court to interfere with an award on the ground that it was patently illegal and therefore, opposed to the public policy of India.

41. An award might be set aside as patently illegal, provided the illegality goes to the root of the award. If the illegality is of a trivial nature it cannot be said that the award is against public policy. This proposition was reaffirmed by the Supreme Court in *Hindustan Zinc Ltd, vs. Friends Coal Carbonization* reported in: (2006) 4 SCC 445. In *ONGC Vs. Saw Pipes Ltd.* (supra) the Supreme Court held that an award could also be set aside, if it was so unfair and unreasonable, that it shocked the conscience of the Court.”

15. As far as the issues of interpretation of terms of contract are concerned, it is settled legal position that the court shall not ordinarily substitute its interpretation of the terms of the contract with the interpretation of the arbitrator. A reference may be had to the judgment of the Supreme Court in the case of *Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739*. The court held as follows:

“19. The words “public policy” or “opposed to public policy”, find reference in Section 23 of the Contract Act and also Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the arbitrator, who is a judge chose by the parties to determine and decide the dispute. The Court is precluded from reappreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

16. The learned arbitrator has interpreted the terms of the contract to conclude that the additional wagons at the fixed price have been ordered by the respondent in terms of clause 2.5 of the contract. There are no reasons to

disturb this finding of the learned arbitrator. The plea of the petitioner that this tantamounts to addition of clauses into the contract is an erroneous submission.

17. There is no merit in the present petition. The same is dismissed. All pending applications also stand disposed of.

(JAYANT NATH)
JUDGE

MAY 02, 2017/n

