

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 05.04.2018

+ **O.M.P. (COMM) 238/2016 & IA No.5634/2016**

ALPHA SERVICES

..... Petitioner

Versus

IRCON INTERNATIONAL LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner :Ms Neelima Tripathi and Ms Gunjan Singh.

For the Respondent :Ms Leena Tuteja, Mr Ishaan Chawla and Ms Diksha Bhatia.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'Alpha') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 23.12.2015 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties in relation to the contract entered into by the parties, whereby Alpha had agreed to supply 35 numbers of Electric Overhead Travelling Cranes (hereafter 'EOT Cranes') to the respondent (hereafter 'IRCON') for the Rail Coach Factory at

Raebareli.

2. The principal dispute between the parties relates to the question whether Alpha was obliged to provide fish plate sets, rail clamp sets, bolts, nuts and other concomitant accessories in connection with the rails to be installed for the horizontal (lengthwise) movement of the EOT Cranes. The rails were to be fixed on the Gantry and the EOT Cranes supplied by Alpha would rest on the said Rails. There is no dispute that Alpha was required to erect and carry out the works for fixing of the rails as part of its contract. It is also not disputed that it was IRCON's obligation to supply the rails. The controversy only relates to the clamps, nuts and bolts which were required to fix the rails on the Gantry and the fish plates that are required to join the sections (pieces) of the Rail. According to Alpha, the contract did not include supply of such concomitant accessories. IRCON disputed the same and claimed that in terms of the contract, the obligation to supply all the materials other than rails rested with Alpha.

3. Briefly stated, the relevant facts necessary to address the controversy are as under:-

3.1 On 21.01.2012, IRCON floated a tender for supply, erection, testing and commissioning of 35 numbers of EOT Cranes for the Rail Coach Factory, Raebareli along with an Annual Maintenance Contract (AMC) for 5 years. Pursuant to the aforesaid invitation, Alpha submitted its bid. The said bid was accepted and IRCON issued a Letter of Acceptance (LOA) dated 14.11.2012. Thereafter, IRCON

issued the Purchase Order dated 05.12.2012 (hereafter ‘the Purchase Order’).

3.2 Alpha claims that by February, 2013, two EOT Cranes were ready and it requested IRCON to supply sets of rail, fish plates and rail clamps. This was followed by another reminder on 27.02.2013. IRCON responded to the said letter on 01.03.2013 denying its liability to supply the concomitant accessories in question. Alpha responded by asserting that supply of the accessories was not within its scope of works. It is stated that on 04.03.2013, IRCON sent an email informing Alpha that the matter had been examined by the competent authority and was decided to provide rail fittings (fish plates, bolts, clamps) alongwith rails being provided by IRCON. However, IRCON did not supply the said accessories. Alpha claims that it sent further requests on 06.03.2013, 28.05.2013 and 04.06.2013, for supply on such accessories. IRCON responded to the said requests by reiterating its stand that in terms of paragraph 1.2 and 48.3 of Section 2 of the Purchase Order, the petitioner’s request for free supply of rail fittings was not admissible.

3.3 In view of the controversy that had arisen between the parties, the matter was referred to the sole conciliator. The said proceedings did not fructify in settlement of the disputes. Consequently, the Sole Arbitrator was appointed by IRCON to adjudicate the disputes that had arisen between the parties.

4. Before the Arbitral Tribunal, Alpha made two sets of claims.

The first claim related to the recoveries made by IRCON for supply of concomitant accessories, and the second claim related to the value of the materials supplied by Alpha. The arbitral proceedings culminated in the impugned award. The Arbitral Tribunal held that in terms of the Notice Inviting Tender (NIT), the bidders were invited to submit their offer for complete installation and commissioning of machinery/plant/system (referred to as 'M&P') on a Turnkey basis. It was held that IRCON was only responsible to provide electricity on chargeable basis, water as a free item, open space for storage and work load for commissioning of M&P. The Arbitral Tribunal held that the obligations of IRCON did not extend beyond the said terms, and all the balance materials (other than Rails) and services which were required for execution of the works in totality was Alpha's responsibility/obligation. Accordingly, the Arbitral Tribunal rejected the claims made by Alpha.

Submissions

5. Ms Tripathi, the learned counsel appearing for Alpha had contended that the Arbitral Tribunal had fallen into an error in proceeding on the basis that the entire contract was to be performed on Turnkey Basis. She submitted that the contract between the parties was split into two separate agreements. The first contract related to supply of EOT Cranes and the other related to erection, testing and commissioning of the EOT Cranes. She submitted that while the first contract related to supply of goods, the second contract was only for provision of services. She further submitted that in terms of the

understanding, Sales Tax was payable in respect of the contract for supply of the EOT Cranes and Service Tax was payable in respect of the contract for erection, testing and commissioning of the EOT Cranes. She submitted that, admittedly, supply of concomitant accessories such as fish plates, rail clamps, nuts and bolts were not a part of the contract for supply of M&P, as such accessories were not a part of the EOT Cranes. She contended that these accessories were used only to fix the rails on the Gantry for the forward and backward movement of the EOT Cranes alongwith length of the Gantry. She also referred to the photographs annexed with the petition to indicate the use of the concomitant accessories in question.

6. Ms Tripathi drew the attention of this Court to paragraph 7.1.3 of the impugned award, wherein the Arbitral Tribunal had observed that *“the responsibilities of supplier have been prescribed wherein under para 2.2.2.5 any other resources/facilities required as deemed necessary by supplier covers for completion of the turnkey contract in totality”*. She contended that the Arbitral Tribunal had misread paragraph 2.2.2.5 of Section 1 of the Purchase Order as the same did not mention the expression “turnkey contract”. This, according to her, was a patent error warranting setting aside the impugned award.

7. She further contended that the Arbitral Tribunal had erred in ignoring the email dated 04.03.2013, whereby IRCON had agreed to supply the said concomitant accessories. She stated that although the said email was referred to the Arbitral Tribunal but the Arbitral Tribunal had failed to consider the same.

8. She further stated that Alpha had supplied the rail clamp sets at actual cost of ₹219.71/- per set on the suggestion of the Arbitral Tribunal. However, IRCON had recovered ₹358.45/- per set for those clamps sets that were supplied by IRCON initially. She further contended that IRCON had also made recoveries for fish plate sets at an exorbitant cost of ₹150/- per set. She contended that such recovery was wholly unjustified. Ms Tripathi also referred to the decisions of the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Western Geco International Limited*: (2014) 9 SCC 263, *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*: (2003) 5 SCC 705, *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*: (2007) 8 SCC 466, *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*: (2006) 4 SCC 445 and *Associate Builders v. Delhi Development Authority*: (2015) 3 SCC 49 in support of her contentions.

Reasons and Conclusion

9. At the outset, it is necessary to state that there is no dispute that IRCON had issued the NIT dated 21.01.2012 for supply, erection and commissioning of EOT Cranes. Alpha's bid of ₹20,77,79,502/- for 35 numbers of EOT Cranes was accepted. In addition, IRCON also accepted Alpha's bid of ₹15,28,758/- for AMC for five years. The LOA dated 14.11.2012 expressly provided that "*Total amount includes cost of the EOT Cranes, accessories, loading unloading & handling charges inland transportation & transit insurance, installation & Commissioning charges, cost of civil works training charges & AMC as per details attached and Annexure A1 to A9 and*

Annexure –II F”.

10. The Annexures referred to in the LOA included the price schedules. Some of the schedules expressly provided for the ex-works costs of concomitant accessories / spares. It was contended on behalf of the petitioner that the said accessories did not include fish plates, clamps, nuts and bolts required for fixing the rails on the Gantry and the concomitant accessories referred to in the annexures were only those accessories that were related to the EOT Cranes. This is a contentious issue.

11. The Purchase Order also indicates that the entire contract was for supply, erection, commissioning and testing of EOT Cranes, which was considered as a consolidated contract. At this stage, it is necessary to refer to Article 2 of Section 1 of the Conditions of Contract, which is an integral part of the Purchase Order. The relevant extract of the said Article indicating the scope of works is set out below:-

“2. SCOPE OF WORKS:

2.1 SUPPLY:

The M&P to be supplied shall be new and as per specifications given at Section – II.

M&P offered must be of proven design and capacity. It must be capable of continuous operation for long periods in temperatures from 0 to 50 degrees Celsius and humidity up to 98%.

2.2 ERECTION, INSTALLATION AND COMMISSIONING:

The Bidder shall install and commission the M&P at place of delivery as per Delivery Schedule as well as the schedule for Erection, Installation and Commissioning.

The tenderer or his agent will be required to inspect the consignment at the consignee's premises before unpacking is done and carryout a Joint Check of the receipt of components to avoid subsequent complaints regarding short shipment or transit.

The bidder shall offer complete installation and commissioning of M&P on a turnkey basis. Responsibilities of Consignee and Supplier in this regard shall be as per following details-

2.2.1 Responsibilities of Consignee

2.2.1.1 IRCON shall provide suitable site for construction of foundation.

2.2.1.2 IRCON will provide electric connection including earthing point at the column nearest to the machine area (within a range of 10 to 15 meters from the M&P) and all further arrangements / connections shall be done by bidder at his own cost. However, electricity shall be provided by IRCON on chargeable basis (as per Railways rules) based upon number of units consumed for which supplier will have to deposit requisite security deposit for taking connection and supplier will also install consumption meter at his own cost. Water will, however, be provided by IRCON free of cost to bidder.

2.2.1.3 xxxx xxxx xxxx

2.2.1.4 IRCON will provide open space for storage of material/equipment required for working/ construction of foundation and installation of

the machine etc. However, safety and security arrangements for keeping watch on the material will have to be done by bidder at his own cost. Alternatively, bidder can keep his material by making temporary storage on the space provided by IRCON.

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2.2.1.5 Work Load (including input material, consumables, compressed air, diesel, electricity etc.) for commissioning period and proving out the M&P shall be provided by IRCON/RCF.

2.2.2 Responsibilities of Supplier:

2.2.2.1 xxxx

xxxx

xxxx

2.2.2.2 xxxx

xxxx

xxxx

2.2.2.3 xxxx

xxxx

xxxx

2.2.2.4 All facilities required for the installation & Commissioning such as manpower, material handling equipment like cranes, lifting arrangement etc., tools & tackles, welding or cutting machine, first fill of all lubricants/oils etc. shall also be the responsibility of the Supplier.

2.2.2.5 Any other resource/facilities required as deemed necessary by Supplier.”

12. Section 2 of the Purchase Order contained the detailed technical specifications including the scope of supply. Clause 48 of the Technical Specification provides for erection, commissioning and proving test. Sub-clauses 48.2 and 48.3 of the Technical Specification of Section 2 of the Purchase Order are relevant and are set out below:-

“48.2 Following items of work shall be performed by the Contractor

- i) Fixing of rail on gantry girder and final alignment (if required) of gantry rail at site.
- ii) Installation of the crane structure and associated machinery in position.
- iii) Complete fitting and wiring of all electrical items
- iv) Fixing of down shop leads wherever required.
- v) Commissioning of the equipment. The crane performance shall be demonstrated after successful commissioning.

Note: - Rail for fixing on the gantry girder shall be provided by IRCON/RCF/RBL Transportation of rail from a centralized location within the premises of RCF/RBL facility to the site of fitment shall be done by the contractor.

48.3 Consignee's obligation with regard to erection & commissioning will be limited to supply of electricity required, on chargeable basis for the purpose of erection lighting.”

13. Clause 1 of the Technical Specification of Section 2 of the Purchase Order provided for detailed scope of supply. Clause 1.2 of Technical Specification clearly includes that the items referred therein were not exhaustive. The opening lines of Clause 1.2 of the Technical Specification are clearly stated that *“the scope of supply shall include but not be limited to the following alongwith necessary fittings, fixtures and ancillaries”*.

14. The Arbitral Tribunal had considered the above clauses and

concluded that the obligation of IRCON in relation to supply of any material was restricted to those specified and the balance material of services required for execution of the work was the primary responsibility/obligation of Alpha.

15. The aforesaid view cannot be stated to be perverse or contrary to the terms of the contract entered into between the parties. It is necessary to bear in mind that the scope of judicial review under Section 34 of the Act is restricted and does not extend to reassessing and re-appreciating the evidence. In ***P.R. Shah, Shares & Stock Broker (P) Ltd. v. M/s. B.H.H. Securities (P) Ltd. & Ors.: (2012) 1 SCC 594***, the Supreme Court had observed as under:-

“21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Act..... Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

16. In ***Associate Builders (supra)***, the Supreme Court had noted the earlier decisions and held as under:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and

quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

17. The decisions relied upon by Ms Tripathi are also authorities which clearly highlight the limited scope of judicial review in proceedings under Section 34 of the Act and are, thus, of little assistance to Alpha.

18. In *Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.*: (2006)11 SCC 181, the Supreme Court had explained that the question relating to the construction of the agreement is within the jurisdiction of the arbitrator.

19. Interpretation of a contract is a matter for the arbitrator to determine. Plainly, no interference with the exercise of jurisdiction of the arbitrator would be called for except on the grounds specified under Section 34 of the Act.

20. In the present case, this Court is unable to accept that any of the grounds set out in Section 34 of the Act have been established, which warrant any interference with the impugned award. As stated above, the view expressed by the Arbitral Tribunal is a plausible one. Thus, even if this Court is partial to the interpretation canvassed on behalf of Alpha, the same would not be a ground to set aside the impugned

award.

21. In view of the above, the present petition is dismissed. The application also stands disposed of. The parties are left to bear their own costs.

APRIL05, 2018
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VIBHU BAKHRU, J

