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IN THE HIGH COURT OF DELHI AT NEW DELHI*Reserved on : 14.02.2024*

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Pronounced on: 30.04.2024

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FAO(OS) (COMM) 196/2022 & CM APP. 32867/2022, CM APP. 5632/2024**JINDAL RAIL INFRASTRUCTURE LIMITED** Appellant

Through: Mr Jayant Mehta, Senior Advocate,
with Mr Nilava Bandyopadhyay and
Mr Prateek Dhir, Advocates.

versus

UNION OF INDIA & ANR. Respondents

Through: Mr Nitinja Chaudhry, Senior Panel
Counsel, with Mr Keshav Sehgal, GP,
Mr Shivam Gaur, Mr Kshitij Joshi
and Mr Rahul Mourya, Advocates.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J.:****Prefatory Facts:**

1. This is an appeal preferred by Jindal Rail Infrastructure Limited [hereafter referred to as "JRIL"] under Section 37 of the Arbitration and Conciliation Act, 1996 [in short, "1996 Act"] against the judgment dated 23.05.2022 [hereafter referred to as "the impugned judgment"] passed by the learned Single Judge.

1.1 *Via* the impugned judgment, the learned Single Judge allowed the petition instituted by the respondents, in effect, Union of India [hereafter



referred to as “UOI”].

2. The UOI, through its petition instituted under Section 34 of the 1996 Act, had assailed the decision rendered by the sole arbitrator concerning Claim No. 2 which was subject matter of the arbitral award dated 01.03.2019. *Via* Claim No. 2, JRIL had sought recovery of the additional amount in respect of BG Bogie Open Wagons [hereafter referred to as “BOXNHL wagons”] manufactured and supplied by it, over and above the quantities which UOI initially ordered, and on account of breaches committed by UOI.

2.1 The excess amount whose recovery was sought by JRIL at the market rate was pegged at Rs.50,07,93,577 (albeit excluding interest and other charges). In the alternative, JRIL claimed at the L-2 rate Rs.30,39,69,420 (exclusive of interest and other charges). Thus, with interest and other charges, the total amount claimed at the market rate was Rs. 52,47,21,679, and at the L-2 rate was Rs. 32,12,37,351. A third alternative *qua* Claim 2 was also given, whereby the monetary relief was crystallized at Rs. 51,82,91,768/-.

2.2 The L-2 rate was based on the price discovered in a tender [i.e., a new tender] opened after the subject tender.

3. The dispute between JRIL and UOI is rooted in Clause 2.4 (renumbered as Clause 2.8) of the subject contract. Under Clause 2.4, UOI exercised its option to increase the ordered quantity during the currency of the subject contract, based on the price and terms and conditions on which it had placed an order for the original quantities. For convenience, Clause 2.4 of the subject contract is set forth hereafter:

“2.4 Option Clause: The purchaser reserves the right to increase/decrease the ordered quantity up to 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.”

4. The record shows (something which is not in dispute) that in absolute terms, under the aforementioned option clause, UOI had placed an order on JRIL for manufacturing and delivering 496 additional BOXNHL wagons at the price of Rs. 10,80,000/- per wagon. Concededly, Rs. 10,80,000/- per wagon was the price paid by UOI to JRIL for the quantities ordered initially under the subject contract.
5. Under the subject contract, UOI had ordered wagons in two lots. In the first lot, it had ordered 1403 BOXNHL wagons, while in the second lot, it had ordered 251 BOXNHL wagons, bringing the total number of BOXNHL wagons ordered to 1654. As indicated above, the option clause entitled UOI to increase/decrease the ordered quantities by 30%. Accordingly, UOI exercised this right and ordered an additional 496 BOXNHL wagons, i.e., approximately 30% of the original quantity ordered, i.e., 1654 BOXNHL wagons.
6. Admittedly, when a purchase order was raised on JRIL for the additional 496 BOXNHL wagons, it accepted the same without protest since the option clause, in no uncertain terms, provided that if UOI chose to trigger the option available to it under Clause 2.4 of the subject contract, the manufacturer/seller would have to supply the additional quantities at the price and the terms and conditions applicable to the ordered quantities.
7. There is no dispute that although the subject contract had not been closed, the option clause was triggered by UOI only after the fresh tender had been opened by it on 12.01.2016 [hereafter referred to as "the 2016 tender"] for the manufacture and supply of BOXNHL wagons. The L-1 price



discovered *vis-à-vis* BOXNHL wagons under the 2016 tender was Rs. 14,50,000/- per wagon.

8. Undisputedly, the tender committee constituted by the UOI could not get the bidders to reduce their price to Rs. 10,80,000 per wagon, which was the rate applicable to the subject contract. The UOI's inability to have the price reduced emerges from a perusal of the minutes of the meetings held by the supplementary tender committee on 12.06.2015 and 24.06.2015, as well as the minutes of the meetings dated 23.07.2015 and 28.07.2015 of the second supplementary tender committee.

9. Thus, the inflection point in the instant matter revolved around the rate that UOI chose to apply to the additional 496 BOXNHL wagons supplied by JRIL. The learned sole arbitrator ruled in favour of JRIL and awarded monies under Claim No. 2 by directing UOI to pay JRIL the difference between the rate discovered in the 2016 tender and the applicable rate under the subject contract.

9.1 In other words, *qua* 496 BOXNHL wagons, UOI was directed to pay an additional sum at the rate of Rs. 3,70,000/- per wagon, being the difference between Rs. 14,50,000/- and Rs. 10,80,000/- per wagon.

10. This led UOI to lodge its action under Section 34 of the 1994 Act. The learned single Judge reversed the award. It was the Single Judge's view that the learned arbitrator, in allowing Claim no. 2, had redrawn the bargain between the parties by rewriting the terms of the subject contract. Thus, according to the learned Single Judge, the award was in conflict with the fundamental policy of Indian law and was patently illegal.

Submissions of Counsels:

11. Mr Jayant Mehta, learned counsel who appeared on behalf of JRIL,



assailed the impugned judgment on the following grounds:

11.1 The interpretation of a contract falls within the domain of the arbitral tribunal. The learned arbitrator had furnished reasons why JRIL was entitled to a higher rate per wagon. In this context, the learned arbitrator had noticed that JRIL was subjected to economic duress, unfairness, and malafide exercise of the power invested in UOI under the option clause. The learned Single Judge had lost sight of these aspects of the matter.

11.2 Furthermore, the learned arbitrator had adverted to the fact that since the subject contract was not negotiated between the parties, a unilateral power invested in UOI under the option clause could not be subjected to literal interpretation if it "flouts business commonsense". The learned arbitrator had thus found out, as it were, the intention of the parties which would give effect to the commercial purpose with which parties had entered into the subject contract. It is in this context that the learned arbitrator had concluded that UOI had been unfair in raising an order for additional quantities, i.e., 496 BOXNHL wagons, *albeit* at the rate at which original quantities were ordered, although, in the interregnum, the cost of manufacturing the wagons had gone up substantially.

11.3 The learned arbitrator thus relied on the provisions of Sections 70 and 73 of the Indian Contract Act 1872 to compensate JRIL for the breach caused by UOI.

11.4 The learned arbitrator's conclusion was based on a plausible view. On the other hand, the learned Single Judge had failed to establish how the interpretation accorded by the learned arbitrator to Clause 2.4 was implausible. An arbitral tribunal is entitled to take into account trade usages applicable to a transaction and is not hemmed in by the words of the



contract¹. The principles of fairness inhere in every contract, and this principle applies with greater force concerning contracts to which the State is a party².

11.5 UOI had exercised the option only after discovering an increased L-1 rate in the 2016 tender. Upon discovering the increased L-1 rate, it reduced 496 BOXNHL wagons from the 2016 tender and allocated it to JRIL. Therefore, the learned arbitrator concluded that UOI had unfairly triggered the option clause. The interpretation afforded to the option clause by the learned arbitrator was a plausible view. It should not have been interdicted by the learned Single Judge while exercising powers under Section 34 of the 1996 Act.

11.6 The option clause is triggered in two situations, during the currency of the contract. First, when there is an urgent need for wagons. Second, suppose one of the parties fails to supply the wagons. In that case, the purchaser can decrease the quantity of the defaulting contractor and increase the quantity of the other contractor to a maximum of 30% by exercising rights under the options clause. As is apparent, if the rate discovered under the 2016 tender were less than the rate obtaining in the subject contract, UOI would not have exercised the option clause. Since the rate discovered in the 2016 tender was higher, UOI took recourse to the option clause, *albeit* with mala fide intent.

11.7 It is well-established that if an arbitrator commits an error in the construction of the contract, it is an error that falls within his jurisdiction³.

¹ See Section 28(3) of 1996 Act and Eastern Coalfields v Rungta Project (2018) SCCOnline 655 @ paragraph 24

² See Madras Aluminum Company Ltd. V Tamil Nadu Electricity Board and Anr (2023) 8 SCC 240

³ See MSK Projects (JV) Ltd v State of Rajasthan (2011) 10 SCC 573



11.8 A Court ought not to interfere with an award unless it concludes that the perversity alluded to goes to the root of the matter and there was no possibility of sustaining the award based on an alternate interpretation.⁴

12. In rebuttal, Mr Nitinjya Chaudhary, who appeared on behalf of UOI, primarily relied upon the impugned judgment. Mr Chaudhary contended that the learned Single Judge had rightly concluded that UOI was entitled to exercise the option conferred upon it under Clause 2.4 of the subject contract. JRIL laid no challenge to the subject contract; in particular to the provisions of Clause 2.4. JRIL had, without protest, accepted the amendment to the subject contract, whereby an additional order comprising 496 BOXNHL wagons was placed upon it by UOI. The learned arbitrator's reasoning ran afoul of the plain language of the option clause. The conclusion of the learned arbitrator was patently illegal as there was no scope for holding that the application of the option clause would flout business commonsense.

12.1 Mr Chaudhary submitted that JRIL had consciously adopted predatory pricing while bidding for the subject contract thereby successfully ousting from the race other manufacturers and suppliers. JRIL's intent was to acquire a higher share of the tendered quantity, which, in turn, would entitle it to obtain a higher allocation of quantities in the succeeding year based on its performance in the preceding year.

12.2 The learned arbitrator had recast the contract, rendering the award

⁴ See *Delhi Airport Metro Express Private Limited vs Delhi Metro Rail Corporation Limited* [(2022) 1 SCC 131 @ Para 24-31]; [Notably, this judgment cited on behalf of JRIL was subsequently set aside on the Delhi Airport Metro Express Private Limited's appeal, by a 3-Judge Bench of the Supreme Court in Curative Petition (C) Nos. 108-109/2022.]

Daya Technologies Pvt. Ltd. vs Crompton Greaves Ltd. [(2009) 20 SCC 1 @ Para 24-25];

UHL Power Company Limited vs State of Himachal Pradesh [(2022) 4 SCC 116 @ Para 15, 22].



patently illegal and opposed to the fundamental principles of Indian law. The impugned judgment, having noticed the aforesaid fatal error, does not call for interference by this Court.

Analysis and Reasoning:

13. Before proceeding further, it would be relevant to set out broadly the backdrop in which the controversy as regards rate to be applied concerning additional BOXNHL wagons has arisen between the parties.

13.1 UOI had floated a tender on 13.03.2015, whereby, among other things, it invited bids for purchasing 4392 BOXNHL wagons. As per the aforementioned tender, manufacturers and suppliers with a five-year track record were to be allocated 55% of the quantities referred to in the tender. The balance 45% of the tendered quantities were to be distributed between L-1, L-2, and L-3 bidders in the following ratio: 50:30:20. Furthermore, as per the tender, quantities were to be released to the successful bidders in two lots. The first lot was to consist of 50% of the allocated quantity. The second lot was to be released to the contractor by UOI based on its performance *vis-à-vis* the first. In case the contractor's performance was not good, UOI could redistribute the required quantity amongst other contractors.

13.2 The record discloses that UOI *via* corrigendum dated 25.03.2015 increased the tendered quantity of BOXNHL wagons from 4392 to 7492. Upon JRIL submitting its bid, its bid was opened. JRIL was declared the L-1 bidder, and consequently, it entered into the subject contract with UOI on 12.06.2015. The tenure of the contract was one year. As noticed above, the total BOXNHL wagons allocated to JRIL under the subject contract was 1654. The rate fixed for each wagon was Rs. 10,80,000/-.

13.3 As per the terms of the subject contract, UOI raised an order for



BOXNHL wagons in 2 lots. Although the first lot released to JRIL ought to have included only 50% of the allocated quantity, it consisted of 1403 BOXNHL wagons. On 14.03.2016, *via* Amendment No. II, UOI ordered 251 BOXNHL wagons, as part of the second lot. With this, the initial quantity allocated to JRIL under the subject contract stood exhausted.

13.4 As adverted to above, on 12.01.2016, UOI floated a fresh tender (i.e., the 2016 tender). The L-1 price discovered upon opening the 2016 tender for each BOXNHL wagon was Rs. 14,50,000/-. Even though the Tender Committee of UOI made attempts at renegotiating the price discovered under the 2016 tender, it failed to convince the bidders to lower the offered price. A perusal of the minutes of the meetings of the supplementary and second supplementary tender committee held on 12.06.2015, 24.06.2015, 23.07.2015 and 28.07.2015 evidences the failure of price renegotiation parleys.

13.5 The unsuccessful attempt at having the price pared down impelled the UOI to resort to the option clause obtaining in the subject contract. Accordingly, on 08.04.2016, *via* Amendment No.III to the subject contract, UOI placed an order for an additional 496 BOXNHL wagons on JRIL.

13.6 Significantly, JRIL for reasons best known to itself, chose to accept the obligations imposed upon it under Amendment No. III, despite initial misgivings. Additional quantities, that is, 496 BOXNHL wagons, were manufactured and supplied to UOI.

13.7 Interestingly, the claim for extra amount under Claim No. 2 was not restricted to 496 BOXNHL wagons. Before the arbitrator, the stand taken by JRIL was that UOI had short-closed the subject contract, which envisaged a supply of 7492 BOXNHL wagons, by placing an order only *vis-à-vis* 2718



BOXNHL wagons, which included wagons allocated to JRIL and other contractors. According to JRIL, as per the formula provided in the subject tender, even with allocated quantities being increased by 30%, UOI could not have called upon it to supply more than 796 BOXNHL wagons. Therefore, JRIL claimed that it was entitled to receive payment from UOI at the market price for additional wagons supplied by it, i.e., over and above 796 BOXNHL wagons. Accordingly, JRIL sought monies under Claim no.2 based on differential price *qua* 1354 BOXNHL wagons, which was the difference between 1654 BOXNHL wagons that it had supplied under the subject contract and 796 BOXNHL wagons which, according to JRIL, it ought to have been called upon to supply, given the fact that UOI had reduced the total quantities under the subject contract to 2718 wagons.

13.8 It is not in dispute that the learned arbitrator rejected this contention advanced by JRIL. As alluded to above, the learned arbitrator awarded monies under Claim No. 2 based on differential rates only *vis-à-vis* the additional 496 BOXNHL wagons which were the subject matter of Amendment No. III. Before us, JRIL has not agitated that it should have been awarded monies under Claim No.2 based on differential rates *vis-à-vis* 1354 wagons. Mr Mehta, on behalf of JRIL, has, in no uncertain terms, conveyed that it is satisfied with the decision rendered by the sole arbitrator *vis-à-vis* Claim no.2.

14. Thus, in a nutshell, we are called upon to decide whether, given the way the option clause reads, there was any scope for the learned arbitrator to reach a different conclusion than that which one would reach, if it were applied "as is."

15. There is no dispute that UOI was invested with the power to trigger



the option during the currency of the subject contract. The fact that the subject contract was alive is evident, as the additional quantities ordered under Amendment No. III, which was triggered on 08.04.2016, were delivered by JRIL. In other words, JRIL performed its obligations under the contract.

15.1 Given the fact that the subject contract was alive, UOI was well within its right to trigger the option clause. The clause, quite obviously, was put in place in the subject contract to enable UOI to hedge its losses if it was confronted with a situation of the kind that obtained in the instant case. The option clause of the kind obtaining in the subject contract is found ordinarily in commercial agreements. Thus, when parties bid for commercial contracts, their offer factors a situation where bidders may be called upon to supply increased or decreased quantities. We are unable to persuade ourselves that the option clause "flouted business commonsense". On the contrary, it made commercial sense for UOI to incorporate an option clause to protect itself from possible price fluctuations. It would be a leap of faith for the arbitrator to have concluded that JRIL would suffer a loss without knowing, among other things, when the raw material used for manufacturing additional wagons was bought. It could well be that the raw material used was, if not wholly, partially available with it. The learned arbitrator's rationale for awarding monies under claim no.2 based on difference in rates is predicated on the increase in the cost of manufacture, which, according to him, was reflected in the increased price discovered in the 2016 tender. No material was placed before the learned arbitrator to establish, what components of costs of manufacturing wagons had undergone an increase. It is relevant to bear in mind that JLIR had executed the subject contract in June 2015, and



UOI discovered the price under the new tender in June 2016. There was a gap of only one year. Therefore, in our view, the fairness argument advanced on behalf of JRIL is founded on shaky ground, in the absence of relevant material being made available to the learned arbitrator.

16. As indicated above, UOI was well within its right to protect itself against the eventuality which emerged in the instant case.

17. It is trite law that an implied term is read into the contract to give it business efficacy, only if does not collide with the express terms of the contract. That said, before an implied term can be read into the contract, in addition, the following conditions must also be met: the implied term should be reasonable, equitable and something that parties always intended to agree to. [See *Adani Power (Mundra) Limited vs. Gujarat Electricity Regulatory Commission and Others* (2019) 19 SCC 9]. In the instant case, since UOI expressly reserved the right in the subject contract to increase or decrease the ordered quantities to protect its commercial interest goes against JRIL's submission that the 2016 tender rates should apply to the additional quantities. Any other approach would neither be reasonable nor equitable. In fact, it would lead to loss of public revenue.

18. The submission advanced on behalf of JRIL, that the interpretation of a contract falls within the domain of the arbitrator, is a submission with which one cannot quibble. That said, the rules of interpretation kick in only when the contract or a particular clause is vague or ambiguous. The purpose of employing interpretation tools is to ascertain parties' intent when they first enter into an agreement. The best tool to determine the parties' intent is the plain words of the contract [in the given case, the words of a particular clause(s)]. If the words of the contract or a clause incorporated in the



contract are clear, explicit and unambiguous, ordinarily, they have to be given their full effect. The intention of parties is to be ascertained, in the first instance, from the meaning of the words they have used. Intention independent of that meaning is often a cause of confusion, while the process of construction is on⁵. It is good to remember that parties who are knowledgeable and experienced, and can also have the benefit of legal advice, are taken to have intended what is stated in the contract⁶. Therefore, the argument that the interpretation of a contract falls within the domain of an arbitrator is a submission which, in our opinion, is untenable as there was, without doubt, no scope for employing interpretation tools.

19. For the foregoing reasons, we find no merit in the appeal. The appeal is, accordingly, dismissed.

(RAJIV SHAKDHER)
Judge

(AMIT BANSAL)
Judge

APRIL 30, 2024

⁵ *Great Western Railway and Midland Railway v Bristol Corporation* (1918) 87 LJ Ch 414 :

“In such discussions one hears much use made of the word “intention,” but Courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employ shows that they did: in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are constructing the words and expressions used by the parties themselves. What do these mean? That when ascertained is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of parties different from the meaning conveyed by the words employed is not part of interpretation, but is mere confusion.”

⁶ *Board of Trustees of the National Provident Fund v Shortland Securities* (1996) 1 NZLR 45 (CA)] :

“Those principles of construction are well established as is the primary rule that the starting point is the words used by the parties in their contract. The parties, particularly knowledgeable and experienced parties, legally advised, are to be taken to have intended what they have said. It is where there is ambiguity or inconsistency that the stated principles are invoked in order that these may be resolved by reference to such matters as the background and the object and purpose of the transaction.”