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

\+ O.M.P. (COMM) 45/2017

FEDDERS LLOYD CORPORATION LTD. ..... Petitioner

Through: Mr G. Saikumar, Ms Sowmya Saikumar and Ms Noor Rampal, Advocates.

versus

STERLITE TECHNOLOGIES LTD. ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **06.02.2017**

<u>VIBHU BAKHRU, J</u>

<u>IA No. 1521/2017</u>

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

<u>O.M.P. (COMM) 45/2017</u>

3. Fedders Lloyd Corporation Ltd. (hereafter 'FLC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia,* praying for setting aside the arbitral award dated 29.09.2016 (hereafter 'the impugned award') made and published by the Sole Arbitrator, Justice Rekha Sharma, a former Judge of this Court.

4. The disputes between the parties relate to the price charged by Sterlite Technologies Ltd. (hereafter 'Sterlite') for supply of the ACSR Moose Conductor (hereafter 'the product'). FLC claims that the price charged by Sterlite was in excess of contracted price since price agreed included excise

duty at the rate of 10.30%, which was neither levied nor paid by Sterlite. On the aforesaid premise, FLC, *inter alia*, claimed refund of excise duty component included in the price and Central Sales Tax (CST) charged on that component.

5. FLC was awarded a contract for setting up of a 400 KV transmission line by Haryana Vidyut Prasharan Ltd. and FLC required to source the product for that project. Accordingly, FLC entered into an agreement dated 25.02.2011 (hereafter 'the Agreement') with Sterlite for supply of the product, whereby Sterlite agreed to manufacture and supply the product of the given specifications for execution of the project awarded by Haryana Vidyut Prasharan Ltd. to FLC.

6. The Agreement was satisfactorily performed and Sterlite supplied the product as contracted. After the supplies were complete, FLC alleged that during the course of audit of its accounts, it had discovered that Sterlite had unjustly enriched itself by fraudulently charging a sum of ₹1,86,95,666.97/- on account of excise duty. In addition, FLC had also paid the Central Sales Tax (CST) on the aforesaid component of excise duty computed as ₹2,43,412.68/-. Accordingly, FLC raised a claim *inter alia* seeking recovery of the aforesaid amounts.

7. Sterlite did not dispute that excise duty was not leviable on the product in the State of Uttarakhand. But it claimed that it had paid the excise duty on the components. And, the price quoted by it for the product was inclusive of the excise duty and, therefore, FLC's claim was unjustified. Sterlite asserted that reference to excise duty, in its price quotation, was in

respect to the excise paid on the raw materials - Aluminium and Steel - which indisputably are excisable items.

8. The arbitrator considered the rival contentions and accepted Sterlite's contention that the price was inclusive of excise duty and reference to excise duty was with respect to the raw materials used.

9. Mr G. Saikumar, the learned counsel appearing for FLC contended that the impugned award was perverse and patently erroneous. He referred to an email dated 22.02.2011 sent by Sterlite, which clearly indicated that excise duty at the rate of 10.30 % on the unit price of ₹1,81,550/- was included in the FOR price of ₹2,03,752.15/-. He submitted that the aforesaid pre-contractual communication clearly indicated that the excise duty charged was on the final product and not on the components. He contended that in this view, the arbitrator's finding that excise duty mentioned by Sterlite was with reference to the raw material, was unsustainable.

10. I have heard the learned counsel for FLC.

11. First and foremost, it is necessary to observe that it is not disputed that the contracted price as quoted by Sterlite and as accepted by FLC, was an all inclusive price which included excise duty. The unit price as agreed did not indicate any split on account of any component including excise duty. The parties have also agreed that the price would be adjusted for any revision in excise duty.

12. It is also an admitted fact that Sterlite has paid excise duty on the raw materials.

13. Admittedly, no excise duty was payable on the product and the learned counsel for FLC also did not dispute that in the event any excise duty was levied on the product, Sterlite would be entitled to claim CENVAT credit on account of duty paid on the raw material used in the manufacture of the product. It is, thus, clear that Sterlite's costs on account of levy of excise duty on the final product - that is, the additional cost that would be incurred on account of levy of excise duty on the final product - would be significantly less than the excise duty levied on the product on account of credit for the excise duty paid on the raw material used in manufacture of the product. This also amply clarifies that the fundamental assumption that FLC would be entitled to recover excise duty at ₹18,699.60 per unit collected at the rate of 10.30 % of the basic unit price, is too simplistic as the total excise burden on Sterlite would not change to the extent as claimed by FLC in the event excise duty was chargeable on the product.

14. The arbitrator had considered the correspondence between the parties and had concluded that the reference to the excise inclusive price referred to the excise payable on the raw materials since both the parties were fully aware that there was no excise duty that was chargeable on the product in the State of Uttarakhand. The arbitrator further reasoned that both the parties were in business and would be fully aware as to whether manufacture of the product was exigible to excise duty. The arbitrator had also referred to the Circular issued by Cable and Conductor Manufacturers Association of India (CACMAI) which provided for price variation formula since the same was expressly referred to by the parties in the Agreement. The arbitrator noticed that the parties had also accepted that the price would be varied on account

of variation in the base cost of the raw material, which would also include excise duty on the raw material.

15. The arbitrator also observed that the parties had entered into similar contracts in the past and the component of excise was included in the price. And, no such controversy had been raised by FLC in the context of prior contracts.

16. It is well settled that the scope of interference with the award under Section 34(2) of the Act is limited. It is not open for this Court to supplant its view and sit as an appellate Court over the decision of the arbitrator. Unless the arbitrator's view is established to be wholly unreasonable and perverse, no interference with an arbitral award would be called for.

17. Given that the price agreed to by the parties was an all inclusive price; that FLC was aware or ought to have been aware that the product was not chargeable to excise duty in the State of Uttarakhand; and that duty paid raw material was used in manufacture of the product, the arbitrator's view is a plausible one. Thus, even if it is accepted that the arbitrator's view is erroneous, it would not be open for this Court to interfere with the same as impugned award cannot be stated to be patently illegal or opposed to the fundamental policy of Indian law.

18. For the reasons stated above, the petition is dismissed.

VIBHU BAKHRU, J

FEBRUARY 06, 2017
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