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

Date of decision: 14th August, 2018

+ **O.M.P. 121/2013**

M/S SPEEDCRAFTS LIMITED

..... Petitioner

Through: Mr. Devmani Bansal, Mr. Ajay Monga, Mr. Amol Sharma and Ms. Jagriti Ahuja, Advocates.
(M:9213743613)

versus

THE UNION OF INDIA & ORS

..... Respondents

Through: Mr. J.K. Singh, Standing Counsel with for Railways with Mr. Harsh Pandit and Ms. Madhulika Agarwal, Advocates. (M:9958711596)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed challenging the award dated 9th November, 2012 passed by the arbitral tribunal constituted by the Railways.
2. The short point that is raised in this case is as to the liability to pay service tax and whether the Petitioner is entitled to reimbursement of the same. The Railways floated a Tender Notice No.Track-2/TM/2002 for Flash Butt Welding. The last date for submission of the bid was 15th January, 2003. The Petitioner herein, submitted its bid on 11th January, 2003. The relevant portion of the bid document reads as under:

“Our quoted price is incisive [sic inclusive] of Central Taxes Duty, Sales Tax and Works contract Tax. The

present rate of Central Excise duty and Sales Tax is Nil. The present rate of works contract tax is 1%. Any revision in these rates will be to Railway accounts. Further in case Excise Duty is levied by government on this work, the same shall be reimbursed by Railways. ”

3. The contract was subsequently entered into on 15th July, 2003 and was deemed to come into force on 7th July, 2003. The relevant clauses in the said contract read as under: -

- “1. Article of agreement made this 15.07.2003 between President of India acting through the Chief Track Engineer, Northern Railway, Headquarters office, Baroda House, New Delhi hereinafter called the (Railway) of the one part and M/s Speed Craft Ltd., Layak Bhawan, Boring Canal Road, Patna hereinafter called the “CONTRACTOR” of the other part(s).*
- 2. Whereas the contractor has agreed with the railway for the performance of work “Welding 60 Kg/52 Kg. 90 UTS rails in 20 rails panels in FBWP Meerut with firm's own Mobile Flash Butt Welding Plant for 50,000 joints including, cleaning, grinding and finishing, transporting loose rails (13m/26m length) to welding site (average lead not, exceeding 500 meters, deploying and maintaining grinding machine etc.”*
- 3. Now this indenture presents witnessed that in consideration of the payment to be made by the railway, the contractor will duly perform the said work in the said schedule set forth and shall execute the same with great promptness, care and accuracy in a workman like manner to the satisfaction of the railway and will complete the same in accordance with the said condition of on and before 6.11.06 and will observe, fulfill and keep all the condition there in mentioned (which*

shall be deemed and taken to be part of this contract as if the same had been fully set forth herein) and the railway does hereby agree that if the contractor shall duly perform the said work in the manner aforesaid and observe and keep the said terms and conditions the railway will pay or cause to be paid to the contractor for the said work on the final completion thereof the amount due in respect at the rates specified in the schedule here to be annexed.

- 4. That the tender documents, decision taken in pre bid conference and acceptance letter bearing number 319-W/7/73/Pt.V./Loose-I dated 17.6.03 shall form integral part of this contract.*
- 5. This agreement shall deem to come into force with effect from 7.7.03.”*

4. The total cost of the contract was Rs.7.22 crores. The cost of one weld was Rs.1444/- inclusive of all taxes. The basis of the agreement were the documents dated 17th June, 2003, which consisted of the acceptance letter and the terms discussed in the pre-bid conference on 17th June, 2003.

5. The Finance was sought to be amended vide the Finance (No.2) Bill, 2004, by which 'Business Auxiliary Service' was proposed to be included. The Petitioner then addressed a letter dated 9th August 2004 to the Railways informing them of the said proposal and also took the stand that the Railways is liable to pay the same, as and when it becomes applicable. Vide letter dated 7th August, 2004 (actually issued on 28th August, 2004), the Railways clarified that the price agreed in the contract was inclusive of all statutory levies of the Central/ State Governments. The Finance Act was finally amended w.e.f. 10th September, 2004 and "Business Auxiliary Service" was added as a 'taxable service' w.e.f. the said date. By this

Amendment to the Finance Act, service tax at 10% and cess on tax at 2% became applicable on Business Auxiliary Services.

6. Thereafter, the Railways further obtained a clarification from the Ministry of Finance on 18th August, 2006 which reads as under: -

**“GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)**

No.Track/21/2004/0110/7/51154

New Delhi, dt.18.08.06

*General Managers,
All Indian Railways and Production Units.*

*Sub: Service Tax on site works contract – **Flash
Butt Welding of rails at site.***

With reference to one of the Railway Board's contracts for Flash Butt Welding of 52/60kg rails at site using Mobile Butt Welding Plant, the firm having been awarded the said contract sought a clarification whether services rendered by a Company for flash butt welding of rails used for welding short rail length into long rail would attract Service Tax.

2. The issue has been examined in consultation with the Ministry of Finance (Department of Revenue)/Central Board of Excise and Customs who have clarified that since the activity of welding rails into long length rails would amount to production or processing of goods for or on behalf of the client, and activity taxable under Business Auxiliary Service; therefore, Service Tax is leviable on the gross amount charged by the Service provider for such service provided or to be provided.

3. The above clarification may be brought to the

notice of all concerned for information and appropriate action.

4. This issues with the concurrence of Finance Directorate of Ministry of Railways.

Please acknowledge receipt.

*Sd/-
(R.K. Bhandari)
Dy. Director/Track-I/Railway Board*

No.Track/21/2004/0110/7/51154

New Delhi, dt.18.08.06.

Copy for information to FA&CAOs, All Indian Railways & Production Units.

*Sd/-
For Financial Commissioner/Railways”*

7. In view of the fact that the service was stated to be taxable, the Petitioner raised a claim with the Railways, seeking reimbursement of the service tax payable along with the interest. The said claim was for a total sum of Rs. 1,10,41,006.07/- along with interest of Rs.90,70,477.57/-. The Railways rejected this claim and the matter came to be referred to arbitration. The arbitral tribunal, after discussing the various issues raised by the Petitioner, in its award dated 9th November, 2012 came to the conclusion that since the liability to deposit service tax is on the Petitioner under Section 68 of the Finance Act, 1994 and the price quoted by it was inclusive of all taxes, neither the service tax nor the interest component was liable to be reimbursed. The present petition challenges the said award.

8. Learned counsel for the Petitioner has taken the Court through the

various clauses in the agreement and submitted that on the day of the bid i.e. 11th January, 2003, since service tax was not payable, the bid price could not have included the service tax component. He submits that the bid has to be interpreted on the basis of taxes that were payable on the date of submission of the bid and any liability thereafter cannot be imposed upon the Petitioner. He specifically relied upon the “taxes and duties” clause which clearly stated that even if excise duty is levied by the government on the said work, the same was to be reimbursed by the Railways. Learned counsel for the Petitioner relied upon *Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd. (2007) 8 SCC 466* where levy of countervailing duty subsequent to the execution of the agreement was considered by the Supreme Court. He specifically relied upon paragraphs 13 and 17 of the said judgement.

9. On the other hand, learned counsel for the Respondents submits that the clause in the agreement was quite clear that the price includes all statutory levies which may be imposed by the Central or State governments and under these circumstances, the Railways cannot be saddled with the liability to reimburse service tax. He relied upon the conclusion of the arbitral tribunal, which clearly holds that the liability of service tax is on the service provider, and hence the Railways cannot be made to reimburse the same.

10. On a query from the Court, learned counsel for the Petitioner has clarified that though the contract was executed in 2003 and the services were rendered thereafter, till date, there has been no demand from the service tax department to the Petitioner for payment of service tax on the contracted amount. He also admits that no deposit of service tax has in fact been made by the Petitioner.

11. In this background, firstly, it is noticed that the contract between the parties clearly stated that all taxes have to be paid by the Petitioner. However, it would be too much to assume that a tax which did not exist at the time when the bid was submitted would also be a liability of the Petitioner. In fact, a perusal of the clause clearly indicates that excise duty, if levied, was to be reimbursed by the Railways. On services, no excise duty is imposed, however, service tax was imposed subsequent to the conclusion of the agreement.

12. The judgment of the Supreme Court in *Numaligarh Refinery Ltd.(Supra)* clearly held that if countervailing duty came into existence after the execution of the agreement, the same would not be the bidder's responsibility or obligation. The Supreme Court in paragraph 17 notices that since the duty came into existence subsequently, the liability upon the bidders would not include the said duty. Thus, the Department was to pay the same. The ratio of the Supreme Court, is that the intention of the parties has to be ascertained from the agreement between the parties. The Supreme held:

“13. Next issue is with regard to countervailing duty. DIC claimed a sum of Rs.8.78 crores which was paid on account of excise duty. The claim of DIC was that in fact at the time when the agreement was executed between the parties, countervailing duty was not there and it was introduced with effect from 1-1-1995 by the Customs Tariff (Amendment) Ordinance, 1994. New Sections 9, 9A and 9B were introduced. This Ordinance was subsequently replaced by the Customs Tariff (Amendment) Act, 1995 which was deemed to have come into force with effect from 1-1-1995. DIC submitted its initial bid on 16-3-1994 and

final bid on 23-11-1994 by taking into consideration customs duty on imported materials at 25% as operative then. DIC could not have imagined the levy of countervailing duty at 12.5% brought into force with effect from 1-1-1995. Bid settlement was made on 24-1-1995 and NRL finally awarded the contract to DIC by fax of intent dated 31-1-1995. Therefore, the submission of DIC was that at the relevant time there was no countervailing duty and it came into force subsequent to the contract, therefore as per Section 64-A of the Sale of Goods Act, 1930, DIC is entitled to get this claim reimbursed. NRL contended that as per Clause 14.1 in the statement of claim pertaining to the contract, clear instructions were given to the bidders under Clauses 15, 15.1, 15.2, 15.3 that entire customs duties or levies including the stamp duty and import licence fee levied on the equipments by Government of India or any State Government will have to be borne by DIC. The payment of countervailing duty was allowed by both the arbitrators i.e. the majority and minority. But the Division Bench of the High Court reversed the finding. Aggrieved against this part of the order, appeal has been filed by DIC which has been registered as civil appeal arising out of SLP (C) No.4409 of 2007.

17. *We have considered the rival submissions of the parties. So far as the legal proposition as enunciated by this Court in various decisions mentioned above, it is correct that courts shall not ordinarily substitute their interpretation for that of the arbitrator. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the arbitrator should be*

accepted without demur. There is no quarrel with this legal proposition. But in a case where it is found that the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case, there is no prohibition for the courts to set things right. In the present case, the aforesaid clauses reproduced above, clearly lay down that all taxes, duties and levies have to be borne by the contracting party. Countervailing duty which came into force with effect from 1-1-1995 by way of Ordinance (subsequently converted into an Act) is a duty enforced by the statute and hence in face of Clause 2(b) and Clause 6 of the Consolidated Agreement read with Clause 2.1(g) of the Instructions to Bidders and Clause 13(f) of the Bid Document, there is leaves no manner of doubt that DIC has to pay the same. Therefore, this levy has to be borne by the DIC and they cannot escape from this situation.

18. *In this connection, learned counsel has invited our attention to Section 64-A of the Sale of Goods Act, 1930 which reads as under:*

“64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.- (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at

that time,-

- (a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and*
- (b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.*
- (2) The provisions of sub-section (1) apply to the following taxes, namely;-*
 - (a) any duty of customs or excise on goods;*
 - (b) any tax on the sale or purchase of goods."*

This section also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. In this connection, the intention of the parties is to be ascertained, as per the clauses mentioned above."

13. Going by the aforesaid precedent of the Supreme Court, it is clear that

the intention of the parties, in the present case, was not to pass on the liability of the service tax to the Petitioner. The Petitioner was liable to the extent of the obligations which existed on the Bid date but not beyond that. As service tax was imposed subsequently, the same would be reimbursable.

14. However, the matter does not end here. The fact that for more than 15 years, the Petitioner has not deposited the service tax, but is merely raising a claim for the entire service tax amount and the interest therein, shows that the Petitioner has not complied with the obligation under Section 68 of the Finance Act. Learned counsel for the Petitioner submits that the arbitral tribunal's award, being contrary to law, should not be sustained and is liable to be set aside, as, if the service tax department raises claims in future, the same would be liable to be reimbursed.

15. Since the entire issue is in the realm of fiction at this point inasmuch as the Petitioner has not deposited the service tax and obviously cannot claim reimbursement of an amount which it has not deposited, no monetary claim is allowable in this matter. It is directed that if a demand is raised in future by the Service tax department, for the amount which is covered under this contract, upon the Petitioner depositing the said amount, it can approach the Railways for reimbursement at that stage.

16. Petition is disposed of with these observations.

PRATHIBA M. SINGH
JUDGE

AUGUST 14, 2018

Rekha