

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.03.2018

+ **O.M.P. (COMM) 121/2018**

L&T-SUCG JV CC27 DELHI

..... Petitioner

versus

**DELHI METRO RAIL CORPORATION
LIMITED**

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Dayan Krishnan, Sr. Advocate with Ms Megha Mehta Agrawal, Ms Aakash Lodha and Mr Samith Sagaranaahalli.

For the Respondent: Mr Tarun Johri, Mr Ankit Saini and Mr Ankur Gupta.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 17.11.2017 (hereafter 'the impugned award') passed by the Arbitral Tribunal in the context of the disputes relating to the 'Contract Agreement' dated 22.01.2013 (hereafter 'the Agreement'). The controversy involved in the present petition relates to the petitioner's claim for reimbursement of

Countervailing Duty (CVD) and Special Additional Duty (SAD) imposed on the Tunnel Boring Machines (TBMs) imported by the petitioner. By the impugned award, the Arbitral Tribunal had rejected the petitioner's claim for reimbursement of CVD and SAD on the TBMs imported by the petitioner. The Arbitral Tribunal found the petitioner's contention that there was no restrictive covenant proscribing the petitioner from raising such claim as "not maintainable". The Arbitral Tribunal held that in terms of Clause 11.1.1(ii) of the General Conditions of Contract (GCC) nothing extra was payable to the petitioner over and above the quoted rates. In addition, the Arbitral Tribunal has also found that the procurement of the TBMs was delayed.

2. Briefly stated, the controversy involved in the present petition arise in the following context:-

2.1 The petitioner is a joint venture entity constituted by Larsen & Toubro Limited (L&T) and Shanghai Urban Construction Group Corporation (SUCGC). The respondent (hereafter 'DMRC') is a Public Sector company incorporated under the Companies Act, 1956.

2.2 DMRC issued a Notice Inviting Tender (NIT) on 04.04.2012 for inviting bids from eligible bidders for execution of the works entailing *"Design and Construction of Tunnel from end of underground ramp (near Shankar Vihar Metro Station) to Hauz Khas Metro Station and Underground ramp near Shankar Vihar Metro Station and underground metro stations at Vasant Vihar, Munirka, R. K. Puram,*

IIT and Hauz Khas on the Janakpuri West-Botanical Garden Corridor of Delhi MRTS Project of Phase-III (hereafter referred to as ‘the project’).

2.3 The estimated cost for the project was ₹1435 cores and the same was to be completed within a period of 42 months.

2.4 In response to the aforesaid NIT, the petitioner submitted its bid. The bid was opened by the DMRC on 01.10.2012 and the petitioner was declared to be the successful bidder. Thereafter, on 01.11.2012, the DMRC issued a Letter of Acceptance (LoA), which also constituted “Notice to Proceed”.

2.5 Thereafter, on 03.01.2013, the petitioner placed a Purchase Order for import of two TBMs (TBM THI-01 and TBM THI-02).

2.6 On 22.01.2013, the parties executed the Agreement for execution of the project at a lumpsum price of ₹1012,53,04,600/- (Rupees One Thousand and Twelve Crores Fifty Three Lakhs Four Thousand and Six Hundred Only) plus US\$ 4,34,59,599.48 (US Dollar Four Crores Thirty Four Lakhs Five Hundred Ninety Nine and Forty Eight Cents).

2.7 One of the TBMs (TBM THI-01) was imported from China and arrived in India by the end of the year 2013. It is stated that at the material time, the import was exempt from levy of CVD.

2.8 By a notification dated 03.02.2014 (notification no.4/2014-Cus.) the exemption from levy of CVD on import of TBMs was withdrawn.

Thus, with effect from 17.02.2014, the import of TBMs and its accessories were subject to levy of CVD at the rate of 10% and SAD at the rate of 4%.

2.9 TBM (THI-02) – the Purchase Order of which was placed on 03.01.2018 – arrived at the Indian Port on 03.03.2014 and, therefore, was subject to levy of CVD and SAD. On 12.03.2014, the petitioner made a payment of ₹4,91,53,394/- on account of CVD and SAD imposed on import of the said TBM.

2.10 The petitioner made a request for reimbursement of the duties (CVD and SAD) levied on the import of TBM THI-02 on 11.07.2014, which was denied by DMRC on 02.08.2014.

2.11 On 02.02.2015, the petitioner also obtained a clarification from the Economic Adviser, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry that other than the excise duty, no indirect tax was included in WPI. On obtaining the said clarification, the petitioner once again reiterated its demand for reimbursement of customs duties.

2.12 The petitioner claimed that it had encountered huge quantities of excavation in a rocky terrain, which could not be reasonably anticipated. It is also claimed that at the material time, a TBM which could cater to excavation in a rocky terrain was not available and, therefore, the petitioner was compelled to import another TBM (that is, CREG TBM).

2.13 The petitioner claims that in April 2015 it paid an amount of ₹3,98,85,358/- as CVD and SAD on the import of CREG TBM and its parts. The petitioner also made a claim for reimbursement of the said amount from DMRC vide its letter dated 11.04.2015.

2.14 On 08.07.2015, the petitioner once again sent a letter to DMRC demanding reimbursement of the CVD and SAD, aggregating a sum of ₹8,90,38,752/-, paid on the import of the two TBMs (TBM THI-02 and CREG TBM). Since DMRC did not accede to the said demand, the petitioner issued a notice of dispute dated 30.07.2015 and the disputes were referred for conciliation. The efforts to resolve the disputes amicably could not succeed and the claims made by the petitioner were referred to the Arbitral Tribunal. The said proceedings culminated in the delivery of the impugned award.

Submissions

3. Mr Dayan Krishnan, the learned senior counsel appearing on behalf of the petitioner contended that the impugned award is wholly erroneous and contrary to the terms of the Agreement. He earnestly contended that the Arbitral Tribunal had erred in proceeding on the basis that the petitioner was precluded from raising any claim on account of the CVD and SAD imposed pursuant to the notification dated 17.03.2012. He contended that the conclusion of the Arbitral Tribunal that the levy of 10% CVD and 4% SAD, by virtue of the notification dated 03.02.2014 only amounted to a change of duty and not a fresh levy. He stated that the reliance placed by the Arbitral

Tribunal on the decision of the Supreme Court in *CCE, Hyderabad & Ors v. Vazir Sultan Tobacco Co. Ltd & Ors.: (1996) 3 SCC 434* in this regard was wholly erroneous. He stated that the said decision was rendered in the context of excisable goods under Central Excise Act, 1944 and the said decision would have no application for determining whether the goods were dutiable goods under the Customs Act, 1962. He submitted that nil rate of excise duty on goods did not mean that the said goods were not excisable goods; but, a nil rate of customs duty on import of any goods would imply that the said goods were not exigible to customs duty. Thus, the notification dated 03.02.2014 had the effect of TBM becoming chargeable to customs duty for the first time and the said notification could not be construed as a mere change in the levy of duties. He relied on the decision of the Supreme Court in *Associated Cement Companies Ltd. v. Commissioner of Customs: (2001) 4 SCC 593* in support of his contention.

4. Next Mr Dayan Krishnan, contended that the finding of the Arbitral Tribunal that there was delay on the part of the petitioner in importing the TBMs is also erroneous. He stated that the Purchase Order for the two TBMs was placed on 03.01.2013, which was even prior to the petitioner submitting its programme for execution of the Project. The CREG TBM had to be imported as the petitioner encountered hard rock, which was neither the part of the contract nor could be reasonable anticipated. He submitted that mere two months of geological survey was wholly insufficient for any entity to conclusively establish the underground geology, therefore, the

reasoning of the Arbitral Tribunal that the petitioner could have imported the TBMs prior to the notification and the subsequent levy of CVD and SAD is an incident of delay on the part of the petitioner, is unsustainable.

Reasoning and Conclusion

5. In order to address the controversy, it would be necessary to refer to the relevant clauses – Clause 11.1.1(ii) of GCC, SCC Clause 22; 11.1.1 (a); SCC Clause 23; and Clause 11.1.3(v) – which are set out below:-

“i. **GCC Clause 11.1.1 (ii):-**

Nothing extra shall be payable over the quoted rates, notwithstanding any provision to the contrary in any law for the time being in force, save and except what is specially provided in General or Special Conditions of Contract.

ii. **SCC Clause 22. Clause 11.1.1 (a):-**

the contract price, subject to any adjustment thereto in accordance with the contract shall be inclusive (including all taxes, duties, royalties etc) including Value Added Tax (VAT) paid under Delhi VAT Act, 2005 where work is done at Delhi and Value Added Tax (VAT) paid under other state Government VAT Act if work is done in that State.

SCC Clause 23 Clause 11.1.3 (v):-

Change in Taxes /Duty - the Contract price shall not be adjusted to take into account any increase or decrease in cost resulting from any change in taxes,

duties, levies from the last of submission of tender to the completion date including date of the extended period of contract.”

6. Although, it was extensively debated whether Clause 11.1.3(v) of the SCC precluded the petitioner from raising the claim for reimbursement of CVD and SAD; the same is secondary. The first and foremost question to be answered is whether the DMRC was obliged to pay for any item of costs incurred by the petitioner in execution of the Project over and above the contract price.

7. Clause 11.1.1(ii) of GCC makes it amply clear that the DMRC was not obliged to pay anything extra over and above the quoted rates except “*what was specifically provided in the General or Special Conditions of Contract*”. Indisputably, there is no clause in the General or Special Conditions of Contract, which specifically entitles the petitioner to any additional reimbursement of any amount with respect to levy of any additional tax or duties. Thus, even if it is accepted that the effect of notification dated 03.02.2014, whereby CVD at the rate of 10% and SAD at the rate of 4% was levied, was to render the import of TBMs chargeable to customs duty, the petitioner would not be entitled to claim any amount on account of the same. The contract between the parties does not entitle the petitioner to claim any element of costs for execution of the Project. The rates accepted by the DMRC are all inclusive rates. Concededly, the petitioner’s claim is not one in the nature of the damages. The petitioner is, essentially, claiming a variation in price. The petitioner has founded its

claim on the basis that the price variation clause does not adequately compensate the petitioner because the wholesale Price Index (which is used as an indicator for variation in price) does not factor in custom duties on TBM. The claim made by the petitioner appears to be fundamentally flawed because if the claim for compensation is neither founded as a claim of damages nor included in the price variation clause, there would not be no justification for awarding such additional reimbursement to the petitioner.

8. The Arbitral Tribunal had considered the Clause 11.1.1(ii) of GCC and had concluded as under:-

“c) The Claimant’s contention that there is no restrictive covenant which forbids him from raising any claim due to the incident of any subsequent levies or duties, is not maintainable in view of the GCC Clause 11.1.1 (ii), according to which ‘Nothing extra shall be payable over and above the quoted rates, save and except what is specially provided in GCC or SCC.’”

9. In view of the above, the decision of the Arbitral Tribunal to reject the petitioner’s claim cannot be faulted.

10. Having stated above, it is also apposite to consider the challenge laid by the petitioner in respect to the other reasons stated by the Arbitral Tribunal for arriving at the conclusion that it did. The Arbitral Tribunal had held that the notification dated 03.02.2014 amounted to a change of duty and any claim on that count was proscribed by virtue of SCC Clause 23; 11.1.3(v). The Arbitral Tribunal had reasoned that

there was nil CVD on import of TBMs at the time of submission of tenders and the subsequent notification dated 03.02.2014 only brought about a change in the rate of duty from nil to 10%. As noted above, the Arbitral Tribunal had also relied on the decision of the Supreme Court in *Vazir Sultan Tobacco Co. Ltd.* (*supra*) in support of its view.

11. The contention that the notification dated 03.02.2014 brought TBMs in the net of customs duty for the first time, is merited. Import of TBMs could not be considered as chargeable to customs duty prior to the said notification. The reference to the decision in the case of *Vazir Sultan Tobacco Co. Ltd.* (*supra*) may not be apposite in view of the decision of the Supreme Court in *Associated Cement Companies Ltd.* (*supra*). In this case, the Supreme Court had explained as under:-

“79. It appears to us that the aforesaid decisions, which were sought to be invoked by the respondent in an effort to submit that the drawings and designs, which came as a part of passenger baggage were dutiable goods, would not be applicable. In *Vazir Sultan and Wallace Flour Mills* cases (*supra*), this Court considered the definition of “excisable goods” in Section 2(d) of the Central Excise Act, 1944 which was as follows:

“2. (d) ‘excisable goods’ means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt”.

80. Under the Customs Act, there are two definitions which are relevant. Section 2 (22) defines “goods” as follows:

“2.(22) ‘goods’ includes –

(a) Vessels, aircraft and vehicles;

- (b) Stores;
- (c) baggage;
- (d) currency and negotiable instruments; and
- (e) any other kind of moveable property.

In addition thereto, Section 2(14) defines, “dutiable goods” as follows:

“2.(14) ‘dutiable goods’ means any goods which are chargeable to duty and on which duty has not been paid;”

81. Under the Central Excise Act, 1944 in the definition of words “excisable” goods under Section 2(d), the very specification or inclusion of goods in the First and Second Schedules of the Central Excise Tariff Act would make them excisable goods subject to duty. Under the Customs Act, the provisions seem to be somewhat different. While by virtue of Section 2(22) all kinds of moveable property would be “goods” but it is only those goods which would be regarded as “dutiable goods” under Section 2(14) which are chargeable to duty and on which duty has not been paid. The expression “chargeable to duty on which duty has not been paid” indicates that goods on which duty has been paid or on which no duty is leviable, and therefore no duty is payable, will not be regarded as “dutiable goods”. It is only if payment of duty is outstanding or leviable that goods will be regarded as dutiable goods.”

12. Having stated above, it is also necessary to read SCC Clause 11.1.3(v) in its context. A plain reading of the said clause indicates that it is not limited to merely change in the rates of duties. The expression “*change in taxes, duties, levies*” would not only take within its sweep the change in the rate of taxes, duties and levies but also any substantive change in taxes brought about as imposition of such taxes,

duties and levies. The petitioner's contention that Clause 11.1.3(v) must be read in a restrictive manner to proscribe a claim only when there is a change in the rate of the duty, is unpersuasive. The clear import of Clause 11.1.3(v) is that the DMRC would not be responsible on account of any change in duties, taxes and levies. And, imposition of customs CVD on import of TBMs is clearly a change in the levy of duties, which falls within the scope of Clause 11.1.3(v). Thus, this Court finds no infirmity with the conclusion that SCC Clause 23; 11.1.3(v) proscribes any adjustment on account of increase or decrease in cost resulting from the levy of CVD on TBM introduced by virtue of notification dated 03.02.2014. In this view, the debate whether the said notification only brought about a change in the rate or included the import of TBM as chargeable to duty for the first time is not material.

13. Mr Dayan Krishnan had fairly stated that in the event, the Tribunal's decision that the petitioner was not entitled to claim reimbursement of additional costs incurred on account of imposition of CVD and SAD by virtue of GCC Clause 11.1.1(ii) and SCC Clause 23; 11.1.3(v) is upheld, the question whether there was any delay on the part of the petitioner would be rendered academic.

14. It is seen that the petitioner had also canvassed before the Arbitral Tribunal that the delay in import of TBMs was for reasons attributable to the DMRC. The said contention is plainly unmerited and was rightly rejected by the Arbitral Tribunal. The Arbitral Tribunal had noted that the Purchase Order for the TBM THI-01 and TBM THI-02 were placed at the same time. Whilst TBM THI-01

arrived in India on 01.11.2013, TBM THI-02 arrived much later; thus, the delay in import of TBM THI-02 was not on account of any reason attributable to DMRC. The Tribunal also noted that the petitioner had claimed that the delay in arrival of TBM THI-02 was because of problems related to supplies from Japan which had been affected due to major typhoon.

15. The Memorandum of Understanding dated 08.12.2012 entered into between Larsen & Toubro and Hubei Tiandi Heavy Industries Co. Ltd. (THI) specified that TBM THI-01 and TBM THI-02 would be delivered in 31 weeks from the date of MoU and, thus, both the TBMs ought to have been received in India by 14.07.2013.

16. As far as the import of CREG TBM is concerned, the petitioner claimed that the said TBM had been imported on account of meeting hard rock, which was not anticipated earlier. Plainly, this factor cannot be attributed to DMRC and, thus, the petitioner's claim that the delay in import was caused on account of DMRC, is unmerited.

17. Although, this Court has examined the merits of the contentions raised by the petitioner, it was not necessary to do so as the scope of interference with the Arbitral Award under Section 34 of the Act is limited. The impugned award can be interfered only on the grounds as set out in Section 34 of the Act. In the present case, the impugned award is neither beyond the jurisdiction of the Arbitral Tribunal nor can be stated to be opposed to the Public Policy of India.

18. The controversy as to the interpretation of the contract is squarely within the jurisdiction of the Arbitral Tribunal and even if it was accepted that such interpretation is erroneous (which this Court does not), the impugned award cannot be interfered with unless it is found to be perverse or plainly contrary to the terms of the contract. (See: *Mcdermott International Inc. v. Burn Standard Co. Ltd and Ors.*: (2006) 11 SCC 181).

19. In view of the above, the petition is dismissed. The parties are left to bear their own costs.

MARCH 20, 2018
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VIBHU BAKHRU, J