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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 14th March, 2018

O.M.P. (COMM) 95/2017

HPCL- MITTAL ENERGY LIMITED Petitioner
Through Mr.Kartik Nayar, Mr.Sarthak
Malhotra and Mr.Rishab Kumar,
Advs.
versus

ARTSON ENGINEERING LTD. Respondent
Through Mr.Sameer Parekh, Ms.Smita
Bhargava, Ms.Pavitra Singh and
Ms.Raveena Rai, Advs.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

IA 8013/2017

This is an application seeking condonation of delay in the filing of the reply. As the matter has been heard on merit, delay is condoned and the application is allowed.

IA 13475/2017

This is an application seeking condonation of delay in filing of the rejoinder. As the matter has been heard on merit, delay is condoned and the application is allowed.

O.M.P. (COMM) 95/2017

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 21.12.2016 by which the Sole Arbitrator, while allowing the claims of the respondent has dismissed the counter claim filed by the petitioner. The summary of the amount awarded by the Sole Arbitrator is as under:

“The Tribunal hereby passes an Award in favour of Claimant and against the Respondent and directs the Respondent to pay the following amounts-

1) Claimant is entitled to a total sum of Rs.3,56,58,819/-Respondent is directed to pay to Claimant-

i. A sum of Rs.14,71,129/- towards CVD paid on imported materials in Project 2505.

ii. A sum of Rs.5,90,160/- towards additional CVD paid on imported materials in Project 2505.

iii. A sum of Rs.32,77,250/- towards Central Excise Duty paid on Structural Steels, Paints, Nuts & Bolts, etc. in Project 2505.

iv. A sum of Rs.33,32,812/- towards CVD paid on imported materials in Project 2507.

v. A sum of Rs.14,33,457/- towards additional CVD paid on imported materials in Project 2507.

vi. A sum of Rs. 2,18,51,044/- towards Central Excise Duty paid on Structural Steels, Paints, Nuts & Bolts, etc. in Project 2507.

vii. A sum of Rs. 22,38,414/- towards Non cenvatable Excise Duty in Project 2512.

viii. A sum of Rs. 14,64,553/- towards Short payment on account of reimbursement of Service Tax in Project 2512.

2) Interest payable should be as per the given classification-

i. Interest at the rate of 10% p.a. is calculated from the date of cause of action up to date of reference.

ii. Interest at the rate of 10% p.a. is calculated from the next day of date of reference till the date of Final Award.

iii. Interest at the rate of 10% p.a. to be calculated from the date of cause of Award till actual realization.

3) All other claims of the Claimant and counter claims of the Respondent are hereby rejected.

4) Claimant is entitled to receive total costs and expenses of the Arbitration from the Respondent. Calculation to be done by the parties in this regard-

i. Tribunal directs Respondent to pay Claimant, its share of Arbitrator's fee and expenses including Tribunal's Administrative Expenses.

ii. Tribunal directs Respondent to pay Claimant, the fee and expenses of Claimant's Counsel, if certified."

3. The dispute between the parties is in relation to the following three agreements:

Sr. No.	Contract No./Purchase order no. and date of execution	Scope of work/purpose	Contract value (in INR)	Contract Code
1	Contract No.HMEL/LET-3-/BR-005 dated 8 August, 2008	For Construction of Crude Storage Tanks	36,27,98,395/-	2505
2	Contract No.6922/T-161/070-08/MCJ/40 dated 10 January, 2009	For construction of Intermediate and Product Storage Tanks	191,69,88,669/-	2507
3	Contract Dated 3 September, 2010 with Work Order dated 6 August,2010 and revised Purchase Order No.5200000093 dated 14 May, 2012	Works entailing Supply, Fabrication and Erection of Structural Crossover Platform	13,71,42,327/-	2512

4. The said agreements, as far as the payment of Custom Duty, Excise

Duty and Service Tax is concerned, contains the following arrangement:

“2.0 CONTRACT VALUE

The estimated value of works included in this contract works out to Rs.1,91,69,88,669/- (Rupees One Hundred Ninety One Crore Sixty Nine Lakhs Eighty Eight Thousand Six Hundred Sixty Nine Only) for PART-A, PART-B & PART-C on the basis of unit rates included in the Schedule of Rates (SOR) attached as Appendix-A to this detailed Letter of Acceptance and considering overall rebate @ 5.25% (five point two five percent) applicable on all items of SOR. The actual contract value shall however, be subject to variation, increase or decrease, depending upon the actual quantities of works executed, measured and accepted for payment at site.

The contracted rates are inclusive of all applicable taxes, duties, levies as per provision of bidding document but excluding the following taxes and duties which shall be reimbursed extra up to a ceiling mentioned below, upon production of Cenvatable and Vatable documents (as the case may be) as per the provisions of the Bidding Document.

Sl.No.	Description	Celling amount in rupees		
		PART-A	PART-B	PART-C
i	Cenvatable Excise Duty (incl. Cess)	1,83,67,323	1,40,69,065	1,41,86,639
ii	Service Tax (incl. Cess)	2,91,13,193	2,65,48,026	2,33,18,713
iii	(CVD/Addl. CVD (incl. Cess) for Goods directly dispatched to site	41,48,702	58,72,471	55,44,135
iv	Sub Total (i+ii+iii)	5,16,29,218	4,64,89,562	4,30,49,487
v	CST	NIL	NIL	NIL
vi	VAT on sale of goods	1,45,13,100	1,20,14,160	1,03,52,000

The contracted prices/ rates as above shall be adjusted on account of statutory variations by Government Notification in taxes, duties and levies imposed after submission of final price bid i.e. December 26, 2008 against submission of documentary evidence as per provisions of Bidding Document.

The amount of CIF value for the purpose of statutory variation in Custom Duty is as follows:

Sl.No.	Description	Celling amount in Rupees		
		PART-A	PART-B	PART-C
I	CIF Value	3,58,12,064	5,06,91,830	4,78,57,600

Adjustment in Contract price/unit rate due to statutory variations as above will be to OWNER's account until contractual completion schedule. Any variation beyond contractual completion Schedule will be to CONTRACTOR's account.

The CONTRACTOR will furnish the necessary documents/Invoices in line with the CENVAT Credit Rules 2004 and other related legislations and/or rules, to enable the OWNER claim CENVAT Credit of Excise Duty and Service Tax so paid. In case, the OWNER Is not able to claim CENVAT Credit of Excise Duty and/or Service Tax paid or payable to the CONTRACTOR, such amount(s) will be debited to CONTRACTOR's account. The CONTRACTOR will also furnish the necessary documents/Invoices as per Punjab VAT Act and Rules to enable the OWNER claim Input Tax Credit (ITC) of the (Punjab) VAT so paid or payable to the CONTRACTOR. In case, the OWNER Is not able to claim ITC of the VAT paid or payable to the CONTRACTOR, such amount(s) will be debited to CONTRACTOR's account. The OWNER shall deduct Income Tax and Punjab VAT at source (TDS), from the payment(s) to be made to the CONTRACTOR, as per rates applicable under the respective legislations/rules at the time of releasing payment. The OWNER shall issue certificate for such deductions (TDS), as per respective legislation/rules, so as to enable the CONTRACTOR claim credit of the same.

Further, the contracted unit rates shall remain firm and fixed till completion of all works except for the variation in unit rates due to variation in Steel Prices as per the provision of bidding document."

(emphasis supplied)

5. The respondent, claiming that in spite of having furnished all necessary documents/invoices in accordance with the Cenvat Credit Rules 2004 and other related legislation and rules to the petitioner, the petitioner has not reimbursed some portion of the Custom Duty, Excise Duty and the Service Tax to the respondent, filed the Statement of Claim before the Arbitrator.

6. In its response thereto, the petitioner, apart from raising various other defence on merit, inter-alia contended that as the Tax Authorities had rejected the claim of the petitioner for Excise Duty, it was entitled to claim the refund of the same from the respondent. The petitioner further contended that the claim made by the respondent in the arbitration proceedings was far in excess of what had been submitted by the respondent during the course of the agreement to the petitioner and for which no documents had been supplied by the respondent to the petitioner either during the currency of the agreement or even in the arbitration proceedings.

7. The Arbitrator by his Impugned Award has inter-alia held as under:

“8.2.5.10 After going through the pleadings and submissions advanced by Ld. Counsel for the parties, it is observed that no documents have been shown/ produced by Respondent that it had submitted the cenvatable documents before the authorities yet the same were rejected. It was only after completion of the Contract that Respondent had raised objections regarding the same.

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8.3.1.3 The following facts have been ascertained by the Tribunal-

i. That Bid/Contract drafted by Respondent makes a representation that Respondent is entitled to

reimbursement by way of cenvatability of all these three duties/taxes from relevant authorities. Contract only requires Claimant to provide the necessary documents for the same.

- ii. That right: through the period of Contract, all goods, whether imported or purchased in India by Claimant were consigned to & delivered directly by the sellers to Respondent's factory/facility.*
- iii. Claimant provided all documents relevant for claiming Tax reimbursement/ exemption.*
- iv. That at no point of time during the currency of the contract did respondent ever inform Claimant that it had not provided necessary or proper documents. This claim or allegations have been made by Respondent for the first time, much after the Contracts period came to an end and the entire Contract had been performed by Claimant. Thus obviously same appear to be an afterthought to defeat just, proper, legal and equitable claims of the Claimant."*

8. In view of the above findings, the Arbitrator in his Impugned Award has held the respondent to be entitled to a sum of Rs.3,56,58,819/- from the petitioner and has rejected the counter claim of the petitioner.

9. Learned counsel for the petitioner submits that the Arbitrator has not considered the counter claim made by the petitioner at all in the Impugned Award. Relying upon the agreement and particularly Clause 2 of the same reproduced herein above, the counsel for the petitioner submits that the counter claim was based on the fact that the petitioner has been denied the benefit of the Excise Duty reimbursement by the concerned authorities and therefore, the petitioner is entitled to claim back the amount paid on this account from the respondent; the Arbitrator has not considered this Clause of the agreement at all and has in fact, given no reason why the counter

claim made by the petitioner on this ground is not maintainable. He further submits that the Arbitrator has awarded the above mentioned sum of Rs.3,56,58,819/- without there being any evidence on record before the Arbitrator justifying such a claim. He submits that even if the finding of the Arbitrator on the interpretation of the agreement is found to be correct i.e. that the respondent had supplied all nature of documents necessary for making the claim for reimbursement of taxes from the petitioner during the currency of the agreement, in view of the categorical stand of the petitioner in its Statement of Defence that the claim now been raised by the respondent was for in excess than that what had been submitted by the respondent during the currency of the agreement to the petitioner and for which no document had been given to the petitioner, the arbitrator should have given reasons for rejecting the same and for quantifying the amount awarded in favour of the respondent. He draws my attention to the Statement of Defence filed by the petitioner before the Arbitrator, which *inter-alia* contended as under:

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(v) That without prejudice to the submissions hereinabove that none of the purported Claims submitted by the Claimant are eligible for reimbursement by the Respondent, it is further submitted that the purported Claims under the present arbitration are actually inflated and are much more than what was earlier claimed by the Claimant from the Respondent. A comparative chart depicting the claims of the Claimant prior to the initiation of the present arbitration and the claims under the present arbitration is provided herein below:

Tax	Claim under present Arbitration	Claim prior to initiation of Arbitration	Claim not made prior to initiation of Arbitration
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Countervailing Duty	14,71,129/-	4,50,851/-	16,10,438/-
Additional CVD	5,90,160/-		
Excise Duty	32,77,250/-	10,39,187/-	22,38,063/-
Total	53,38,539/-	14,90,038/-	38,48,501/-

(vi) Therefore, from a perusal of the aforesaid chart it is evident that the purported claims now submitted by the Claimant are inflated, baseless and without any proof and therefore such additional claims are prima facie not admissible and are required to be rejected at the threshold.

(vii) That on the strength of the aforementioned submissions hereinabove, the Respondent submits that the purported claims of the Claimant for reimbursement of the taxes purportedly paid and which purportedly qualify for reimbursement are wholly misconceived and not payable either under the Contract or under law."

10. He further submits that, in fact, it was the own case of the respondent that the Arbitrator does not have to quantify the claim of the respondent, but is only to give a declaratory relief in favour of the respondent with respect to its entitlement for refund of such tax amount. In this regard, he placed reliance on the rejoinder filed by the respondent before the Arbitrator, which is reproduced herein below:

"The claim before the Hon. Arbitrator has been made considering the total payments of duties and taxes paid by the Claimant during the execution of the contract. All the claims of Claimant have been supported by the documents mentioned in clauses 12.3.3, 12.5.1, 12.5.2 of the special conditions of the Contract. This is a matter of verification between the parties. Please also refer to annexure 2 & 3 appended to this rejoinder."

(emphasis supplied)

11. He also relies upon the averment made in the application for production of additional documents filed by the respondent before the Sole Arbitrator at the final stage of the proceedings, wherein the respondent had contended as under:

“17. Accordingly, AEL is moving the present application to take on record the above documents. The Claimant still submits that it is probably not necessary for this Tribunal to go into the question of computation. If the claim of the Claimant/AEL is disallowed nothing further survives. However, in the event, the claim of the Claimant is allowed the parties should be directed to reconcile the figures leaving the liberty to the parties to come back to this Tribunal, if necessary.”

(emphasis supplied)

12. Based on the above, he submits that the Arbitrator has therefore, granted relief to the respondent which was not even prayed for by the respondent before the Arbitrator.

13. Learned counsel for the respondent, on the other hand, submits that the only issue before the Arbitrator was whether the documents that had been supplied by the respondent to the petitioner during the currency of the agreement were deficient in any manner because of which the petitioner was unable to claim credit of the taxes from the relevant authorities. He submits that the Arbitrator has come to a finding of fact that the documents that were submitted by the respondent to the petitioner were not deficient in any manner and in fact the petitioner had itself made claim before the concerned authority for the credit of the tax based on the said documents. He further submits that the only reason why the authorities refused to give such credit in favour of the petitioner was because, according to the said authority, only

the respondent could have made such claim and not the petitioner as the respondent was the purchaser of the goods. He submits that the petitioner, being aggrieved of such findings of the Tax Authority, has in fact challenged the same by way of an Appeal and therefore, cannot take a contrary plea before the Arbitral Tribunal.

14. As far as the documents justifying the amount of claim is concerned, he submits that, prior to the filing of the arbitration proceeding, there was no dispute with respect to the quantification of the claims. Once the said dispute was raised by the petitioner before the Arbitrator, the respondent had sought to produce all the relevant documents before the Arbitrator, however, the Arbitrator refused to grant permission to the respondent to place the said documents on record. He submits that as these documents were always available with the petitioner, therefore, the amount awarded in favour of the respondent cannot be challenged.

15. I have considered the submissions made by the learned counsels for the parties. At the outset, it is to be noticed that Clause 2 of the agreement between the parties clearly records as under:

“In case, the OWNER is not able to claim CENVAT Credit of Excise Duty and/or Service Tax paid or payable to the CONTRACTOR, such amount(s) will be debited to CONTRACTOR's account.”

16. The said Clause, therefore, does not restrict the right of the owner to debit the account of the contractor i.e. in this case the respondent. On the other hand, it states that if for any reason whatsoever, petitioner is unable to claim credit the Excise Duty paid by it to the contractor, it will be entitled to debit the respondent's account for such amount. In any case, in the

Impugned Award there is no discussion whatsoever with respect to this Clause, its effect and its interpretation. As the counter claim of the petitioner was based solely on the interpretation of this Clause, it was for the Arbitrator to have interpreted the same and having not even considered the same, in my opinion, the Arbitrator has clearly failed to discharge his duty as obligated on him under Section 28(3) of the Act. It is well settled that while the interpretation of a contractual term by an Arbitrator, if found plausible, cannot be interfered with by the Court in exercise of its power under Section 34 of the Act, however, at the same time, if the Award is passed in ignorance of the terms of the contract, the said award would have to be set-aside by the Court. The Arbitrator having been appointed in terms of the contract, cannot proceed beyond it or in ignorance of the same. I therefore, find substantial merit in the objection of the petitioner that the counter claim of the petitioner has been rejected without any discussion of the same and to that extent the award is unreasoned and is liable to be set aside.

17. Section 31 (3) of the Act mandates that the Arbitral Award shall state the reasons on which it is based, unless the parties have agreed that no reasons are to be given. In the present case, no reason is given in the Arbitral Award for rejecting the counter claim made by the petitioner.

18. As far as the second contention is concerned, I again find that the Arbitrator has not discussed the defence of the petitioner that was raised before the Arbitrator with respect to the claim of the respondent being unsubstantiated with any evidence. As noted above, the petitioner in its Statement of Defence had clearly taken a stand that the claim made by the respondent before the Arbitrator was much beyond it had claimed during the

currency of the agreement and thereafter from the petitioner. It was further contended that the documents for substantiating this additional claim had not been supplied by the respondent to the petitioner at any stage. The respondent was therefore, alive to this objection and not only in its rejoinder, but also in its application seeking production of the additional documents made categorical submission before the Arbitrator that its claim before the Arbitrator is confined only to the determination of the principle whether the respondent is entitled to the reimbursement of CENVAT on Excise Duty, Custom Duty and Service Tax and to the quantification thereof. The respondent took a categorical stand that it was not calling upon the Arbitrator to quantify such claim and prayed that, for the purpose of quantification, the parties would reconcile the same after the award is passed by the Arbitrator on the principle mentioned above and was the matter of disputes between the parties. It is further important to note that, having realized that claim for a particular amount cannot be granted by the Arbitrator in the absence of documents/ evidence being led by it, the respondent itself filed an application seeking the production of additional documents, before the Arbitrator to substantiate its claim in terms of the money. This application, was, however, rejected by the Arbitrator by its order dated 28.04.2016, inter-alia holding as under:

“7. The following salient features are required to be mentioned herein below:

- i. The said Application by the Claimant has been filed admittedly at the stage, when, final arguments on merits were being heard. In fact, Respondent's rebuttal arguments were over and Claimant was to respond to the same in its Rejoinder.*

- ii. *Admittedly both Parties have not led any Oral Evidence and had submitted that matter could be decided on the strength of documents filed and relied upon by them. Thus, no Oral Evidence is there on record at all.*
- iii. *Looking to the serious challenge made by the Respondent, it appears that the same shall have no evidentiary value, unless, they are proved in accordance with law. More so when, Respondent has denied receipts thereof.*
- iv. *It is definitely at a belated stage and if taken on record then prejudice is likely to be caused to the Respondent and obviously opportunity shall have to be given to the Respondent to file documents in rebuttal, if so required.*
- v. *Learned Counsel for Claimant Mr. Sameer Parekh has specifically prayed that final Hearing on merits be continued and these documents be just kept on record. Only if it is found that Claimant is entitled for the reliefs of refund of Excise Duty and Customs Duty, then only they would be considered for computation of the amounts to be paid by the Respondent to the Claimant under the said heads. This suggestion also does not appear to be reasonable and proper as for the same facts, only one Award is to be passed.*
- vi. *It is not disputed that some of the sample Invoices have been filed by the Claimant and are already part of the Record. If these additional documents are taken on record, then no useful purpose is going to be served except Increasing the weight of the Record. Secondly it is not desirable to pass two Awards in the same matter, that too when only by passing one final Award, controversy arising between the Parties can be set at rest.*
- vii. *If documents are directed to be taken on record then the clock shall go back to almost for one year as Respondent shall have to be given an opportunity to file documents and fresh arguments would be required to be heard in the light of these documents.*

viii. The Respondent shall in likelihood ask for more time to advance arguments pertaining to these documents, which were not there when Respondent's arguments had concluded. Both Parties have cited several Judgements to press their respective points but at this stage, it is not necessary to deal with the same individually."

19. In view of the above, the Impugned Award is liable to be set aside inasmuch as it grants a relief in favour of the respondent which is not even prayed for by it before the Arbitrator and also because the Award passed is without any evidence being led by the respondent to substantiate such claim in terms of the money.

20. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, while explaining the limited ground on which the Arbitral Award can be set aside by the Court in exercise of its power under Section 34 of the Act, the Supreme Court has held as under:

"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*

(iii) *ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32. *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum- Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312, it was held: (SCC p. 317, para 7)*

“7. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10,, it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

36. *The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral*

award would be liable to be set aside on the ground that it is contrary to “justice”.

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42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trival nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India-

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute.-(1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

21. In view of the above, the Impugned Award cannot be sustained and is accordingly set aside, leaving it open to the parties to initiate such

proceedings as may be open to them in law and making it clear that if such proceedings are initiated, the parties would be entitled to take the benefit of the arbitration Section 43(4) of the Act for the purpose of limitation.

22. The petition is allowed in the above terms with no order as to cost.

NAVIN CHAWLA, J

MARCH 14, 2018/Arya