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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 120/2018**

Date of decision: 31st May, 2018

L&T SUCG JV CC27 DELHI Appellant

Through: Mr. Dayan Krishnan, Sr. Advocate
with Ms. Megha Mehta Agarwal, Ms.
Akanshi Lodhi and Mr. Samith S.,
Advocates.

versus

DELHI METRO RAIL CORPORATION LIMITED

Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

CM APPL. 24162-24163/2018 (exemption)

Exemption allowed, subject to all just exceptions.

The applications are disposed of.

FAO(OS) (COMM) 120/2018

1. This intra-Court appeal under Section 37 of the Arbitration and Conciliation Act, 1996(A&C Act for short) impugns judgment dated 20th March, 2018 and order dated 1st May, 2018, passed by the learned Single Judge in OMP(COMM) No.121 of 2018 and I.A. No. 5742/2018 in OMP(COMM) No.121 of 2018, respectively.

2. Judgment dated 20th March, 2018 dismisses the application filed by the appellant under Section 34 of the A&C Act, upholding the unanimous award of three arbitartors dated 17th November, 2017. Order dated 1st May, 2018 disposes off

IA No. 5742/2018 filed by the appellant for modification of the order dated 20th March, 2018.

3. The appellant effectively prays for setting aside of the arbitral award dated 17th November, 2017.

4. The appellant is a joint venture company between Larsen & Toubro Limited (L&T, for short) and Shanghai Urban Construction (Group) Corporation (SUCGC, for short). Pursuant to Notice Inviting Tender dated 4th April, 2012, the appellant was awarded contract for design and construction of Tunnel from end of underground ramp near Shankar Vihar Metro Station to Hauz Khas Metro Station, underground ramp at 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, vide agreement dated 22nd January 2013 with Delhi Metro Rail Corporation Ltd. (DMRC) on a fixed cost of Rs. 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). Consideration or cost fixed for execution of the work to be paid to the appellant, was inclusive of all taxes, royalties, duties, fees, cess, octroi and other levies.

5. The appellant, vide statement of claim dated 30th September, 2016, had prayed and sought “reimbursement of

additional customs duty” comprising of “countervailing duty” (CVD) and “special additional duty” (SAD) of Rs. 8,90,38,752/- paid by them on import of two Tunnel Boring Machines (TBMs). The contention was that TBMs were exempt from levy of CVD and SAD on 22nd January, 2013, i.e. on the date of the agreement with DMRC, in terms of Exemption notification No.21/2012 dated 17th March, 2012. Subsequently, CVD at the rate of 10% and SAD of 4% was imposed with effect from 17.02.2014.

6. Arbitral Tribunal has rejected the claim relying and interpreting Clause 11.1.1(ii) of the General Commission of Contract (GCC) and Clause 22; 11.1.1(a) of the Special Conditions of Contract (SCC); Clause 23; and Clause 11.1.3 (v) of the SCC. For the sake of convenience, the said clauses are reproduced 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."

7. The contention of the appellant was that Clause 22;11.1.1 (a) of the GCC and Clause 23;11.1.3(v) of the SCC would not apply as CVD and SAD were imposed with effect from 17th February, 2014. They were exempt and not payable when the agreement dated 22nd January, 2013 with the DMRC was executed. Further, Clause 23;11.1.3(v) of SCC would not apply as the claim for reimbursement of additional cost was in the nature of damages and not for escalation of cost. Clause 23;11.1.3(v) of the SCC relates to escalation of cost and not reimbursement of damages.

8. The Arbitral Tribunal in the award dated 17th November, 2017 had examined these contentions and has rejected the claim, for the following reasons:-

“3.3 Findings and Conclusions of the AT

3.3.1 From the evidence placed on record, the AT has noted that

3.3.1.1.The Claim in question has arisen from the Notification no. 4/2014-Cus dated 03.02.2014 issued by Ministry of Finance withdrawing exemption on the incidence of Counter Vailing Duty (CVD) and Special Additional Duty (SAD), on the import of Tunnel Boring Machines (TBM). Earlier TBMs were exempted from

CVD and SAD, by virtue of Notification no.12/2012-Cus and Notification no. 21/2012 dated 17.03.2012.

3.3.1.2. TBMs were, thus subject to CVD of 10% and SAD of 4%.

3.3.1.3. As a result, a sum of Rs. 8,90,38,752/- was paid by the Claimant for import of two TBMs THI-2 and CREG, for use in the work of Contract Package CC-27(UG-2).

3.3.1.4. The Claimant sought reimbursement of this amount from the Respondent. The Respondent however denied the claim of the Claimant on the ground that it was not admissible as per the provisions of the Contract. This led to the dispute, which is under reference before the AT.

3.3.1.5. The Claim brought up before the AT for adjudication is, for reimbursement of Countervailing Duty (CVD) and Special Additional Duty (SAD) imposed on import of THI-2 & CREG TBMs.

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3.3.6. The AT has examined the justifiability of the claim raised by the Claimant, in the light of submissions made by both the parties and finds as under:-

3.3.6.1. Applicability of GCC Clause 11.1.1 (ii) & SCC Clauses 22, Clause 11.1.1 (a) & Clause 23 Clause 11.1.3(v), has been examined and the AT observes as under:-

a) With the exemption notified vide Customs notification no. 12/2012-Cus dated 17.03.2012, the

CVD applicable on TBMs was NIL, while with exemption having been withdrawn as per notification no. 4/2014-Cus dated 03.02.2014, the same became 10%. As per the Claimant there was no duty on TBMs prior to the notification no. 12/2012-Cus dated 17.03.2012, The Respondent has filed a copy of Customs Tariff with New Import Policy Volume 1, March 2010 published by Business Database Publishing Company. It shows on page 572, 10% CVD & 4% SAD on "Tunneling Machinery. Contesting this, the Claimant says that the entry therein is not related to TBM. However the very use of the term 'exempt' in the above notification dated 17.03.2012, presupposes that there was some customs duty applicable on TBMs which got exempted by this notification and the 'NIL' CVD, became 10%.

b) AT is of the view that 10% CVD and 4 % SAD applicable as per the Notification No. 4/2014-Cus, dated 03.02.2014, is a 'change of duty' and not levy of a new duty and therefore clause SCC Clause 23; 11.1.3 (v) is considered applicable. According to this clause, "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". Another clause which is applicable is SCC Clause 22. Clause 11.1.1 (a) wherein it is stated that the Contract price shall be inclusive (Including all taxes, duties etc.)

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.'

d) *The Claimant has contended that with the imposition of duty on TBM, there was a change of fact situation and therefore, the clause which disallows such payment, becomes otiose. In the Supreme Court Judgment in the Tarapore and Company Vs Cochin Shipyard Ltd. (1984) 2 cited by the Claimant, it was held, 'that when an agreement is predicated upon an agreed fact situation, if the latter ceases to exist, the agreement to that extent becomes irrelevant or otiose'. The AT is of the view that the judgment in the above case is not applicable to the present claim under consideration. In the case of Tarapore and Company Vs Cochin Shipyard Ltd., the whole contract was concluded on the understanding that the contractor would invest Rs. 2 crores for imported equipment and technical know-how fees. The tendered rates were predicated upon this understanding. Once the estimated expenditure exceeded the tendered rate the quoted rates became irrelevant. On the other hand in the present case under consideration, there was no such understanding or agreement between the parties that there would not be any custom duty leviable on import of TBMs. As such, in this case, there was no agreed fact situation which later ceased to exist and thus the question of the clause, which disallows any such payment becoming otiose and does not arise.*

e) *In the light of the above, AT is of the view that the objection raised by the Claimant against the applicability of GCC Clause 11.1.1 (ii), SCC Clause 22, Clause 11.1.1 (a) and SCC Clause 23 Clause 11.1.3 (v) is without any valid ground.*

9. Arbitration Tribunal had specifically examined the question whether DMRC had committed breach of contract and was liable and responsible for the delay in import of two TBM.

On the said aspects, the factual findings recorded by the Arbitral Tribunal are as under:-

“3.3.6.2.3 The AT has examined the submissions made by both the parties, as well as the relevant documents on record and in regard to point 5.6.2.1.(a) above, AT finds that:-

a) As per Clause B2 of Instructions to Tenderer, Clause 2.7.3 of Outline Design Specifications and Clause 9 of the SCC, it is stipulated that:-

i) The Geotechnical and other related data provided by the Employer are for reference purpose only. The accuracy or reliability of the documents and reports is not warranted.

ii) The Tenderer should satisfy himself with the data furnished and make his-own investigation, if required, for submitting his offer.

iii) The proper design of TBM is the responsibility of the Contractor.

iv) Any change in design later during execution, on account of change of Geotechnical data, will be the responsibility of the Contractor and no additional cost or time shall be allowed.

b) The Respondent has cited the law laid down by Hon'ble High Court of Delhi In the matter of "NTPC Vs Gammon India Ltd & Anr. MANU/DE/0863/2008, wherein the clauses pertaining to the responsibility of the Contractor to carryout detailed investigation in terms of the Contract, were upheld.

c) In the present case, the bids for the work of Contract Package CC-27(UG-2) were invited on 04.04.2012 and bids were to be submitted up to 19.06.2012. The AT observes that a period of 214 months available was good enough for the Claimant to carry out his own investigation, as stipulated in the Special Conditions of the Contract, to satisfy, himself regarding the accuracy or otherwise of the Geotechnical data furnished in the tender document. If later on, he encountered Geological surprises necessitating redesign of the TBM and thereby causing delay in procurement of the TBM THI-2, he cannot hold the Respondent responsible for the same.

3.3.6.2.4 As regards to Non-availability of work fronts and failure on the part of Respondent to provide timely access to the site which has been stated by the Claimant as another reason for the delayed arrival of TBM THI-2, the AT finds that:

a) As per the Respondent, there was no such issue of storage of TBMs because sufficient space as per Contract was provided at Mundka casting yard, Pushp Vihar Batching yard and at respective underground station sites. The TBM could be stored at any available location and could be shifted to working site as and when required. Besides, the Claimant had never raised this issue of non-availability of storage, space for TBMs at any time.

b) From the fact that TBM THI-1, which was ordered along with TBM I THI-2, did arrived in India on 01.11.2013 and started its initial drive at Munirka on 29.01.2014, it is obvious that lack of space or access to the site could not be ascribed as the reason for delay in import of TBM THI-2 to India.

3.3.6.2.5 As per Claimant's submission made at Para .26 of the Claim Petition, one reason for the delay in the arrival of TBM THI-2 was on account of problems related to the supplies from Japan which had been affected due to major typhoon.

3.3.6.2.6 As per Memorandum of Understanding entered on 08.12.2012, between Larsen & Toubro Ltd. (L&T) and Hubei Tiandi Heavy Industries Co. Ltd. (THI), delivery time on CIF-Mumbai basis, for the two TBMs THI-1 & 2, was specified as 31 weeks, from the date of MOU. Accordingly TBM THI-2 ought to have been received in India by 14-07-2013. However the TBM THI-2 actually arrived in India, much later, only in the month of March 2014.

3.3.6.2.7 Mere grant of EOT by the Respondent for the delay in achieving various mile stones by the Claimant, for completing various items of the Works, including mile stone KD 9 for start of initial drive of the IBM THI-2. cannot, by itself, justify delay in import of TBM THi-2 being attributed to the Respondent.

3.3.6.2.8 The conclusion from above is that the delay in import of TBM,THI-2 was caused due to manufacturing problems and other factors attributable to the Claimant. The Respondent cannot be held responsible for the same.”

10. On the question what had necessitated procurement of the third TBM, described as CREG TBM, the finding of the Arbitral Tribunal is as under:-

“3.3.6.3 What necessitated the procurement of CREG TBM?

a) The Claimant has stated that the import of CREG TBM was necessitated for no fault of his. This was done

as the Respondent had instructed him to speed up the works and compress the construction schedule. The CVD levied on CREG TBM, thus was an additional unforeseen burden on him and hence needs to be reimbursed.

b) The Respondent has rejected this contention. Quoting from the Minutes of the DP level Meeting held on 26.7.2014 and his letter dated 18.4.2015 to the Claimant, the Respondent stated that on account of non- reliability of and repeated problems given by TBMs THI-1 and THI-2, there was delay in completion of main drive from Munirka to R K Puram by these two TBMs, which were to be re-launched for Vasant Vihar to Munirka. It Is for this reason that CREG TBM was mobilized, by the Claimant, as a contingency plan, to overcome inordinate delays on his behalf.

c) Based on the documents on record, the AT is of the view that procurement of CREG TBM was done by the claimant to cover delays in achieving prescribed Key Dates. Hence in accordance with the Contract clause GCC 8.6, the Claimant is not entitled to any additional payment on this account. ”

11. Learned Single Judge, referring to the contentions raised by the petitioner, has held that the interpretation given by the Arbitral Tribunal to the afore-stated clauses was reasonable and plausible and not perverse. Learned Single Judge had also examined the said clauses and has observed:-

“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 . "

12. Learned Single Judge referring to ***Associated Cement Companies Ltd. vs. Commissioner of Customs, 2001(4) SSC 593*** has observed that even if reliance placed by the Arbitration Tribunal on ***CCE, Hyderabad & Ors. vs. Vazir Sultan Tomaco Company Ltd. & Ors. (1996) 3 SSC, 434*** was not appropriate, this would not make difference to the final outcome, for meaning and implication of Clause 11.1.3(v) in the context, was plain and simple. Arbitration Tribunal had appropriately considered and reflected on the scope and ambit of the relevant clauses and interpreted them. Learned Single Judge held:-

"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. Moreover and significantly, the Arbitral Tribunal has held that there was no breach of terms of agreement, which had resulted in delay in import of the TBMs. The learned Single Judge affirmed aforesaid primarily factual findings of the Arbitral Tribunal on the said aspect, recording as under:-

“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."

14. Thus, there are two clear-cut findings of the Arbitral Tribunal, which have been confirmed by the learned Single Judge. Firstly, there was no breach of agreement by DMRC, which would have resulted in claim for damages on account of delay in procurement of TBMs. This is the finding of fact which is not perverse or unsubstantiated by the evidence and material on record. The finding is fair, just and reasonable. In these circumstances, when there is no breach of agreement by DMRC, claim for damages is difficult to appreciate and understand. It was rightly rejected.

Secondly, on the question of interpretation of relevant clauses, the Arbitral Tribunal, as well as learned Single Judge, have come to the conclusion that any fresh imposition of taxes or levies had to be borne and paid by the appellant.

15. The claim put forward by the appellant on the question of damages in the form of reimbursement is rather stretched and

extreme. Submission was purportedly predicated on clarification of the Economic Advisor, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, vide letter dated 02.02.2015, stating that the price for bulk sale at the first stage of transaction, inclusive of excise duty but net of trade discount, was used to compile wholesale price index (WPI). No other indirect taxes were included in WPI. The appellant urges that CVD and SAD were excluded from computation of WPI and therefore cost of execution was higher. We fail to understand the relevance of a rather abstruse and constrained argument in the teeth of plain and simple interpretation given by the Arbitration Tribunal to the specific clauses of the agreement. Further, the claim as argued is for damages. As an appellate court exercising power under Section 37 of the A&C Act, we would not, except for sound and valid ground, interfere with the arbitration award, when the same has been affirmed and objections under Section 34 of the A&C Act have been dismissed, accepting the interpretation on the clauses.

16. Argument raised would hardly justify interference of the Court in terms of the statutory mandate of Section 34/37 of the A&C Act as elucidated in *Mcdermott International Inc. vs. Burn Standard Company Limited and Others*, (2006) 11 SCC 181. Factual and final findings and conclusions recorded by the Arbitral Tribunal are not perverse or plainly contrary to the terms of the contract. In *Associate Builders vs. Delhi*

Development Authority, (2015) 3 SCC 49, Supreme Court elaborating scope of the term “patent illegality” in an Arbitral Award in the context of interpretation of terms of the contract has held that construction of the terms of contract would primarily fall in the exclusive domain the Arbitrator/Arbitral Tribunal. Court would not interfere unless Arbitrator/Tribunal misconstrues the contract terms in a way that no fair minded or reasonable person do. In the present case, this test is not satisfied as construction and interpretation given by the Arbitrators is a possible and reasonable one. Legal principles on interpretation of terms of contract and interference by courts was examined by the Supreme Court in *HRD Corporation vs. Gail (India) Limited*, 2017 (10) SCALE 71, to hold that “patent illegality” may not be established even if there was erroneous application of law. In the context of the present case, the said test of the “patent illegality” is certainly not satisfied even if we accept that the Arbitral Tribunal had somewhat erroneously understood and applied decision in *Vazir Sultan Tobacco Company Limited (supra)*.

17. On a question being put, learned Senior advocate for the appellant fairly stated that TBMs were imported and were property of the appellant. These TBMs were not property of the DMRC. Further, the agreement for execution and performance of the project was for lump sum price/cost. DMRC was not liable to pay price or enhancement of alleged execution cost in the form of levy of any duty on the capital goods.

18. At this stage, learned counsel for the appellant has drawn our attention to paragraph 3.3.6.3 of the Arbitration Award wherein it is recorded that the procurement of CREG TBM was to achieve the prescribed key dates. Hence, the appellant was not entitled to any additional payment on this account. It is submitted that the question of delay in achieving the key dates is subject matter of another dispute. On a question being asked, the learned Senior Advocate for the appellant accepts that this objection and contention was not raised before the learned Single Judge. We are not required to say anything on the said aspect at the appellate stage as no such argument was pressed and raised before the learned Single Judge.

19. The appeal is dismissed. No order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

MAY 31, 2018/rd