

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

Decided on: 16.10.2018

+ **FAO (OS) 458/2012**

POWER GRID CORPORATION OF INDIAAppellant
Through: Sh. Parag Tripathi, Sr. Advocate with Sh.
Pawan Upadhyay, Sh. Rajesh Chhetri, Sh. Rajeev
Chhetri, Ms. Meenakshi Rawat and Sh. Srinivasan
Ramaswamy, Advocates.

Versus

L.S. CABLERespondent
Through: Sh. Sanjay Bansal, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellant - Power Grid Corporation of India (hereafter "PGC") challenged an award of 09.01.2010 made by the Arbitral Tribunal; the learned Single Judge rejected its petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act").

2. The respondent ("LS Cables") is a Korean incorporated corporation with a project office in Delhi, engaged in the manufacturing, installing and commissioning of power underground cables; it has experience in many such projects in several countries. PGC is a Government company and Central Transmission Utility notified under Section 38 of the Electricity Act, 2003; it

invited tenders for Over Head Fibre Optic Cable in 4 packages, namely 1A, 2A, 1B and 2B *inter alia* for the installation, testing and commissioning of the optic fibre cabling and associated hard wares. Disputes arose with respect to packages 1B and 2A. PGC was in the process of constructing a worldwide back-bone telecommunication network to connect the main cities in India. The scope of work for the aforesaid contracts included survey, planning, design, engineering, supply, installation, termination, testing and commissioning of optic fibre cabling, all associated hardware, accessories, fittings, in line splice enclosures etc. and also fibre optic project cabling and fibre optic distribution panel. The invitation to bid was issued on the 14.07.2000, pursuant to which LS Cables submitted its bid on 27.02.2001, duly filled in terms of the instructions to the bidders (hereafter "ITB"). The ITB required the bidders to quote prices for "installation services" separately. Paragraph 11.4 (d) of the ITB provided that:

“(d) Installation Services shall be quoted separately (Schedule No.4) and shall include rates or prices for all labour, contractor’s equipment, temporary works, materials, consumables and all matters and things of whatsoever nature, including operations and maintenance services, the provision of operations and maintenance manuals, training etc. where identified in the bidding documents, as necessary for the proper execution of the Installation services, including all taxes, duties, levies and charges payable in the Employer’s country as of twenty eight (28) days prior to the deadline for submission of bids.”

3. LS Cables’ bid was a "fixed price bid" for PDT 1B and PDT 2A projects. The bids were opened on 27.02.2001 and LS Cables was declared to be the successful bidder. Accordingly, two contracts were awarded to it by

PGC by notification of award dated 10.04.2003. Both the contracts consisted of "off-shore contract" and "on-shore contract". The subject matter of the disputes related to the on-shore contract. This was followed by post-bid discussions held between 14.04.2003 and 28.04.2003. Two separate but inter-linked agreements were signed on 22.05.2003 containing almost identical terms.

4. On 20.06.2003, the Government of India issued a notification whereby service tax levy was introduced to "Commissioning and Installation" services with effect from 01.07.2003. LS Cables, accordingly sought M/s. Ernst & Young's opinion, its tax consultant on the issue whether the services rendered by it were covered by the notification dated 20.06.2003. It was advised that the contracts in question were covered by the notification and were liable for imposition of service tax on the commissioning and installation services rendered by LS cables. In view of these developments (the notification and the legal opinion obtained), in its invoices in relation to installation work executed after 01.07.2003 LS Cables included service tax at the applicable rate. These invoices brought on record were for different periods apart from the service tax returns etc. Though the invoices included the service tax element, petitioner paid only the principal amount and not the service tax claimed by the LS Cables which it had paid directly or through its sub-contractor. By May, 2006 the service tax dues amounted to ₹3.30 crores approximately. The *inter se* negotiations and meetings were deadlocked; eventually by PGC's letter dated 25.05.2006 it formulated two options for processing the LS Cables' claims. This was, however, unacceptable to the latter and by its communication dated 21.09.2006, LS Cables refused to

accept either options and claimed full reimbursement. The letter evoked no response from the petitioner, and, therefore, LS Cables wrote to PGC conveying its final decision regarding the reimbursement of the amount of service tax paid by it. By its letter of 20.08.2007, PGC returned the original service tax bills contending that the claims were not acceptable for the reasons that all the activities were scheduled for completion as per the approved L2 network of the LOA prior to effective date of service tax, i.e. 10.09.2004. As parties were unable to resolve their disputes amicably through negotiations, LS Cables on 22.05.2008 invoked clause 6 of the General Conditions of Contract (hereinafter referred to as "GCC") and, referred the matter to the named adjudicator. The named arbitrator expressed his inability to adjudicate the dispute; eventually LS Cables applied to the Supreme Court under Section 11 (6) of the Act claiming the appointment of an arbitrator. The Supreme Court by its order dated 29.01.2009 appointed a former Judge of the Supreme Court, as the Arbitral Tribunal to adjudicate the disputes which have arisen between the parties.

5. The Arbitral Tribunal, after completion of parties' pleadings in arbitration, formulated the points of dispute as follows: (i) Whether having regard to the provisions of the Contract and scope of works, the "Installation and Commissioning" works executed by the claimant are covered under clause 2.6 of the Notification dated 20.06.2003 issued by the Ministry of Finance, Govt. of India, or any other notification issued by the competent authority or any Act, Rule, Regulation etc. enacted, framed or issued by the competent authority?(ii) Whether having regard to scope of Works under the Contract the petitioner is liable to pay/ reimburse/ refund the amount of

applicable Service Tax on the payments made by the petitioner for installation and commissioning works executed by LS Cables under the contract; (iii) If the second question is answered in the affirmative to what amount is LS Cables entitled; (iv) whether the contract was a firm price contract and if so service tax liability was on PGC or was to be borne by it. The Arbitral Tribunal held – after a conspectus of the circumstances and after considering the overall facts of the case, that LS Cables was entitled to be reimbursed of the amounts.

6. The award was challenged by PGC on the ground that it was opposed to fundamental policy of Indian law; it was urged that the Arbitral Tribunal failed to appreciate that under Section 68 the Finance Act, it is the service provider (LS Cables, the claimant in the impugned award) who is primarily liable to bear the burden of service tax and the liability in that regard could be transferred to the service recipient (PGC) only when the contract between the parties so provided. It was urged by LS Cables that the Arbitral Tribunal erred in failing to appreciate the combined effect of the bid documents, Special Conditions of Contract and the provisions of the agreement which cumulatively showed that (a) LS Cables had quoted a fixed price bid; (b) it was liable to bear the burden of all taxes, duties, license fees etc; (c) LS Cables had to include in its bid price *all duties and levies for any items used for their consumptions or dispatch directly to the employer from their sub supplier*; (d) any taxes, duties and levies additionally payable was to the contractors account (i.e LS Cables' account) and no separate claim could be entertained by PGC; (e) By circular dated 28.12.2002, i.e, prior to signing of the agreement, the Minister of Finance and Company Affairs, Department of

Revenue of the Government of India has notified that the services rendered by the consulting engineers shall be taxable within the concept of service tax;(e) The contract price was firm and fixed in terms of Appendix -2 to the contract and was not subject to any price adjustment for the entire duration of the contract. PGC also argued that as service recipient it was not liable to pay service tax and that the burden of payment of service tax could not be shifted to it in absence of specific provision in the contract. There was no specific provision of the contract, therefore, PGC was not liable to bear the burden of service tax. PGC had relied on Clause 9 of the Special Condition of Contract, which modified clause 11 of the GCC which resultantly read as *"The contract price shall be a firm price basis and shall not be subject to any alteration except in the event of a change in the facilities. The contract price shall be adjusted on account of variation in quantity in accordance with Clause 39 of GCC read in conjunction with Clause 31 GCC."*

7. Other provisions in the contract (Clause 1.1 GCC), clause 12 of the Special Conditions of Contract -which modified clause 14 of the GCC, and more particularly Clause 14.2 GCC as modified in the SCC were relied to say that in case of contract for domestic supplies and services, the contractor shall be entirely responsible for payment of all taxes, duties, license fees etc incurred until delivery of the contracted supplies to the employer. Clause 14.5 (modified by clause 12 SCC) too were cited. PGC also relied on Clause 36 of the GCC, which provided for the effect of change in law and regulations subsequent to the signing of the Contract which was modified by Clause 28 of the Special Conditions of Contract and is the relevant condition. That reads as follows:

"Changes in laws and regulations (GCC Clause 36) GCC 36.1 - If, after the date twenty eight (28) days prior to the date of bid submission, in the country where the site is located, any law, regulation, ordinance, order or by law, having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the contractor and / or the time for completion, the contract price shall be correspondingly increased or decreased, and / or the time for completion shall be reasonably adjusted to the extent that the contractor has thereby been affected in the performance of any of its obligation under the contract. However,, these adjustments, would be restricted to direct transactions between the employer and the contractor and not on procurement of raw materials, intermediary, components etc by the contractor. Further, no adjustment of the contract price shall be made on account of variation in deemed export benefits. Notwithstanding the foregoing such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with the Appendix - 2 of the contract agreement".

8. The learned Single Judge noticed all contentions made by and on behalf of the parties and held that the Arbitral Tribunal rendered detailed findings after considering the conditions: especially the GCC and the amendments made through the SCC as well as Appendix-1 to the contract. The learned Single Judge held that upon a review and analysis of the award, having regard to the limited nature of intervention permissible under Section 34, no patent error was discernable requiring interdiction with the award.

9. Mr. Parag Tripathi, learned senior counsel argued that the Arbitral Tribunal fell into error in holding that service tax liability had to be borne by PGC. It was emphasized that the original ITB ceased to have any relevance,

given that the amended GCC (i.e amended in terms of the special conditions -i.e. SCC) had categorically changed or replaced Clauses 14.3 and 14.4. This established that the liability to bear all taxes and levies introduced or brought into force after award of contract, was on LS Cables. The latter willingly agreed to these conditions and signed the contract. In the circumstances, it could not complain that the amount (towards service tax liability) was to be defrayed at PGC's account. It was argued Arbitral Tribunal in fact misappreciated various provisions of the GCC and SCC. Counsel relied on Clause 9 of the SCC which modified Clause 11 of GCC which was substituted to read as *"The contract price shall be a firm price basis and shall not be subject to any alteration except in the event of a change in the facilities. The contract price shall be adjusted on account of variation in quantity in accordance with Clause 39 of GCC read in conjunction with Clause 31 GCC."* It was argued that "facilities" is defined in Clause 1.1 GCC to mean *"the plant and equipment to be supplied and installed as well as the installation services to be carried out by the contractor under the contract."*

10. It was highlighted that Clause 12 (of SCC) modified Clause 14 of GCC, especially Clause 14.2 GCC, to say that in case of contract for domestic supplies and services, the contractor shall be entirely responsible for payment of all taxes, duties, license fees etc incurred until delivery of the contracted supplies to the employer. It was highlighted that Clause 14.5 GCC (as modified by Clause 12 SCC) stipulates that:

"in case of local supplies and services, all customs duties and levies, duties, sales tax payable on equipment, components, sub-assemblies, raw materials and any other items used for their consumption or dispatched directly to the employer from

their sub supplier (that is, sale in transit at concessional rate) shall be included in the bid price and any such taxes, duties, levies additionally payable will be to contractor's account and no separate claim on this behalf will be entertained by the employer. Employer, shall, however, issue requisite sales tax declaration forms.”

11. Clause 36 of GCC, which provided for the effect of change in law and regulations subsequent to the signing of the Contract (which was modified by Clause 28 SCC and relevant for the present controversy was also relied on. It states that:

“Changes in laws and regulations (GCC Clause 36) GCC 36.1 - If, after the date twenty eight (28) days prior to the date of bid submission, in the country where the site is located, any law, regulation, ordinance, order or by law, having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the contractor and/or the time for completion, the contract price shall be correspondingly increased or decreased, and/or the time for completion shall be reasonably adjusted to the extent that the contractor has thereby been affected in the performance of any of its obligation under the contract. However,, these adjustments, would be restricted to direct transactions between the employer and the contractor and not on procurement of raw materials, intermediary, components etc by the contractor. Further, no adjustment of the contract price shall be made on account of variation in deemed export benefits. Notwithstanding the foregoing such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with the Appendix-2 of the contract agreement”.

12. Mr. Tripathi submitted that the contract price was firm and fixed and as stipulated in Appendix -2 to the contract it was not subject to any price

adjustment for the entire duration of the contract. Further, clause 14.4 of GCC provided that new taxes could be passed on by LS Cables to PGC and was specifically amended under clause 12 of SCC which provided that all duties and levies on services shall be only to the account of the Contractor (i.e. LS Cables). It was urged that the contractual conditions did not cast the burden of service tax on PGC. In not appreciating this aspect the learned Single Judge erred by not setting aside the award of the Arbitral Tribunal. It was argued that PGC relied upon Clause 36 of the GCC as modified by Clause 28 of SCC, providing for change in laws and regulations. It is urged that even this clause does not fasten liability of service tax upon PGC because the contract provided that any additional reduced cost shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable in accordance with Appendix-2 to the contract agreement. It was stated that Appendix II to the contract agreement does not provide for applicability of price adjustment provisions. Therefore, change in law- through imposition of service tax could not be to the account of PGC in terms of Clause 26 GCC read with Clause 28 of the SCC. Counsel submitted that though taxes and duties do not form the component of contract price, they are no less factors that increase or decrease costs and expenses and since such increase or decrease can be accounted for only in accordance with the price adjustment formula, wherever applicable, the additional burden of service tax would not be payable by the respondent because the price adjustment formula does not apply in the present case by virtue of Appendix II to the Agreement. Reliance was placed on *Numaligarh Refinery Ltd. v. Daelim Industrial Company Ltd.* reported in 2007 (8) SCC 466 where the Supreme Court of

India, taking into account the various provisions of the bid conditions held that there was no scope for giving any benefit of subsequent fluctuation on the exchange rates. Once the price was fixed and the contract contained no provision for giving any benefit for the fluctuation in terms of the contract and in that case the claimant cannot raise the claim for excess payment made towards the custom duty.

13. Further reliance was placed on *Union of India v. Bhardwaj Enterprises* reported in 2009 (157) DLT 444; where this court held that the subsequent increase in the sales tax after the awarding in the contract would not be payable since the price valuation clause was not applicable and the intent of the contracting parties was clear that the contract was a fixed price contract providing for no variation whether on account of increase or decrease in the rates of taxation. Likewise, *Ajudia Distillery v. Delhi Administration* 1998 (1) RAJ 316 (Delhi) was relied on.

14. Learned counsel lastly urged that the impugned award dated 09.01.2010 was delivered on the admissibility of the claim of service tax. He argued that after the rendering of the award, the Central Government's Department of Revenue, Central Board of Excise and Customs issued a clarification dated 24.05.2010 by which the taxability of service tax with respect to electric cable laying was omitted from Section 65 of The Finance Act, 1994. The clarificatory circular No. 123/5/2010 was relied on by PGC (especially Para 4 of the said circular which reads as follows - "*that the pending disputes/cases may be decided based on the clarification contained in the said circular*"). Pursuant to that as on the date there is no service tax payable on laying of electric cables. PGC's Senior Counsel cited *Suchitra*

Components Ltd. v. CCE reported in 2006 (12) SCC 452 where the Supreme Court of India held that a “beneficial circular has to be applied retrospectively”. Relying upon this observation, learned counsel for the petitioner requested to the Court to consider the said circular and pass an appropriate order authorizing the petitioner to seek the refund of the payments against the service tax from the competent authority on behalf of the respondent, if this Court upholds the award.

15. Mr. Sanjay Bansal, learned counsel for LS Cables argued that the scope of judicial review of the award passed in the Arbitral Tribunal proceedings, is narrow, under Section 34(2) of the Act and the grounds urged by PGC do not fall under any of the provisions of section 34(2). Reliance was placed on *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* 2003 (5) SCC 705 and *GAIL v. Bansal Contractors* 2010 (10) AD (Delhi) 291 where it was held that a Arbitral Tribunal is the master of facts and the award made by it cannot be interfered with except on specific grounds provided for under law. It was highlighted that the Arbitral Tribunal rendered findings after duly considering the evidence on record with detailed reasoning on each contention, which cannot now be regurgitated before the Court.

16. It was Mr. Bansal that although the primary liability of paying the service tax to the Government is upon the service provider but the ultimate burden of this taxation is upon the user of the service. In the case between LS Cables and PGC, the former deposited service tax and charged it in its invoices to the PGC in terms of Clause 36 of the agreement as this tax has been imposed by change of law on 20.06.2003 that is, after signing of the

agreement on 22.05.2003. Counsel relied on the findings of the Arbitral Tribunal in para 28 of the award in question and submitted that the arbitrator considered the material placed on record by the parties, had given definite findings on the issue. Counsel also submitted that as far as the issue of “firm price contract” is concerned the same has also been dealt with by the Arbitral Tribunal in detail from para 38 onwards which is also now again reiterated by the petitioner here in his objection petition.

Analysis and Reasoning

17. The Arbitral Tribunal, in discussing the effect of clause 36 of GCC, as modified by Clause 28 of SCC held as follows:

"48. In order to appreciate the rival contentions one must understand what is meant by the contract price being firm and fixed. When tenders are invited, bidders are expected to quote their rates and price having regard to all the instructions contained in the ITB given to bidders. After taking everything into account a bid is made by a bidder. All the bids are thereafter scrutinized and one of the bidders is declared successful having made the best bid. It would be unfair to other bidders if subsequent to the acceptance of the bid the bidder is permitted to make any alteration in the contract price quoted by him. Therefore,, as a normal rule, contract price must remain firm and fixed unless there be any other provision in the contract agreement which permits any modification in given circumstances. Obviously, the situations in which such modifications may be allowed, generally speaking, must be fair to all concerned and must apply to all the bidders. The GCC and SCC were available to the bidders even before they submitted their bids, and one can therefore, assume that they had knowledge of their contents. So understood, the fixed price under the agreement cannot be changed unless there be any other provision in the agreement permitting such change in

given circumstances. As the definition of contract price in the agreements in question would suggest, the fixed price has been defined with a condition that the contract price shall include "such other sums as may be determined in accordance with the terms and conditions of the Contract". Thus, a contractor who has made a bid must take into account his costs, expenses, etc. apart from the tax, charges, levies, etc., payable. After taking into account all the relevant circumstances he must make his bid which may be permitted to be modified before acceptance, but will not be permitted to be modified after his bid has been accepted. Therefore,, the contract price remains unchanged, meaning thereby, firm and fixed. Even if the bidder is able to satisfy the concerned authority that he had on account of ignorance or by inadvertence failed to take into account certain cost, expenses, tax liability etc. which he was entitled to take into account while making the bid, he will not be permitted to change the contract price and he must suffer the consequences. If he is allowed to change his bid price after its acceptance, that will be clearly violation of the fair bidding process. However,, as observed earlier the question is whether apart from the contract price specified in Article 2 , there is anything in the terms and conditions of the contract which entitles the bidder to any other sum in addition thereto.

49. This takes us to a consideration of clause 36 of the GCC as modified by clause 28 of SCC. Clause 14.4 of the GCC stands deleted by modification by the SCC. This provision provided inter-alia for equitable adjustment of the contract price in the event of a new tax being imposed during the course of the performance of the contract, in accordance with clause 36 of GCC. Thus even when clause 14.4 existed as a general condition of the contract, it referred to equitable adjustment being made in accordance with clause 36 of the GCC. Therefore,, if clause 36 applies, the mere fact that clause 14.4 has been deleted, will make no difference. On a careful scrutiny of clause 36 as modified, there appears to be no doubt that if after the relevant date any new law is enacted imposing a tax which affects the costs and expenses of the contractor, the

contract price shall be correspondingly increased. In the instant case all the conditions mentioned in the first part of the clause are fulfilled because service tax was levied w.e.f. July 1, 2003 whereas the bid was submitted on 27.2.2001 and relevant date for taking into account all existing taxes, levies etc. was 30.1.2001.

50. The second part of the clause emphasizes that the adjustments would be restricted to direct transactions between the employer and the contractor and not on procurement of raw materials, intermediary components etc. by the contractor or on account of variation in deemed export benefits. In the instant case these conditions are not attracted to defeat the claim of the contractor because the liability to pay service tax arises on account of taxable services rendered by the contractor to the employer. If at all, this is in the nature of a direct transaction between the employer and the contractor and no third party is involved. We then come to the last part of the clause which says that additional costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with Appendix 2 to the Contract Agreement. For the applicability of this part of the clause it is envisaged that:

a) There are price adjustment provisions which are applicable to the contract in question;

b) In accordance with the said provisions the additional cost has already been accounted for, and

c) It is so provided in Appendix 2 to the Contract Agreement. It is not disputed that there are no price adjustment provisions applicable to the contract in question. Appendix 2 to the Contract Agreement says in so many words that the contract price shall remain firm and fixed and shall not be subject to price adjustment for the entire duration of the contract. Reading Appendix 2 to the Contract Agreement in letter and spirit, it is clear that there are no price adjustment provisions

applicable to the contract in question in accordance with Appendix 2 to the Contract Agreement. Obviously, therefore,, the additional cost has not been accounted for in accordance with the price adjustment provisions and consequently has not been separately paid or credited.

51. To me it appears that the last part of clause 36 of the GCC which refers to Appendix 2 to the Contract Agreement does not intend to defeat the claim arising out of levy of a fresh tax after the relevant date. It only provides against dual payment, one under clause 36 and the other in accordance with the price adjustment provisions. This is only fair because if Appendix 2 to the Contract Agreement provided for price adjustment provisions to be applicable in such cases, there could be no justification for a separate claim being made under clause 36 of the GCC.

52. Learned counsel for the Respondents submitted that since there is no provision for price adjustment in Appendix 2 to the Contract Agreement the additional cost by way of new taxes levied cannot be paid to the contractor. In my view the approach is wholly erroneous because the last part of clause 36 will deny to the contractor any additional amount on account of added tax liability, only if under the relevant price adjustment provisions he has already been benefitted and the additional cost has been accounted for. If there are no such price adjustment provisions then the contractor must get the benefit of clause 36 if he fulfils the conditions enumerated therein. I am, therefore,, of the view that reading together the various provisions of the contract there is no escape from the conclusion that the contractor is entitled to the benefit under clause 36 on account of subsequent levy of tax, which did not exist on the relevant date, in the absence of any price adjustment provisions in the contract in accordance with the Appendix 2 to the Contract Agreement.

53. There is no dispute in the instant case that the contract awarded is on a fixed price basis. Clause 11.6 (b) of the ITB

referred to adjustable price. If a contractor bid for adjustable price, the price quoted by him was subject to adjustment during performance of the contract to reflect the changes in the specified items in accordance with the procedure specified in Appendix 2 to the Contract Agreement. Those four items were:

- a) Cost of labour,*
- b) Cost of material*
- c) Transport components and*
- d) Contractors equipment.*

In the instant case the bidder has not chosen the alternative of adjustable price but has bid on fixed price basis and, therefore,, the question of applying the adjustable price formula does not arise. However,, clause 11.6 of the ITB while dealing with the adjustable price refers to Appendix 2 to the Contract Agreement and provides for adjustment only in respect of these four items. There is force in the contention of leaned counsel for the claimant that even if it were assumed that there existed a price adjustment formula it could only be in respect of the four items specified above. However, since we are concerned with a fixed price bid, this need not detain us any further.

54. Learned counsel for the Respondent has cited authorities before me in support of the contention of that where the price is fixed and firm the contractor cannot raise a claim for additional payment made towards any tax levied after the signing of the agreement. In my view the authorities cited by him do not lay down any such broad principle of law in absolute terms. It all depends on the facts of each case and the provisions of the contract agreement. Even if the price is fixed but there is a provision for additional payments being made on account of certain events that take place subsequently, the additional payment cannot be denied, because clearly the intention of the parties was to make such additional payment over and above the fixed price."

18. It is mercifully unnecessary to repeat and quote the profusion of judicial authority on the issue that Section 34 jurisdiction is neither appellate nor supervisory; it is to ensure that awards are expressions of decisions of

agreed private judges, are broadly in conformity with law and are not preceded by an approach that betrays unreasonableness in procedure or outcome of the kind that would shock a court of law, or disclose patently erroneous understanding of law: [Ref *Saw Pipes (supra)* and *Mc Dermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181]. The decision in *Associate Builders v Delhi Development Authority* [2015 (3) SCC 49] cautioned courts from intervening with findings in Arbitral Tribunal awards, on public policy grounds unless there was a patent error of law or a manifestly unreasonable finding (which have now become precepts for the approach under Section 34) thus:

“33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his Arbitral Tribunal award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

19. The second facet which Courts must be conscious of is that if the arbitrator commits an error in contract interpretation, that is an error within her jurisdiction (Ref *MSK Projects (I) (JV) Ltd v State of Rajasthan and Anr.* 2011 (10) SCC 53; *G. Ramachandra Reddy v Union of India and Anr.* 2009 (6) SCC 414; *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.*, (2006) 11 SCC 181 and *Renusagar Power Co. Ltd. v. General Electric Co. and Anr.* 1984 (4) SCC 679). In *McDermott International (supra)*, the

Supreme Court clarified the Court's inherent limitation by reason of Section 34 in such matters:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325]).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

20. Likewise, in *Steel Authority of India v. Gupta Brothers* 2009 (10) SCC 63, the Court held that Section 34 would be attracted in cases where an arbitrator “*travels beyond the contract*”, or makes an award “*contrary to the terms of the contract*”. Section 34, however, the Court stated, cannot be used to set aside awards in which there was an “*error relatable to interpretation of the contract*”, or if it was based on a “*possible view of the matter*”, or if it was based on a finding of law in a case where a “*specific question of law [had been] submitted to the arbitrator.*” In short, it is not the courts' primary responsibility to examine the award as though they were sitting in appeal over it.

21. Keeping these prefatory observations in perspective, this court must now examine whether there was a patent or manifest error with respect to the interpretation of contractual conditions. To recapitulate the facts, LS Cables' bid was accepted on 27.02.2001. A term, necessary for decision of the dispute, is the relevant condition in the ITB [clause (d)] which stated that, *"Installation Services shall be quoted separately (Schedule No.4) and shall include rates or prices for all labour, contractor's equipment, temporary works, materials.. including all taxes, duties, levies and charges payable in the Employer's country as of twenty eight (28) days prior to the deadline for submission of bids."* PGC's position, maintained throughout these proceedings is that upon signing the contract (which had amended the GCC through SCC on this issue), willingly, LS Cables agreed to bear the taxes subsequently levied.

22. The definition of "contract price" was in clause 1.1 GCC: it meant *"the sum specified in the Article 2.1 of the Contract Agreement subject to such additions and adjustments thereto or deduction therefrom as may be made pursuant to the contract."* Clause 9 of the Special Conditions of Contract (SCC) modified this definition and stated that:

"The contract price shall be a firm price basis and shall not be subject to any alteration except in the event of a change in the facilities. The contract price shall be adjusted on account of variation in quantity in accordance with Clause 39 GCC read in conjunction-with Clause 31 GCC."

23. "Facilities" was defined to mean (in Clause 1.1 of GCC) *"the plant and equipment to be supplied and installed as well as the installation*

services to be carried out by the contractor under the contract." Clause 14.4 of the GCC read as follows:

"14.4 For the purpose of the Contract, it is agreed that the Contract Price specified in Article 2 (Contract Price and Terms of Payment) of the Form of Contract Agreement is based on the taxes, duties, levies and charges prevailing at the date twenty eight (28) days prior to the date of bid submission in the country where the site is located (hereinafter called 'Tax') in this GCC Sub-clause 14.4). If any rates of Taxes are increased or decreased, a new Tax is introduced, an existing tax is abolished, or any change in interpretation or application of any Tax occurs in the course of performance of contract, which was or will be assessed on the Contractor, sub-contractor or their employees in connection with performance of the Contract, an equitable adjustment of the Contract Price shall be made to full take into account any such change by addition to the Contract Price or deduction therefrom, as the case may be, in accordance with GCC Clause 36 (Changes in Laws and Regulations) hereof."

24. This condition was modified by the SCC (Clause 12) through clauses 14.2 and 14.5 which are as follows:

"14.2 In the case of contract for domestic supplies and services, the Contractor shall be entirely responsible for payment of all taxes, duties, licence fees. etc. incurred until delivery of the contracted supplies to the Employer.

XXX

XXX

XXX

14.5 In the case of local supplies and services. all Customs Duties and Levies, Duties, Sales Tax payable on equipment, components, sub-assemblies, raw materials and any other items used for their consumption or dispatched directly to the Employer from their sub-Supplier (i.e. sale-in-transit at concessional rate) shall be included in the Bid Price and any

such taxes. duties, levies additionally payable will be to the Contractor's account and no separate claim on this behalf will be entertained by the Employer. Employer, shall, however issue requisite sales tax declaration forms."

25. Clause 36, (of GCC) which was amended by clause 28 of the SCC read as follows:

"36.1 If, after the date twenty-eight (28) days prior to the date of the bid submission, in the country where the Site is located, any law, regulation, ordinance, order or by-law having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the cost and expenses of the Contractor and/or the time for Completion, the Contract Price shall be correspondingly increased or decreased, and/or the time for completion shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the Contract. However,, these adjustments would be restricted to direct transactions between the Employer and the Contractor and not on procurement of raw materials, intermediary components etc. by the Contractor. Further, no adjustment of the Contract Price shall be made on account of variation in deemed export benefits. Notwithstanding the foregoing such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with the Appendix -2 to the Contract Agreement."

26. The crux of the Arbitral Tribunal's reasoning is that in principle the amendment to clauses 14.2 and 14.4 as well as amendment of clause 1.1 did not affect PGC's liability to bear the taxes, given that they were introduced after the contract was formed. The Arbitral Tribunal relied on Clause 36.1

(i.e the amended stipulation) and indicated its reasoning in the following manner:

“51. To me it appears that the last part of clause 36 of the GCC which refers to Appendix 2 to the Contract Agreement does not intend to defeat the claim arising out of levy of a fresh tax after the relevant date. It only provides against dual payment, one under clause 36 and the other in accordance with the price adjustment provisions. This is only fair because if Appendix 2 to the Contract Agreement provided for price adjustment provisions to be applicable in such cases, there could be no justification for a separate claim being made under clause 36 of the GCC.”

27. The preceding discussion analysed the nature of changes to clauses 14.2 and 14.4; later the Arbitral Tribunal also took into account what could be given under Appendix 2 (to the contract). In the opinion of the court, the intention to compensate the contractor/supplier for any new levy or law that was likely to affect is cost, is apparent from the following terms of Clause 36.1: *“If after the date twenty-eight (28) days prior to the date of the bid submission, in the country where the Site is located, any law, regulation, ordinance,” is “enacted” etc, which “subsequently affects the cost and expenses of the Contractor and/or the time for Completion, the Contract Price shall be correspondingly increased or decreased, and/or the time for completion shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the Contract.”* Significantly, the parties also visualized that certain type of increases due to change in law such as *“direct transactions between the Employer and the Contractor and not on procurement of raw materials,*

intermediary components etc. by the Contractor. Further, no adjustment of the Contract Price shall be made on account of variation in deemed export benefits.” This meant that deemed export benefits fell outside the purview of the change in law provision (which was otherwise intended to protect the contractor/LS Cables). Barring that exception, all changes that tended to increase the price, were compensable by PGC. This court is of opinion that there is nothing abhorrent or unreasonable in such interpretation calling for interference under Section 34.

28. PGC had urged that the payment to service tax authorities was made in haste, even without a demand and that the subsequent notification inured to its benefit and had to be given retrospective interpretation. On this issue, the court is of opinion that since LS Cables was in doubt and sought expert opinion, which favoured deposit of the amounts, rather than risk action by the revenue, it followed such course; there is nothing illegal or irregular. To have followed another course- suggested by PGC (ironically, a State owned enterprise) is promoting the view which undermines the law. As to the second argument that the clarification is to be construed as a retrospective benefit, exempting the supplies from the service tax liability, there appears to be no merit in it, because the clarification did not say so. The recent Constitution Bench judgment on interpretation of exemptions (in the context of taxing statutes) is forthright and categorical- in *Commissioner of Customs v Dilip Kumar & Company* 2018 SCC Online (SC) 747, it was observed that

“every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee,

but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State”

29. In view of the preceding discussion and findings, this Court holds that the appeal is insubstantial. Accordingly, it is dismissed without an order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

OCTOBER 16, 2018

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