

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

+ O.M.P. (COMM) 264/2018 & IA No. 8453/2018

Reserved on: 6th July, 2018
Date of decision : 6th August, 2018

DANS ENERGY PVT.LTD Petitioner
Through: Mr.Gajendra Maheshwari,
Ms.Perna Chopra, Advs.

versus

GE POWER INDIA LTD. Respondent
Through: Mr.Anish Kapur,Ms.Divya Bhalla,
Mr.Dhritiman Roy, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

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 30.04.2018 passed by the Arbitral Tribunal consisting of three Arbitrators adjudicating the disputes that have arisen between the parties in relation to the Contract dated 07.08.2009 executed between the parties, whereunder the respondent was to supply plants, Equipments and Mandatory Spares from abroad on CIF-India Port of Entry basis and from Ex-works (India) basis for Electro-Mechanical Package of Jorethang Loop Hydro Electric Project, Sikkim being set up by the petitioner.

2. Admittedly the Contract envisaged that the respondent should supply the goods and products manufactured by it or Bought Out Product (BOP). The BOP items/materials were those that were procured by the

respondent from the sub-contractor(s) approved by the petitioner and consigned directly to the petitioner. The dispute between the parties was as to whether the petitioner is liable to reimburse the Excise Duty/Central Sales Tax (CST) on such BOP items/materials.

3. It was admitted between the parties that the petitioner had paid an amount of Rs. 2,84,12,708/- to the respondent as reimbursement of taxes till 14.11.2016, when, on a legal advice received, it stopped making further payments and also sought to deduct the payment already made from the retention money payable by it to the respondent.

4. The Arbitral Tribunal, on the interpretation of the Contract has held that the respondent is entitled to shift the burden of Indirect Tax of BOP items to the petitioner and therefore, is entitled to claim a sum of Rs. 2,84,12,708/- from the petitioner alongwith interest at the rate of 9% per annum from December 2016, when such amount was deducted by the petitioner till the date of the Award. It has been further directed that incase the petitioner fails to pay the awarded amount to the respondent within one month from the date of the Award, the petitioner shall pay further interest at the rate of 12% per annum on the total amount awarded under the Impugned Award. The petitioner has further been directed to pay cost of Rs. 30 lakhs to the respondent.

5. As noted above, the dispute between the parties is in relation to the interpretation of the Contract dated 07.08.2009 executed between them. Clause 2.1 of the Agreement states the “Contract Price” and is reproduced hereinbelow:-

“Article 2. Contract 2.1 Price and Terms of Payment

Contract Price (Reference GCC Clause 11)

The Employer hereby agrees to pay to the Contractor the Contract Price in consideration of the performance by the Contractor of its obligation hereinunder. The Contract Price shall be the aggregate of:-

<i>I</i>	<i>Plant, Equipment and Mandatory spares supplied from outside India mainly from Europe, USA & Canada on CIF basis:-</i> <i>CIF (India Port of Entry) price</i>	
<i>II</i>	<i>Plant, Equipment and Mandatory spares supplied from India (Employer's Country) on Ex-works basis:-</i>	<i>Xxxxx</i>
	<i>Total</i>	<i>xxxxx</i>

as per the Price Schedule annexed as Appendix 10 and/or such other sums as may be determined in accordance with the terms and conditions of the Contract. The above prices are excluding all applicable taxes and duties and levies. All taxes & duties and levies as applicable at the time of dispatch are to be paid / reimbursed by Employer to the Contractor at actuals as per the Contract (refer indicative taxes and duties annexed as Appendix 10, Schedule 7, Estimated Tax & Duties.”

6. A reading of the above Clause would show that it had been agreed between the parties that all taxes and duties and levies as applicable at the time of dispatch are to be **paid / reimbursed** by Employer / petitioner to the **Contractor / respondent** at actuals as per the Contract.

7. Clause 2.1 in turn refers to Schedule 7 of Appendix 10, which is the “**price schedule and supply**” and gives Estimated Tax Sheet-Supply. Note(s) of the said Schedule state that the above taxes and duties and levies are only indicative as applicable on 1st April 2009, however, the taxes and duties shall be reimbursed as per actuals at the time of dispatch or execution; any change in taxes and duties or introduction of new taxes and duties and levies shall be borne by or reimbursed by the Purchaser. Schedule 2 and Schedule 5 in the note appended thereto also state that the prices are exclusive of taxes and duties.

8. Clause 14 of the General Conditions of Contract specifically deals with “tax and duties” and is reproduced herein below:-

“14. Taxes and Duties

14.1 All Taxes and Duties (Excise Duty, Central Sales Tax, Customs Duty & Service Tax) applicable are indicated in Schedule 7 and will be paid/reimbursed by the Employer at actuals. All State & local (State Government, Municipal etc.) taxes, such as Entry Tax / Octroi / VAT / Works Contract Tax / any other local taxes, duties, levies etc., which are not included in Schedule – 7, if levied on the Contract shall be paid / reimbursed by the Employer on actuals. However, the income tax, whenever applicable on the contractor or the Expatriates deputed by him for the Project under the purview of this Contract shall be borne by the Contractor.

14.2 Notwithstanding GCC Sub-Clause 14.1 above, the Employer shall bear and promptly pay all customs and import duties imposed on the Plant and Equipment and mandatory spare parts specified in Price Schedule No. 1 and that are to be incorporated into the Facilities by the law of the country where the Site is located. Essentiality Certificate/ Project Authority Certificate for the claim of Concessional rate/ Exemption of Customs Duty as applicable for Project Import/ Advance Authorization shall be provided by Employer.

As per Import Export Policy (2008-2009), as applicable of Government of India, goods supplied for the project where procedure of International Competitive Bidding (ICB) has been followed, same shall be eligible for Deemed Export benefits. The Employer shall be solely responsible for obtaining such Deemed Export Benefits.

For the Material/ Items purchased outside the State of Sikkim, Road Permit & Form "C" and other relevant statutory documents to avail the Concessional Rate of Central Sales Tax shall be issued by the Employer.

The above payment/ reimbursement of taxes, duties as defined in Schedule 7 ie. Excise Duty, Customs Duty, Central Sales Tax & Service Tax shall be restricted to the extent of Grand Total amount mentioned in Schedule No. 7 subject to GCC Clause 14.4 & 36.

If any material/item as per the nomenclature mentioned in Bill of quantities and invoiced by the contractor, are coming directly from the works of his duly approved Sub contractor to the Employer's site in a state different from the state wherein Sub-contractor's work are located, the contractor shall effect 'Sale in Transit' for such transaction. For effecting 'Sale in Transit', the contractor shall ensure that his Sub-contractor raises invoices in the Contractor's name and obtains GR/LR/RR in the name of Contractor and the Contractor further endorses the GR/LR/RR in the name of the Employer during transit of the equipment before the delivery of equipment is taken over by the

Employer. Such transaction shall also be treated as direct transaction between Employer and the Contractor.

14.3 If any tax exemptions, reductions, allowances or privileges may be available to the Employer in the country where the Site is located, the Contractor shall extend all help to enable the Employer to benefit from any such tax savings to the maximum allowable extent.

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 on the date of signing of Contract (hereinafter called "Tax" in this GCC Sub-Clause 14.4). If any rates of Tax 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 the performance of Contract which was or will be assessed on the Contractor an equitable adjustment of the Contract price shall be made to fully 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 (change in Law and Regulations) hereof."

9. A reading of the above Clauses of the Agreement would show that the Contract Price mentioned in the Contract was exclusive of the taxes and the same were to be borne by the petitioner. The Contract itself, in Appendix 5 gives a list of approved sub-contractors from whom supply can be procured by the respondent. For such supplies that are procured by the respondent from the sub-contractors, there was no exclusion to the liability of the petitioner to reimburse the taxes so paid by the respondent to such sub-contractors. Even the petitioner interpreted the Agreement as such and reimbursed taxes to the respondent till 14.11.2016.

10. In *The Godhra Electricity Co. Ltd. and Ors. v. The State of Gujarat and Ors.*, MANU/SC/0282/1974, the Supreme Court has held as under:-

“11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the court so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actions as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party’s express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation.”

11. The Arbitral Tribunal, after considering all the terms of the Agreement held as under:-

“44. As regards the words ‘applicable taxes at actuals’ and their meaning, the Respondent submitted that the Respondent had agreed that it would reimburse the applicable taxes, namely, the Excise Duty and CST at actual and it has been further submitted that the words ‘at actuals’, according to the

Respondent, mean that taxes must have been paid actually by the Claimant to the Exchequer. As regard Schedule-7 of Appendix-10 the Respondent contended that this Schedule gives an estimate and cannot be construed that the Respondent had agreed to pay such amount. However, the various other terms of the contract show that the prices quoted were sans the taxes, duties and levies and payable by the Respondent to the Claimant. This is the way the Respondents also understood the terms of the contract till November, 2016 whereafter, they have done a volte face. Not only did they stop making payment of the tax, duties and levies but have also withheld the retention money and have claimed the amounts already paid as Counter Claim in this matter. In matters of contract, the understanding of the parties about the terms of the contract is normally accepted to be the correct position. We are aware that there is no estoppels and the terms of the contract must not be contrary to law.

45. As noticed above, there are two aspects of the matter; one relating to the interpretation of the terms of the contract and the other with regard to the law applicable to such terms. We are of the considered view that under the contract the Claimant is entitled to the amount of taxes, duties and levies on the BOP items which were admittedly paid by the Claimant to the BOP manufacturers. As already noted, applicable taxes do not mean applicable to the Claimant but applicable on the goods manufactured. This is the view we have taken after considering the various terms of the contract noted earlier in the Award. We are unable to accept the interpretation given on behalf of the Respondent to the words “applicable taxes” or “as applicable”.

46. As regard the contention of the Respondent that the Claimant is not entitled to these amounts, we are of the view that the judgment of the Hon’ble Supreme Court in the case of Rashtriya Ispat Nigam applies in the instant case and the judgment of the Hon’ble Supreme Court in T. Stanes case is distinguishable; both on fact and in law and therefore, does not support the contention of the Respondent. The wordings of the

contract are clear and unambiguous and they must be given full effect since there is no ambiguity. We, therefore, hold that under the contract, the Claimant is entitled to the amount claimed and there is no bar in law in claiming the said amount. The argument on behalf of the Respondent in this regard cannot be accepted. The Claimant is right in contending that the parties had agreed to shift the burden of indirect taxes on BOP items to the Respondent. The Respondent has not shown any law or judgment which bars this.”

12. A reading of the above finding of the Arbitral Tribunal would show that on interpreting various terms of the Contract, it has come to the conclusion that under the Contract the petitioner is liable to reimburse taxes, duties and levies, which were admittedly paid by the respondent to the BOP manufacturers on the BOP items. This being a finding based on interpretation of the Agreement, which in my opinion is correct and cannot by any stretch said to be unreasonable or perverse, cannot be interfered with in exercise of power under Section 34 of the Act. In *Associate Builders vs. DDA*, (2015) 3 SCC 49, the Supreme Court has held as under:-

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

xxxx

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.”***

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be expressed 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. Oil and Natural Gas Commission, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 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 fact of the award.”

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011)10 SCC 573: 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachmi Ram*, AIR 1954 SC 689, *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468, *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 SC 1362, *Alopi Parshad & Sons Ltd. v. Union of India*, AIR 1960 SC 588, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*, AIR 1965 SC 214 and *Renusagar Power Co. Ltd. v. General Electric Co.* (1984) 4 SCC 679: AIR 1985 SC 1156)”

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the

award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after

interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

13. In ***National Highways Authority of India v. ITD Cementation India Ltd.***, (2015) 14 SCC 21, the Supreme Court reiterated the limits of jurisdiction of a Court exercising power under Section 34 of the Act in the following words:-

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do.”

14. The learned counsel for the petitioner relying upon the Judgment of the Supreme Court in ***Sea Customs Act***, S.20(2), Re v., AIR 1963 SC 1760, submits that the Arbitral Tribunal, in paragraph 42 of the Award has wrongly held that Excise Duty is not a tax on manufacture of goods. I do not find any merit in the said submission. Paragraphs 42 and 43 of the Award have to be read as a whole. The Arbitral Tribunal has stated that the liability to pay Excise Duty is on the manufacturer, however, at the same time the incidence of the tax is on the activity of the manufacture of goods and rate of levy is on the goods.

15. The learned counsel for the petitioner further relied upon Section 6(2) read with Section 9A of the Central Sales Tax Act, 1956 to contend that only a registered dealer can collect tax in respect of sale of goods in

the course of inter-State trade or commerce. Further relying upon the Judgment of the Supreme Court in *T. Stanes & Co. Ltd. v. State of T.N. And Another*, (2005) 9 SCC 308, it is submitted that if there is a bar to collect tax, it cannot be recovered in form of purported recoupment or recovery .

16. Though, the legal principle contended by the learned counsel for the petitioner is not disputed, it would have no application to facts of the present case. The Arbitral Tribunal in paragraphs 32, 40 and 41 of the Impugned Award has rejected the above arguments on the ground that the same were raised without there being any supporting pleading in that regard. It is not argued before me that the said finding of the Arbitral Tribunal is incorrect.

17. The learned counsel for the petitioner contends that the tax borne by the respondent, to the BOP Manufacturers, would become part of its cost. Any recovery thereof would result in double recovery of taxes paid.

18. I am unable to agree with the submissions made by the counsel for the petitioner. It is not disputed that the respondent had raised two separate invoices for the BOP items; one for cost and the other for taxes. There was also no dispute raised that the taxes paid by the respondent to BOP Manufacturers had already been included in the cost invoices. The Arbitral Tribunal has discussed this issue in paragraph 47 of the Impugned Award, which is reproduced hereinbelow:

“47. In view of what has been placed on record by both the parties, we are not inclined to accept the alternate submission on behalf of the Respondent that the Claimant

has already realized the amount of taxes, duties and levies being Excise Duty and CST in the price. The Claimant has demonstrated that in many instances, the price charged from the Respondent was even lesser than what it paid to the manufacturers of BOP items. The Claimant had paid the amount of Excise Duty and CST to the sub-contractor in respect of BOP items supplied by it to the Respondent. It is only this amount, and nothing in excess thereof, which has been claimed by the Claimant from the Respondent. We need not discuss at length the various judgments cited by both the parties because, according to us, the two judgments of the Supreme Court which are necessary for deciding the matter are of Rashtriya Ispat Nigam case and T. Stanes case which we have discussed to decide the matter.”

19. It was not shown how the above finding of the Arbitral Tribunal is wrong or perverse.

20. In ***Rashtriya ISPAT Nigam Limited v. Dean Chand Ram Saran***, (2012) 5 SCC 306, the Supreme Court has held that there is nothing in law to prevent a party from entering into an agreement, passing on the burden of any indirect tax arising out of obligation under the Contract to the other party. The same view has been recently reiterated by the Supreme Court in ***Union of India and Others v. Bengal Shrachi Housing Development and Anr***, (2018) 1 SCC 311. In view of the above, the question before the Arbitral Tribunal was, whether, in terms of the Contract between the parties, the burden to pay the taxes had indeed been passed on by the respondent to the petitioner. This being answered in the affirmative, I do not find Section 6(2) or 9A of the Central Sales Act, 1956 as prohibiting the same.

21. The learned counsel for the petitioner has also relied upon Section 11(D)(1) of the Central Excise Act, 1944. The said provision is reproduced hereinbelow:-

“11D. Duties of excise collected from the buyer to be deposited with the Central Government.-(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, [every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods] in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.”

22. The above provision is applicable only where a person collects any amount in excess of the duty determined and paid on any excisable goods under the said Act from the buyer of such goods. It is not the case of the petitioner that any amount in excess of what has been paid by the respondent as tax is being collected by the respondent in the facts of the present case. Therefore, in my opinion Section 11(D)(1) of the Central Excise Act, 1944 cannot be of any aid to the petitioner.

23. It is further contended by the petitioner that the Arbitral Tribunal has erred in awarding interest on the amount of Rs. 2,84,12,708/- without appreciating that the petitioner had already paid an amount of Rs. 1.50 crores to the respondent on 30.11.2016. The above position is accepted by the respondent in the written submission filed by it before this Court. Therefore, I find merit in the said contention and the Award in so far as it directs the petitioner to pay the interest at the rate of 9% per annum from

December 2016 till the date of the Award on an amount of Rs. 1.50 crores is set aside, equally, the interest awarded in favour of the respondent post the Impugned Arbitral Award shall also stand modified.

24. The last challenge of the petitioner to the Impugned Award is to the cost of Rs. 30 lakhs awarded in favour of the respondent and against the petitioner. The learned Arbitral Tribunal has considered the said issue and as held as under:-

“52. The Claimants have also claimed costs of the proceedings and have given the details of costs in the written submission filed. The amount claimed as costs is Rs. 38,99,800/- which comprises of the fees to the Arbitrators and expenses, apart from fees payable to law firms. Without going into the details, we award to the Claimant against the Respondent a total sum of Rs. 30,00,000/- as costs.”

25. I do not find the cost awarded by the Arbitral Tribunal to be unreasonable. The Arbitral Tribunal has in fact kept in mind the parameters as provided in Section 31A of the Act and therefore, award of such cost does not warrant any interference of this Court.

26. In view of the above, the present petition partially succeeds, with no order as to cost.

NAVIN CHAWLA, J

August 06, 2018/rv