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

Date of Decision: 28th November, 2018

\+ **FAO(OS) (COMM) 279/2018**

DANS ENERGY PVT LTD ..... Appellant

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Vineet Tayal and Mr. P.T.Vasandani, Advs.

versus

GE POWER INDIA LTD ..... Respondent

Through: Mr. Anish Kapur, Ms. Divya Bhalla & Mr. Dhritiman Roy, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

CM APPL. No. 49434/2018 (exemption)

Allowed subject to all just exceptions.

CM APPL. No. 49433/2018 & CM APPL. No. 49435/2018

These applications for condonation of delay of 8 days in filing and 2 days in re-filing are allowed as the counsel for the respondent, who appears on advance notice, does not oppose the prayers.

FAO(OS) (COMM) 279/2018 & CM APPL. 49432/2018

This intra-court appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ('A&C Act', for short) read with Section 18 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, impugns the order and judgment dated 6.08.2018 dismissing the objections filed by DANS Power Pvt. Ltd. ('appellant', for short) to the Arbitral Award ('Award' for short) dated 30.04.2018.

2. Learned senior counsel appearing for the appellant, challenging the findings recorded in paragraphs 42 to 44 of the unanimous Award dated 30.04.2018, submits that as per the Central Excise Act, 1944 excise duty is payable by the manufacturer and not per-se on the goods. Thus, as per the terms of the contract, the appellant was not liable to pay taxes and duty to the respondent as per actuals. Relying on Clause 14.4 of Chapter 3 of the General Conditions of Contract ('GCC', for short), he submits that the appellant was liable to differential *i.e.* increase in taxes, duties and levies prevailing on the date of signing of the contract. Further, this additional amount was payable in connection with the performance of the contract.

3. The appellant's contention relying on the provisions of the Central Excise Act, 1944 and concept of 'charge' in case of excise duty, would not justify interference in the Award since statutory obligation and contractual liability to pay and reimburse taxes and duties are two different aspects. Interpreting the contractual terms the Arbitral Tribunal has held that appellant had agreed and contracted to pay or reimburse the taxes, duties etc. as per actuals.

4. The Arbitral Tribunal in paragraphs 42 to 44 of the Award has held that the liability was on the goods in the sense that as per contractual terms the appellant was bound to pay or reimburse the respondent/contractor for the duties levied. Clause 14.4 of the GCC relating to enhancement of taxes was applicable where the price fixed was inclusive of taxes and duties

levied. It would not be applicable to products including the Bought-Out-Products (‘BOP’, for short), where the incidence of tax had to be borne and paid by the appellant as per the contract.

5. During the course of the arguments before us, it was conceded by the learned Senior Advocate that in terms of Clause 1 to Article 2 of the contract relating to price and terms of payment, the prices fixed were excluding all applicable taxes, duties and levies. There was specific stipulation that all taxes, duties and levies payable at the time of discharge, were to be paid or reimbursed by the employer *i.e.* the appellant to the contractor *i.e.* respondent on actuals. Indicative taxes and duties were annexed in Schedule 7 of Appendix10. For sake of convenience, we would reproduce the relevant clauses which were also quoted in the impugned order; they read ;-

"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	*Plant, Equipment and Mandatory spares supplied from outside India mainly from Europe, USA & Canada on CIF basis:-*	

	CIF (India Port of Entry) price.	
II	*Plant, Equipment and Mandatory spares supplied from India (Employer's Country) on Ex-works basis:-*	*Xxxxx*
	Total	*xxxxx*

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 and duties and levies as applicable at the time of dispatch are to be paid/reimbursed by Employer to the Contractor at actual as per the Contract (refer indicative taxes and duties annexed as Appendix 10, Schedule 7, Estimated Tax & Duties."

(Emphasis supplied.)

6. Clause 14 of the GCC dealing with taxes and duties had the following stipulations:-

"*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, Muncipal etc.) taxes, such as Entry Tax/Octroi / VAT/Works Contract Tax/ any

<u>other local taxes, duties, levies etc., which are not included in Schedule - 7, it 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</u>.

14.2 Nothwithstanding 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.

<u>The above payment/reimbursement of taxes, duties as defined in Schedule 7 i.e. 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</u>.

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 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 <u>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</u>."

(Emphasis supplied.)

Aforesaid clause again states that where the contract price was exclusive of taxes, the taxes except income tax shall be paid or reimbursed by the appellant to the respondent, as per actuals.

7. Learned Single Judge has referred to Appendix 5 which gives a list of approved sub-contractors from whom BOP had to be procured by the respondent. Accordingly, the respondent had procured the supplies from sub-contractors.

8. It is accepted that the appellant had paid or had reimbursed the contractor/respondent excise duty and other taxes on BOP of Rs. 2,84,12,708/- till 14.11.2016. Therefore, the appellant had understood and interpreted the contract as imposing an obligation to pay all taxes and duties leviable and payable on BOP.

9. Interpretation placed by the Arbitral Tribunal on the relevant clauses of the contract is certainly a reasonable and plausible view. In fact, it is the correct and only view possible. The contention that the duty and taxes as per actuals means duty and taxes paid on 'goods' and not duty and taxes imposed on the manufacturer or the seller, is clearly farfetched and illogical.

10. The appeal has no merit and is dismissed.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 28, 2018/*uj*