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

+ **FAO(OS) 94/2019**

GAIL (INDIA) LTD Appellant
Through: Ms. Maninder Acharya, Additional
Solicitor General of India with Mr.
Ajit Puduserry, Mr. Ajeet Singh
Verma, Advocates.

versus

JINDAL SAW LTD. Respondent
Through: Mr. Arun Kumar Varma, Senior
Advocate with Mr. Abhay Raj Varma,
Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE REKHA PALLI

ORDER
07.05.2019

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REKHA PALLI, J.:

C.M.No.20758/2019 (for exemption)

1. Exemption allowed, subject to all just exceptions. The application is disposed of.

C.M.No.20759/2019 (for condonation of delay)

2. For the reasons stated in the application, the delay in filing is condoned. The application is disposed.

FAO(OS) 94/2019 & C.M No.20757/2019 (stay)

3. The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') assails the order dated 13th

February, 2019 passed by the learned Single Judge in O.M.P. No.410/2009, whereby the learned Single Judge has rejected the objections filed by the Appellant/GAIL (India) Ltd. to the arbitral Award dated 20th February, 2009.

4. Under the arbitral Award, the learned Arbitrator had allowed the claim of the Respondent by directing the Appellant herein to pay to the Respondent an amount of US\$ 5,060,565.06/- and Rs.5,91,27,019/- along with interest @ 14% per annum from the date of Award till the date of payment.

5. The relevant facts of the case are that, pursuant to a request for quotation floated by the Appellant for supplying of line pipes for the Dahej-Vijaipur Pipe Lines (DVPL), the offer submitted by the Respondent was accepted by the Appellant at the unit rate of US\$ 282.85/- per meter. On 3rd February, 2003 a purchase requisition was issued by the Appellant followed by a formal contract being concluded between the parties on 11th February, 2003, for supply of 270 km of 42 inches pipes. As per the terms of the contract, out of the agreed 270 kms of line pipes, 180 kms was to be manufactured by the Respondent from plates at the Mundra Plant, while the remaining 90 kms of the unfinished pipes was to be imported either from Saw Pipes, USA or from any other pipe mill approved by the Appellant and the finishing thereof was to be done at the Mundra plant of the Respondent.

6. The relevant terms of the contract dealing with price as also the delivery schedule for supply of goods under the contract read as under:

“1.0 PRICES AND PRICE BASIS

1.1 The total price of USD 77,687,662.56 (US Dollars Seventy Seven Million Six Hundred Eighty Seven Thousand Six hundred

Sixty Point Five Six only) stipulated in Annexure-2 shall remain firm and fixed till complete execution of order.

1.2 The prices of 42"size (1067 mm) line pipe, qty 270,000 meter (at item 1.1 of Annexure-2 to this order) are on FOT dispatch point Mundra basis and the prices of 36"size (914.4 mm) line pipe, qty. 4,576,meters (at item 2.1 of Annexure-2 to this order) are on FOT dispatch point kosikalan basis.

The above prices are inclusive of packing, forwarding, and loading of pipes on trailers but exclusive of Excise Duty, Central Sales Tax (CST is not applicable on 42"sixe linepipe) freight charges and transit insurance charges.

1.4 The seller will supply 42"size line pipes through two routs of manufacturing viz. a) manufacture from plates and b) manufacture from unfinished pipes.

*The supplies of 180,000 mtr. Pipes shall be through plate route and the balance quantity of 90,000 meters through manufacture from unfinished pipes. The seller shall source the unfinished pipes from SAW Pipes USA Inc. **or any other pipe mill** qualified by owner/EIL against this Tender No.VKG/ICB/4844-00QA-MR9010/1001.*

"4.0 DELIVERY PERIOD AT F.O.T. DESPTACH POINT (MUNDRA FOR ITEM 1.1 & KOSIKALAN FOR ITEM 2.1) BASIS:

4.1 Delivery is the **essence** of this purchase Order and the Seller shall try to improve upon the same.

4.2 Goods covered in this purchase order shall be delivered within 4 to 9 months from the date of Fax of Intent, i.e. latest by 27.10.2003 as per delivery schedule attached at Annexure-3.

4.3 The date of LR/Gr shall be considered as date of delivery. The seller shall give 15 days advance notice to Owner for arranging the trailer to be provided by coating contractor. However in case the trailer is not arranged within the above period, the date of Inspection Release note issued by EIL shall be considered as the date of delivery for the purpose of application of price reduction clause only."

The delivery schedule on FOT dispatch print basis as mentioned in

Annexure-3 to the Purchase Order:-

<i>Delivery before the end of following period</i>	<i>Lot</i>	<i>42" API 5L GRX70 Line Pipe (Item 1.1 of PR)</i>	<i>36" API 5L GRX 70 Linepipe item 1.5 (2.1 of PR)</i>
<i>28.04.2003 to 27.06.2003</i>	<i>I</i>	<i>65,000 meter</i>	<i>-</i>
<i>28.06.2003 to 27.08.2003</i>	<i>II</i>	<i>103,000 meter</i>	<i>-</i>
<i>28.08.2003 to 27.10.2003</i>	<i>III</i>	<i>102,000 meter</i>	<i>5,576 meter</i>
<i>Total quantity</i>		<i>270,000 meters</i>	<i>4,576 meter</i>

7. On 16th March, 2003, the Appellant requested the Respondent to supply all pipelines within a shorter time span than the one agreed in the contract. Therefore, it was suggested to the Respondent that instead of procuring and manufacturing the unfinished pipes in the U.S.A, if the Respondent could ensure production of the said pipes from any other line pipes manufacturers from Europe, it would save time. In response to this request, the Respondent after a series of meetings with the Appellant came up with the proposal to source the mother pipes from the Mundra Mill itself, which proposal was accepted by the Appellant on 26th August, 2003, though by placing a rider that it would be subject to passing of commercial benefit to the Appellant.

8. On receipt of the aforesaid letter, there was some further correspondence exchanged between the parties. The Respondent clearly brought out that since the contract in question under which the supplies were being made was a fixed price contract and the Respondent was required to make deliveries of furnished pipes from a single point i.e. Mundra, there was no provision, occasion or scope for raising a demand to pass any commercial benefit. The

Appellant thereafter vide its letter dated 21st October, 2003 to the Respondent stated that due to the change of route the Respondent would be benefited to the tune of Rs.23 crores. This was denied by the Respondent, who in turn informed the Appellant that its assessment of cost saving was not correct and that the Respondent is saving only a sum of Rs.10.31 crores.

9. Without any further correspondence on the aspect of commercial benefits accruing to the Respondent as a result of the change in the source of supply in respect of the 90 kms of line pipes, the supplies were completed within the prescribed time. The Appellant made part payment to the tune of Rs.102.04 crores but did not release the entire amount which was Rs.148 crores.

10. In these circumstances, the Respondent invoked the arbitration clause and the matter was referred to the sole Arbitrator. After examining the terms of the contract and the entire correspondence exchanged between the parties, the Arbitrator passed the impugned Award whereby the Appellant was required to pay the Respondent US\$ 5,060,565.06/- and Rs.5,91,27,019.00/- towards the balance amount qua the respective invoice amount in USD and INR along with interest @ 14% per annum from the date of passing of the Award till the date of actual payment.

11. The Appellant feeling aggrieved by the Award allowing the Respondent's claim for the balance contractual amount along with interest, filed objections under Section 34 of the Act which, as noted hereinabove came to be rejected by the impugned order. The learned Single Judge after considering the correspondence exchanged between the parties and the

specific terms of the contract came to the conclusion that the contract was a fixed price contract. The learned Single Judge held that there was no infirmity in the arbitral Award directing payment of balance contractual amount to the Respondent along with interest.

12. The factual findings in the impugned judgement of the learned Single Judge *inter alia* were as under:

“41.....Admittedly the petitioner accepted the proposal of production of such unfinished pipes of 90 ton at Mundra plant of the respondent and the respondent in its initial correspondence was very clear of not passing commercial benefit and though in its later correspondence had disclosed about its alleged saving Rs.6.92 crores or 110.31 crores but in no clear terms ever the respondent had agreed, to; pass on such benefit to the petitioner. More importantly, it was never a condition of the contract. The unfinished pipes were got manufactured in India from Mudra facility only because of crash in the supply schedule and that too at the instance of the petitioner. The learned arbitrator thus rightly noted the claimant had agreed to unreasonable and unlawful concession only under compelling circumstances; viz a) the petitioner being, its important customer; and b) huge chunk of money was held-up by the petitioner causing great financial hardship to respondent and hence consent was given to recover its payment expeditiously and that it was not fair or reasonable for the petitioner to ask the respondent to share its savings, it being a fixed price contract.”

47.Admittedly there was crash in supply schedule at the instance of petitioner. The passing of the commercial benefit was never accepted by the Respondent as noted in its letters dated 27.08.2003 and 19.09.2003. It is also an admitted fact the entire production was completed and entire pipes were supplied on or before 21.10.2003. Between 06.08.2003 till 21.10.2003 the petitioner has been accepting the delivery of the product and it did not refuse its delivery by saying the commercial benefit

be first passed onto them only then the petitioner shall accept the delivery. It was only after the delivery was fully received by the petitioner, it started raising this demand/plea. Since the Respondent was to recover more than 100 crores from the petitioner it was made a silent spectator and thus had to disclose its savings on the project. At no stage the Respondent ever adhered to the demand of the petitioner.

13. The learned Single Judge, on a detailed analysis of the evidence on record, concurred with the learned Arbitrator that the Appellant had failed to prove the trade practice or usage alleged by it whereby even though the contract was a fixed price contract, the price could be varied if the cost of manufacture (which includes transport costs) got reduced for any reason, but if the cost of manufacture increased, the price would remain constant. The learned Single Judge agreed with the Arbitrator that “this contention is contrary to the clear terms of the Contract. The Purchase Order specifically provides that the price shall remain firm and fixed till complete execution of the order. It also lays down that the Seller shall source the unfinished pipes from Saw Pipes U.S.A Inc. or any other pipe mill qualified by the Owner/EIL.” The conclusion of the learned Arbitrator that “the price payable for the supply by the Claimant cannot be reduced because of the fact that the entire 270 KMs pipes were manufactured at Mundra in India and nothing was manufactured in USA” was also upheld.

14. The learned Single Judge also did not find any merit in the Appellant’s challenge to the award of interest @ 14% per annum by the learned Arbitrator. It was held that once Section 37 (7) (b) of the Act provided for payment of interest @ 18% p.a. from the date of award to the date of

payment, the direction of the learned Arbitrator to award interest at a rate lower than the one prescribed by the statute could not be faulted with in any manner.

15. Before us, Ms. Maninder Acharya, learned ASG appearing for the Appellant, contends that the impugned judgment, as also the arbitral Award, are liable to be set aside as they overlook the specific admission of the Respondent in its various letters to the effect that there was a commercial benefit of Rs.10.31 crores to the Respondent as a result of the change in the source of supply of the 90 km line pipes. She submits that the logical consequence thereof, in terms of what had been agreed between the parties, was that the said amount had to be passed on to the Appellant. Therefore, the Appellant was justified in deducting the said amount while making the payment to the Respondent towards the supply of goods.

16. Ms. Acharya submits that the learned Single Judge, as also the learned Arbitrator, have failed to appreciate that the Appellant had agreed to the manufacture of the entire 270 kms at Mundra through the plate route instead of 180 kms as originally agreed, only on the condition of passing on of commercial benefits to it, which fact was specifically mentioned in the Appellants' various letters. She, thus, contends that in view of the admission of the Respondent themselves that there was a commercial benefit of Rs.10.31 crores to them as a result of the Appellant agreeing to their proposal for production of unfinished pipes of 90 km at the Mundra plant itself, there was no reason as to why the said benefit should not have been passed on to the Appellant. Ms. Acharya further submits that once there is

an admission by the Respondent itself, the principles of Order XII Rule 6 of the Civil Procedure Code, 1908 would apply. The Award having overlooked this legal position and would fall foul of the public policy of India. It was, therefore, liable to be set aside.

17. Ms. Acharya further submits that the award of interest @ 14% by the learned Arbitrator overlooks the various decisions of the Supreme Court wherein it has been held that under the Act and the present interest regime in the country, the award of interest @ 9% per annum would be just and proper. She, therefore, contends that the impugned order and arbitral Award are liable to be set aside on this ground as well.

18. We have considered the submissions of the learned ASG and, with her assistance, perused the record.

19. What emerges from the record is that the entire controversy between the parties relates to the short issue as to whether, as per the terms of the contract, the Appellant was entitled to claim that the commercial benefit, if any, arising to the Respondent, as a result of the 90 km land pipes being produced at Mundra itself instead of being sourced from Saw Pipes U.S., had to be passed on to the Appellants or not. We find that both the learned Arbitrator and the learned Single Judge have consistently found that under the contract even though the source of pipes in respect of 90 km was not fixed as it provided that the seller shall source the unfinished price qualified by the owner/EIL, the contract was still a fixed price contract. It was also found that no condition of passing on of any commercial benefit was ever envisaged in the contract and, therefore, merely because the parties had, in

their correspondence, referred to the commercial benefits which had accrued to the Respondent, the basic terms of the contract, making it a fixed price contract, had not been altered. The learned Single Judge, as also the Arbitrator, did not find any specific admission on the part of the Respondent to pass on this commercial benefit to the Appellant and, therefore, did not find any merit in the Appellant's claim that it was entitled to the commercial benefit accruing to the Respondent.

20. Even though in exercise of jurisdiction under Section 34 of the Act, the scope of interference by the Court is very limited, as any such interference is called for only where the finding of the Arbitral Tribunal is found to be either contrary to the terms of the contract, or to be perverse in any manner, we find that the learned Single Judge has again examined the relevant clauses of the purchase requisition and the purchase order as noted hereinabove. The correspondence exchanged between the parties has also been analysed exhaustively. At the end of that exercise, the learned Single Judge concurred with the learned Arbitrator.

21. The scope of the present appeal under Section 37 of the Act is even narrower. Nevertheless, we too have once again been invited to examine the clauses of the contract, the correspondence between the parties in light of the concurrent findings of the learned Arbitrator and the learned Single Judge. In our view, there can be no manner of doubt that the price of the pipes under the contract was fixed and the Respondent was, therefore, entitled to claim the amount in accordance with the contract. We are also unable to find any specific admission in the Respondent's letters, on which heavy reliance

has been placed by Ms. Acharya to contend that the Respondent had agreed to pass on the commercial benefit to the Appellant. We are also unable to find any perversity in the rate of interest as awarded by the learned Arbitrator, which, admittedly, is at a rate lower than the statutory rate prescribed under the Act. We, thus, find no ground to interfere with the impugned order of the learned Single Judge or the arbitral Award.

22. The appeal and application are accordingly dismissed.

REKHA PALLI, J.

S. MURALIDHAR, J.

MAY 7, 2019

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