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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 07th February, 2019
Pronounced on: 13th February, 2019**

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O.M.P. 410/2009

GAIL (INDIA) LIMITED

..... Petitioner

Through : Mr.Dhruv Mehta, Senior Advocate
Mr.Kaushik Laik and
Mr.Anupama Dhurve, Advocates.

versus

JINDAL SAW LIMITED

..... Respondent

Through : Mr.Arun Kumar Varma, Senior
Advocate with Mr.Abhay Raj
Varma and Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The petitioner filed the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') against an arbitral award dated 20.02.2009.

2. The petitioner is a Limited Company duly constituted under the provisions of the Indian Companies Act, 1956. The factual matrix of the case leading to the filing of this petition are as follows:-

(i) on 06.05.2002 RFQ and Global Notice for Invitation of Bid (IFB) was issued by Gail in relation to a pipeline project (HBJ Upgradation Project) for supply of, inter alia, 42" LSAW

Linepipes. Article 8.2 (C) of IFB is to the effect the “*bidders shall indicate breakup of the quantum of imports involved for import of necessary raw materials and component giving CIF value of import in applicable currency considered and included in bid price*”;

(ii) on 18.06.2002 an offer was made by Saw Pipes Limited (“SPL”) for supply; SPL specifically indicated CIF component separately as annexure to the price bid as under:- *Our Ex-Works prices are inclusive of CIF component. Our quoted Ex-works prices shall be firm and fixed on account of any impact due to any change in CIF value at the time of actual import*”. SPL offered to supply from its Mundra facility through two routes of manufacturing: (a) Manufacture of finished pipes from plate involving all activities of manufacture from plate to finished pipes (in short “**First Route**”); (b) Manufacture of finished pipe from unfinished pipes by carrying out Eng Bevelling, Finishing, Manufacturing of Bevel End protectors, fixing of bevel end protectors and undertaking the complete final inspection activities (in short, “**Second Route**”). For the Second Route, the Respondent had categorically stated the “unfinished pipes will be brought to our Mundra works from our US facility”. SPL’s offer was a total length of 270 Kms of linepipes, by both the routes of manufacturing;

(iii) on 28.01.2003 Gail accepted SPL’s offer for supply of 270 Kms of Line Pipes and issued a Fax of Intent to the Respondent in this regard. It placed an order for 270 Kms of 42” LSAW Line

Pipe, to be supplied from *Mundra* Mill at the rate of *USD 282.85* per meter;

(iv) on 11.02.2003 Purchase requisition was issued by Gail to SPL providing a break-up of 270 Kms of 42" Line Pipes in the following Manner:

"B. Pipe Mills

Line Pipes shall be manufactured and supplied from pipe mills as defined below: a. 42"OD, 14.6 m wall thickness API 5L Gr. X-70 pipe:

SAW pipes, Mundra Pipe Mill – from plates for a maximum of 180 Km and from unfinished pipes for a maximum of 90 Km. The unfinished pipes may be sourced from SAW Pipes USA or any other pipe mill approved by Company for a maximum length of 90 km..."

Clause 4.0 of the Purchase Requisition provided for the contractual timeframe of a maximum of 9 months and an explicit obligation was cast upon the Respondent to improve upon the same;

(v) a meeting was held between the Parties on 16.05.2003 (Minutes were communicated vide letter dated 22.5.2003) wherein Gail requested SPL to supply all line-pipes within a shorter time-span, i.e. by the end of August 2003. GAIL suggested to SPL that instead of manufacturing the unfinished pipes in US, if SPL could ensure production of the said pipes from any other line pipe manufacturer "in Europe", it would save time;

(vi) on 2.6.2003 SPL sent letter stating they were advised to explore possibilities of procuring mother pipes from sources other than USA mill, namely M/s I.U.D, Ukraine or any other pipe manufacturer as stipulated in the contract. SPL further stated as per the scope and terms of work with I.U.D. Ukraine, the pipes will be delivered by August, 2003;

- (vii) on 11.6.2003 SPL's letter stating that the aforesaid pipes will be coated by 30.09.2003;
- (viii) on 18.08.2003 SPL wrote to Gail stating that, as discussed during a review meeting held on 24.07.2003, SPL would source the mother pipes from Mundra mill itself;
- (ix) on 26.08.2003 Gail agreed to SPL's proposal to produce mother-pipes from Mundra facility, "*subject to passing on commercial benefit to GAIL*";
- (x) on 27.8.2003 SPL sent letter acknowledging GAIL's reaffirmation of the production of 90 km mother pipe at Mundra, however, reference to *commercial benefits was not clearly comprehended*;
- (xi) on 19.09.2003 SPL wrote to Gail stating, interalia, the instant contract was a "*fixed price contract*" and there was "no occasion/scope for raising a demand to pass on any commercial benefit";
- (xii) on 21.10.2003 EIL sent letter to GAIL stating over-all saving of SPL from not importing the mother pipes would be about 23 crores;
- (xiii) on 26.9.2003 SPL's letter confirmed the sea freight and other charges envisaged in the present project;
- (xiv) Gail released a sum of ₹ 101.04 crores to SPL on 17.11.2003 and 19.11.2003 towards part supply of LSAW pipes, out of the total contract price of ₹ 145 Crores (approx.);

(xv) on 09.04.2004 SPL wrote to Gail saying SPL saved only 10.31 Crores;

(xvi) on 28.05.2004 SPL again wrote to Gail reiterating its assessment of ₹ 10.31 Crores as cost-saving was correct and the Gail's assessment of ₹ 23 Crores worth of cost-saving was flawed;

(xvii) on 22.08.2004 an alleged U-turn was made by SPL wherein SPL agitated no money could be retained by Gail, while admitting cost-saving of at least ₹ 10.31 Crore;

(xviii) on 15.10.2004 Gail wrote to SPL alleging its U-turn was clearly an afterthought and Gail was justified in retaining an amount of ₹ 23 Crores together with Excise Duty @ 25.4%; and

(xix) on 31.12.2004 SPL invoked arbitration. On 20.02.2009 impugned award was published by the learned arbitrator.

3. After referring to various provisions contained in documents the learned senior counsel for the petitioner referred to a letter dated 22.05.2003 of the petitioner qua corporate review meeting dated 16.05.2003 and it notes :-

“Please note that in the said meeting we have agreed upon the revised schedule for supply as contained in the said minutes. The revised schedule therefore represents a modification of the original schedule for supply of the line pipes contained in the contract/purchase order No. GAIL / Noida / C&P / 4844 / 1001 / 01091 / 01 / C-297 dated 11.2.2003.”

The minutes of meeting dated 16.05.2003 between GAIL, EIL and Live Pipe manufacturer are as below :-

“3. Supply of Pipes:

In view of the fact that the LNG terminal at Dahej has to be completed by November/December 2003 C&MD. GAIL explained that the line pipes would have to be laid and ready to transport LNG by this date. Accordingly C & MD GAIL requested that the supply of all the line pipes be made by August 31,2003 under the contracts for supply of the line pipes with the respective suppliers.

SAW PIPES

i) The schedule for supply of plates and the supply of pipe was discussed with M/s Saw Pipes. M/s. Saw Pipes confirmed that the total supply of plates, excluding the 34,000 MT going to their US Plant, will be received by end Jun'2003.

ii) Ms/ Saw Pipes were informed that the shipment for 34,000 MT of plates going to their US Plant for manufacturing mother pipes will take unnecessary 10 to 11 weeks in transportation of plates from Ukraine to US and further supply of mother pipe from US to India. If this travel time is utilized in the production of line pipes at M/s. IUD. Ukraine works or any other line pipe manufacturers in Europe as stipulated in the contract. The supply of mother pipe can be expedited which will be helpful in completing the total supply by end Aug'03. M/s. Saw Pipes informed that they will examine the same and will revert by 21st/22nd May'03 after discussing with other probable line pipe manufacturers."

12. The respondent's replied vide its letter dated 02.06.2003 as follows:-

*"1. During the Review Meeting on 16.05.2003, we were advised that in the interest of project and to save some time period, we should explore possibilities of procuring mother pipes from sources other than USA mill, namely M/s. I.U.D. Ukraine **or any other line pipe manufacturer as stipulated in the contract.** Although, it would certainly increase our financial outgo, however, in the interest of the project, we offered to explore such possibility for a part quantity. For achieving this objective and as advised we had to keep the shipment of plates earmarked for USA (34500 MT. approx) in abeyance. Parallely, the matter of alternative source of Mother Pipe supply had already been initiated with a pipe supplier in Ukraine (M/s. I.U.D.)"*

13. The Ld. Senior Council for the petitioner then referred to letter dated 18.08.2003 of the respondent which noted:-

*"1. During the Director's Review Meeting at GAIL on 24.07.2003, the discussions held between GAIL / EIL clearly concluded that **SPL would now have to source the mother pipes from Mundra mill** after SPL finishes production of 180 KM of finished pipes from plate route. This was informed to SPL in the meeting.*

2. xxx

3. Consequent upon the various directions received from GAIL / EIL, the movement of plates was shifted and eventually the plates arrived at Mundra. The mother pipes sourcing initially was to be done from SAW Pipes USA Inc. (as per provisions of the contract) and SPL had made all provisions and preparedness for receiving the plates at Baytown, Huston, keeping the mill in readiness for undertaking the said assignment and subsequent shipping of mother pipes of Mundra.

4. Subsequent to plates arrival at Mundra, it was communicated to GAIL/EIL that the production of mother pipes from Mundra, which is also in line and as per the provision of the contract, will be taken up only after the completion of 180 KM of finished pipes from plate route. However, as informed earlier, the Mundra plant is still idling for want of EIL inspectors to inspect the production process of mother pipes. This has caused interruption in the supply of linepipes which has further inflicted a major financial set-back to us. Also, this has totally disrupted our cash flow and has left SPL totally incapacitated towards discharging its financial obligations."

and also to a letter dated 26.08.2003 of the petitioner which read:-

"

*We hereby convey GAIL's acceptance got rolling of 90 Km plates to produce unfinished pipes at Mundra Pipe mill and finishing at the beveling unit of the plant against the requirement of 90 Km pipes through mother pipes route, **subject to passing on commercial benefits to Gail**, which shall accrue to you, as a result of manufacturing of pipes at Mundra plant, instead of importing mother pipes from SAW pipe USA Inc.*

Further, M/s Saw Pipes is to deliver coated pipes as per agreed schedule so as to meet the project completion in time.

You are also advised to depute your senior management level representative to attend the negotiation meeting with GAIL and EIL designated personnel for setting the commercial issues as mentioned above at the earliest. The date for such negotiation meeting shall be communicated separately.

Please take necessary action immediately for manufacturing of pipes, pending commercial negotiation/settlement.

Thanking you

Yours truly

Sd/-

Karnatak

DGM (Projects)”

14. The learned senior counsel for the petitioner then referred to a letter dated 21.10.2003 of Engineers India Limited to the petitioner wherein it was noted the change of route would benefit the respondent to the extent of ₹ 23.00 Crores approximately. However, vide its letter dated 09.04.2004 the respondent rebutted such an allegation saying:-

“As our estimate varied with that of EIL / GAIL, we have re-worked such cost benefit taking highest prevailing shipping rate. The cost benefit in such situation works out to approx. Rs.10.31 crores. The details of revised estimates are enclosed for your kind information.

We request you to consider the said revised estimate of cost benefit for release of our balance payment at the earliest.”

15. Even the letter dated 28.05.2004 of the respondent noted:-

“.....Nevertheless, SPL while submitting the estimates for Rs.10.31 Crores have considered the rates at the highest values after referring to the internationally regarded references journal “Fernleys” to accord total fairness and reasonability.

Subsequently, we were invited for negotiations on 17.05.2004 with GAIL / EIL at GAIL office. During this meeting, SPL expressed its predicament about the large amount due to SPL for a very long period. The various financial hardships and difficulties being faced by SPL were expressed to the senior officials of GAIL / EIL. Consequently, there were two more rounds of meetings with EIL / GAIL on 24.05.2004 and 27.05.2004 wherein we were provided with the basis of calculation of EIL / GAIL. SPL had immediately drawn the attention of EIL / GAIL towards major variance on certain head and counts in the estimation of EIL / GAIL. We enclose the

detailed reasoning based on documentary evidence for your kind perusal.

You would appreciate that SPL on its part has been very transparent and than fair in their estimates of Rs.10.31 Crores by taking the highest values for charter hire rates. Also, SPL has been consistent in their method of calculation estimates and have kept two expenses viz. Suez Cannal charges and charges in addition to per day charter hire rates. Therefore, it may be appreciated that SPL's estimates of Rs.10.31 Crores has been calculated on the basis maximum rate of per day charter hire plus giving all possible and benefit to EIL / GAIL. Accordingly, we would now urge EIL / GAIL to accord consideration to the facts and figures enclosed with this letter before taking view in this regard."

16. Lastly the learned senior counsel for the petitioner referred to its letter dated 15.10.2004 wherein the petitioner had categorically alleged :-

"The contents as narrated in your referred letter are believed to be an afterthought and after your agreeing to pass on the commercial benefits to GAIL, M/s Engineers India Ltd (EIL), the Project Management Consultant of this project has been requested to calculate the net amount of the commercial benefits to be passed on to GAIL. EIL worked out the commercial benefit to be Rs.23 crores, on the basis of the details submitted by you, which was already communicated to you.

Accordingly, GAIL retained an amount of Rs.23 crores together with the Excise Duty @25.4% as per the calculations of our Project Management Consultants which may please be noted."

17. Thus, the main contention of the petitioner was since the change of route from USA to Mudra factory has benefitted the respondent to an extent of ₹ 23.00 crores and since such a change of route was not possible except with the written consent of the petitioner and since the petitioner has consented to change of route only upon passing of commercial benefit to it, hence later the respondent could not have refused to pass on such benefit to the

petitioner, and thus the award to this extent is contrary to the terms of the contract.

18. The learned counsel for the petitioner urged the learned arbitrator erred in noting the contract price was *fixed* though the source of supply was *not fixed* and such a finding is contrary to the express term of the contract viz. clause 1.4 which says the supply of 1,80,000 meters of pipes shall be through Mundra and whereas 90,000 meters shall be from Saw pipes USA Inc. Further he referred to Article 8.2 (c) of the Instructions to Bidders wherein bidders were required to separately give the break up of the quantum of imports involved, for import of necessary raw materials and components giving CIF value of import in applicable currency considered and included in bid price. The learned counsel for the petitioner also referred to clause 1 of Purchase Order dated 11.02.2003 which speaks about prices and price basis and clause 1.4 says the supply shall be through two routes of manufacturing i.e. from steel plates and from unfinished pipes.

19. The learned counsel for the petitioner also referred to the cross examination of Mr.Abhijeet Singh and Mr.Ashutosh Karnatak to show the supply was to be from two sources i.e. 180km pipes from Mundra and 90Km pipes from Saw pipes USA Inc. and the petitioner had approved of shifting the source of supply to Ukraine which did not materialize.

20. Another contention raised by the petitioner is the learned arbitrator erred in saying the trade practice or usage qua passing of

commercial benefit was not approved. It is argued the petitioner claim was never based upon trade practice or usage but was based upon two sources of manufacturing as the Mundra Mill was not qualified by the owner beyond 180Km pipes as admitted by Mr.Abhijeet Karnatak and RW1. It is alleged the respondents witnesses rather admitted the USA pipe mill was approved by EIL and reference to “*any other mill*” in clause 1.4 if is held to be Mundra Mill it shall completely negate the concept of two routes manufacture because then the entire 270 Km would be manufactured from the plate route.

21. The learned senior counsel for the petitioner argued the award is against the fundamental policy of Indian law and is per se against Section 28(2) and Section 28(3) of the Act. Section 28(3) read as under :

“(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.”

22. It was argued the learned arbitrator had failed to consider the contractual terms, pleadings and evidence as there was no question of any variation in the route except with the consent of the petitioner and since change of route leads to novation of the contract viz. alterations in terms thereof and since the conditional offer of passing of commercial benefit was given by the petitioner and was accepted hence the learned arbitrator ought to have held such conditional offer was accepted in entirety i.e. the respondent

accepted the conditional offer only upon passing of commercial benefit.

23. The learned senior counsel for the petitioner then referred to a letter dated 01.05.2003 issued by EIL which read :

“Kindly recall the discussions we had on the subject during the meeting with GAIL, C&MD on 8th April, 03 since then we have received the production plan from your end on 28-04-03. From the documents submitted by you, it is still not very clear about your production plan from USA mill and hence we are unable to appreciate your commitment of end September as already committed to your office.

I shall, therefore, request your kind intervention so that we can get the details of your production plan at USA with schedule.”

24. It is alleged the USA mill was not in readiness and it was in the mind of the petitioner for agreeing to the supplies of the pipes to be made from Mundra instead of USA. It is alleged clause 1.4 was incorporated in the interest of the petitioner rather than of the respondent and was not to give any flexibility to the source of supply.

25. The learned senior counsel for the petitioner in support of his case relied upon *Food Corporation India and Another vs Ram Kesh Yadav and Another* (2007) 9 SCC 531 and *General Assurance Society Ltd. vs. Life Insurance Corporation of India* (1964) 5 SCR 125 wherein the Courts held when a party accepts one part of conditional offer, it cannot reject its other part.

26. The learned senior counsel to bring home his point also referred to the cross examination of Mr.P.K.Tripathi, viz.,

“Q.90. Is it correct that according to GAIL on 90km of pipes, the Claimant has saved approximately Rs.23 crores by not manufacturing the pipes at their US facility?”

A. Yes, as per our assessment, this is saving.”

27. Lastly the learned counsel for the petitioner argued that the interest @ 14% as granted by the learned arbitrator be modified to 9% per annum and in support thereof has relied upon *Krishna Bhagya Jala Nigam Ltd. vs. G.Harischandra Reddy and Another* (2007) 2 SCC 720 which notes:

“ Here also we may add that we do not wish to interfere with the Award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.”

28. Further in *Swadeshi Construction Company vs. DTTDC* 2009 (SCC) Online Delhi 3325, 9% per annum interest was awarded.

29. Heard.

30. Let me now examine various clauses of different documents executed between the parties and are filed on record. The Global Invitation of Bids (DFB) gives the following details :-

S. No	Description API 5L Gr. X70 LSAW	Quality (metres)	Delivery in Months	Bid Security Value
.	OD (mm) WT (mm)			

			<i>Indian Bidder (On FOT Desp pl basis)</i>	<i>Foreign Bidders (on FOB port of shipment basis)</i>	<i>For bidders quoting in Indian Rupees (in Rs.Lakhs)</i>	<i>For Bidders quoting in Foreign currency (in US \$ thousands)</i>	
1.0	1067 mm (42") LINEPIPE						
1.1	1067.0	14.6	468500	4 to 9	3 to 8	490	1040
1.2	1067.0	17.5	105000	4 to 9	3 to 8	250	555
1.3	1067.0	20.5	45000	4 to 9	3 to 8	130	280
1.4	1067.0	22.2	1000	9	6	3	5
2.0	914.4 MM (42") LINEPIPE						
2.1	914.4	17.7	7000	9	6	151	30
TOTAL		625,500					

31. Article 8 of Instructions to Bidders read as under:-

"Article 8 Bid Price:

8.1 *Indian Bidders are permitted to quote in foreign currency under International Competitive bidding.*

8.2 *Indian Bidders shall also indicate the following separately (as per price schedule)*

A) *Ex-works price including packing and forwarding charges (such price to include all costs as well as duties and taxes paid or payable on components and raw materials incorporated or to be incorporated in the goods).*

The domestic bidder may include applicable project rate of customs duty for import of raw materials and component required for manufacturing the goods. Owner will issue certificate to enable bidder to obtain essentially certificate for availing the project rate of customs duty. However, this certificate shall not be issued for import of line pipes.

B) *Taxes and duties (rates) which will be payable on the finished goods, if this contract is awarded.*

C) *The bidders shall indicate breakup of the quantum of imports involved for import of necessary raw materials and components giving CIF value of import in applicable currency considered and included in bid price.*

E) *The statutory variation in taxes and duties covered under Article 8.2 (b) within the contractual delivery period shall be to GAIL's account. Further, any statutory variation in the rate of customs duty (except CVD) within contractual delivery period on*

the actual CIF value of import content but subject to maximum of such duty payable on quoted CIF value, under Article 3.2 (A) shall also be to GAIL's account. In case of delay in delivery any increase in the rate of customs duty beyond the contractual completion period shall be to bidders account and any decrease shall be passed on to GAIL.

8.5 Fixed Price: prices quoted by the bidder shall be firm and fixed during the bidder's performance of the contract and for repeat order purpose upto 3 months upto 25 % of total contract value from date of award of contract and not subject to variation on any account except for variations permitted under 8.2 (B) for domestic bidders. A bid submitted with an adjustable price quotation without any ceiling on prices will be treated as non responsive and rejected."

32. The respondent submitted its offer by its letter dated 18.06.2002 for supply of (LSAW) and it notes :-

2. "Prices:

Pursuant to Article 8, Instructions to Bidders, our prices are based on manufacture and supply of goods from our works located at Mundra, Gujarat (42" OD pipes), and Kosi Kalan Mathura India (36"OD Pipes). The prices quoted by us are on Ex factory (works) basis. We have quoted our prices in US dollars. Our Ex-works prices are inclusive of P&F charges. We have indicated CIF component separately as annexure to the priced bid. Our quoted EXW prices are inclusive of CIF component. Our quoted Ex-works prices shall be firm and fixed on account of any impact due to any change in CIF value at the time of actual imports."

3. SIZE GRADE AND QUANTITY OFFERED

The supplies from Mundra facility will be through two routes of manufacturing namely one manufacturer of finished pipes from plate involving all activities of manufacturing from plate to finished pipe. Two-manufacture of finished pipe from unfinished pipes by carrying out end beveling, finishing, manufacturing of bevel end protectors, fixing of bevel end protectors and undertaking the complete final inspection activities etc.

The unfinished pipes will be brought to our Mundra works from our US facility. The further manufacturing and finishing including all necessary testing as required per specifications of unfinished pipes shall be carried out at our Mundra facility. The API approved beveling and end finishing facility at Mundra is in operation with state of the art testing facilities including X-ray, MPI, UT etc. the equipment and facility has been recently surveyed by an independent third party surveyor "DNV" who

have certified the capacity to 165 pipes per day. The required finishing capacity is expected to be far less than the available capacity. You would appreciate that we had supplied finished pipes from beveling and end finishing unit in GAIL's HBJ GREP-(36"OD) and ONGC's SBHT- (42" OD) orders executed by us.

Therefore the offered pipes shall be primarily manufactured at the JCO pipe mill of EOU pipe division, Mundra and supplemented through unfinished pipes manufactured by our US-pipe mill, which will be finished at EOU pipe division, Mundra to meet the contractual delivery requirement of the quantities offered. Accordingly we have flexibility to use both facilities depending upon the requirement during execution of the job so as to meet the contractual delivery schedule.

Considering our commitments to other projects/customers at our US pipe mill we are in a position to supply a maximum of 270 kms for 42" OD pipes putting together our Mundra-India and US pipe mill capacities. We confirm our compliance to the Schedule of rates as per tender document."

33. The Purchase Requisition dated 11.02.2003 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"size 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-MR-9010/1001.

“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.”

34. Annexure-3 to the Purchase Order is the delivery schedule on FOT dispatch print basis:-

<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>
28.04.2003 to 27.06.2003	<i>I</i>	65,000 meter	-
28.06.2003 to 27.08.2003	<i>II</i>	103,000 meter	-
28.08.2003 to 27.10.2003	<i>III</i>	102,000 meter	4,576 meter
<i>Total quantity</i>		270,000 meters	4,576 meter

35. Hence broadly speaking the delivery schedule was from 4 months to 9 months, per Purchase Order and the contract envisaged the respondent shall state the *CIF* value of import content for each raw material and if there was any increase in *CIF* value then the *petitioner* was not liable to pay such increase.

36. The fax of intent dated 28.01.2003 gives the delivery schedule as under:

“The delivery period on FOT dispatch point basis, to be reckoned from the date of this fax of intent, for all the above item is detailed hereunder:”

<i>Item No.</i>	<i>Supply (%) of ordered qty.</i>	<i>Deliverable qty. in mtrs.</i>	<i>Delivery to be completed by</i>
<i>1.1</i>	<i>24%</i> <i>38%</i> <i>38%</i>	<i>65,000</i> <i>1,03,000</i> <i>1,02,000</i>	<i>4th and 5th month</i> <i>6th and 7th month</i> <i>8th and 9th month</i>
<i>1.2</i>	<i>100%</i>	<i>4576</i>	<i>8th and 9th month</i>

37. The provisions of the contracts above, entered into between the parties do reveal it had a flexibility to either get the unfinished pipes from US Mill *or* from any other pipe mill qualified by the owner. Admittedly the period of delivery was also fixed but it crashed at the instance of the petitioner herein and that it was only in May 2003 the respondent was informed it had to supply the entire material by 31.08.2003 as the project was to complete by December 2003. Admittedly the goods could not be obtained from Ukraine Pipe Mill since it faced insolvency proceedings and hence no risk could be taken. Thus the only alternative for speedy supply was the Mudra facility to be utilized to fullest extent. Admittedly, the contract in question was a *fixed price* contract irrespective at what rate the unfinished pipes were to be obtained from Ukraine or any other facility by the respondent. Now on crash of delivery schedule (at the instance of petitioner) if the prices would have varied to the disadvantage of the respondent then the respondent only was to take the brunt of it, per the contract. Rather in its letter dated 2/6/2003 the respondent showed its concern saying *the*

change of rate would certainly increase their financial outgo, however, in the interest of the project, they offer to explore such possibility for a part quantity. Hence, in such circumstance, the petitioner was not to share loss, as it was a fixed price contract and there was no scope to pass on any commercial loss to the petitioner. Thus the respondent rightly rejected the demand of passing of commercial benefit to the petitioner and agitated so even in its initial correspondences.

38. Admittedly on 27.08.2003 the respondent wrote to the petitioner alleging they could not understand as to what the petitioner meant in saying *transfer of all the commercial benefits*. Rather in its letter dated 19.09.2003 the respondent categorically urged as follows:-

“5. It is relevant to point out that the contract in question under which the supplies are being made by SPL is a ‘Fixed Price Contract’ under which GAIL is to make payments for the pipes received by it at the price agreed between the parties in the said contract, irrespective of the route adopted for manufacturing the pipes. SPL is required to effect the deliveries of finished pipes from a single point i.e. Mundra and on a Fixed Price Basis, and under the present arrangement the same is complied with.

6. In a contract of the present nature, there is no provision or occasion for any party to assess, analyze and review the various inputs and expenditures incurred by the other party in fulfilling its obligations under the contract.

***Being a fixed price contract, there is no occasion / scope for raising a demand to pass any commercial benefit.** Any other interpretation adopted by GAIL in contradiction to the above express intent behind the ‘Fixed Price Contract’ would also necessarily lead to the conclusion that SPL would be entitled to claim higher than agreed rates for the pipes supplied by it in case any unexpected, unforeseen and un-provided expenditure is either incurred by SPL or is forced to be suffered by SPL due to unilateral changes made by GAIL in the implementation of the terms and conditions of the contract.”*

39. And also in its letter dated 22.08.2004 the respondent clearly alleged it was not liable to pay any amount towards any alleged “Commercial Benefit”. The letter notes:-

“11. In addition to the above GAIL did not release any payments towards the value of the pipes supplied by SPL. This outstanding was to the tune of Rs.145 Crores approx till November, 2003. Thereafter on repeated reminders by SPL and upon realizing its liability to pay, GAIL released a sum of Rs.102.04 Crores i.e. (USD 17831664.88 + Rs.208345172.00 on 17.11.2003 & 19.11.2003. Even at this stage GAIL did not raise any demand or imposed conditions regarding passing on of the so called commercial benefits. This led SPL to believe that its protest against GAIL’s letter dated 26.08.2003 was appreciated.

*12. To SPL’s utter surprise, initially GAIL sought to reduce the contractual price of the 90 KMs of the pipes manufactured through the mother pipe route by an arbitrary sum of Rs. 34 crores, which later on was reduced to Rs. 23 Crores without any tangible basis. **Both these amounts were totally against the terms and conditions of the contract and totally unacceptable to SPL.***

*13. It is relevant to point out that the contract in question under which the supplies were made by SPL was a **fixed price contract** under which GAIL had to make payments for the pipes received by it at the agreed price mentioned in the contract. Irrespective of the route adopted for manufacturing the pipes, SPL effected the deliveries of finished pipes from a single point i.e. Mundra and on a fixed price basis.”*

40. Now, admittedly two other companies viz. M/s.Welspun and M/s.Man Industries were also awarded contract to produce and supply the requisite quantities of pipes from their facilities in India and that too at the rates lesser than that quoted by the respondents.

41. Now, admittedly M/s.Welspun and M/s.Man Industries had its manufacturing facilities in India and the entire quantity of the pipes to be supplied by them were to be manufactured locally in

India. The price ex factory payable for the pipes to be supplied by all other three manufacturers was the same i.e., US \$ 282.85/ meter. Admittedly, no special price was fixed for supply of 90 km of pipe from US Mill. Now as per the contract the respondent was to get 90 Kms of pipes from Saw Mill USA Inc. *or* may be from any other pipe mill. Admittedly the petitioner accepted the proposal of production of such unfinished pipes of 90 km 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 ₹ 6.92 crores or ₹ 10.31 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.

42. Admittedly the petitioner did not insist to pass on commercial benefit when the petitioner suggested IUD, Ukraine as a possible source of supply, though it did not materialize. It rather gives a credence to the argument of the respondent the price was fixed but the source of supply was not.

43. Mr.B.C. Tripathi Executive Director (Projects) of the petitioner admitted the cost for transportation of raw material, if increased during the delivery, was not to be paid by the petitioner herein, over and above the US\$ 282.85 per meter. Rather Mr.Tripathi agreed the extra cost of transportation, if any, was included in the price paid to the two other vendors. Hence the claim qua sharing commercial benefit was against the terms of the contract as also any usage alleged by the petitioner. Such usage, even otherwise, was never proved.

44. The judgments cited by the petitioner would not be applicable since it was the petitioner who was responsible for crash in the supply schedule and at a much later stage. In its correspondences the respondent rather showed ignorance qua alleged passing of '*commercial benefit*' and simply remarked qua alleged savings and nothing else.

45. The judgments cited by the learned senior counsel are not be applicable on facts. In *Food Corporation of India and another vs. Ramkesh Yadav and another* (2007) 9 SCC 531 an employee agreed to seek voluntary retirement provided his dependant son

was given an appointment on compensate ground and hence filed his retirement papers. FCI did not object in filing of retirement papers and accepted his voluntary retirement but later did not appoint his son on compassionate ground and in such circumstances it was held if the FCI felt such a conditional application was contrary to the scheme or not warranted, it ought to have rejected the application or ought to have informed the employee the compassionate appointment could not be given to his son since the employee had already completed 55 years of age. In such event the employee could have withdrawn the offer itself. Having denied the employee an opportunity to withdraw his offer and having retired him by accepting the conditional offer, the FCI cannot later refuse to comply with the condition subject to which the offer was made.

46. Similarly in *Kanchan Udyog Limited vs. United Spirits Limited* (2017) 8 SCC 237 it was silent acceptance of the offer and hence it was held to be a case of *sub-silentio*.

47. However the facts are different here. Admittedly the respondent had started manufacturing and supplying the pipes. 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.

48. The learned arbitrator thus rightly held as under :-

*“ In my judgment, the contention made on behalf of the Respondent is untenable. The agreement was to manufacture and supply 270 KMs line pipes for DVPL Project at the unit rate of 282.85 US\$ from Mundra Mill. 180 KMs of pipes were to be manufactured by plate route at Mundra and the balance quantity of 90 KMs through manufacture from unfinished pipes. The Contract provides 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". Therefore, it cannot be said that the price of 282.85 US\$ per unit was fixed only after taking into consideration the transport costs of the plates from Ukraine to U.S.A and thereafter the mother pipes from U.S.A to Mundra. The Respondent suggested IUD, Ukraine, as a possible source of supply which did not materialize. **No condition of passing on of any "commercial benefit" was imposed at that stage.** Although, under the Contract the price was fixed, the source of supply was not. Moreover, the two other Suppliers selected for this Project, Man Industries and Welspun Industries, manufactured pipes entirely in India. Their unit price was also fixed at 282.85 US\$ per unit. Therefore, it cannot be said that the price payable to the Claimant was variable because it was fixed only after taking into consideration the transport cost from Ukraine to U.S.A and thereafter from U.S.A to India.*

The trade practice or usage alleged by the Respondent has not been proved. No instance could be cited of any other party similarly circumstanced where price fixed by the contract was varied because of any commercial benefit enjoyed by the supplier. If the contention of the Respondent has to be accepted, it will have to be held that 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 will remain constant.

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.

For the aforesaid reasons, I am of the view 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.

No one has appeared from 'R&J'.12S to explain how the calculation of commercial benefit at a figure of RS.34 crores was made by it initially nor has it been explained why and how the figure was brought down to Rs. 23 crores. It is true that the Claimant had agreed to pass on a sum of Rs. 6.92- crores and later to Rs. 10.3 crores on account of alleged "commercial benefit". It has been contended on behalf of the Claimant that this unreasonable and unlawful concession had to be made under compelling circumstances. The Respondent is an important Customer of the Claimant. Moreover, a huge lot of money of the Claimant had been held-up by the Respondent which was causing great financial hardship to the Claimant. The Claimant had made the aforesaid concession only for the purpose of getting expeditious payment which did not happen. It will not be fair or reasonable to compel the Claimant to give up any part of its legitimate claim at this stage."

49. Considering the facts I find no illegality in the Award impugned and it is, certainly, not against the terms of contract, as alleged. However, qua the interest awarded to the respondent the learned senior counsel for the petitioner says the rate of 14 % per annum, as awarded, is on the higher side and has relied upon the decision in *Vedanta Limited vs Shenzhen Shandong Nuclear Power Construction Company Limited* Civil Appeal No.10394/2018 decided on 11.10.2018 wherein it was held:-

12. The Award has granted a uniform rate of 9% S.I. on both the INR and the EUR component. However, when the parties do not operate in the same currency, it is necessary to take into account the complications caused by differential interest rates. Interest rates differ depending upon the currency. It is necessary for the arbitral tribunal to co-ordinate the choice of currency with the interest rate. A uniform rate of Interest for INR and EUR would therefore not be justified. The rate of 9% Interest on the INR component awarded by the arbitral tribunal will remain undisturbed. However, with respect to the EUR component, the award-debtor will be liable to pay Interest at the LIBOR rate + 3 percentage points, prevailing on the date of the Award."

50. However, I may say the decision in *Vedanta Limited* (supra) would not be applicable in the facts of this case since in the cited case the parties were not operating in the same currency and whereas in the case at hand, both the parties are Indian companies located in India and operate in the same currency and cost of finance, irrespective of the currency, is the same for both and therefore, there is no possibility of complications caused by differential interests rates. Further, in the cited case there existed clause No.35.2.3 in the Conditions of Contract wherein it was specifically provided *that there would be no consequential damages payable by the purchase to the supplier in the event of termination of the contract, as the supplier would get 105% of the costs incurred.* The present facts thus differ from *Vedanta Limited* (supra) and hence the decision would not be applicable.

51. Lastly, I would also say Section 37(7)(b) of the Act provided for payment of interest @ 18% per annum on the awarded sum from the date of the award to the date of payment, unless a different rate was awarded by the arbitrator. This mandatory

statutory provision did not distinguish between currencies. In the present case, the learned arbitrator could have remained silent on the future interest and the present respondent would have statutorily got 18% per annum as interest on the awarded sum. However, the learned arbitrator has given 14% per annum interest, which is 4% less than the statutory rate of interest.

52. Thus, in the circumstances, there exist no illegality or perversity in the impugned award. The objections so raised by the petitioner are devoid of any merits, and hence are dismissed.

53. The pending applications, if any, is disposed of accordingly. No order as to costs.

FEBRUARY 13, 2019
M/DV

YOGESH KHANNA, J.