

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 11.02.2020

Pronounced On : 15.05.2020

C O R A M

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.613 of 2014

M/s.Resistoflex Dynamics Private Limited,
a Company incorporated
under the Companies Act, 1956,
having its Registered Office
at B-15, Friends Colony West,
New Delhi - 110 065 and
its Corporate Office at
Plot No.27-28, Udyog Vihar,
Greater Noida (U.P.)
through its Vice President ... Petitioner

-Vs.-

1.Controller of Stores,
Integral Coach Factory,
Chennai - 600 038.

2.Mr.B.Narasimha Rao,
Sole Arbitrator,
FA & CAO/P,
Integral Coach Factory,
Chennai - 600 038.

... Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award dated 15.04.2014 made by the 2nd respondent in the matter of Arbitration for the adjudication of disputes arising out of and in connection with contract ISO No.SM/D/50B No.020902/09/1000/S, dated 18.09.2009, to direct the 1st respondent to pay an amount of Rs.67,02,329/- to the petitioner being the price difference for 71 sets supplied at reduced rate, to direct the 1st respondent to pay interest at the rate of 18% per annum upon Rs.67,02,329/- from 30.11.2010 to the date of payment of the sum of Rs.67,02,329/- and to direct the contesting respondent to pay the costs of the petitioner and the litigation expenses incurred by the petitioner.

For petitioner : Mr.T.M. Hariharan

For Respondents : Mr.C.V.Ramachandramurthy
for R1

ORDER

The claimant before the Arbitral Tribunal has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of the Sole Arbitrator dated 15.04.2014. The parties are being referred to in the same status as before the Arbitrator.

2.Relief claimed by the claimant:

a.To declare that the reduction in the rates in terms of Modification Nos. 7 and 8 dated 26.10.2010 by the respondent was illegal being contrary to the terms of the Letter of Acceptance dated 18.09.2009,

b.to pass an Award in favour of the claimant, directing the respondent herein to pay an amount of Rs.67,02,329/- being the price difference for 71 sets supplied to the respondent at reduced rates,

c.Award Rs.19,96,376/- being the interest @18% per annum upon Rs.67,02,329/- i.e., the price difference for 71 sets supplied to the respondent at reduced rates from 30.11.2010 (the date of supply) till the date of filing of this statement of claim and

d.to award costs towards the litigation expenses incurred by the claimant Company along with the cost of the present Arbitration proceedings

in favour of the claimant Company and against the Respondent Company."

3.Claimant's Case:

- a) The claimant would submit that their Company with its Unit of Jagadhai road, Sirman (HP) has been approved by the Research Designs and Standards Organization (RDSO for the sake of brevity) of the Government of India - Ministry of Railways for supply of air springs manufactured by M/s.Contitech for fitment on EMU/DMU Coach. The respondents had floated e-tenders on 20.03.2009 for procurement of Higher Capacity Air Springs. Clause 3800 of the Additional Special conditions of IRS conditions of the contract provide for increase or decrease of quantities. Such increase or decrease cannot exceed 30% and can be effected only after giving reasonable notice of such increase or decrease to the contractor viz., the claimant.
- b) On 15.04.2009, the claimant had submitted their bid to the respondent and vide clause 15 of the Commercial

Annexure "C" attached to the offer against the aforesaid tender, the claimant had clarified that since several compartments were being imported against the respondent's order they cannot accept cancellation of the order once placed. Likewise it was clearly mentioned that any decrease in quantity cannot be accepted, however they would accept an increase in quantity upto 30% at quantity rates subject to this option being exercised by the respondent within six months from the date of the purchase order.

- c) The claimant had made the above stipulation only because the RDSO has granted approval with the mandatory requirement that the Air springs and Emergency Bumper should be manufactured by M/s.Contitech, Germany and Metal Parts fabrication at their own works. It was made clear that a decreased order cannot be accepted as once the order is placed part of the Air Springs is manufactured in Germany and then imported. The product has no shelf life and any decrease in quantity after the order is placed

would cause a huge loss to the claimant.

- d) The bid was opened on 15.04.2009 and the claimant was declared as L1. On 05.05.2009 the respondent vide its letter requested the claimant to correct the status of supply and confirm warranty by 15.05.2009. The claimant vide then response dated 12.05.2009 had forwarded the requisite information to the respondent. The claimant had once against reiterated that a cancellation of order once placed cannot be accepted.
- e) Thereafter, negotiations were held and the claimant had put down the discussion in writing reiterating the stand that it is only an increased quantity that would be acceptable and not a decreased quantity. To this, the respondent had issued a letter of acceptance on 18.09.2009. In this letter, it was specifically stated that the 30% option clause will be acceptable only for the increased quantity. The claimant had therefore at each stage put the respondent on notice that a decreased quantity after the order was placed was totally

unacceptable.

- f) However, in the purchase order dated 13.09.2009 for the supply of 336 sets of Air springs, in clauses F to the Purchase Order, the respondent had reserved their right to increase or decrease the quantities by not more than 30% of the ordered quantity. The clause stipulated that if the option for an increased quantity has to be exercised the same can be done only after the original ordered quantity is completed before the date of the delivery period.
- g) The claimant had pointed out this anomaly immediately vide their letter dated 26.10.2009 and requested the respondent to rectify the clause in the purchase order. The respondent had conceded that the clause had been inadvertently included and agreed to remove it. However, the assurance was observed in the breach.
- h) On 30.08.2010, contrary to the Agreement, the respondent had exercised the 30% option clause and reduced the quantity by 30%. The respondent had informed the claimant to alternatively accept the lower

rate of Rs.3,27,600/- per set for 125 sets and to submit their unconditional acceptance before 31.08.2010. The claimant vide their response of the same date i.e., 30.08.2010 expressed their inability to accept the offer since they had only agreed for an increase of quantity. They also brought to the notice of the respondent that out of the total supply made by them only 71 sets remained to be supplied of which 48 sets had been offered for inspection to the RDSO and 23 were in transit.

- i) However, the respondent had arbitrarily and contrary to the terms of the agreement issued modification No.5 dated 03.09.2010 reducing the quantity from 301 sets to 211 sets. This was objected to by the claimant vide their letter dated 11.09.2010 and thereafter, the respondent had vide modification No.6 dated 12.10.2020 increased the quantity from 211 sets to 230 sets @ Rs.4,21,999/- per set. Since the claimant had already manufactured the 71 sets and as there was no other buyer available they had agreed to supply the 71 sets of a reduced price of Rs.3,27,600/-

without prejudice to their rights as per their letter dated 16.10.2010. Thereafter, the respondent had issued modification Nos.7 and 8 dated 26.10.2010 for the 71 sets @ Rs.3,27,600/- along with the 230 sets @ Rs.4,21,999/- per set.

- j) The claimant sought for the appointment of an Arbitrator to sort out the disputes regarding reduction of rates. The pre-arbitration meetings did not resolve the issue. Ultimately, the sole Arbitrator was appointed by the General Manager of the respondent and the learned Arbitrator by his letter dated 19.06.2012 had directed the claimant and the respondent to submit their pleading and the documents. Hence, this claim.

4.Counter statement of the respondent:

The respondent would admit the statement of the claimant that the letter of acceptance dated 18.09.2009 had clearly stipulated that the option clause would be exercised only for increase in quantity. The respondent would further contend that

after the issue of the Purchase Order the claimant had started the supply without a demur. They denied receipt of the letter dated 16.10.2009. They would also state that the 30% option clause has been implemented only after a letter was sent to the claimant informing them about the same. They, therefore sought for a dismissal of the claim.

5.Rejoinder by the claimant:

The claimant had rebutted the various allegations contained in the counter and reiterated the fact that there was no notice prior to the reduction.

6.Arbitral Tribunal:

The Sole Arbitrator after hearing the parties had proceeded to dismiss the claim filed by the claimant. The learned Arbitrator had arrived at the conclusion narrated hereinbelow:

<i>Claim No.</i>	<i>Description of claims</i>	<i>Amount claimed</i>	<i>Award</i>
1.	Price difference	Rs.67,02,329.00	NIL

<i>Claim No.</i>	<i>Description of claims</i>	<i>Amount claimed</i>	<i>Award</i>
	between the price agreed between the parties as per the letter of acceptance dated 18.09.2009 being Rs.4,21,999/- per set and the reduced price of Rs.3,27,600/- at which 71 sets were supplied as per Modifications No.7 and 8 dated 26.10.2010.		
2.	Interest at the rate of 18% on the price differential of 71 sets supplied	18% on NIL Rs.67,02,329.00	

The learned Arbitrator has proceeded on the basis that once the Purchase Order had been accepted and supplies effected thereon then the claimant is bound by the same.

Challenging this Award the claimant is before this Court.

7. Submission:

Mr.T.M. Hariharan appearing on behalf of the claimant would submit at the outset that the learned Arbitrator has not

considered the terms under which the agreement had been entered into between the parties. He would contend that right from the inception the claimant had informed the respondent that considering the fact that the Air Springs had to be imported from M/s.Contitech, Germany as per the directions of the RDSO the claimant cannot cancel the contract and since the product had a short shelf life and a very restricted market the question of exercising the 30% option can only be exercised to increase and not decrease the quantity. He would further submit that having accepted the above terms vide their letter of acceptance dated 18.09.2007, the respondent cannot now contend otherwise. The counsel would take the Court through the correspondence between the claimant and the respondent to highlight the fact that the respondent had reneged on its original agreement. He would submit that the very basis on which the claim has been rejected is fallacious. The arbitrator has erred in not considering the letter of acceptance dated 18.09.2009 of the respondent which is the acceptance of the claimant's offer. He would contend that the Award was violative

of the provisions of Section 28(3) of the Act and therefore a patent illegality. In support of his arguments he would rely on the following Judgments:

a.2015 (3) SCC 49 - Associate Builders v. Delhi Development Authority and reliance was placed on Paras 40, 42.2 and 42.3.

b.2014(9) SCC 263 - ONGC v. Western GECO International Limited (Paras 34,35, 38 and 40)

c.2008 (13) SCC 80 - Delhi Development Authority v. R.S.Sharma and Company (Para 21)

(d)2003 (5) SCC 705 - ONGC v. Saw Pipes Limited (Paras 31, 74)

(e)2019 SCC online SC 677 -Ssangyong Engineering & Construction Co. Limited v. National Highways Authority of India (Paras 37, 38, 42)

8.Per contra, Mr.C.V.Ramachandramurthy appearing on behalf of the respondent would contend in their letter dated 30.08.2029 that the respondents had clearly given the reasons for exercising the 30% option clause for reducing the quantity by 125 sets as in a subsequent tender opened on 28.08.2010 the respondent had indicated that the claimant could either reduce the supply or accept a reduced price of Rs.3,27,600/- for the reduced quantity on 125 sets. The learned counsel would submit though by their reply of the same date the claimant had not accepted the reduction ultimately they have acted upon the Purchase Order. The counsel would submit that for 230 sets the agreed price was to be given and it is only for the 71 sets that the reduced price was fixed. He would further contend that since the IRS conditions were non - negotiable the Award cannot be challenged.

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9.Discussion:

The point in issue in the instant case is whether the

Arbitrator has given a go - by to the agreed terms between the parties to arrive at his conclusion. The learned Arbitrator has based his Award on the ground that the Purchase Order contained a Clause that the respondent could exercise the 30% option clause to increase or decrease the quantity (Clause F) and having effected the supply the claimant cannot claim the difference. The learned Arbitrator has not discussed the earlier correspondence between the parties which formed the basis of the Agreement and it is very clear that the learned Arbitrator has thrown to the winds the provisions of Section 28(3) of the Act. Section 28(3) of the Act would read as follows:

"28. Rules applicable to substance of dispute.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."

10. Let us therefore examine the terms of agreement between the parties since the main ground of challenge is that Clause 28(3) of the Act has been violated. The terms of the agreement between the parties commencing from the floating of the tender, submission of bid on 15.04.2009 in response to the e-tender dated 20.03.2009 floated by the respondent etc., the claimant had clearly stipulated that they cannot accept a decreased order as once an order is placed part of the Air Springs had to be manufactured at Germany and imported and therefore there was no question of altering the order. That apart, the shelf life and market for the product was limited and a reduction would cause a huge loss to the claimant. Once again during the negotiation which has been reduced into the letter dated 09.09.2009 the claimant had made it very clear that they can accept only an increased quantity and not a decreased quantity. The respondent in their letter of acceptance dated 18.09.2009 accepted this stand and had specifically stated that the 30% option clause is applicable only for the increase in quantity. With this letter, the terms of the contract

between the claimant and the respondent had been firmed up. It is pursuant to this Agreement that the Purchase Order had been placed and the Purchase Order is not the offer made by the respondent as concluded by the learned Arbitrator. The learned Arbitrator has not adverted to the correspondence between the parties prior to the Purchase Order and no reasoning had been given as to why these documents which form the basis of this Agreement has been ignored by this learned Arbitrator.

11. Even the Purchase Order has not been considered as a whole by the learned Arbitrator, Part 2 of the Purchase Order refers to the letter dated 09.09.2009 of the claimant wherein they have in very clear terms stated that they cannot accept any cancellation of the order once placed or decrease in the ordered quantity. That apart, Part 2 of the Purchase Order clearly specified that Clause F which is the 30% option Clause is not applicable, this despite Clause 9 containing the Option Clause. In the light of the documents, the Award of the learned

Arbitrator is totally bereft of reasoning.

12.The Hon'ble Supreme Court in its Judgment in **ONGCC v. Saw Pipes** Supra, was considering judicial intervention under Section 34 of the Act to set aside an Award on the ground of Patent illegality. The Bench had observed that the object of bringing about a finality to an Award and resolving the dispute quickly would be frustrated if a patently illegal award is permitted to operate. They had further observed that the phrase "Public Policy of India" has to be given a wider meaning. They observed that an Award could be set aside if it is contrary to:

- (a) fundamental policy of India Law; or
- (b) the interest of India; or
- (c) Justice or morality; or
- (d) if it is patently illegal.

The illegality should go to the root of the matter and should not be of a trivial matters. This Judgment was relied upon by the Supreme Court in its later Judgment of Associate Builders supra.

At Para 31 of the Judgment the Bench has held as follows:

"31.The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

- (i)a finding is based on no evidence, or*
- (ii)an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii)ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

13.The Bench had gone on to hold that contravention of the provisions of Section 28(3) of the Act is a patent illegality. They observed that an Arbitral Tribunal must decide in accordance with the terms of the contract and such decisions cannot be questioned. However, if the decision arrived at is such

that no reasonable or fair-minded person would do, in such cases it is clearly a patent illegality which has to be interfered with. The learned Judges had analysed that the prior Judgments on the point and finally reiterated the Judgment in ONGC v. Saw Pipes regarding the 4 grounds on which an Award can be set aside. In the Judgment in Ssangyong, this position was further crystallized as follows:

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders

(supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the [Amendment Act, 2015](#), to [Section 34](#). Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

42.30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for

challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

14. Applying the principles laid down in the above Judgments to the case on hand, it is clear that the learned Arbitrator has ignored the vital evidence to arrive at his conclusion and therefore, the award suffers from a perversity and is patently illegal.

In fine, the Original Petition is allowed and the Award dated 15.04.2014 is set aside. No costs.

15.05.2020

Internet : Yes/No
Index : Yes/No
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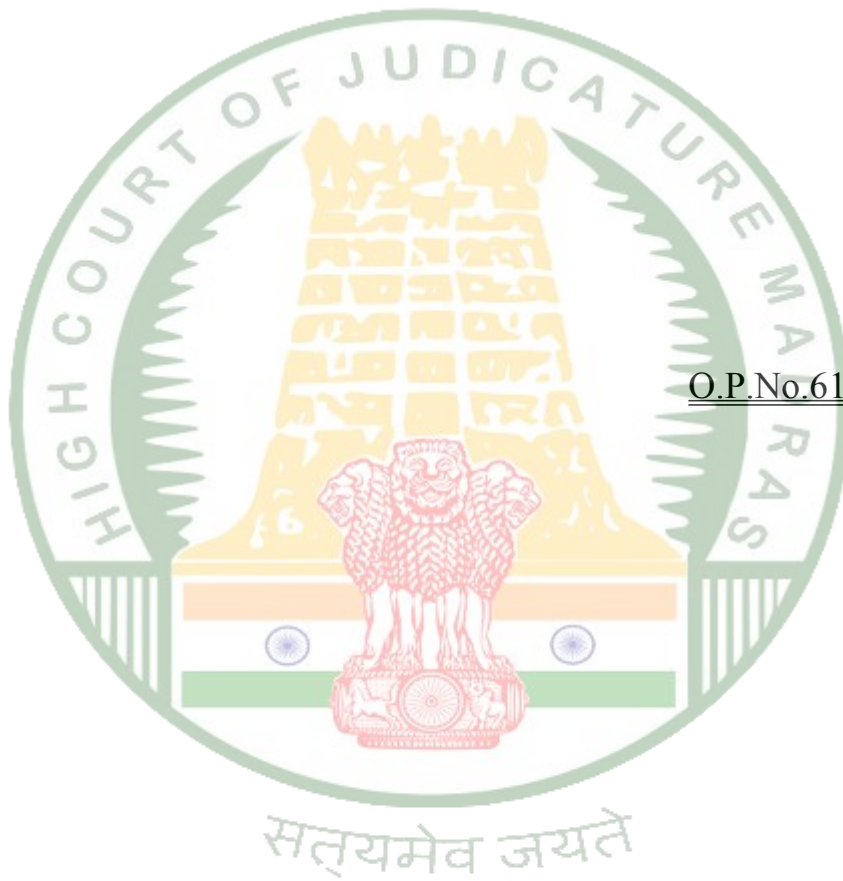


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