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

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Reserved on: 07.11.2019

Pronounced on: 04.03.2020

+ O.M.P. 488/2015

MOHAN STEELS LIMITED

..... Petitioner

Through Mr. Harsha Peechara and Ms. Kriti
Sinha, Advocates.

versus

STEEL AUTHORITY OF INDIA(SAIL)

..... Respondent

Through Mr. H.S. Phoolka, Sr. Advocate
with Mr. Joydeep Mazumdar, Mr.
Rohit Dutta, Ms. Shilpa Diwan,
Ms. Priyata Chakraborty, Mr.
Sanjeev Kumar, Advocates with
Mr. Vikas Gill, Manager (Law)
SAIL.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Present petition had been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking to set aside the Award dated 01.07.2015 passed by the Sole Arbitrator as also seeking a declaration that the recovery made by the respondent is illegal and arbitrary.

2. Brief facts germane to the present petition are that the petitioner was appointed as a Conversion Agent for the first time in the year 2006 by the respondent which is a Government Company for conversion of TMT Bars. A contract was entered into for a period of three years i.e. from 2006 till 2009 (hereinafter referred to as 'Contract-I') Under

Contract-I, conversion charges payable to the petitioner were to be increased @ 2% every year. Consequently, the respondent revised the conversion charges for the year 2007-2008 vide letter dated 17.03.2007 as well as for the year 2008-2009 vide its letter dated 30.05.2008 and accordingly reimbursed the money at increased rate every year till the conclusion of Contract-I.

3. On 05.02.2009, petitioner entered into a fresh agreement with the respondent (hereinafter referred to as 'Contract-II'). Contract-II had a different clause with regard to the rates of escalation and reads as under:

“ESCALATION OF RATES

The conversion charges finalized in the tender shall be kept firm for 1 year w.e.f the date specified for commencement of work in the work order. At the end of one year, the conversion charges will be revised based on the following weightage and neutralization for each of the components:-

<i>Components</i>	<i>Weightage</i>	<i>Neutralization</i>	<i>Basis</i>
<i>Labour</i>	<i>10%</i>	<i>100%</i>	<i>Min or statutory wages as per Notification of labour department of the concerned state government.</i>
<i>Fuel (Furnace Oil)</i>	<i>20%</i>	<i>60%</i>	<i>IOC Retail Outlet</i>
<i>Electricity</i>	<i>25%</i>	<i>60%</i>	<i>Unit electricity rate as per Electricity Provider co/ SEB in the concerned locality</i>
<i>Overheads</i>	<i>30%</i>	<i>50%</i>	<i>End month/ end</i>

			<i>year RBI Index on machinery and M/c Tools and transport equipment and parts on a simple average basis</i>
<i>Profit</i>	<i>15%</i>	<i>Nil</i>	-

4. Pursuant to Clause 8, as mentioned above, respondent after completion of one year of the agreement vide letter dated 24.05.2010 approved the revised conversion charges w.e.f. 05.02.2010 and consequently, the petitioner raised the invoices and was paid at the revised rates. The charges were once again revised w.e.f. 05.02.2011 by the respondent vide its letter dated 08.11.2011 and the petitioner was paid at the revised rates till the conclusion of Contract-II.

5. It is the case of the petitioner that at the end of Contract-II, respondent issued 'No Dues Certificate' and the Bank Guarantees submitted by the petitioner to the tune of Rs. 1.25 Crores and Rs. 75 Lacs were released, without any demur.

6. As the chronology goes, the petitioner then entered into a third Contract with effect from 18.02.2012 for three years valid upto 17.02.2015 referred to as Contract-III. The escalation clause in Contract-III, according to the petitioner, was identical to the Clause in Contract-II and the petitioner therefore, had no doubt that the escalation was based on weightage and neutralization of various components such as labour, electricity etc. and was to be determined every year by the respondent. This understanding of the petitioner according to it was fortified by the fact that even under Contract-III after completion of each year, the

respondent vide its letters dated 30.09.2013 and 12.06.2014 revised the conversion charges for the years 2013-2014 and 2014-2015 respectively and in accordance with Clause 8, paid at the revised rates.

7. Petitioner however avers that at the fag end of Contract-III, the respondent in an arbitrary manner, illegally raised a demand for recovery of the second escalation amount paid under Contract-II vide its letter dated 09.09.2014 and consequently, vide letter dated 14.10.2014, unilaterally recovered Rs.78,74,189/- from the conversion charges payable under Contract-III.

8. Aggrieved by this action of the respondent, petitioner invoked the Arbitration Clause under Contract-II and also invoked the arbitration under Contract-III, the latter of course is not the subject matter of the present petition.

9. The Sole Arbitrator having been appointed, petitioner submitted its statement of claim thereby claiming reimbursement of an amount of Rs. 78,74,189/- with interest @ 18% per annum, wrongly deducted by the respondent and a sum of Rs. 1,46,03,051/- towards damages for electricity bills, labour charges, overhead expenses etc. and the cost of litigation along with interest.

10. Respondent filed its reply and denied the claims of the petitioner. Vide the impugned Award dated 01.07.2015, the Arbitrator rejected the claim of the petitioner and the said Award is assailed by the petitioner before this Court.

11. The principal contention of the petitioner is that the interpretation given by the Arbitrator to Clause 8 of Contract-II is perverse and contrary to the terms of the Contract as well as the understanding between the

parties which was unambiguously reflected in the conduct of the respondent. It is contended that reading of the escalation clause does not leave any doubt that conversion charges were to be firm for one year only and were thereafter to be linked to various components such as labour, fuel, electricity, overheads etc. as provided in detail in Clause 8, keeping the profit margin constant @ 15%. The escalation was to be determined by the respondent on the basis of variations in these components, every year. With this understanding, respondent had revised the charges in the preceding 8 years and the escalation was granted for input costs keeping the profit margin constant.

12. It is contended by the petitioner that the Award is perverse inasmuch as the Arbitrator has rejected the '*contra proferentem*' argument of the petitioner. It is submitted that it is a well-known rule of construction that if the terms applied by one party are unclear an interpretation against that party is preferred. Reliance is placed on the judgment in the case of ***Bank of India and Anr. V. K. Mohandas and Ors. (2009) 5 SCC 313***. It is argued that the respondent had not only drafted the Contract, but had also given a particular interpretation to Clause 8 for the last several years and the Arbitrator could not have given a contrary interpretation.

13. It is next contended that the Arbitrator has seriously erred in appreciating that there was "accord and satisfaction" of Contract-II, way back in the year 2012 and the payments having been made, the issue could not have been reopened by the respondent. The parties had acted pursuant to a certain interpretation and the respondent cannot be permitted to retract from the understanding and course of action adopted

by it. If the Award is upheld the result would be that there would be no sanctity of the terms of the contract and mutual understandings between the parties.

14. Learned senior counsel for the respondent on the other hand contends that the petitioner has not set up any grounds for interference of the Court within the parameters of Section 34 of the Act. The Award is a well reasoned award and the Arbitrator having interpreted the terms of the contract it is not open to this Court to give any other interpretation. Reliance is placed on the judgment of the Supreme Court in the case of ***McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181*** , wherein the Supreme Court had held as under:

*“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325].)”*

15. Without prejudice of the aforesaid contention, it is submitted that the terms of the tender were prescribed by SAIL and were competitive in

nature. They were governed by 'Revised Conversion Policy and Guidelines on Appointment of Conversion Agent' vide Marketing Circular No. 33 of 2007, issued on 15.09.2007. In terms of the said Guidelines, the terms and conditions relating to payment and escalation of rates towards conversion charges were varying, depending on changing price indices. The rates were quoted by prospective agents after going through the terms of the Tender. It is argued that in terms of the Marketing Circular No. 30 of 2003 issued on 18.09.2003, the conversion charges finalized shall be kept firm for one year from the date of issue of work order. At the end of every year, they will be increased upto 2% on yearly basis. In terms of Circular No. 33 of 2007, the charges were to be finalized and kept firm for one year from the date specified for commencement of the work. At the end of one year, the charges were to be revised based on weightages and neutralization of various components mentioned therein. It is further argued that in terms of the circular No. 27 of 2009 issued on 02.09.2009 the conversion charges were firm for one year from the date of commencement of work and at the end of one year the charges were to be revised based on weightages of the component. It is thus argued that the conversion charges in the various Circulars were different and distinct though in all the Circulars, the charges were firm for one year i.e. the first year of the contract. Under Circular of 2003, at the end of every year, the charges would vary through negotiations, but under Circulars of the years 2007 and 2009, the charges were to be revised at the end of one year **only** and there was no provision for another increase at the end of 2nd year. It is further argued that Clause 8 in Contract-II was

governed by circulars of the year 2007 and 2009, thus, the petitioner was not entitled to any escalation for the second year.

16. It is next contended that although the respondent had cleared the Bills of the petitioner towards second escalation, but this was an inadvertent error and cannot justify the claim of the petitioner. Since the petitioner failed to refund the money the same was sought to be recovered from the Bill towards Contract-III. It is thus submitted that there is nothing due to the petitioner and the Award deserves to be upheld. Reliance is placed on the judgment in the case of *Michigan Rubber (India) Ltd. v. State of Karnataka (2012) 8 SCC 216* for the proposition that fixation of the value of tender is within the purview of the Executive and the Courts have no role to play in the same. Reliance is placed on the judgment in the case of *Chandi Prasad Uniyal v. State of Uttarakhand (2012) 8 SCC 417* for the proposition that any amount received by a party without authority of law can be recovered, barring few exceptions of extreme hardships etc.

17. Learned counsel for the petitioner in rejoinder has reiterated its arguments. In response to the argument of the respondent with respect to the Marketing Circulars/Guidelines, the stand of the petitioner is that the said Circulars did not form part of the Contract. The parties are bound by the terms of the Contract and not any extraneous documents, which are beyond the terms of the Contract or the Tender conditions.

18. I have heard learned counsels for the parties and examined their rival contentions.

19. The Arbitrator has primarily rejected the claim of the petitioner on the ground that perusal of the escalation clauses of the previous years

show that the respondent was explicit in mentioning about its intentions that the escalation rates were to be revised at the end of one year **alone**. Reliance has been placed on the various Master Circulars, submitted by the respondent to show that the escalation rates were different for different years and the intent to revise the escalation rates was different for the different contracts. The Arbitrator has interpreted the Escalation Clause in Contract-II to mean that the conversion charges finalized in the tender were firm for one year and were liable to be revised at the end of one year alone and that the Clause did not permit revision of escalation charges each year under the 2009 Contract. The Arbitrator has further held that the wordings of Clause 8 were unambiguous based on perusal of the Circulars placed on record and thus rejected the argument of the petitioner regarding the doctrine of ‘*contra proferentem*’. Relevant part of the Award is as under:

“Perusal of the escalation clauses of the previous years show that the Respondent is explicit in mentioning about its intentions that the escalation rates are to be revised at the end of one year alone. The principle of interpretation of contract essentially signifies that the words in the contract are to be construed in their ordinary and popular sense. The underlining principle being that parties to a contract, as reasonable men must have intended to use the word in its commonly used sense. If the wording of a clause is ambiguous, and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. In view of the same, I am of the opinion that present contract is clearly non-ambiguous for this clause based on perusal of the circulars placed on record, therefore, the doctrine of Contra Proferentum relied by the Claimant has no basis and the argument of the Respondent that the said escalation charges were paid

inadvertently and the same is liable to be returned as it would cause loss to public exchequer, is allowed. I see no merit in the plea to interpret the clause by stretch of imagination to extend the explicit escalation clause to mean otherwise. Further, the Arbitrator has no power to write the contract between the parties to give it a interpretation desired by either party except for a role to interpret the clause of the contract as per law. Further, the Conversion Agent was fully aware of the terms and conditions of contract. Simply an inadvertent payment/payment made under mistake of fact, if made by a party in a contract would not mean, that the clause in the contract would be interpreted differently. Additionally, the Claimant has not placed on records any law that prevent recovery of payment of dues under a contract determined by time. They only state the same is void ab initio but fail to draw attention and therefore the argument has no basis to stand.”

20. There can be no quarrel with the proposition that interpretation of the clauses of the contract is purely in the domain of the Arbitral Tribunal. This has been so held clearly in several judgments of the Supreme Court as well as this Court. However, equally well-settled is the proposition of law that the Arbitrator is a creature of the Contract and therefore, cannot decide contrary to or outside the ambit of the terms of the contract between the parties. In fact, Section 28(3) of the Act mandates so. It has been held by the Supreme Court in ***Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49*** as under:-

“42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute.—(1)-(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

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

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

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional

error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alop Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588], Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])”

21. In the present case, it is significant to note that the interpretation given by the Arbitrator to the Escalation Clause 8 is based purely on the Master Circulars which were placed on record by the respondent with their written arguments. It is to be noted that neither was the ground of Master Circulars pleaded by the respondent in the reply to the Statement of Claim nor were the circulars annexed to the reply. These documents were placed on record of the arbitrator on 20.06.2015, whereas the third and final hearing of the Arbitral Tribunal was held on 18.06.2015. Apparently, for this reason, the petitioner did not have the opportunity to rebut the applicability of the said Circulars.

22. Moreover, what is significant is that these Master Circulars/Guidelines are internal guidelines for the respondent and are only meant for internal circulation as has been noted by the Arbitrator himself. The said Circulars were never a part of the tender conditions or the Contract dated 05.02.2009. The petitioner has taken a categorical stand in its pleadings before this Court that the Circulars were never a part of the Contract. Once the circulars are beyond the terms of the

Contract and were not within the knowledge of the contracting parties, it is not open for the respondent to rely upon them for interpreting the clauses of the contract. It is pertinent to note that if the respondent had intended that the Master Circulars or the guidelines were to form the basis of revision/fixation of conversion charges then the same should have been mentioned in the Contract or at least the tender documents and the bidder should have been put to notice that the revision of conversion charges will be as given in the Master circulars. In my opinion, it was not open for the Arbitrator or the respondent to even place reliance on the Master Circulars. Thus, the Arbitrator has committed a patent illegality by placing reliance on these Circulars to interpret Clause 8. Relevant part of the Award is extracted as under for emphasis:

“...I am of the opinion that present contract is clearly non-ambiguous for this clause based on perusal of the circulars placed on record...”

23. The petitioner is right in its contention that in the absence of the Master Circulars, which were not a part of the Contract, the only interpretation that can be given to clause 8 is that the conversion charges would be revised each year during the currency of the Contract. The words used in the clause are ‘at the end of one year’ and not ‘one year alone’ as has been interpreted by the Arbitrator. The conspicuous absence of the word ‘alone’ is not without significance. This is fortified by the fact that even in the past, the respondents had granted escalation on a year to year basis. Even otherwise, in the trade usages and business sense, this is the only interpretation which can be given to the clause. The components such as labour charges, electricity charges, overheads,

fuels etc. are varying components and cannot remain static during the entire currency of a contract extending over three years. This is the reason that the conversion charges have been made variable depending on the weightage and neutralization of the components. If the logic of revising the conversion charges is seen in this perspective, the interpretation of restricting the revision to one year alone becomes illogical. In fact, the petitioner is also right in its contention that the respondent itself understood the clause in this manner and which is why it had initially paid the revised conversion charges and release the Bank Guarantees, without any demur.

24. In my view, therefore, the interpretation of the Arbitrator based on documents extraneous to the contract between the parties is patently illegal and the Award rejecting the claim of the petitioner for reimbursement of Rs. 78,74,189/- deserves to be set aside. Award is also set aside to the extent it validates the recovery by the respondent from the dues of the petitioner under Contract-III.

25. The judgment relied upon by the respondent in the case ***Michigan Rubber (supra)*** would not help the respondent since the proposition laid down therein is that the fixation of the value of a tender is in the domain of the executive. The said controversy does not arise for consideration in the present petition. In so far as the judgment in the case of ***Chandi Prasad (supra)*** is concerned, there cannot be a quarrel with the proposition laid down therein that any amount received by a party unauthorizedly can be recovered. However, in view of the finding by this Court above, it cannot be said that the petitioner was not entitled to reimbursement of the money and it is wrong for the respondent to

contend that respondent was entitled to recover money from the petitioner. The said judgment also does not help the respondent.

26. The present petition is accordingly allowed, leaving the petitioner to agitate its claims in accordance with law.

JYOTI SINGH, J

MARCH 4th , 2020

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