

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.08.2021

+ **O.M.P. (COMM) 506/2020 & I.A. 9395/2020**

STEEL AUTHORITY OF INDIA LTD.

..... Petitioner

Versus

LARSEN & TOUBRO LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Parag P. Tripathi, Senior Advocate with
Ms Anjali Sharma and Mr Srinivas,
Advocates.

For the Respondent : Mr Sameer Parekh, Mr Tanuj Agarwal, Ms
Rashi Gupta and Ms Swati Bhardwaj,
Advocates.

CORAM:

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J.

1. Steel Authority of India Limited (hereinafter 'SAIL'), a company incorporated under the Companies Act, 1956, has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 01.05.2020 (hereinafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three arbitrators.

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to a Contract Agreement dated 16.03.2009 (hereinafter ‘the Agreement’).

3. By the impugned award, the Arbitral Tribunal accepted the claims preferred by the respondent in part and entered an award of ₹15,90,14,025/- in its favour. The Tribunal allowed interest at the current rate of interest in accordance of the Interest Act, 1978 on the amount due to the respondent and; post award interest at the current rate of interest (as per the Interest Act, 1978) plus 2%, with effect from ninety days after 01.05.2010, on the amount payable to the respondent.

4. Briefly stated, the relevant facts that are necessary to address the controversy are as under:-

4.1 By a notice dated 13.01.2009, SAIL invited bids from various contractors for “*Additional Civil Works of Rolling Mills, BOF, CCP Complex including Lime and Dolomite Plant (Package No.: 48 C-1)*” under 2.5 MT New Stream Expansion at IISCO Steel Plant (hereinafter ‘the Project’).

4.2 The respondent (hereinafter ‘L&T’) submitted its bid of ₹245,33,43,297/- on 02.02.2009. Thereafter, SAIL issued a Letter of Acceptance (LoA) dated 27.02.2009 to L&T, accepting a total price ₹189,52,29,602 for the execution of the Project on Item Rate basis. In terms of Clause 8.2.1 of the General Conditions of the Contract (GCC), L&T was required to submit a security deposit equivalent to 5% of the total contract value.

4.3 On 16.03.2009, pursuant to the issuance of the LoA, SAIL and L&T entered into the Contract Agreement (the Agreement) for execution of the works at a contract price of ₹189,52,29,602. In terms of Article 5 of the Agreement, the time of completion of the Project was stipulated as twelve months from the date of the contract. Subsequently, two change orders were issued on 29.09.2009 and 02.07.2010 for extra items amounting to ₹26,48,90,255/- and ₹56,43,69,208.31/- respectively and the contract price was adjusted accordingly.

4.4 In terms of Article 6 of the Agreement, Mecon Ltd. (hereinafter 'Mecon') was appointed as the Consultant to undertake the functions delegated by SAIL.

4.5 On 30.09.2011, L&T completed the work awarded to it by SAIL and, on 04.01.2013, SAIL issued the Preliminary Acceptance Certificate (PAC) effective from 30.09.2011.

4.6 Thereafter, on 21.09.2015, SAIL issued the Final Acceptance Certificate (FAC) with effect from 21.06.2014.

4.7 SAIL withheld certain payments due to L&T on various grounds. Disputes arose between the parties, *inter alia*, with respect to processing the invoices and release of payments and processing of payments for price adjustment. L&T issued a notice dated 11.07.2016 claiming a sum of ₹29.20 crores and inviting SAIL for resolution of the said claims through conciliation.

4.8 The conciliation proceedings were not successful and Mr. S.S. Agarwal, Conciliator, issued a letter dated 29.03.2018 confirming that the conciliation had failed.

4.9 Thereafter, on 06.05.2019, L&T invoked the Arbitration Clause, as contained in the Agreement. The Arbitral Tribunal comprising of Mr. Rajeev Kher, as the Presiding Arbitrator, Justice (Retd.) D.R. Deshmukh and Dr. Vishwapati Trivedi was constituted to adjudicate the disputes between the parties.

5. The claims made by L&T in its Statement of Claims are summarized as under:-

Claim No. 1	Towards outstanding/withheld payments on account of PAC- ₹10.28 crores.
Claim No. 2	Towards outstanding/withheld payments on account of FAC- ₹.48 crores
Claim No. 3	Towards price variation- ₹6,93,90,658
Claim No. 4	Towards interest on delayed payments- ₹13,04,21,553
Claim No. 5	<i>Pendente lite</i> and post award interest.
Claim No. 6	Cost of Arbitration

6. The counter-claims made by SAIL in the Statement of Defence are summarized as under:-

Counter Claim No. 1	Declaration that the Respondent is entitled to the Guaranteed CENVAT and VAT credit amount of Rs. 15,97,29,195/- from the Claimant on account of guaranteed CENVAT in terms of the contract between the parties;
Counter Claim No. 2	Declaration that the Respondent is entitled to withhold, adjust and appropriate a sum of Rs.15,97,29,195/- from the payments due to the Claimant under PAC and FAC in pro tanto satisfaction of the claim of the Respondent.
Counter Claim No. 3	Cost of Arbitration.

7. The Arbitral Tribunal rendered the impugned award in favour of L&T and rejected the counter claims preferred by SAIL.

8. Aggrieved by the impugned award, SAIL has filed the present petition.

Submissions

9. Mr Parag Tripathi, learned senior counsel appearing for SAIL assailed the impugned order on, essentially, three grounds. First, he submitted that the Arbitral Tribunal had grossly erred in entering an award of a sum of ₹2,49,74,638/- in favour of L&T on account of sums withheld by SAIL from the amounts due to L&T. SAIL had withheld

the aforesaid amount on account of non-compliance with statutory rules and regulations including the amounts claimed by SAIL as payable by L&T under the Building and Other Conditions of the Contract Act, 1996 (BOCW Act).

10. He submitted that Clause 39 of the Special Conditions of Contract (SCC) expressly provided that the Contractor [L&T] shall also be responsible for implementation of all statutory rules and regulations including “*The Building and other conditions of contract Act, 1956 (if applicable) and the cess Act, 1996 and they shall quote their price accordingly*”. He pointed out that in addition to the above, Clause 17.3 of the General Conditions of Contract (GCC) specified twelve enactments, which were required to be complied with by L&T. He submitted that it was apparent from the plain language of Clause 17.3 of the GCC that the enactments mentioned therein were only illustrative and not exhaustive. The fact that the Building and Other Conditions of Contract Act, 1996 was not mentioned under Clause 17.3 of the GCC, did not in any manner, absolve L&T from complying with the provisions of the said Act. He contended that the Arbitral Tribunal had erred in allowing L&T’s claim on the ground that SAIL had not presented any judicial decision, bilateral understanding or other evidence, in support of the said issue.

11. Second, he submitted that the Arbitral Tribunal had grossly erred in not accepting that a sum of ₹7,60,97,027/- was payable by L&T on account of CENVAT and VAT on Works Contract and the said sum had been rightly deducted from the amounts due to L&T. He referred to

terms of Article 2.2 of the Agreement, which expressly sets out that CENVAT, VAT and VAT on Works Contract Credit would be passed on to the Employer [SAIL]. He stated that the guaranteed credit amount was ₹15,97,29,195/-, however, SAIL could not avail of the same. The amount of credit availed of by SAIL fell short of ₹7,60,97,027/- and, L&T was therefore, liable for the said shortfall.

12. Third, he submitted that the Arbitral Tribunal had committed a patent illegality by accepting L&T's contention that it was entitled to escalation. He submitted that the same was contrary to the express terms of Sub-clause (a) of Clause 1.1. of Appendix – 4 to the Agreement, which proscribed payment of any escalation.

Reasons and Conclusion

13. The Agreement was entered into between the parties on 16.03.2009 at a Contract Price of ₹189,52,29,602 (Rupees One eighty nine crores, fifty two lakhs, twenty nine thousand and six hundred two only). Thereafter, two amendment orders were issued on 29.09.2009 and 02.07.2010 for extra items amounting to ₹26,48,90,255/- and ₹56,43,69,208.31 respectively. The Contract Price was, accordingly, enhanced.

14. L&T had completed the project on 30.09.2011. SAIL had issued the Preliminary Acceptance Certificate (PAC) and Final Acceptance Certificate (FAC). In terms of the Agreement between the parties, SAIL was required to pay 90% of the agreed amount on execution of the works, 5% of the amount on issuance of the PAC; and the balance 5%

of the amount on issuance of the FAC. However, SAIL withheld certain amounts from the payments due, which led to disputes between the parties.

15. Before the Arbitral Tribunal, L&T made claims for the payments withheld; payments due on issuance of the PAC and FAC; amount due on account of price adjustment under the Appendix in terms of the price variation clause; and interest on delayed payments. SAIL disputed the said claims and also raised two counter claims : (i) a declaration that it was entitled to ₹15,97,29,195 as guaranteed CENVAT and VAT Credit; and (ii) a declaration that it was entitled to withhold, adjust and appropriate a sum of ₹15,97,29,195 from the payments due to L&T.

16. The first and foremost question to be addressed is whether the Arbitral Tribunal has committed a patent error in denying SAIL's claim for shortfall in credit on account of CENVAT and VAT.

17. Article 2.1 of the Agreement provides for the Contract Price. The said Clause is set out below:-

“2.1 Contract Price (Reference GCC Clause 1)

The Employer hereby agrees to pay to the Contractor the Contract Price in consideration of the performance by the Contractor of its obligations hereunder. The Contract Price shall be Rs.189,52,29,602/- (Rupees One Hundred Eighty Nine Crores Fifty Two Lac Twenty Nine Thousand Six Hundred and Two only) or such other sums as may be determined in accordance with the terms and conditions of the Contract. The guaranteed amount

of CENVAT, VAT and VAT on Works Contract Credit to be passed on to the Employer is Rs.11,37,13,776-(Rupees Eleven Crore Thirty Seven Lac Thirteen Thousand Seven Hundred Seventy Six only).”

18. Admittedly, the value of the Contract was increased pursuant to the additional work orders for extra items issued by SAIL. The final value of works executed by L&T amounted to ₹2,49,74,63,830/- and it is not disputed that L&T was liable to provide a minimum guarantee credit on account of CENVAT and VAT on WCT of ₹15,97,29,195/-.

19. It is SAIL’s grievance that although it had availed of CENVAT credit in the sum of ₹8,36,32,168/-, it could not avail the balance. Accordingly, SAIL claimed that L&T was liable to pay a sum of ₹7,60,97,027 as a shortfall of the minimum guarantee credit on account of CENVAT and VAT on WCT. The Arbitral Tribunal found that in fact, L&T had paid actual taxes amounting to ₹16,46,35,688 and therefore, CENVAT and VAT on WTC was available to SAIL to the aforesaid extent. The fact that SAIL did not or could not avail of the credit, does not in any manner, lead to the conclusion that L&T had defaulted in its obligations. L&T’s obligations extended to paying actual taxes so that the credit on account of CENVAT, VAT and VAT on Works Contract Credit was passed on to SAIL. Since it was found that L&T had in fact paid taxes amounting to ₹16,46,35,688/- and a credit to the aforesaid extent was available to SAIL, L&T had performed its obligations. In view of the above, the Arbitral Tribunal rejected SAIL’s counter claim and rightly so. The contention that the

impugned award is perverse or patently erroneous on this ground, is without any merit.

20. The next question to be examined is whether SAIL was entitled to withhold any amount on account of any liability under the Building and Other Conditions of Contract Act, 1996. The Arbitral Tribunal had found that there was no justification for SAIL to have withheld a sum of ₹2,49,74,638/-, on that ground.

21. According to L&T, it had incurred no liability under the said Act as the works executed by it fell within the confines of an existing factory covered under the Factories Act, 1948. SAIL disputes the same. However, it is not necessary to examine this question as concededly, there is no provision in the Agreement, which entitles SAIL to withhold any amount on account of the alleged dues payable under the Building and Other Conditions of the Contract Act, 1996. In the event L&T was liable to pay any amount under the said Act, the same would be recovered from L&T under the provisions of that Act. Concededly, SAIL had not been called upon to pay any amount under the said Act on account of any alleged default on the part of L&T. SAIL has neither incurred any liability nor made any payment towards alleged dues under the Buildings and Other Conditions of Contract Act, 1996. Therefore, in any event it could have not withheld any payment due to L&T on that ground. It is in this context that the Arbitral Tribunal held that SAIL had neither presented any judicial decision nor any bilateral understanding or any other evidence, to show that the said sum withheld

by it was justified. This Court finds no infirmity in the aforesaid decision.

22. The last aspect to be considered is whether the impugned award is patently erroneous to the extent that it accepts L&T's claim for price adjustment (escalation). Mr Tripathi, had contended that the same was contrary to the express terms of the Agreement between the parties. He relied on Sub-Clause (a) of Clause 1.1 of Appendix - 4 of the Contract Agreement to submit that award of any price variation/escalation was contrary to the express terms of the Agreement between the parties.

23. Sub-Clause (a) of Clause 1.1 of Appendix - 4 to the Agreement reads as under:-

“(a) Price adjustment be applicable for contracts with completion period of 12 months and more, with the condition that where the invitation for Bids provides that the "Time for Completion" does not exceed 12 months, but the contract is finally entered with "Time of Completion" of more 12 months, no price adjustment shall be allowed.”

24. In the present case, the Notice Inviting Tender dated 10.01.2009 issued by SAIL had specified the completion schedule as “12 (*Twelve*) months from effective date of Contract”. Thus, the stipulated time period for completion of the contract under the Agreement could not be construed as less than twelve months. As is apparent from the plain language of Sub-clause (a) as set out above, price variation would be applicable for contracts where the time for completion is twelve months or more. Since in the present case, the time for completion of the

Contract was stipulated as twelve months, the said clause applied. The second limb of Sub-clause (a), is applicable only in cases where the time for completion as stipulated in the Notice Inviting Tender does not exceed twelve months but the contract finally entered into provides for more than twelve months to complete the contract. Since in the present case, the time for completion under the Agreement did not exceed twelve months, the second limb of Sub-clause (a) is not applicable.

25. In this view the contention that the Agreement between the parties prohibited grant of any price variation and the impugned award is liable to be set aside as being contrary to the express terms of the Contract, is also without any merit.

26. This Court finds no grounds to interfere with the impugned award. The petition is unmerited and, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

**AUGUST 17, 2021
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