

Ashwini

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL NO. 98 OF 2020
IN
COMM ARBITRATION PETITION NO. 953 OF 2018
WITH
INTERIM APPLICATION NO. 1111 OF 2019
IN
COMMERCIAL APPEAL NO. 98 OF 2020**

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**NUCLEAR POWER CORPORATION OF
INDIA LTD,**

A company incorporated under the
provisions of the Indian Companies Act
1956 having its registered address at 16th
Floor, World Trade Centre, Cuff Parade,
Colaba, Mumbai 400 005, Also having its
office at VS Bhawan Anushakti Nagar,
Mumbai – 400 064

... APPELLANT
(ORIG. PETITIONER)

~ VERSUS ~

VASU CHEMICALS,

A Partnership Firm registered under the
provisions of Indian Partnership Act 1956
having its office at Vasu Centremilitary
Road, Marol,
Andheri (East) Mumbai – 400 059

... RESPONDENT
(ORIG. PETITIONER)

APPEARANCES

FOR THE APPELLANT	Mr Aseem Naphade , <i>with Srishti Shetty, i/b MV Kini & Co.</i>
FOR RESPONDENT	Mr Rohaan Cama , <i>with Naira Jeejeebhoy, Jyotsana Kondhalkar & Rahul Jain, i/b VBA Legal.</i>

**CORAM : G.S.Patel &
Gauri Godse, JJ**

DATED : 19th September 2022

ORAL JUDGMENT (Per GS Patel J):-

1. The Appeal under Section 37 of the Arbitration and Conciliation Act 1996 is directed against an order and judgment dated 5th September 2019 of SC Gupte J in a Petition filed by the Appellant under Section 34 of the Act challenging an award dated 20th June 2016 by a sole Arbitrator.

2. The Petitioner, Nuclear Power Corporation of India Limited, (“NPCIL”), invited tenders for chlorination work at its units at Tarapur, namely TAPS-3&4. The estimated cost of work was a little over Rs. 30 crores and was to be done in 36 months. The Respondent, Vasu Chemicals, was awarded the contract.

3. There is no dispute that there was a single tender but that four work orders were ultimately issued by NPCIL. Two were six-month work orders and are not subject matter of these proceedings. Work Orders Nos 22 and 23 had a duration of more than 12 months.

4. There are two contentions raised before us, as they were before Gupte J. One of these pertains to the claim by Vasu Chemicals for extra work done. It is not disputed that Vasu Chemicals indeed did extra work, or that this extra work was done at the instance of NPCIL. The quantum of work is also not in dispute for NPCIL has issued a completion certificate certifying that the additional work was done.

5. Mr Naphade for NPCIL makes a submission that the completion certificate does not preclude NPCIL from opposing the claim for extra work. He says that if there is to be a claim for payment for a variation, then in clause 11.2.3 of the General Conditions of Contract (“GCC”), the contractor must give notice to NPCIL of its intention to “claim a varied rate or price supported by proper analysis”.

6. There is no substance in this submission. NPCIL’s project engineer instructed Vasu Chemicals to do the additional work. This is not a case where Vasu Chemicals felt additional work was necessary, and either went ahead and did it on its own or even sought approval from NPCIL. The Arbitrator found that the completion certificate issued by NPCIL clearly said that the work done indeed included those items of extra work for which Vasu

Chemicals had made a claim. The Arbitrator found that the completion certificate included the tendered work items, and also the extra additional work. It can hardly be suggested that it was for Vasu Chemicals to get written instructions from NPCIL, if NPCIL did not deem this necessary. The Arbitrator found that the clear implication was that the additional work had been done on NPCIL's instructions in accordance with approved drawings. In fact, the Arbitrator looked into the various measurements and found them to be in accord with the approved drawings. NPCIL furnished a detailed working of the amount payable for the extra work. This was compared to Vasu Chemical's claim, and the Arbitrator worked out what was actually payable to Vasu Chemicals for this extra work. Both sides seem to have left the determination of the amount to the Arbitrator. Once the Arbitrator had carried out this exercise, as Gupte J correctly said, one can find no infirmity with either the conclusion or the approach.

7. The other area of controversy pertains to escalation. Mr Naphade says that Work Orders Nos 22 and 23 did not provide for escalation. This is something peculiar. As we noted there was a single tender. The GCC governed the entire tender. Clause 8.1.2 of the GCC originally provided that the rates quoted would remain firm until the completion of the contract, and that no escalation in rates would be allowed. This provision was *deleted* in an amendment issued after a pre-bid meeting between the parties.

8. The work orders followed thereafter. It is nobody's case that the terms of the work orders were the result of negotiations between

the parties. These are boilerplate or standard form work orders, and the contractor never has a say in them. Work Order No 22 was consistent with the amended GCC. It did not contain a provision prohibiting escalation. Work Order No 23, however, in clause 1 said both that the rates would remain firm and that there would be no escalation.

9. Mr Naphade attempts to argue that it is the provisions of Work Orders No 23 that will bind, at least for the purposes of that work order. This is not an argument that we can accept. Neither did Gupte J, and the Arbitrator too comprehensively rejected this.

10. For one thing, it appears to us that the argument is entirely flawed and internally inconsistent. It cannot be that one work order is consistent with the GCC but the next work order has an inconsistency, and it is this inconsistency (only because the work order is later in point of time), that must prevail. Before one comes to the argument that every Arbitrator is bound by the terms of the contract, cannot travel beyond, is a creature of it, and so on to the end of the chapter, one must bear in mind the equally well settled position that every effort must be made to harmoniously construe all parts of a contract, and that the conduct of the parties is a guide to interpretation. The deletion of clause 8.1.2 was a negotiated deletion. It was a deletion in the GCC which governed the entire tender and all work orders under the Letter of Intent that followed the tender. The purpose of a work order is only to segregate certain items of work from other items of work. It is a not a standalone

contract and it is by no means a novatio as Mr Naphade faintly endeavours to argue.

11. There is internal evidence to show why the GCC deletion was necessary. This arises from the dates themselves. The tender was of August 2008. There were two addenda of October and November 2008. There was a pre-bid meeting of 8th October 2008. Vasu Chemicals' bid was of 11th November 2008. It was not until 14th April 2010, nearly two years later, that NPCIL issued a Letter of Intent to Vasu Chemicals. In other words, the better part of two years had already passed by the time Vasu Chemicals got its LoI. It is possibly in anticipation of a delay that both sides agreed to a deletion of clause 8.1.2 in the GCC.

12. Mr Naphade argues that the deletion cannot prevail over the clause in Work Order No 23. We believe it is exactly the other way around. It is not shown, for instance, that clause 1 of Work Order No 23 was an insertion or was negotiated by the parties. In contrast, the deletion in clause 8.1.2 was clearly a contractually agreed change.

13. Mr Naphade submits that the Arbitrator could not have gone on questions of equity and justice. That is correct. Section 28 forbids such an approach unless expressly agreed. Unfortunately for Mr Naphade, this makes not the slightest difference. For even if we completely ignore the Arbitrator's approach, and confine ourselves to matters of interpretation of the contract, we find that the Arbitrator cannot be said to have been in error. The view he took was plausible, and Gupte J correctly held so. As he noted, the

deletion in the GCC has to be read in the context of a contractual period that stretched from three years to nearly six. The deletion in the GCC makes complete sense. Clause 1 in Work Order No.23 does not. Commercial contracts, even if the government is a contracting party, must be read, understood and construed in a commercial manner, as ordinary men of commerce would do.

14. There is a fundamental mistake made by many such appellants. We do not assess in challenge Petitions under the Arbitration Act the absolute rightness or wrongness of an arbitral decision. We look only to its plausibility and to see whether it meets the other parameters as settled by a long line of decisions following the amendments in 2015 to the Arbitration Act. Primary among these is the decision of the Supreme Court in *Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India*.¹ Where the view taken by the Arbitrator is a plausible view, the Court will not interfere. The arbitrator cannot wander outside the contract but if his interpretation is a plausible view, there is no scope for interference. There is no room for a merit-based review. Perversity has to be shown and established beyond controversy, as being a view not even remotely possible, or a matter of vital and germane evidence being ignored, for a challenge to succeed.

15. The scope for challenge under Section 34 is narrow; the scope in an appeal under Section 37 is narrower still, and this is what the Supreme Court has said repeatedly and most recently in *UHL Power Company Limited v State of Himachal Pradesh*.²

¹(2019) 15 SCC 131.

²(2022) 4 SCC 116

16. We find no reason to interfere with the impugned order. The Appeal is without merit. It is dismissed. There will be no order as to costs.

(Gauri Godse, J)

(G. S. Patel, J)