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IN THE HIGH COURT OF DELHI AT NEW DELHI

BEFORE

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

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FAO(COMM) 38/2022

Between:-

**M/S. ICON SLEEPER TRACK PRIVATE
LIMITED**

**SURVEY NO. 255/1+2, PLOT NO. 3,
ASHINA PARK- II, AUNDH, PUNE- 411007**

.....APPELLANT NO. 1

**M/S VAMAN PRESTRESSING COMPANY PRIVATE
LIMITED,**

**303, ELPHINSTONE HOUSE, 17,
MARZABAN ROAD, MUMBAI 400001**

.....APPELLANT NO. 2

*(Through: Mr. Vinay Navari, Senior Advocate alongwith Mr.
Keshav Ranjan, Advocate)*

AND

RAIL VIKAS NIGAM LIMITED

**1st FLOOR, AUGUST KRANTI BHAVAN,
BHIKHAJI CAMA PLACE, R. K. PURAM,
NEW DELHI-110066**

.....RESPONDENT

*(Through: Mr. Udit Seth, Ms. Priya Kanwat & Mr. Vivek G.B.,
Advocates)*

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Pronounced on : 23.12.2022

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. This appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'A&C Act') read with Section 13 of the Commercial Courts Acts, 2015 (hereinafter referred to as

‘CCA’) is directed against the order dated 10.12.2021, passed by the District Judge (Commercial Court)-01 Patiala House Courts, New Delhi, rejecting an application under Section 34 of the A&C Act and affirming the arbitration award dated 03.08.2010 passed by the Arbitral Tribunal (hereinafter referred as ‘AT’).

2. The brief facts leading to filing of the present appeal are as under:-

(i) The respondent-Rail Vikas Nigam Limited (RVNL) invited bids for the work of “MANUFACTURE AND SUPPLY OF PSC MONO-BLOCK SLEEPER PLANTS FOR VARIOUS RAIL ROADS PROJECTS IN DIFFERENT REGIONS OF INDIA”.

(ii) The appellant No. 2/ M/s Vaman Prestressing Company Private Limited (VPCL) was one of the bidders whose bid was found to be viable and was offered for performance of the work in question. The appellant No. 2/VPCL on 31.08.2007 accepted the offer unconditionally and had a request for exemption from excise duty on raw material and assignment of contract to M/s Icon Sleeper Track Private Limited (ISTPL) as per Clause-36 of Section VI of General Conditions of Contract (GCC). It be noted that ISTPL is appellant No. 1 in the instant appeal.

(iii) On 14.09.2007, RVNL accepted the request of VPCL granting an exemption for excise duty and assignment of contract to ISTPL. The period for completion of the whole work was 18 months from the date of acceptance of the counter-offer by RVNL.

(iv) On 05.11.2007, an agreement was entered into between VPCL & RVNL. During the course of execution of the work, certain disputes arose between the contracting parties. In

accordance with the provisions of Clause 10.1 of GCC of the contract agreement, efforts for amicable settlement of the disputes were made between the parties. However, the parties failed to arrive at an amicable settlement. Resultantly, in accordance with the provisions of Clause 10.2 of the GCC, the AT was constituted, consisting of a presiding arbitrator and two other members. The AT after conducting various hearings, passed the final award on 05.08.2019, rejecting the claim of the appellants.

(v) The appellants challenged the award passed by the AT in an application under Section 34 of the A&C Act before the learned Commercial Court. The learned Commercial Court passed the impugned order and did not find any substance in the said application and has rejected the same. Therefore, the appellants have approached this court in the present application under Section 37 of the A&C Act.

3. Learned senior counsel appearing on behalf of the appellants vehemently submitted that the impugned order and award passed by the AT is patently illegal and against the Public Policy of India and hence, deserves to be set aside by this court. According to him, the entire understanding of the AT and the Commercial Court is erroneous, inasmuch as, the appellants are only insisting on the due observance of the terms of the contract in their strict sense. While taking this court through condition 15.2 of the GCC, he has specifically pointed out that C_0 is defined as the base cost of the cement per MT including ED, ST/VAT and freight equal to Rs.4,080/- and C_1 is defined as the cost of the cement per MT including ED, ST/VAT and freight on the date of adjustment. He, therefore, submitted that C_0 is the base cost of cement, which includes excise

duty, ST/VAT and freight and is equal to Rs.4080/- PMT. According to him, as per the agreement, the contractual price of a sleeper is Rs. 1053/- and for transportation (related service) Rs.100/- per sleeper as per rate based on February, 2007, as the bids were submitted on 15.03.2007 and hence the appellants submitted their rate updating proposal for the month of February, 2008 as per the price adjustment formula provided in Clause No. 15.2.1 of GCC for price adjustment of sleeper and transportation respectively. He, therefore, submitted that the entire understanding of the respondent is erroneous to the extent of including excise duty in working out the price rise for cement in C_0 and excluding excise duty (due to exemption) in working out the price rise for cement in C_1 . He submitted that such an understanding is against all logic and leads to absurd results inasmuch as the excise duty is included in C_0 but is excluded in C_1 at the time of adjustment even though the excise duty is exempted by the Central Government. He contended that a purposive interpretation deserves to be given to the contract and the excise duty component must be excluded from the C_0 . Therefore, patent illegality has been committed by the AT and the Commercial Court, in not accepting the claim of the appellants.

4. Learned counsel appearing on behalf of the respondent opposed the arguments made by learned senior counsel for the appellants and submitted that this court in exercise of power under Section 37 of the A&C Act is not supposed to re-examine the entire matter and should confine its scope only to the extent of examining as to whether any patent illegality has been committed warranting interference under Section 37 of the A&C Act. He further submits that the AT, as well as the Commercial Court, have extensively considered the case of the appellants and after examining their contentions, it has been

concluded by the AT & the Commercial Court that the submissions of the appellants cannot be accepted as the same would result in rewriting of the terms of the contract. It is also submitted that the appellants have participated in the contract with open eyes and the formula under Clause 15.2 of GCC of the contract is unequivocally clear and the same is beyond any doubt. Therefore, any interference with the unequivocal terms of the definition of C_0 and C_1 is not called for.

5. No other points have been raised by any of the parties.

6. We have heard Shri Vinay Navari, learned senior counsel for the appellants assisted by Shri Keshav Ranjan, Advocate and Shri Udit Seth, learned counsel for the respondent and carefully perused the material available on record.

7. The entire dispute in the instant case revolves around the application of the PVC formula provided in Clause 15.2 of the contract. The same is, therefore, reproduced as under:-

“GCC 15.2 1. Pursuant to GCC Sub-clause 15.2, prices payable to the Supplier-

1.1 The Prices of Goods as stated in the Price Schedule. Section IV: Bidding Forms, shall be subject to adjustment during performance of the Contract to reflect changes in the cost of labor and material components in accordance with the formula:

$$P_1 = P_0(a + b.L_1/L_0 + c.F_1/F_0 + d.C_1/C_0 + e.S_1/S_0) - P_0$$

8. The terms in the formula have been assigned their respective meanings. Meaning of terms C_0 and C_1 are reproduced as under:-

“ C_0 = base cost of the cement per MT including ED ST/VAT and freight equal to Rs.4080/-

C_1 = cost of the cement per MT including ED, ST/VAT and freight on the date of adjustment”.

9. As per sub-clause 1.1.1 of Clause 15.2 of GCC the value of components (a), (b), (c), (d) & (e) is as under:-

<i>S.No.</i>	<i>Component</i>	<i>Value(%)</i>
<i>1.</i>	<i>Fixed a</i>	<i>12</i>
<i>2.</i>	<i>Labour b</i>	<i>19</i>
<i>3.</i>	<i>Fuel Power Light and Lubricants c</i>	<i>25</i>
<i>4.</i>	<i>Cement d</i>	<i>18</i>
<i>5.</i>	<i>Steel e</i>	<i>26</i>

10. The base date and date of adjustment shall have meaning as under:-

“The base date and date of adjustment shall have meaning as under:-

Base date = twenty-eight days prior to the deadline for submission of the Bids.

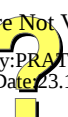
Date of adjustment = 4 weeks prior to the date of manufacture of goods”

11. The AT has considered the argument made by the appellants that C₀ should not be taken as Rs.4080/- but should be reduced to Rs.3651.52 MT by the reverse calculation deleting its ED component. It has been noted by the AT that Clause 15.2 of the Contracts defining PVC formula is beyond any doubt and the same is in use in almost all contracts not only in RVNL but also industry-wise in different formats all over the world. The respondent in the pre-bid meeting stage itself had clarified MODVAT benefit issues in answer to question no. 7 and 18. In answer to question no. 18 regarding MODVAT, respondent directed the bidders to quote the price after taking MODVAT credit in the input side. There were 7 projects in the same tender out of which in 4 projects excise duty was exempted and in three projects the excise duty was leviable. The appellants were fully aware of the cost

of the cement for both ADB and non-ADB-funded projects and RVNL had stated only one price for C_o for both types of projects. The AT, therefore, did not find any ground to interfere with the understanding of the respondent in applying the PVC formula.

12. The learned Commercial Court while placing reliance on various decisions of the Hon'ble Supreme Court has held that from day one it was clear that the base price of the cement will be Rs.4080/- PMT including the tax component. When the tax component was included in the base price, if it would have been levied, the base price should have remained the same and, if the same has been exempted by the Government, still it will not affect the base price. Since the terms of the contract were clearly understood in a particular way right from the inception of the bidding process, the same was not required to be interfered with and accordingly, an application under Section 34 of the A & C Act against the award of the AT has been rejected by the Commercial Court.

13. We find no infirmity with the view that once the rates are fixed in the contract for a particular work, the contractor is not entitled to claim any benefit over and above the rates already fixed in the contract merely because the fixation of the rates to some extent is disadvantageous. The AT has interpreted the terms of the contract and it is well settled that the views of an arbitral tribunal cannot be interfered with, except on the grounds as set out in Section 34 of A&C Act. The AT has held that any interference in the terms of the contract or giving a different meaning thereto than the intent which was understood by the contracting parties at the time of entering into the contract is not permissible. This view is also supported by the decision of the Hon'ble Supreme Court in the case of *Satyannarayana*



*Constructions Company v. Union of India and Others*¹. The Hon'ble Supreme Court in another decision in the case of *Shree Ambica Medical Stores and Others v. Surat People's Co-operative Bank Limited and Others*², while placing reliance on various earlier decisions on the subject has held that the courts through their interpretative process cannot re-write and create a new contract between the parties. The courts are to simply apply the terms and conditions of the agreement as agreed between the contracting parties. The same principle has further been reiterated by the Hon'ble Supreme Court in the case of *Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Others*³.

14. This court finds that the view taken by the AT and the Commercial Court does not require any interference under Section 34 of the A&C Act. Firstly, the definition of C_0 and C_1 was clear and unambiguous to all bidders before submission of their respective bids. Pre-bid meetings were admittedly conducted and various clarifications with respect to other aspects were sought but no grievance with respect to working out of the PVC formula was raised. The appellants were, therefore, accepting the PVC payments as per the terms and conditions of the contract relating to which they had sufficient information and knowledge. Secondly, the reverse calculation sought by the appellants for C_0 in ADB-funded projects would amount to distinguishing two sets of contracts, one relates to ADB-funded projects and the other non-ADB-funded projects. The respondent did not distinguish the application of the PVC formula in ADB-funded projects and non-ADB-funded projects and has left it

¹ (2011) 15 SCC 101

² (2020) 13 SCC 564

³ (2022) 4 SCC 657

open for the respective bidders to submit their bids in terms of the disclosed formula. Thirdly, if at a later stage, the application of the concerned formula is resulting in any financial loss to the appellants, that would not in itself necessarily call for interference in arbitral proceedings. Fourthly, the base price of the cement cannot be allowed to be reduced commensurate to the component of the excise duty as the factum whether excise duty is payable or not was already made clear to the parties before the agreement in question was entered. It was, therefore, necessary on the part of the contractor to accordingly work out the contract. We find no flow with the view that if the argument of the appellants is accepted and the excise duty from the fixed price of C₀ of Rs.4080/- is deducted, then it would amount to re-writing of the contract, which on terms of the law laid down by the Hon'ble Supreme Court, as referred to above, would be impermissible.

15. Having considered the submissions in detail and the legal position as applicable in the instant case, we find that the view taken by the AT and the Commercial Courts cannot be said to be contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; neither the same can be said to be patently illegal, therefore, we find no substance in the instant appeal and the same is accordingly dismissed.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

(VIBHU BAKHRU)
JUDGE

DECEMBER 23, 2022

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