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

Pronounced on: 20.12.2023

+ **O.M.P. (COMM) 148/2021**

JSIW INFRASTRUCTURE PVT LTD.

.... Petitioner

Through: Mr. Aayush Agarwala, Ms. Bhumika
Sharma and Mr. Auritro Mukherjee,
Advs.

versus

ONGC LTD .

.... Respondent

Through: Mr. Saurav Agrawal, Ms. Akriti
Dawar, Ms. Kavya Pahwa, Mr.
Anshuman Chowdhary and Mr.
Vibhu Anshuman, Advs.

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CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. O.M.P. (Comm.) 148/2021 assails an arbitral award dated 10.01.2020 issued in background of disputes between the parties arising out of contract for “two pipeline replacement project for Ahmedabad and Mehsana Asset”.



The said contract was awarded to the petitioner vide notification of award dated 25.06.2008.

2. O.M.P. (Comm.) 149/2021 assails an arbitral award dated 10.01.2020 issued in background of disputes between the parties arising out of contract for “two pipeline replacement project for Ankleshwar Asset”. The said contract was awarded to the petitioner vide notification of award dated 30.06.2008.

3. The disputes between the parties in both the contracts pertains to petitioner’s claim of reimbursement of excise duty in terms of clause 3.4.1.5 of the General Conditions of Contract (GCC). Both the impugned awards are identical.

4. After notification of award/s, the petitioner and the respondent have exchanged certain communications, wherein the petitioner sought certain clarifications from the respondent in respect of the contract. In the said communications, the petitioner highlighted the difficulty in procuring line pipes domestically, and informed the respondent that the petitioner would probably have to import line pipes required for the project instead of purchasing them from domestic supplier. The petitioner also highlighted the fact that on import of materials, CVD (countervailing duty) will be imposed in lieu of excise duty at the same rate of excise duty. The petitioner requested the respondent that for import of line pipes, the CVD, as would be payable by the petitioner should be reimbursed to the petitioner instead of excise duty. It was also mentioned that there will not be any financial implication on the respondent, as reimbursement of CVD will be restricted to excise duty. Although, initially the respondent rejected the said request of the petitioner, subsequently, vide letter dated 27.08.2008 the respondent



accepted the said request which resulted in a certain amendments to the contract. The said letter dated 27.08.2008 reads as under:-

*“No.: DLH/OES/2PLRP/AMD-MEN/Contr/2008 dated 27.08.2008
To,
M/s JSIW Infrastructure Pvt. Ltd.
4, Asstt. Mitra Estate, Near Vadilal Ice Factory,
Ahmedabad-380004 (Gujarat)
(Fax No.:079-23971209)*

*Attn. : Shri Prashant Patel
Sub. : Reimbursement of CVD in lieu of Excise Duty (ED).
1. Ref. : NOA NO.DLH/OES/2PLRP/AMD-MEN/Contr./2008
dated 25.06.2008 for Two pipeline replacement project –
Ahmedabad-Mehsana Asset
2. NOA No.DLH/OES/2PLP/ANK/Contr./2008 dated
30.06.2008 for Two Pipe Line Project – Ankteshwar Asset*

Sir(s),

This is in reference to your letters dated 28.06.08, 17.07.08, 30.07.08, 06.08.08 requesting ONGC to allow reimbursement of CVD in lieu of ED and that no claiming any other duties & taxes other than already quoted in your price bid, thus allowing the import of line pipes and OGC responses dated 16.07.08, 30.07.08, 31.07.08, 18.08.08 clarifying the existing provisions of contract clauses. ONGC vide these letters also requested you to sign the contract, submit PBC and execute the project in compliance of tender/contract clauses.

In response to your persistent request for reimbursement of CVD vide above mentioned letters ONGC, as special case, has agreed to make the modifications in the contract condition, as below:

1. To allow reimbursement of only CVD (Countervailing Duty) portion of Custom Duty, for import of line pipes, equivalent to Central Excise Duty leviable on a like product manufactured in India. The CVD reimbursement shall be limited to amount of ED quoted in your price offer for import of line pipes only, payment of CVD) for 2PLRP (AMD-MHN) and 2-PLP (Ank) Projects The CVD (14.42%) shall be calculated on the basis of assessable CIF value (and not on CIF+BCD+Surcharge, if any) for only line pipes imports made by you. It may once again be noted the maximum reimbursement amount will be limited to amount of ED quoted in your price offer.

This modification shall be incorporated in existing “price performa A-3) and “Milestone Payment formula” to facilitate reimbursement of CVD.



(emphasis supplied)

2. Only to facilitate reimbursement of CVD, in lieu of Ed as per (1) above:

Reference	Existing Clause	Amendment (in bold)
GCC 3.4.1.5	The contractor shall furnish documentary evidence in support of payment of Customs Duty, Excise Duty, Service Tax and VAT/Sales tax on works/work Contract tax (central or state) as identified in the contract price schedule for the purpose of claiming such amounts from the company. The Company shall reimburse the custom duty, excise duty, service tax and VAT/sales tax on works/work contract Tax (central or state) paid by the contractor directly to the tax authorities at actual in Indian rupees against documentary evidence subject to the maximum of the amount of duty/tax indicated in the contract price schedule.	The Contractor shall furnish documentary evidence in support of payment of Customs Duty, Excise Duty, Service Tax and VAT/Sales tax on works/work Contract tax (central or state) as identified in the contract price schedule for the purpose of claiming such amounts from the company. The Company shall reimburse the custom duty, excise duty, service tax and VAT/sales tax on works/work contract Tax (central or state) paid by the contractor directly to the tax authorities at actual in Indian rupees against documentary evidence subject to the maximum of the amount of duty/tax indicated in the contract price schedule. However, only for line pipes, company shall reimburse the Excise Duty paid by the manufacturer to the tax Authorities and invoiced to the Contractor, at actual, in Indian Rupees against documentary evidence subject to the maximum of the amount of Excise Duty indicated in the Contract Price Schedule. <i>(emphasis supplied)</i>

All other terms & conditions will remain unchanged.

You are advised to sign the Contract and submit PBG without any further delay.

Yours faithfully,



Sd/-
B. Viswanathan
Deputy General Manager (MM)”

5. Notably, the following addition was made to Clause 3.4.1.5 of the GCC:

“However, only for line pipes, company shall reimburse the Excise Duty paid by the manufacturer to the Tax Authorities and invoiced to the Contractor, at actual, in Indian rupees against documentary evidence subject to the maximum of the amount of Excise Duty indicated in the Contract Price Schedule.”

6. Thereafter, formal contracts were entered into between the parties incorporating the aforesaid amended clause 3.4.1.5. The letter dated 27.08.2008 was also made part of the Annexure-B of the contracts.

7. The petitioner, however, procured the line pipes domestically and submitted the tax invoices claiming reimbursement of excise duty. The said invoices were returned by the respondent with an endorsement “to submit proof of ED paid to authority directly by M/s JSIW”. Thereafter, correspondence was exchanged between the parties, wherein the petitioner relying on the amended clause 3.4.1.5 of the GCC contended that the requirement to pay excise duty directly to the tax authorities by the contractor is not applicable in case of line pipes and the claim for reimbursement of excise duty on line pipes ought to be allowed. The respondent’s contention, in the said communications, was that the amended portion of clause 3.4.1.5 of the GCC is only valid for imported line pipes for the purpose of reimburse CVD and is not valid for reimbursement of excise duty not directly paid by the contractor to the tax authorities.

8. Disputes having arisen, the parties’ first attempt to resolve the same



was made through conciliation by the Outside Expert Committee (OEC) constituted by the respondent. It is stated that OEC accepted the claim put forth by the petitioner but the respondent refused to accept the said recommendation and requested OEC to review its recommendation. The OEC is stated to have reiterated its earlier recommendation. Thereafter, the parties referred disputes to a three member arbitral tribunal, which resulted in an award dated 20.02.2015, in favour of the petitioner. However, the said award was set aside by this court with the consent of the parties. Thereafter, the present learned sole arbitrator was appointed to adjudicate the disputes between the parties arising out of the aforesaid two contracts.

9. In the above context, the petitioner raised its claim for reimbursement of excise duty along with interest before the learned sole arbitrator.

10. The learned arbitrator framed the following question for determination:

“The questions for determination are: whether the Claimant is entitled to reimbursement of excise duty in terms of the amended Clause 3.4.1.5 of GCC if so, whether the Claimant is entitled to pre-reference or pendente-lite interest @ 18% per annum or at any other rate.”

11. The petitioner’s claim of excise duty in terms of amended clause 3.4.1.5 of GCC was answered in the impugned awards¹ as under:

“25. I have given my thoughtful consideration to the respective contentions raised by the parties. I have also already reproduced above (para 9) the letter dated 27.08.2008 by virtue of which the amendment in Clause 3.4.1.5 was made. This letter has been specifically made part of the contract by virtue of Annexure B (SL No. 17, page 161 of Vol. III of the Claimant's documents). This letter refers to the entire correspondence exchanged between the parties. This letter being part of the contract can very well be referred to and relied upon by either of the parties and the Arbitral Tribunal. This letter says, “in response to your persistent request for

¹ The awards are identical in both the petitions except for some factual changes. For sake of convience, extracts from the award in O.M.P. (COMM) 148/2021 are being reproduced.



reimbursement of CVD vide above mentioned letters ONGC, as a special case, has agreed to make the modification in the contract condition". What is the modification is given in para 1 of the letter which says that the Respondent would be allowed "reimbursement only (sic) of CVD (Countervailing Duty) portion of custom duty for import of line pipes, equivalent to central excise duty leviable on like product manufactured in India. The CVD reimbursement shall be limited to amount of ED quoted in your price offer for import of line pipes only against submission of supporting document (for payment of CVD)". A further perusal of para 9 of this award where the existing clause and the amendment to clause 3.4.1.5 has been quoted would reveal that although the Respondent had as a special case allowed reimbursement of CVD on certain conditions as mentioned in para 1 of the letter yet in para 2 the words "reimbursement of CVD" was completely missing. In normal course, the Claimant would have come forward to the Respondent to make corrections in para 2 of the letter which it did not come forward to do. Perhaps, he wanted to take advantage of para 1 where he was permitted to import line pipes and get reimbursement of CVD in lieu of excise duty and para 2 where the word "reimburse the excise duty paid by the manufacturer to the tax authorities and invoiced to the contractor" had come without any reference to CVD.

26. Can it be said that the terms of the contract which came into existence by virtue of amendment at Claimant's behest are unambiguous? The simple answer to the question would be plain "No". Since the language used in the letter dated 27.08.2008 particularly para 1 and 2 is contradictory, rather para 2 has to give effect to the Respondent's intention in para 1, it would be incumbent on the Arbitral Tribunal to gather the real intention of the parties from the letters which have been mentioned in the opening paragraph of this very letter. I am supported in this view by catena of judgments including Pratihvichand Ramchand Sablok v. S.Y. Shinde, (1993) 3 SCC 271, ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705, Tarpore & Co. v. Kochin Shipyard Ltd., (1984) 2 SCC 680, Board of Trustees of Chennai Port Trust v. Chennai Container Terminal Pvt. Ltd., 2014 SCC Online Madras 73, DLF Universal Ltd. v. Director Town & Country Planning Department Haryana (2010) 14 SCC 1 and McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.

27. So, we come to the first letter i.e. the letter dated 28.06.2008 (extracted in para 6 above). What the claimant emphasized in this letter was that the line pipes were not available domestically and therefore the Claimant must be permitted to import the same and may be granted reimbursement of CVD in lieu of excise duty. In this letter there was absolutely no mention of reimbursement of CVD or excise duty. In fact, excise duty was already reimbursable to the Claimant subject to the conditions which were mentioned in Clause 3.4.1.5. When the Respondent did not agree and



conveyed by its letter dated 16.07.2008 that it would amount to change in the condition of contract the Claimant came up with the stronger justification in his letter dated 17.07.2008. Although the Claimant's bid was open for 90 days from the date of submission and just 37 days had passed yet it took the plea that its back to back offer with other vendors had already expired and therefore on page 2 of the letter it mentioned :

"To import the ERW line pipes, your confirmation is must in respect of reimbursement of CVD in lieu of Excise duty since both are same and different terminology is used (CVD/ Excise duty) depending on the sources of supply i.e. imported or indigenous".

Here again there was no mention of reimbursement of CVD or (in the alternative) excise duty. In the last para of this very letter the Claimant stated :

"Again, we request you to conform that CVD will be reimburse instead of excise duty without any further delay since there is no financial implication on either side".

28. Thus, I am of the considered opinion that the Arbitral Tribunal is under an obligation to gather the real intentions of the parties not only from the letter dated 27.08.2008 but also from the entire correspondence which was initiated by the Claimant by its letter dated 28.06.2008. Even if I look only at the letter dated 27.08.2008 which in any case is part of the contract, it would be amply clear that the real intention of the Respondent was to allow the Claimant's request for reimbursement of CVD in lieu of excise duty and not excise duty as such or any additional facility for reimbursement of excise duty because reimbursement of excise duty was already allowed in the original Clause 3.4.1.5 subject to the condition that it is "paid by the contractor directly to the tax authority at actual against documentary evidence subject to the maximum of the amount of duties/tax indicated in the contract price schedule". It may also be mentioned that in this letter the words "reimbursement of CVD in lieu of excise duty" has been used at four places which would also show that by virtue of the amendment, the Respondent had only allowed reimbursement of CVD in lieu of excise duty.

29. The Claimant sought reimbursement of the excise duty by its letter dated 09.11.2009 which was returned in original (RIO) by the Respondent with the remarks "please submit pro (sic proof) of ED paid to the authority directly by M/s JSIW". There were stream of letters exchanged between the parties, the Claimant relying on the amendment incorporated only in para 2 of the letter dated 27.08.2008 which came to be substituted in place of the original Clause 3.4.1.5 by way of amendment and the Respondent on the other hand insisting that if the Claimant were to seek reimbursement of excise duty it could do so only by adhering to the conditions as originally envisaged in Clause 3.4.1.5. The Claimant's claim for reimbursement of the



excise duty was finally rejected by the Respondent by letter dated 08.04.2010 which ultimately led to the formation of the OEC by letter dated 18.05.2010 and then the Arbitral Tribunal

30. Although, the Ld. Counsel for the Claimant has laid much stress on the letter dated 06.08.2008 to contend wherein the Claimant is alleged to have made a claim for payment of either excise duty or "CVD equivalent to excise duty not exceeding the total excise duty mentioned in the quote" yet taking into account the letters dated 28.06.2008, 17.07.2008 and 30.07.2008 written by the Claimant it is amply clear that what the Claimant since the very beginning was seeking was reimbursement of CVD equivalent to excise duty and not exceeding the total excise duty mentioned in the quote. Even if, the letter dated 27.08.2008 is taken in isolation and read together from beginning to end it would only convey that the Respondent had allowed reimbursement of CVD only as an exception on import of line pipes otherwise the import of any other material was not allowed to the Claimant as against the column of customs duty the Claimant has specifically mentioned "NIL".

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33. In view of the foregoing discussion, there is no manner of doubt that the Respondent's view that the Claimant was not entitled to reimbursement of excise duty even in terms of the amended Clause 3.4.1.5 of GCC cannot be faulted."

Submissions of respective counsel

12. Learned counsel for the petitioner has submitted as under:-
- It is submitted that the learned arbitrator in guise of contractual interpretation of clause 3.4.1.5 has re-written the contract between the parties. It is submitted that the learned arbitrator has ignored the settled principle that recourse to purposive interpretation by reading prior correspondence of the parties is permissible only if some ambiguity is discovered in the clause. It is submitted that the learned arbitrator has not found any ambiguity in clause 3.4.1.5 and therefore was bound to enforce the amended clause 3.4.1.5.



- ii. It is submitted that the amended portion of the clause does not provide for import of line pipes and payment of CVD at all, and the impugned award commits patent illegality in holdings so. In this regard, reference has been made to the judgments in *Pandit Chunchun Jha v. Sheikh Ebadat Ali*²; *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal*³; *State Bank of India v. Mula Sahakari Sakhar Karhana Ltd.*⁴; *Mathai Samuel v. Eapen Eapen (Dead) By Lrs.*⁵; and *Rajasthan State Industrial Development and Investment Corporation v. Diamond & Gem Development Corporation Limited*⁶.
- iii. It is submitted that the learned arbitrator by relying upon prior correspondence between the parties has ignored specific terms of the contract between the parties. It is submitted that clause 1.2.5 of the GCC specifically provides that the contract constitutes the entire agreement between the parties. It is submitted that by virtue of the said clause, it was impermissible to rely upon prior negotiations and correspondence between the parties.
- iv. It is further submitted that the impugned award, by relying upon the letter dated 27.08.2008, has ignored clause (b) of the agreement, which provides for priority of documents in case of any discrepancy or conflict. It is submitted that the GCC i.e., Annexure A, which contains clause 3.4.1.5 would prevail over the letter dated 27.08.2008,

² (1955) 1 SCR 174

³ (2004) 8 SCC 644

⁴ (2006) 6 SCC 293

⁵ (2012) 13 SCC 80

⁶ (2013) 5 SCC 470



which document was made part of Annexure B.

- v. Lastly, it is submitted that even the Outside Expert Committee, constituted by the respondent to conciliate the disputes between the parties, found in favour of the petitioner. It is further submitted that even the earlier constituted three member arbitral tribunal found in favour of the petitioner and the said award was only set aside on the ground that the arbitration agreement prescribes that a sole arbitrator would be appointed to adjudicate the disputes between the parties. It is submitted that the present award permits the respondent to pay a sum much less than what was agreed to be paid for the project under the agreement. The award is therefore perverse and unconscionable.
13. *Per contra*, learned counsel for the respondent has contended as under:-
- i. It is submitted that an attempt on the part of the petitioner to read only the amended portion of clause 3.4.1.5 in isolation, to unduly claim reimbursement of excise duty, is impermissible in law, as it disregards the intention of the parties. It is submitted that this isolated interpretation disregards the true intentions of the parties as established by the contract and surrounding circumstances. The letter dated 27.08.2008 and prior correspondence serve as valuable context, revealing the object, purpose, and intent behind the amendment to clause 3.4.1.5. Therefore, it is submitted the learned arbitrator was justified considering these documents to ascertain the real intent of the parties. In this regard, reference has been made to the judgments in ***Board of Trustees of Chennai Port Trust v. Chennai Container***



Terminal Pvt. Ltd.,⁷; *Tarapore and Co. v. Cochin Shipyard Ltd*⁸; *DLF Universal Ltd v. Director, Town and Country Planning Dept, Haryana.*⁹; *Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd.*¹⁰ and *Godhra Electricity Co. Ltd. v. State of Gujarat.*¹¹

- ii. It is submitted that the amendments were made to address a specific situation: the petitioner being desirous of importing line pipes and receive CVD reimbursement instead of excise duty. As explicitly stated in the letter dated 27.08.2008, these amendments were in the matter of a “special case” exception. It is submitted that the amendments extended beyond clause 3.4.1.5, encompassing the price schedule and milestone payment formula through the addition of a note specifically outlining CVD reimbursement. It is further submitted that paragraph 2 of the letter dated 27.08.2008 commences with “only to facilitate reimbursement of CVD as per (1) above”, while paragraph 1 directly addresses CVD reimbursement. It is submitted that this leave no room for doubt that despite the amended clause 3.4.1.5 not explicitly mentioning CVD reimbursement, its application was intended solely for situations involving such claims.
- iii. Lastly, it is submitted that the whole case set up by the petitioner relates to interpretation of the contractual terms, a matter primarily in domain of the arbitral tribunal. It is submitted that the court would defer to the view taken by the arbitral tribunal unless the view taken

⁷ 2014 (1) CTC 573

⁸ (1984) 2 SCC 680

⁹ (2010) 14 SCC 1

¹⁰ (1963) 3 SCR 183

¹¹ (1975) 1 SCC 199



by the arbitral tribunal suffers from perversity. It is submitted that in the present case, the impugned award has held that letter dated 27.08.2008 forms part of the contract by virtue of Annexure B and therefore, can be relied upon by the parties and the arbitral tribunal. After considering the said letter, the impugned award has taken a view that real intention of the parties is to be gathered from the entire correspondence between the parties. Consequently, the impugned award finds that the respondent's CVD reimbursement concession was a singular exception applicable solely to line pipe imports, disentitling the petitioner to any excise duty reimbursement. It is submitted that this interpretation, grounded in a comprehensive analysis of the contractual terms and surrounding context, is plausible, reasonable, and correct. Therefore, it falls outside the narrow scope for intervention under Section 34 of the A&C Act.

Analysis and Conclusion

14. I have perused the record and heard learned counsel for the parties. I find merit in the submissions of the learned counsel for the petitioner. The reasons are enumerated hereunder.

15. There is no gainsaying that scope of interference with an arbitral award in exercise of jurisdiction under Section 34 of the A&C Act is limited. The interpretation of the terms of the contract between the parties is within the domain of the arbitrator. Even if two views are possible, this Court will defer to the interpretation accorded by the arbitral tribunal, as long as the same is a possible view. It is only when the interpretation of contractual provisions is patently unreasonable or perverse, or contradictory to well settled principles governing interpretation of contracts, that the court



would interfere. Further, it is equally well settled that an arbitral tribunal being a creature of a contract, is bound to act in terms of the contract. An award can be said to be patently illegal where the arbitral tribunal has failed to act in terms of the contract or has ignored the specific terms of the contract. In this regard reference may be made to the judgment of the Supreme Court in **Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum**,¹² wherein it has held as under:-

“43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.

44. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.

46. In Associate Builders, this Court held that an award ignoring the terms of a contract would not be in public interest...”

16. Similar observations have been made by the Supreme Court in **UHL Power Co. Ltd. v. State of H.P.**,¹³, **Dyna Technologies (P) Ltd. v. Crompton**

¹² (2022) 4 SCC 463

¹³ (2022) 4 SCC 116



Greaves Ltd.,¹⁴ *State of Chhattisgarh v. SAL Udyog (P) Ltd.*,¹⁵ *Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*¹⁶ and *South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd.*¹⁷

17. This Court in ***GMR Ambala Chandigarh (P) Ltd. v. National Highways Authority of India***¹⁸, has held as under:

“23.1 There is no gainsaying that interference with arbitral awards is not an exercise to be likely undertaken. Ordinarily, the Arbitral Tribunal is the final arbiter on all aspects factual and legal. Interpretation of contractual covenants is ordinarily the province of the Arbitral Tribunal. The scope of interference, with the manner in which an Arbitral Tribunal interprets contractual covenants, is heavily circumscribed. A Section 34 Court cannot interfere with an Arbitral Tribunal on the ground that the Arbitral Tribunal has not interpreted the contractual covenants correctly, as, in its view the covenants were required to be differently interpreted. The Court cannot, therefore, substitute the interpretation of the contractual covenants which, according to it, is most appropriate, in place of the interpretation that the learned Arbitral Tribunal has chosen to place thereon. It is only where the interpretation of the contractual covenants is plainly unacceptable, or contradictory to well settled principles governing interpretation of contractual covenants, or the interpretation accorded by the Arbitral Tribunal to a contractual covenant would be contrary to other covenants of the same contract, that the Section 34 Court can interfere...”

18. In the present case, the conclusions arrived at in the impugned award, result in manifest disregard of clause 3.4.1.5 of GCC. This manifest disregard has been achieved through a distorted interpretative process, contrary to well established principles of interpretation. The same is further compounded by undue reliance placed on the letter dated 27.08.2008 and pre-contract correspondences, for the purpose of disregarding the specific

¹⁴ (2019) 20 SCC 1

¹⁵ 2022) 2 SCC 275

¹⁶ (2019) 7 SCC 236

¹⁷ (2020) 5 SCC 164

¹⁸ 2022 SCC OnLine Del 3122;



terms of the contract.

19. It is a well settled principle of contractual interpretation that if a contractual provision is unambiguous, the same has to be given effect to. Only if there is any ambiguity, will it be permissible to resort to internal aids to resolve the ambiguity. Only if internal aids prove insufficient, recourse to external aids is permissible. In ***Pandit Chunchun Jha v. Sheikh Ebadat Ali*** (supra), it has been held as under:

*“6. The first is that the intention of the parties is the determining factor : see **Balkishen Das v. Legge**. But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.”*

20. In ***Provash Chandra Dalui v. Biswanath Banerjee***,¹⁹ it has been held as under:

“10. ...In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.”

21. In ***State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd.*** (supra), it has been held as under:

“22. A document, as is well known, must primarily be construed on the basis of the terms and conditions contained therein. It is also trite that while construing a document the court shall not supply any words which the

¹⁹ 1989 Supp (1) SCC 487



author thereof did not use.”

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32. *It is one thing to say that the nature of a transaction would be judged by the terms and conditions together with the surrounding and/or attending circumstances in a case where the document suffers from some ambiguities but it is another thing to say that the court will take recourse to such a course, although no such ambiguity exists.*

22. In ***Mathai Samuel v. Eapen Eapen*** (supra), it has been held as under:

“19. The primary rule of construction of a document is the intention of the executants, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. We need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. If the language used in the document is unambiguous and the meaning is clear, evidently, that is what is meant by the executants of the document. Contemporary events and circumstances surrounding the execution of the document are not relevant in such situations.”

23. In ***Godhra Electricity Co. Ltd. v. State of Gujarat*** (supra), it has been held as under:

“16... If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. The parties themselves might not have been clear as to the meaning of the word or phrase when they entered into the contract. Unanticipated situation might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement by them which would illuminate the darkness arising out of the ambiguity of the language should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible.

*“The question involved is this: Is the fact that the parties to a document, and particularly to a contract, have interpreted its terms in a particular way and have been in the habit of acting on the document in accordance with that interpretation, any admissible guide to the construction of the document? In the case of an unambiguous document, the answer is ‘No.’ (See *Odgers' Construction of Deeds and Statutes*, 5th Edn. by G. Dworkin, pp. 118-19).”*



But, as we said, in the case of an ambiguous one, the answer must be “yes””

24. Perusal of the award demonstrates that the learned arbitrator did not, in fact, identify any ambiguity within clause 3.4.1.5 of the GCC. In the present case, an unambiguous contractual provision is rendered ambiguous by reading into it some conditions/limitations which simply do not exist in the provision itself. In paragraph 26 of the impugned award, the interpretive process for clause 3.4.1.5 of the GCC is commenced, not with an examination of the provision itself, but rather by viewing it through the lens of language used in the background correspondence, namely letter dated 27.08.2008. In this way something is sought to be read into/introduced in the clause, which is not borne out from the language of the clause itself.

25. Clause 3.4.1.5 of the GCC is reproduced hereunder:

“3.4.1.5 The Contractor shall furnish documentary evidence in support of payment of Customs Duty, Excise Duty, Service Tax and VAT/sales tax on works/Work Contract tax (Central or state) as identified in the contract price Schedule for the purpose of claiming such amounts from the Company. The company shall reimburse the custom duty, excise duty, service-tax and VAT/sales tax on works/Work Contract tax (Central or state) paid by the contractor directly to the tax authorities at actual in Indian rupees against documentary evidence subject to the maximum of the amount of duty/tax indicated in the Contract Price schedule. However, only for line pipes, company shall reimburse the Excise Duty paid by the manufacture to the Tax Authorities and Invoiced to the Contractor, at actual, in Indian Rupees against documentary evidence subject to the maximum of the amount of Excise Duty Indicated in the Contract Price schedule.”

26. It is simply impermissible to read into/infer an ambiguity in a contractual provision based on background correspondence, and then seeking to resort to an interpretative exercise to resolve that ambiguity, even



though the contractual provision itself is quite unambiguous.

27. Clause 3.4.1.5 of the GCC clearly provides that for line pipes, the respondent shall reimburse the '*excise duty*' paid by the manufacturer to the tax authorities and invoiced to the contractor. The learned arbitrator relying upon letter dated 27.08.2008 and prior correspondences exchanged between the parties has, in effect, replaced the words '*excise duty*' with '*CVD in lieu of excise duty*'. By importing said words to the clause 3.4.1.5 of the GCC, the impugned award has rewritten the said contractual provision. The same is impermissible and results in patent illegality.

28. Furthermore, by giving primacy to the letter dated 27.08.2008, a document forming part of Annexure B, the arbitrator disregarded the hierarchical precedence of documents established by the contract itself, which is as under:

"b) the follow documents annexed herewith shall be taken as mutually explanatory of one another and shall be deemed to form and be read and construed as integral parts of this Contract and in case of any discrepancy, conflict, dispute they shall be referred to in the order of priority as cited below:

- 1. Agreement*
- 2. Annexure 'A' General Conditions of Contract.*
- 3. Annexure 'B' Bidding Documents comprising of Part-IV (Vol-II, Vol -IIIA & Vol -IIIB) including Addenda / other documents issued by Company, subsequent correspondences exchanged between the Company and the Contractor which have been agreed to by the Company and the Contractor and Sections cited in the order of priority:*
 - i) Scope of the Works & Design Criteria*
 - ii) Specifications/ data Sheets*
 - iii) P & IDs and other drawings/ Documents**In the event of conflict within Scope of the Works & Design Criteria, the order of precedence is Scope of Work, then Design Criteria.*
- 4. Annexure 'C' Contract price schedule and Rental Rate Schedule.*
- 5. Annexure 'D' Construction schedule/Project Key Dates.*
- 6. Annexure 'E' Milestone payment formula*
- 7. Annexure 'F' Integrity Pact."*



29. Annexure A, containing the General Conditions of Contract (GCC), explicitly supersedes and prevails over Annexure B, in case of any discrepancy, conflict, dispute between the two. Consequently, clause 3.4.1.5 of the GCC, a provision within the Annexure A, should have taken precedence over any potentially conflicting language contained within the letter dated 27.08.2008, a document within Annexure B. The priority accorded in the Contract itself, as reproduced aforesaid, has not even been noticed in the impugned award.

30. Moreover, reliance on pre-contractual communications by the learned arbitrator to interpret clause 3.4.1.5 results in contravention of clause 1.2.5 of the GCC²⁰, which states:

“1.2.5 Entire Agreement

The Contract constitutes the entire agreement between the Company and the Contractor with respect to the subject matter of the Contract and supersedes all communication, negotiations and agreement (whether written or oral) of the parties with respect thereto made prior to the date of this Agreement.”

31. This provision of the GCC, explicitly declaring the contract as an entire agreement, has not even been noticed in the impugned award. By prioritizing pre-contractual communications, the arbitrator disregards the fundamental principle that all prior discussions and agreements would stand superseded, as expressly agreed to by the parties in clause 1.2.5 of the GCC.

32. The judgments²¹ cited by the respondent are of no avail and do not detract from the above position. While there is no quarrel with the proposition that an interpretation considering both the express terms of the contract and the surrounding circumstances can sometimes be necessitated,

²¹ Supra notes 7, 8, 9, 10, 11



the same does not apply when no ambiguity exists in the first place. Resorting to external factors/correspondence in the absence of ambiguity would be unwarranted and undermine the sanctity of contract. Additionally, as already stated above, in the present case, clause 1.2.5 of the GCC specifically states that the contract supersedes all communication, negotiations and agreement made prior to the date of the contract. Therefore, the unambiguous contractual provision/s would prevail over any contrary understanding as may be discernible during the contract formation stage. Further as noticed hereinabove, as per stipulation (b) of the contract, clause 3.4.1.5 of the GCC and the direct implication flowing therefrom, has precedence over the letter dated 27.08.2008. As such the judgments cited by the respondent are clearly distinguishable.

33. In the circumstances, the impugned arbitral awards are set aside. Accordingly, the present petitions stand allowed. All pending applications also stand disposed of.

SACHIN DATTA, J

DECEMBER 20, 2023

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