



2024:DHC:1152



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

% **Judgment reserved on : 13 December 2023**
Judgment pronounced on : 15 February 2024

+ **FAO 91/2021 and CM APPL. 8263/2021, CM APPL. 8265/2021, CM APPL. 33574/2022**

SONY INDIA PRIVATE LIMITED Appellant
Through: Mr. Nikhil Nayyar, Sr.
Advocate with Ms. Pritha
Srikumar, Mr. Divyanshu Rai
& Mr. Shubhansh Thakur,
Advocates.

versus

IRIS WORLDWIDE INTEGRATED PRIVATE LIMITED Respondent
Through: Ms. Malvika Trivedi, Sr.
Advocate with Mr. Pawan K.
Bansal, Ms. Sujal Gupta & Mr.
Ahsan Ul haq, Advocates.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. This judgment shall decide the present appeal filed under Section 37(1) (c) of the Arbitration and Conciliation Act, 1996¹ assailing the impugned judgment-cum-award dated 29.10.2020 passed by the learned Additional District Judge-07, South-East District, Saket

¹ A&C Act



2024:DHC:1152



Court, New Delhi² in the case bearing Arbt. No. 21138/2016, whereby the objections of the appellant company under Section 34 of the **A&C Act** were dismissed and the award passed by the learned Sole Arbitral Tribunal³ dated 13.05.2016 in Case Ref. No. DAC/588/08-14 was upheld.

FACTUAL BACKGROUND:

2. Briefly stated, both the parties are Companies incorporated in India, and while the appellant company is incorporated in the business of mobile and electronic devices, the respondent/claimant company has been engaged in the business of providing services in the nature of advertising, strategic planning, retail, trade, activations and events etc. Evidently, the parties entered into an agreement dated 12.12.2011 Ex.CW-1/2⁴ for providing certain services to be rendered by the respondent/ claimant for the period 01.10.2011 to 31.12.2012, which set out detailed terms and conditions for working of the contract *inter alia* providing for updation of the work as also the assignment of work outside the scope of the agreement, for which the appellant company was made liable to pay remuneration as per the agreed terms.

3. Admittedly, the First purchase order dated 17.07.2012 bearing No. 71192641 (hereinafter referred to as the 'Big PO') came to be placed for a total value of Rs. 22,51,69,945/- by the appellant, that stipulated that the fee of the respondent/claimant or the '**Iris fee**', would be 8% of the cost of the work sourced under the purchase order. It is pertinent to mention here that along with the 'Big PO', a

² ADJ

³ Hon'ble Ms. Justice Manju Goel (Retired)



2024:DHC:1152



calculation excel sheet was given to the respondent/claimant, for which invoice No. 165 (Ex.CW-1/4) for an amount of Rs. 51,11,479/- was raised, which is the disputed invoice and hereinafter referred to as such, which, as per the respondent/claimant remained unpaid despite completing the entire work/services assigned.

4. It is also brought on the record that there was a change in the management of the appellant company, which necessitated a review of the entire branding and retail strategy and as a result of which, the scope of work/ services assigned to the respondent/claimant was also subject to a review. Admittedly, a meeting took place between the representatives of the two companies on 21.01.2013 and the value of the 'Big PO' was proposed to be reduced to Rs.15,51,49,505/-, which was conveyed to the respondent/claimant vide an email and later on, meetings took place as between the representatives of the two companies on 01.02.2013, wherein the entire scope of the work was discussed consequent to which, the respondent/ claimant sent an email dated 08.02.2013 and another email dated 12.02.2013. Apparently, after discussions after back and forth talks and after rechecking the quantity etc. from the vendor party, the value of the 'Big PO' was revised to Rs. 15,64,19,447/-.

5. It is pertinent to mention here that 80% of the work/services had already been completed by the respondent/ claimant when the 'Big PO' was revised and it is an admitted fact that the work/services were completed by the end of April, 2013. Admittedly, a meeting took place on 19.04.2013 pursuant to which an email was forwarded by the

⁴ All exhibits during the course of arbitration proceedings



2024:DHC:1152



respondent/claimant to the appellant company along with attached details of the invoices, wherein an amount to the tune of Rs. 3,19,49,030/- was shown to be outstanding *vide* disputed invoice No. 165 dated 17.01.2013.

6. To cut a long story short, thereafter several reminders were given by the respondent/claimant, apparently, through telephonic calls as well as emails for payment towards the aforesaid pending bill and although some clarifications were sought by the appellant company, which were provided too, a reply was received from the appellant company on 19.06.2013 to the effect that they have reconciled the invoice as per the records. However, the respondent/claimant immediately replied that the TDS deducted for the claimant's payment was in excess and also reiterated that there was an outstanding payment towards the invoice No. 165. The appellant company on 20.06.2013 sent a letter to the respondent/ claimant in reference to the aforesaid disputed bill dated 17.07.2012 appending therewith one calculation excel sheet and conveying that an amount of Rs. 2,67,28,969/- was payable to them and they also declined to make any payment in respect of invoice No. 165. The respondent/claimant sent a letter dated 10.07.2013 seeking payment towards the said invoice, but it was in vain; hence, legal notice dated 21.10.2013 (Ex. CW1/15) was served demanding the outstanding dues towards the bill dated 17.01.2013 with interest @ 15% per annum apart from other legal expenses and also invoked the arbitration clause *vide* their notice dated 24.12.2013.



2024:DHC:1152



THE IMPUGNED AWARD:

7. Suffice to state that on the respondent/ claimant moving an application under Section 11(6) of the A&C Act, the Sole Arbitrator was appointed *vide* order dated 10.09.2014 of this Court. On commencement of the arbitration proceedings, the claimant filed a statement of claim seeking an amount of Rs. 51,11,479/- along with interest @ 24% per annum from 17.01.2013 till the date of payment besides damages to the tune of Rs. One lac. Although the appellant company conceded the sequence of events as regards entering into a contract dated 12.12.2011, the 'Big PO' dated 17.07.2012 besides the revised PO on 29.01.2013 and acknowledging all the email correspondence and letters mentioned in the statement of claim, however, they hotly contested the claims of the respondent/claimant stating that pursuant to the meeting between the parties on 21.01.2013, the scope of work in reference to the purchase order was amended and the value of the PO was revised to Rs. 15.50 crores with the understanding that the agency commission of the respondent/claimant was to be paid in proportion to the work executed by the claimant in accordance with the amended purchase order. It was refuted that the respondent/claimant was entitled to 8% of the total value of the original purchase order. The appellant company disputed any liability to make the payment in respect of the invoice No. 165 for an amount of Rs. 51,11,579/- since they claimed that it was revised in place of the original PO of Rs. 22.51 crores; and that on reduction in the value of the PO, the total agency fee payable stood reduced in total to only 8% of the value of the bills. It is pertinent to mention here that



2024:DHC:1152



although the appellant company acknowledged that the amount claimed in the disputed invoice No. 165 was included in the detailed calculations in the excel sheet, but denied the fact that there was any admission on their part to pay such an agency fee. Further, although the TDS was deducted in respect of the amount claimed in the invoice No. 165 and the same was deposited with the authorities as required by law, it was vehemently denied that the same amounted to any admission of claim of the respondent/claimant on their part.

8. From the pleadings of the parties, the learned Arbitral Tribunal framed the following issues:

- “1.Is the claimant entitled to the amount under invoice no 165, Annexure C4 by way of fee for services rendered to the respondent?
2. Is the claim signed, verified and filed by a duly authorized person?
3. Is the claimant entitled to interest? If so, at what rate?
4. Relief”

9. Suffice to state that the learned Arbitral Tribunal decided the issue No.1 in favour of the respondent/claimant holding that the contract between the parties as per the revised PO dated 29.01.2013 included the liability of the appellant company to pay the amount claimed in the invoice No. 165 (Ex.CW-1/4). Needless to state that issue No.2 was also decided in favour of the respondent/claimant and in so far as issue Nos. 3 and 4 are concerned, learned Arbitral Tribunal, keeping in view the rate of interest for commercial lending in the market, allowed interest @ 11% on Rs. 51,11,579/- w.e.f. 17.01.2013 till the date of payment besides providing that the costs of arbitration proceedings shall be borne by the two parties in equal



shares except that the respondent/claimant would be entitled to recover from the respondent the costs that would be payable to the Delhi International Arbitration Centre.

THE IMPUGNED ORDER DISMISSING OBJECTIONS:

10. The impugned award dated 13.05.2016 was assailed by the appellant company by filing an application/objections under Section 34 of the A&C Act and suffice to state that the learned ADJ/First Appellate Court *vide* impugned order dated 29.10.2020, after discussing the relevant provisions of law and the case laws referred to by the parties, dismissed the objections, rejecting the plea of the learned counsel for the appellant company that the impugned award accepted a case not set up in the pleadings and/or that it went beyond the terms and conditions between the parties. It would be expedient to refer to the observations made by the learned ADJ, which read as under:-

64. Perusal of the documents annexed alongwith claim petition would clearly show that case of the respondent all through was that fees of the respondent was not dependent on the work executed rather it was a constant fees irrespective of any change in the purchase order. The reading of the claim petition as a whole would clearly show that all the correspondences between the parties (e-mail dated 29.01.2013, 08.02.2013, 12.02.2013) were made the part of the pleadings and, therefore, claim petition cannot be read in isolation. In the e-mail of petitioner dated 29.01.2013, petitioner itself mentioned that Iris fees need discussion, meaning thereby there was no consensus on fees being agreed @ 8% of work executed. This shows that respondent was demanding more. It cannot be said by any stretch of imagination that a different case was pleaded and during the course of the arguments, a case which was not set in pleadings was argued before Ld Arbitrator. These contentions of the Ld counsel for the petitioner are not at all tenable.



65. The said contention has been raised by petitioner on one more ground that Ld Arbitrator had erroneously observed that respondent had incurred loss as a result of reduction in PO value which was never a case pleaded. In this regard it is stated that though Ld Tribunal had observed the same but the petitioner had never stated or demanded anything over and above the agency fees agreed to be paid at the first instance by the petitioner to the respondent. This observation cannot be read in isolation. It is in continuation of the findings of Ld Arbitrator which were based on thorough analysis of the case set up by both the parties, accompanying documents and evidence thereto. This argument does not hold any merit.

66. Objection no. 2 to 4 are taken up together being inter-related.

(2) Where the award is contrary to, or ignores terms of the contract.

(3) Where material evidence is ignored or findings are based on no evidence

(4) Where the award fails to draw inferences on proven facts or draws inferences that are untenable on the fact of it.

67. The contention of the petitioner is that original contract provided Iris fee would be 8%. During the course of arguments, Ld counsel for petitioner has pointed out that in the purchase order 17.07.2012 itself, it was recorded that "The total quantity is an approximation and would decrease or increase depending". Ld counsel for petitioner had argued that this clause included the understanding between the parties regarding the variation in the Iris fees. It was argued that Ld Tribunal did not consider this clause at all. Simultaneously, clause 1.8 of the general terms and conditions of the contract was also relied upon and it was stated that absence of a reply to e-mail dated 12.02.2013 could not have been construed to be an agreement regarding the Iris fees changing from 8% to a fixed price. In order to understand this, the sequence of the events have to be brought on record. **At the first instance, purchase order dated 17.07.2012 for an amount of approximately Rs. 22.5 Crores was executed between the parties wherein the some costs were fixed whereas some costs were on percentage basis. As far as clause of variation of total quantity is concerned, to my mind that does not appear to be with regard to fee of the respondent. Quantity can be related to some material and not a service charge. The clear reading of the purchase order would show that this was with respect to material which**



was mentioned in the upper portion of the chart prepared alongwith purchase order dated 17.07.2012 whereas in the lower portion, Iris fees was stated to be 8%. Therefore, interpretation that as per the purchase order itself, Iris fees was also subject to change is unilateral interpretation and does not derive any strength from the purchase order dated 17.07.2012.

68. It is an admitted fact that in December 2012, there was a change in the management of the petitioner and, therefore, talks with respect to reduction of the contract value were initiated. On record, there is a reference of the meeting held on 21.01.2013 in the office of the petitioner, in the e-mail dated 29.01.2013. **The e-mail of 29.01.2013 sent by petitioner to respondent is very important and has to be carefully understood. Apart from the contents of the covering letter, an excel sheet containing the simulation was also attached with it. By this e-mail, the petitioner intimated in writing about the reduction of the purchase order to be for an amount of Rs. 155 Millions, however, while calculating the figures, the Iris fees was put in the simulation and after adding the same, this amount of revised PO was arrived at.** Ld counsel for petitioner had explained that in the excel sheet no "Ok" was mentioned above the Iris fees which was there above the column wherein the parties were in agreement. Ld counsel for the petitioner has supported this argument by the fact that in the body of the e-mail dated 29.01.2013, it has been mentioned that "Iris fees needs discussion". In order to have a clear picture of the said e-mail, the content of the said e-mail dated 29.01.2013 is reproduced herein for future reference:-

"Dear Haider

As discussed in our office dated 21 Jan 2013 we've now made revised simulation of our scope of work or total PO. Attached is the copy of that simulation with cost mapped to each aspect/action covered (Incl 32K Orrisa). We're confirming total PO amt now revised at Rs. 155Mil. Details of the same attached for your ready reference. Pls confirm.

Also we'd like to mention that only the amt and scope of work has been revised, rest terms & conditions for warranty after installation support will remain unchanged. Following issues are still need to be discussed and close:

Sl. No.	Heads	Action
---------	-------	--------



2024:DHC:1152



1.	Supervision	Need Proofs
2.	Regional Managers	Need Proofs
3.	State Managers	Need Proofs
4.	Regional Managers Reporting & Communication	Need Proofs
5.	Iris Team Travel	Need Proofs
6.	Iris Fee	Need discussion

Initially we'll be clearing bills as per last details shared with you Earlier.

Total Complete bills we'd received so far is of Rs. 37,168,619/-

<u>Partner Name</u>	<u>Sum of Vendor Amount</u>	<u>Sum of Total Amt Payable</u>
Meroform	5,549,069	5,987,871
P&I	13,499,851	14,395,593
Retailware	15,648,524	16,785,155
Grand Total	34,697,444	37,168,619

Regards
Atul"

69. At this juncture, it was clear that no agreement was arrived at regarding the Iris fees and it was left open to be discussed between the parties. After this e-mail of 29.01.2013, there is an e-mail dated 08.02.2013 written by respondent/Iris to the petitioner which talks about the meeting held between the parties on 01.02.2013. In this e-mail, it is mentioned that mutually discussed and agreed scope of work in the PO subsequently issued was discussed comprehensively and thereafter it was emphasized that how the respondent was entitled to be original agency fee of Rs. 136 Lacs as per original PO and not to an amount of 8% of the work executed as per the reduced value of purchase order. This clearly shows that vide e-mail dated 08.02.2013 also, no consensus was arrived at between the parties regarding the Iris fees but this e-mail made it clear that respondent was claiming Iris fees to be paid at a fixed amount of Rs. 136 Lacs whereas the petitioner was not agreeable to the same and that is why the need to write this e-mail arose. Pursuant to this e-mail



dated 08.02.2013, another email dated 12.02.2013 was sent by the respondent to the petitioner wherein respondent affirmed that total PO should be revised to Rs. 156.5 million and the body of the e-mail 12.02.2013 read as follows:-

“ Dear Atul

This refers to our discussion and subsequent to recheck of quantities from Vendor Partner the Total PO value now stand revised to Rs. 156 Mil, this resolves and closes all issues in this PO.

The updated sheet is attached.

Best regards,

Haider Rizvi.”

70. Alongwith this e-mail the updated sheet/simulation was attached wherein the fees mentioned was Rs. 136 Lacs. These documents clearly shows that respondent had been pleading only this case of claiming the fixed fee since the very beginning. It is pertinent to mention here that no response to this e-mail was ever given by the petitioner herein. Ld counsel for the petitioner during the course of arguments has stated that petitioner witness namely Mr Atul Sharma who has examined as RW-1 before Ld Tribunal had categorically stated about the meeting held between the parties on 05.03.2013 wherein the respondent was allegedly informed that the petitioner would be making payment only at the rate of 8% of the value of the invoices raised for the work actually executed and not abandoned by the parties. While addressing the arguments, Ld counsel for the petitioner had laid great emphasis on the fact that no cross-examination was done on this statement of RW-1 which was mentioned in his affidavit and same amounts to an admission by opposite party and, therefore, it cannot be said that e-mail dated 12.02.2013 was never replied to. It is on this basis, it was argued that material evidence was ignored. As far as this is concerned, it is pertinent to mention here that statement of defence was filed by the petitioner to the claim petition before Ld Arbitral Tribunal, however, in the entire written statement, there is not even a slightest whisper of any such meeting of 05.03.2013 held between the parties. It is only in the affidavit of evidence of RW-1 that this fact was mentioned. It is pertinent to mention here that stating of these lines with respect to meeting held on 05.03.2013 is a material improvement in the defence by the petitioner. It is very apparent from the record that case is based upon correspondences between the parties. None of the e-mail filed by either of the parties show any reference to alleged meeting held on 05.03.2013. Not even a single document



referred to this alleged meeting held on 05.03.2013. Though, in normal parlance, explaining any fact in the evidence would not have matter much but here in this case the parties have proved the case by relying on each and every correspondence between them. Therefore, most significant e-mail dated 05.03.2013 could not have been ignored by the petitioner herein while preparing their statement of defence. Though, the rules of the pleadings and substantive law of CPC is not applicable to arbitration proceedings, however, the basic fundamentals cannot be ignored. This was a very important fact and the opposite party had every right to rebut the same in the rejoinder. Since, this fact was not incorporated in the statement of defence, it could not have been read in evidence. Therefore, absence of cross examination of RW-1 on this point by respondent was not at all fatal to respondent.

71. Now as per record, after e-mail of 12.02.2013 the respondent had written e-mail to the petitioner on 15.04.2013 regarding releasing of payment of all the pending invoices, thereafter some e-mails which have been sent by the official of the petitioner within their department have also been filed on record to show that these invoices were checked. Thereafter, e-mail dated 22.04.2013 was sent by respondent to the petitioner which has been filed on record, the contents of which are reproduced herein as under:-

“Dear Atul,

Kindly refer to our meeting on Friday 19 April 2013 in your office regarding the payment of the invoices raised by us on the Sony mobile Retail Branding Project. As discussed, we have marked in the list some of the invoices as required by you, Kindly process the payment of the invoices as per the attached list and pay us the balance payment of Rs. 3.19 Crores ASAP. As discussed, it will be highly appreciated if you can indicate the date of payment.

Kind regards

Haider Rizvi.”

72. This e-mail talks about the mail sent on 19.04.2013 by the respondent to the petitioner regarding the payment of invoices. It is stated therein that some invoices have been marked to process the payment. The list of invoices have been given alongwith e-mail wherein some of invoices have been marked which shows that marked invoices included the invoice in dispute bearing number 165 dated 17.01.2013. Even on receiving of this e-mail alongwith these marked invoices, the petitioner never reverted back stating that this invoice of 17.01.2013 is not at all payable. This was the second occasion



after e-mail of 12.02.2013 wherein the respondent had clearly stated that respondent was demanding this payment towards the invoice no. 165, which was the difference of the original agency fees minus the agency fee on account of work executed. On 19.06.2013 the petitioner sent an e-mail to the respondent stating that they have reconciled the invoices and in reply to the same respondent had requested the petitioner to resolve this issue of bill no 165 which has been put on hold and immediately on 20.06.2013, a letter was received by the respondent wherein petitioner has stated that this invoice of 165 of 17.01.2013 is not payable. It was mentioned in this letter that this fact had been communicated to Iris/respondent on numerous occasions in the past. This letter was replied to by the respondent on 10.07.2013 wherein it categorically stated that no such communication was ever made in the past that this invoice was not payable. Despite replying to the letter of petitioner dated 20.06.2013, petitioner chose to keep mum and did not clarify by sending a rejoinder to the reply citing those meetings or the dates/e-mails by which this fact was communicated to the respondent. **From the record, it is loud and clear that petitioner never informed the respondent that this invoice no. 165 was not payable. It was done for the first time on 20.06.2013.**

73. There is yet another reason for inferring that there was no such communication of denying this proposal of fixed fee by respondent. In the e-mail dated 29.01.2013, the revised value of PO was stated to be Rs. 155 million. In the e-mail dated 12.02.2013, respondent stated it to be 156 million after discussion but in the letter dated 20.06.2013, when the invoice no. 165 was stated to be not due and payable, the value of purchase order was stated to be Rs. 14,90,55,832/-. Meaning thereby the simulation of e-mail dated 29.01.2013 included the fixed fee of Iris, which is attempted to be explained by RW-1 by giving a theory of 'ok' and no 'ok' on the columns. **But, there is no explanation to the e-mail dated 12.02.2013 where the revised PO was stated to be of 156 million.** There is not even a single revert to this email disputing this figure of purchase order by saying that the revised PO stood at Rs. 14,90,55,832/- as they do not accept the fee of Iris to be a fixed one and they shall pay it @ 8% of work actually executed. This shows that they had impliedly accepted the contents of the email of 12.02.2013.

74. It is an admitted fact on record that petitioner deducted the tax on the entire invoices. Though it is a settled principal of law that deduction of TDS does not amount to an admission of liability, however, from the point of view of an



ordinary prudent man, the respondent would have a legitimate expectation that when the tax has been deducted on this invoice, sooner or later the payment towards the same shall be made to it. **The deduction of TDS can be considered as an attending circumstance, if not an admission, in order to see the conduct of the petitioner, while appreciating the material on record.** The correspondences clearly shows that respondent was made to wait and was never explicitly denied that this invoice no. 165 was not payable. It was only with the reconciliation of 19.06.2013, it was found that invoice no. 165 was stated to be invalid and eventually in the letter 20.06.2013 (on the very next day), it was communicated by the petitioner for the first time that this invoice was not payable. These sequence of events/correspondences make it amply clear that the decision taken by petitioner not to pay the unpaid invoice no. 165 to respondent was arbitrary and capricious and had no basis.

75. In these circumstances, the averments of the petitioner that award has ignored terms of contract or material evidence has been ignored are not at all tenable. The Ld Arbitrator had taken note of each and every fact, pleadings, documents, judgments relied upon by the parties and have extensively recorded the evidence. The findings of Ld. Arbitrator are based on the documents filed by both the parties. There is not even a single plea raised by petitioner which can be stated to be tenable and, therefore, there is no question of re-appreciation of evidence at all. There is no contrary finding on record either beyond the terms of the contract or ignoring the evidence which even otherwise was not permissible to be looked into. The basic premises on which objection petition has been filed are not at all convincing. There is no illegality in the award, what to say about the patent illegality. No grounds has been made out which warrants interference in the award passed by the Ld Arbitrator. Hence, objection petition is dismissed.

11. It should also be clarified that there was a curative application filed before the learned ADJ and the case number was corrected to be read as 21138/2016 instead of 211318/2016 *vide* order dated 09.12.2020. The impugned judgment-cum-order dated 29.10.2020 and



2024:DHC:1152



09.12.2020 have been assailed by way of a second appeal under Section 37 of the A&C Act by the appellant before this Court.

LEGAL SUBMISSIONS ADVANCED AT THE BAR:

12. At the outset, learned counsel for the appellant confined his objections to the rigors of Section 34(1) (b) (2) of the A&C Act and it was urged that the **Iris fee @ 8%** was not fixed and it was stipulated to be reduced based on the reviewed work/services to be performed by the respondent/claimant but the agency fee was based on the total value of the contract. It was urged that the work already undertaken be mentioned in the statement of claims by the respondent/claimant and only after a reply was filed before the learned Arbitral Tribunal that in the rejoinder, the stand was changed by the respondent/claimant to 8% of the total value of the 'Big PO'. Learned counsel took the Court through the relevant paragraphs in the impugned award and it was urged that the fee claimed by the respondent/claimant went beyond the terms of the contract entered into by the parties. It was emphasized that the **Iris fee** was not a frozen figure, but it was stipulated to fluctuate depending upon the quantum of work to be performed and in every invoice, it was submitted by the respondent/claimant that 8% of the work performed had been claimed and all amount towards the bill had been paid except for the disputed invoice No. 165 (Ex.CW-1/4), which was not tenable. It was pointed out that in none of the emails that were sent by the appellant company, there was any admission to pay the amount under the disputed bill.



2024:DHC:1152



13. It was urged that the impugned award as well as the impugned order passed by the learned ADJ are passed based on interpretation of the 'Big PO', which were neither routed in the expressed terms nor the respondents pleaded the case, and thereby, amounted to the creation of a new contract. It was further urged that the impugned award/orders were patently illegal, passed in erroneous appreciation of evidence placed on the record. Reliance has been placed on the decisions in **Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authorities of India (NHAI)**⁵, **PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors.**⁶, **State of Chattisgarh & ANr. v. Sal Udyog Private Limited**⁷, **Indian Oil Corporation Limited Through its Senior Manager v. Shree Ganesh Petroleum Rajgurunagar through its Proprietor Laxman Dagdu Thite**⁸, **Calcom Cement India Ltd. v. Binod Kumar Bawri & Ors.**⁹, **Food Corporation of India v. Adani Agri Logistics Ltd.**¹⁰, **Union of India, Ministry of Railways, Railway Board & Anr. v. Jindal Rail Infrastructure Limited**¹¹, **Satheesh Venugopalan & Anr. v. Rishaj & Anr.**¹², **Hindustan Lever Ltd. v. Shiv Khullar & Anr.**¹³

⁵ (2019) 15 SCC 131

⁶ 2021 SCC OnLine SC 508

⁷ (2022) 2 SCC 275

⁸ (2022) 4 SCC 463

⁹ 2022 SCC OnLine Del 3453

¹⁰ 2022 SCC OnLine Del 1880

¹¹ 2022 SCC OnLine Del 1540

¹² 2022 SCC OnLine Ker 1961

¹³ 2008 SCC OnLine Del 424



14. *Per contra*, learned counsel for the respondent/claimant urged that the appellant company is again disputing the merits of the case, which are beyond the remit of jurisdiction of this Court under Section 37 of the A&C Act; and that the learned Arbitral Tribunal meticulously considered all the documents/submissions and evidence brought on the record by the parties and has passed a reasoned award. It was urged that there is nothing to suggest that the impugned award is rendering a decision on certain issues *de hor* the contract executed by the parties. It was canvassed that in terms of Clause 5 and 5(1) of “General Conditions of the Agreement” between the parties, the agreement was always for a fixed agency fee irrespective of reduction of the PO inasmuch as the entire work to the extent of 80% of the ‘Big PO’ had already been performed by the respondent/claimant. In his submissions, learned counsel for the respondent/claimant relied on the decisions in **MMTC Limited v. Vedenta Limited**¹⁴, **State of Jharkhand v. HSS Integrated SDN**¹⁵, **Mahanagar Telephone Nigam Limited v. Fujitshu India Private Limited**¹⁶, **Jhan Cooperative Group Housing Society Ltd. v. PT. Munshi Ram & Associates Pvt. Ltd.**¹⁷, **Mahanagar Telephone Nigam Limited v. Finolex Cables Limited**¹⁸, **L.G. Electronics India (P) Ltd v. Dinesh Kalra**¹⁹, **Prestress Wire Industries v. Uppal Builders Pvt. Ltd.**²⁰,

¹⁴ (2019) 4 SCC 163

¹⁵ (2019) 9 SCC 798

¹⁶ 2015 SCC OnLine Del 7437

¹⁷ ILR (2013) II Delhi 1632

¹⁸ 2017 SCC OnLine Del 10497

¹⁹ 2018 SCC OnLine Del 8367

²⁰ 2019 SCC OnLine Del 11104



2024:DHC:1152



NHAI v. M/s. BSC-RBM-PATI Joint Venture²¹, ADTV Communication Pvt. Ltd. v. Vibha Goel²², Union of India v. Chenab Construction Company²³, V2 Retail Limited v. SS Enterprises²⁴, Steel Authority of India v. Gupta Brothers Steel Tubes Limited²⁵

ANALYSIS & DECISION:

15. I have given my thoughtful consideration to the submissions advanced by the learned counsel for the rival parties at the Bar. I have gone through the record of the case including the record of the arbitration proceedings, which is Annexure-3²⁶ as well as the impugned order dated 29.10.2020 and 09.12.2020. I have also gone through the case **laws (cited at the Bar)**.

16. First things first, before I advert to the case law on the subject, it would be expedient to re-produce Section 34 as also the scope of appeal under Section 37 of the Act, which read as under:

“34. Application for setting aside arbitral award. –(1) Recourse to a Court against an arbitral award **may be made only** by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award **may be set aside** by the Court only if-

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice

²¹ 2017 SCC OnLine Del 6430

²² 2018 SCC OnLine Del 8843

²³ 2019 SCC OnLine Del 10515

²⁴ 2019 SCC OnLine Del 8230

²⁵ (2009) 10 SC 63

²⁶ Pleading Volume-I PDF Annexure-3 as well



of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within



the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

17. Section 37 of the Act provides as follows:

“37. Appealable orders.

(1) [Notwithstanding anything contained in any other law for the time being in force, an appeal] *[Substituted 'An appeal' by Act No. 33 of 2019, dated 9.8.2019.]* shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:

(a) [refusing to refer the parties to arbitration under section 8; *[Substituted by Act No. 3 of 2016 dated 31.12.2015.]*

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

18. The above said provisions have come to be interpreted in umpteen number of cases by the Supreme Court and various High Courts including the Delhi High Court. It is well ordained that Section 34 is neither in the nature of an appellate nor it is in nature of a revisional remedy. It only provides for setting aside the awards on very limited grounds, as spelled out I sub-sections (2) and (3) of Section 34. Secondly, as the marginal note of Section 34 indicates,



“recourse” to a court against an arbitral award may be made only by an application for *setting-aside* such award in accordance with sub-sections (2) and (3). In other words, there is a limited right to challenge an award. Thirdly, Section 34 proceedings do not entail a challenge on the merits of the award. Fourthly, it is evident from a reading of sub-section (4) that upon receipt of an application under Section 34(4), the court may adjourn the Section 34 proceedings and direct the Arbitral Tribunal to resume the arbitral proceedings or take such action as would eliminate the grounds for setting aside the arbitral award. Lastly, there is no gain saying that Section 34 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a court hearing a challenge to an award²⁷.

19. It would be relevant to refer to a few case law on the subject. In the case of **MMTC Ltd. v. Vedanta Ltd.**²⁸ the agreement between the parties envisaged that the goods manufactured by the respondent were to be stored and handled by the appellant as also to be marketed by it raising invoices in the name of the customers after taking 100% advance. It was further stipulated that the amount was then to be remitted to the respondent after deducting service charges/commission at an agreed rate. It appears that there were certain communications

²⁷ Article 34. Application for setting aside as exclusive recourse against arbitral award.—

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the Arbitral Tribunal's opinion will eliminate the grounds for setting aside.”



2024:DHC:1152



between the parties enabling the appellant to have the liberty to supply the goods to the customers against letter of credit i.e. without advance payment while maintaining that it was the total responsibility of the appellant to ensure the *bona fides* of the letter of credit furnished as also to ensure that the principal amount besides the interest was paid on the due date against the letter of credit. A dispute arose with regard to supplies made by the appellant to Hindustan Transmission Products Limited [“HTPL”] since the payment was not made and the respondent invoked the arbitration clause. The majority of the Arbitral Tribunal found in favour of the respondent and on the award being challenged, the Single Judge as well as the Division Bench of the High Court of Bombay found in favour of the respondent. On further challenge to the Supreme Court, a plea was advanced as to the arbitrability of the dispute as also the plea that the courts should have come to a different conclusion based on evaluation of evidence on the record as regards the alteration affected by the parties envisaging a distinct type of customers. Further, another plea was taken that the supplies had not been made to HTPL independent of the contract between the parties. Outrightly rejecting the aforesaid pleas, the Supreme Court elucidated the contours of the power under Section 34 and 37 of the Act as under:-

“As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot **undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by**

²⁸(2019) 4 SCC 163,



the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

20. In another case **NHAI v. M. Hakeem**²⁹, the Supreme Court delved into the issue as to: whether power of the Court under Section 34 of the A&C Act to set aside an award of an Arbitrator would include the power to modify such an award. It was a case where the Division Bench of the Madras High Court had disposed of large number of appeals under Section 37 of the Act laying down as a matter of law, that arbitral awards made under the National Highways Act, 1956 read with Section 34 of the A&C Act should be so read so as to permit the modification of an arbitral award and thereby, the Division Bench enhanced the amount of compensation awarded by the Arbitrator. Frowning upon such course of action, it was categorically held as under:-

“It can therefore be said that this question has now been settled finally by at least 3 decisions [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181]’ [*Kinnari Mullick v. Ghanshyam Das Damani*, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106]’ [*Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, **revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985** which, as has been pointed out in *Redfern and Hunter on International Arbitration*, makes it clear that, **given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the “limited remedy” under Section 34 is**

²⁹(2021) 9 SCC 1



coterminous with the “limited right”, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

{paragraph 42}

Quite obviously if one were to include **the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done.** In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended **that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996.** It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over.” { paragraph 48}

{Bold Emphasized}

21. The aforesaid view has been reiterated in in a decision titled **an Hindustan Construction Company Limited v. National Highways Authority of India³⁰**, that involved a dispute pertaining to the interpretation of a condition in a contract. The Arbitral Tribunal consisting of three members passed an award with one member dissenting. Aggrieved by the majority view, the contractor filed application/objections under Section 34 of the A&C Act. The said application was rejected by the learned Single Judge on the ground that Arbitral Tribunal’s opinion on the issue of measurement aspect reflected a *‘plausible and reasonable view that did not call for interference’*. On appeal by NHAI, the Division Bench set aside the order and observed that the award was based on an implausible interpretation of the contract. The Supreme Court held that Courts **under Section 34 are not**

³⁰2023 SCC OnLine SC 1063



granted the corrective lens and cannot “*through process.....forbidden under Section 34*” and that the DB’s view under Section 37 *resulted in substitution of the Arbitral Tribunal’s view and that such substitution was impermissible..* It was held³¹

“For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in *State of UP v. Allied Constructions*:

“[.] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see Sudarsan Trading Co. v. The Government of Kerala, (1989) 2 SCC 38 : AIR 1989 SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law”. {paragraph 27}

This enunciation has been endorsed in several cases (Ref. *McDermott International Inc. v. Burn Standard Co. Ltd.*³²). In *MSK Projects (I) (JV) Ltd v. State of Rajasthan*³³ it was held that an error in interpretation of a contract by an arbitrator is “an error

³¹ in **Reliance Infrastructure Ltd. v. State of Goa**, 2023 SCC OnLine SC 604 referring to earlier decision in **Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation**, (2022) 1 SCC 131

³²(2006) 11 SCC 181

³³(2011) 10 SCC 573



within his jurisdiction". The position was spelt out even more clearly in *Associate Builders*³⁴, where the court said that:

"[...] 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." **{paragraph 42.3. Bold emphasized}**

22. In view of the aforesaid proposition of law, reverting back to the instant matter, it would be relevant to reproduce the reasons that prevailed in the mind of the learned Arbitral Tribunal while deciding the issue No.1 in favour of the respondent/claimant, which are as under³⁵:

"14. On 8th February the claimant wrote to the respondent referring to the revised PO. This letter refers to a meeting that was held on 01.02.2013. **The scope of the work as revised has been given in detail in this email letter.** So far as the question on Iris Fee is concerned the letter **Ext CW 1/5** referring to the discussion says:

"During our discussions with Sony Mobile Iris had emphasised that based on the team costs Iris will charge an amount of Rs. 192 lakhs as service fee for the entire project. (mail attached - Global procurement Sony Mobile). **The issue was further discussed and in line with Sony's requirement Iris brought down their fee to Rs. 180 Lakhs. (mail attached - Global procurement Sony Mobile).**

Subsequent to these discussions Iris was advised that this project needs to be **completed within four months** from issuance of PO and since the time was reduced Iris would also reduce its fee since it was based on time costs.

Based on this premise and following negotiations finally Sony agreed to pay Iris fee of Rs. 136 lakhs which is reflected on the official mass retail PO issued by Sony.

For Ease of calculations and discussions this amount was being spoken of and mentioned as 8% of the value of PO'.

³⁴(2015) 3 SCC 49

³⁵ {Emphasized invited by this Court to the observation in bold in second appeal under section 37}



Vide this email we would like to submit that the Iris team in the true team spirit of partnership has from the very beginning developed, managed and delivered this entire project.

You will agree that in the past months we have seen several changes, in the designs, in the markets, retail outlets, timelines, the overall costs, the management of the project etc and Iris has steadfastly worked in tandem with your teams to deliver on Sony's every requirement including providing Sony with substantial savings. **Despite this project having stretched for over nine months now the Iris team has neither shirked responsibility nor asked for any extra remuneration. Now at this very last leg' of our deliveries with more than 80% of the entire project complete it is only appropriate that Sony pay Iris their agreed fee of Rs. 136 lakhs as per the original PO".**

15. On 12th February the claimant sent another excel sheet including the Iris Fee as claimed in invoice no 165 and calculating the new PO value at Rs. 156.5 Mil. The single one line note forwarding the excel sheet written by Mr. Haider Rizvi is as under:

"This refers to our discussion and subsequent to recheck of quantities from Vender Partner the Total PO value now stand revised to Rs. 156.5 Mil, this resolves and closes all issues in this PO. The updated sheet is attached".

16. Now the excel sheet issued by the claimant as well as the one issued by the respondent included the Iris Fee figures Rs. 45,84,451/-. The respondent did say "Need Discussion" in its communication of 29.01.2013. It appears that there were discussions on various dates as reflected in the communications mentioned above and the statement of W1. The amount claimed by the claimant in invoice no 165 was included by the respondent itself while calculating revised value of the PO and despite the discussions that preceded and followed the revision of the PO, the claimant Included this figure in its communication when it sent its own excel sheet. There is no evidence that the respondent disputed this figure after the aforesaid mail of the claimant dated 12.02.2013 was received by it.

17. The next correspondence **Ext CW 1/7(Collectively)** in this matter comes on 15.04.2013 as email from the claimant to the respondent reminding the respondent of the amounts due. The respondent replied to the email on the same day asking for confirmation regarding:

1. Invoices received against "Big PO Rs. 15.33 crores"



2. Payment status of Iris other than the "Big PO".

18. The respondent did not raise any issue regarding its liability to pay the amount claimed in the invoice no. 165 on the claimant's simulation dated 12.02.2013 or by the claimant's earlier letter of 08 the February which said that the Iris fee was agreed upon as Rs. 1,36,10,726/- .

19. On 15th April the parties exchanged notes on various small issues. No questions regarding the invoice no. 165 or the dues thereunder were raised by the respondent although the parties corresponded only regarding the dues in respect of the PO in question.

20. On 16th April the claimant wrote to the respondent an email (part of Ext CW 1/7) asking to take the payment position seriously as the respondent had already confirmed having received all the invoices. On 22nd April, the claimant again wrote an email Ext CW 1/8 to the respondents asking for the payments. A list of all the pending invoices was included in the correspondence. Some of the invoices has been highlighted. The invoice no. 165 was one of the highlighted invoices. The letter explains that some of the invoices were being marked as per the requirement of the respondent. **Despite the highlighting, the respondent did not come out with the refusal to accept the liability for the amount of the invoice no. 165.** The demand for the dues was reiterated by the claimant in its email dated 24.04.2013 Ext. CW 1/22, 17.05.2013 Ext CW 1/9, 02.05.2011 Ext CW 1/25 and 10.06.2013 Ext CW 1/10. On 10.06.2013 itself the respondent again asked for certain invoices. However there was no mention of invoice no 165 in this email letter. The respondent sent reconciliation on 19th June CW 1/11 which was found to be fine by the claimant. The reconciliation includes the invoice no 165. The claimant while confirming the reconciliation said further that the invoice no 165 shall be resolved as soon as possible and asked for the release of the payment at an early date.

21. However on 20th June the respondent wrote a formal letter Ext CW 1/12 sent through, registered post in which the respondent referred to the various dues under various heads and included one cheque towards dues but denied the liability under invoice no 165. The two paragraphs of this letter that referred to invoice no 165 are as under:

"Please note that as regard your invoice bearing no 165 dated 17th Jan, 2013 for an amount of Rs. 51,11,479/- (Rupees Fifty One Lakh Eleven Thousand Four Hundred Seventy Nine Only) which you have raised towards agency



commission charges is not payable by us as the agency commission has already been charged by you in your other bills for the executed work & the same has been duly paid by us. The same has been communicated to you on numerous occasions in the past also.

We reiterate that, the agency commission charges can be paid/is payable only on the work executed i.e. in your case the work executed by you is in accordance of the PO for an amount of Rs. 14,90,55,832/- (Rupees Fourteen Crore Ninety Lakh Fifty Five Thousand Eight Hundred Thirty Two Only) hereafter "New PO"; therefore, your claim of agency commission on the initial PO i.e. on Rs. 22,51,69,945/- (Rupees Twenty Two Crore Fifty One Lakh Sixty Nine Thousand Nine Hundred Forty Five only) is not tenable as the executed work by you is not in accordance of the original PO. It shall not be out of place to mention herein that the original PO in fact was superseded by the New PO 'when you agreed to undertake work in accordance of the New PO'.

22. The claimant replied on 10.07.2013 Ext. CW 1/13 claiming the amount under invoice no. 165 and refusing to accept this settlement of bills, as offered in the letter dated 20.06.2013. Part of the letter relevant to the issue is extracted below.

"As per several discussions with your team our invoice no 165 dated the 17th Jan 2013 for Rs. 51,11,479 is a valid invoice and it has never been communicated in the past that it is not payable. Your contention that you have informed us on numerous occasions in the past that this Invoice in not payable is therefore not correct.

.....

As per our query on TDS deduction that an amount Rs. 2,34,491.78 has been excess deducted we note that the amount paid/ credited by you as reflected in the form 26 AS from the Income Tax Website includes the value of the invoice of Rs 51,11,479 i.e. this amount has already been shown as amount paid/credited by you for the Income Tax records and statutory records. Therefore as per the Income Tax records we have to show the above invoice of Rs 51,11,479 as part of our Income for the FY 2012-13".

23. The claimant reiterated its demand vide a letter dated 10.09.2013 Ext. CW 1/14 and thereafter issued formal legal notice dated 21.10.2013 Ext. CW 1/15.

24. **Now we can analyze the above sequence of events. It is submitted by the respondent that the Iris fee was always**



decided to be a 8% and there was no confusion about it and that the claim raised in invoice no 165 is utterly false. This position is, however, not brought out at all in revised PO on 29.01.2013. There was a discussion on 21.01.2013 as stated in the communication of 29.01.2013. There were in fact discussions even before the disputed Invoice was raised as stated by CW 1. **The excel sheet giving details of dues has the amount of the invoice no 165 incorporated in calculating the total payable to Iris i.e. claimant.** On top of all the columns, there is mention of the word "Ok", except on top of the column with the name Iris. Absence of this term "Ok" on Iris doesn't indicate anything more than what is mentioned in the forwarding note namely "Need Discussion". **If both parties understood the fee payable to be 8% of the value of work done there was no need to include the amount mentioned in invoice no 165 in the excel sheet and say "Need Discussion" in the note. The simplest thing to do was to add 8% in the column of Iris fee and straightway reject the Invoice no 165 as bad.**

25. Secondly, even after discussion between the parties that followed the communication of 29th January, the respondent did not categorically say that the claim under invoice no 165 was entirely bad on the ground that the fee payable was only 3%. **The claimant in the communication of 12th February stated in so many words after including invoice no 165. "This resolves and closes issues in PO". Had the respondent's case as made out been true, the respondent would have immediately replied saying that the issue of Iris Fee was still open and could not be closed.** Nor did the respondent reply by saying that this column had to be corrected with the figure calculated at 8% of the value of the work done.

26. In the earlier communication dated 8th February mentioned earlier a resume of discussion of the parties over the scope of work, the work process and the other issues were discussed. In the 8th February letter, **the claimant sufficiently explained that after discussion the Iris fee had been agreed to be retained at Rs. 136 Lakhs. Both the letter of 8th February and the revised excel sheet of 12 February were subsequent to discussion held on 21st January to issue of the revised PO of 29th January. Till 20.06.2013 here was not a shred of paper or electronic communication denying the claim of invoice no 165 on the ground that the fee to be paid was only 8%.**

27. It appears to me that both parties understood that the fee to be paid to the claimant continued to be the amount agreed originally which justified issue of invoice no. 165. So the letter of



20.06.2013 was merely an afterthought and did not indicate the real situation.

28. The respondent not only included the amount claimed in invoice no 165 while calculating the value of revised PO or the new PO, **but also deducted the Income Tax to be deducted at source**. The respondent says that the claim in invoice 165 was included in the excel sheet accompanying the revised PO only for the purpose of simulation. The Ld. counsel for the respondent has submitted that the inclusion of the figure in the simulation cannot be read as acceptance of inability. Similarly, he says, the deduction of Income Tax at source does not amount to acceptance of liability. The Ld. counsel for the respondent Mr. Nikhil Nayyar referred to two judgements to buttress his argument. They are M/s S.P. Brothers Vs Biren Ramesh Kadakia 2009 AIHC 650 in which the Bombay High Court held that issuance of the TDS certificate did not amount to an acknowledgement of the defendant within the meaning of Section 25 of the Indian Evidence Act and ACTAL Vs India Infoline Limited 2012 SCC Bom 1507 in which the first judgement is referred to with approval. Even if these arguments are taken as correct the two facts namely the deduction of Income Tax and inclusion of the claim made in the invoice no 165 in the simulation taken together indicate that the parties understood that invoice no 165 was valid and payable.

29. If the figure in question was included only for the purpose of simulation, there was no reason why 8% could not have been Included in the simulation. The original figure of Rs. 136 mil was equal to 8% of the total value of the original PO, With the PO value revised, 8% of the revised value again could be similarly calculated. Thus it is apparent that both parties understood that, with the revision of PO value, the fee to pay the claimant did not remain 8% of the value of the work actually delivered.

30. The whole case can be considered from another angle. The claimant had already taken steps on the orders placed by the original PO which was for a much bigger amount of Rs 22,51,69,945/-. The claimant had taken steps to fulfil that order and in the process had incurred 'expenditure and liability in the anticipation that the entire work produced would be delivered and the sum agreed upon as fee namely Rs. 136 mil would be earned by way of fee at the rate of 8% from every bill) Before the conclusion of the entire exercise, the respondent decided to take delivery of the work produced only till then and revised the total value of the PO. **Admittedly the respondent did not offer to take upon itself the loss that was going to be caused to the claimant on account of respondent's decision not to take delivery of the remaining**



work directed under by the first original PO. It is very likely that the claimant would not have accepted the deduction in the value of the PO which was the first contract and forgo the profit expected by it by accepting only 8% of the revised value while shouldering all the costs that had already been incurred for satisfying the first original contract. It was only likely that the claimant would not have agreed to alteration in the contract without securing its own Interest.

31. Ms. Malvika trivedi, the Ld. counsel for the claimant made an argument that the claimant agreed to the respondent's proposal to reduce the value of the PO only on the condition that the "Iris fee" would not be altered. The Ld. counsel for the respondent opposed the argument on the ground that no such plea has been taken in the Statement of Claim, True, the claimant has not categorically pleaded such a case. But the Statement of Claim has to be read along with the documents filed by the claimant. The letter dated 08.02.2013 CW 1/5 is only indicative of such a plea. Hence this plea is a part of the claimant's case and cannot be ignored. The respondent cannot say that this plea takes the respondent by surprise. Therefore such a plea can be considered as a part of the claimant's pleadings and therefore is worth considering.

32. CW1 Mr. Haider Rizvi in his cross-examination also maintained the same case by saying, as quoted earlier, that Iris agreed to lower the value of the Big PO and take the responsibility for the liability of vendor to whom it had issued purchase order based on the Big PO from Sony provided "Iris fee" of Rs. 1,36,10,724/-, is paid as per the original PO.

33. The learned counsel for the claimant has shown from the two simulation excel sheets which has several columns with heading available stock (not executed + modification). Three entities or vendor partners had stocks amounting to Rs. 31,59,294, Rs. 2,21,01,051 and 3,17,45,919. It was between the claimant and these vendor partners to deal with these available stocks. Whatever of these available stocks could not be supplied to the respondent remained with the claimant and its vendor partners. In this situation It is most likely that the claimant could not have agreed to only 8% of the supplies made to the respondent and suffer the consequence Investments/expenditure incurred to satisfy the original PO.

34. The claimant's case that the parties agreed that despite the reduction in the total value of the PO the claimant would get the fee originally agreed upon, seems to be more likely than the case of the respondent that the fee payable to the claimant continued to be 8%. This tribunal has to accept one of the two cases made out by



the two parties and cannot create a third case. The case of the claimant being more probable has to be accepted.

35. At the time of final arguments both the counsel raised the issue as to whether the documents of 17.01.2013, 29.01.2013, 08.02.2013 and 12.02.2013 constituted any contract. The Ld. Counsel for the claimant has referred to a few judgements showing that when a counter proposal is accepted it amounts to an offer. Let us examine the issue on the basis of the respective claims of the parties and the documents on record.

36. The original PO Ext. CW 1/3 was a contract which nobody disputes. In that contract the fee was agreed to be 8% and 8% was calculated at Rs. 1,36,10,726/-. The revised PO dated 29.01.2013, according to the respondent's counsel, is merely a conditional offer and not a contract. The respondent's counsel would further say that the reply of 08.02.2013 was also not an acceptance of the offer made by the letter dated 29.01.2013. So far as the reply of 12.02.2013 is concerned, the respondent's counsel says that the same was not an unqualified acceptance since the total value of the contract calculated by the claimant was 156.5 million as against the offer of 155 million, the Ld. counsel for the claimant would argue that the respondent accepted the offer made vide letter dated 12.02.2013 and therefore the same amounted to a contract.

37. It is quite clear from the narration of facts in the foregoing paragraphs that the contract between the parties had actually taken place before the revised PO was issued when the parties met and discussed on dates including 21.01.2013. The claimant's witness has said that invoice no. 165 was raised as the discussions were already on for reducing the total value of the contract and as per the understanding between the parties that "Iris Fee" would not be altered, the invoice no. 165 was raised. The parties did not formally record the contract as is customary in the commercial world. What the contract was can only be inferred from the documents mentioned above. The foregoing paragraphs indicate the inference that can be drawn from the aforesaid documents, namely that the contract was not to reduce the total fee payable to the claimant.

38. Even if the contention of the Ld. Counsel, that the documents of 29.02.2013 were merely a conditional offer is accepted, it does not advance the case of the respondent. In the letter of 29.01.2013 there was no offer for "Iris Fee" to be paid at 8% of the bills. **If this was to constitute a conditional offer and the respondent intended to pay only 8%, the respondent should have offered 8% in the offer/conditional offer and should have waited for the acceptance by the claimant. Instead, the respondent made a conditional offer for Rs 1.36 crores while**



including in the claim in the invoice no 165 as amount payable to the claimant and asked for discussion. There was no conditional offer for 8% to be accepted. Nor was any such offer accepted. There is no document/communication till June 2013 saying that the contract was only for 8%. In fact the respondent did not itself mention 8% in any of its communication ever since the original offer was revised.

39. As per respondent's affidavit at (pg. 7) there was no agreement regarding "Iris fee" till 12th of February and further that on 05th March in a meeting the respondent offered 8%. The claimant disputes the same in the Cross-examination. But more importantly the witness himself in cross-examination stated that the PO at pg. 47 & 48 of the Statement of Claims viz. the original PO CW 1/3 clearly indicated 8%. Thus the witness contradicts himself rendering his story weak for acceptance. The respondent in none of the subsequent documents, despite repeated demands from the claimant, referred to any fresh agreement of 8% on 5th March or any date subsequent to the revision in the PO. Therefore, it is difficult to infer that the parties contracted to "Iris Fee" being 8% only, even on the revised PO.

40. The "conditional offer" stood accepted on 12.02.2013 where the claimant reiterated the claim under invoice no 165 and recalculated some of the details. The respondent having not replied to this document till all the contractual work was concluded clearly accepted this position to justify a finding that the contract between parties included invoice no 165. It can be seen that the letter 12.02.2013 accepted the offer made in the letter 29.01.2013 and the same should not be treated as a counter offer because the difference in the total was not based on difference in regard to any terms of the contract but because of the way the parties calculated their dues. One may refer to judgement of Supreme Court in the case of Fair engineers (P) Ltd. Vs N.K. Modi, (1996) 6 SCC 385 in which an offer, a counter offer with some corrected technical details and its acceptance were held to be the parts of a concluded contract.

41. Even if the letter dated 12th February was treated as a counter offer that stands accepted by the silence of the respondents as acceptance can also be implied from conduct of the parties. The claimant in this regard cited the judgement in the case of Coffee Board Vs Commissioner Income Tax (1985) 3 SCC 263.

42. In Deokar Exports (P) Ltd Vs New India Assurance Co. Ltd. (2008) 14 SCC 598 the Supreme Court had the following observation to make in respect of offers and counter offers.

"A policy of insurance is a contract based on an offer



(proposal) and an acceptance. The appellant made a proposal. The respondent accepted the proposal with a modification. Therefore, it was a counter-proposal. The appellant had three choices. The first was to refuse to accept the counter-proposal, in which event there would have been no contract. The second was to accept either expressly or impliedly, the counter-proposal of the respondent (that is, the respondent's acceptance with modification) which would result in a concluded contract in terms of the counter-proposal. The third was to make a counter-proposal to the counter-proposal of the respondent in which event there would have been no concluded contract unless the respondent agreed to such counter- counter-proposal. But the appellant definitely did not have the fourth choice of propounding a concluded contract with a modification neither proposed nor agreed to by either party".

43. The situation mentioned in that case is very similar to ours in which there are offers and counter offers but there is no offer of any kind for payment of "Iris Fee" @ 8%. The original PO stood revised and so far as the "Iris Fee" in the new PO was concerned, the same was "conditionally" given to include the invoice no. 165. Therefore, the claimant could accept only this offer. The offer was not for 8% and no suggestion of that nature were at all made in that offer or in offer made thereafter. RW1 himself says that it was only on 05th of March that the parties agreed to 8%, a contention which has been disbelieved.

44. In view of the entire analysis as above I have no option but to hold that the contract between the parties as per the PO 29.01.2013 included the respondent's liability to pay the amount claimed in invoice no 165 as claimed in Statement of Claim. Issue no 1 is decided in favour of the claimant."

23. A careful perusal of the aforesaid line of reasoning would show that the learned Arbitral Tribunal conducted a meticulous exercise of appreciation of the entire evidence brought on the record resulting in passing of the impugned award. Without further ado, there is no question of the learned Arbitral Tribunal going beyond the terms and conditions of the contract between the parties. There is no re-drafting



of the contract so as to envisage that the decision went beyond what was being claimed by the respondent/claimant.

24. The long and short of the entire story is that although the scope of work had been revised in the meeting held on 01.02.2013, the e-mail dated 08.02.2013 (Ex.CW1/5) clearly brought out that based on the 'Big PO', 80% of the work had already been performed and the 'Iris fee' had been negotiated to be Rs. 136 lakhs assessed @ 8%. Evidently, this was followed by another e-mail dated 12.02.2013 where the demand for the 'Iris fee' @ 8% was reiterated and for that matter, reiterated in subsequent discussions and accept for a lame assertion on the part of the appellant consequent to the meeting dated 29.01.2013 that the said aspect "need discussion", there was never any refusal on the part of the appellant company to disown such disposition till 20.06.2013.

25. Learned Arbitral Tribunal rightly relied on the decision in **Deokar Exports (P) Ltd Vs New India Assurance Co. Ltd. (*supra*)³⁶**, to the effect that even if there was a counter offer by the respondent claimant, the appellant firm chose to remain silent and the parties acted upon the terms and conditions of the contract and the respondent/claimant thereby performed their part of the contract to the

³⁶ "42 A policy of insurance is a contract based on an offer (proposal) and an acceptance. The appellant made a proposal. The respondent accepted the proposal with a modification. Therefore, it was a counter-proposal. The appellant had three choices. The first was to refuse to accept the counter-proposal, in which event there would have been no contract. The second was to accept either expressly or impliedly, the counter-proposal of the respondent (that is, the respondent's acceptance with modification) which would result in a concluded contract in terms of the counter-proposal. The third was to make a counter-proposal to the counter-proposal of the respondent in which event there would have been no concluded contract unless the respondent agreed to such counter- counter-proposal. But the appellant definitely did not have the fourth choice of propounding a concluded contract with a modification neither proposed nor agreed to by either party".



full satisfaction of the appellant completing the entire task by 30.04.2013.

26. The interpretation that has been accorded by the learned Arbitral Tribunal to the whole sequence of events from the day the contract in question was executed between the parties and ensuing correspondence, which are by all account admitted, leave no scope for doubt that the impugned award holding that the 'Iris fee' was payable @ 8% of the original 'Big PO' cannot be said to be patently illegal or outside the scope of the contract entered into between the parties.

27. In the face of the fact that the learned Arbitral Tribunal has assigned sufficient and cogent reasons in support of its decision, no interference is called from this Court in this second appeal. In other words, there is no scope for any interference when it is palpable that the learned Arbitral Tribunal committed no illegality or perversity in appreciating the evidence led by the parties and there is nothing to discern that the impugned award is based on wrongful application of law on any aspect of the matter. There is no necessity for this Court to delve into the plethora of case laws cited at the Bar and reflect upon the respective pleas or counter pleas advanced by learned counsels for the parties in view of the authoritative pronouncement by the Supreme Court on the subject referred to hereinabove by this Court.

28. In view of the foregoing discussion, the present appeal is bereft of any merits. The appellant company is fully responsible for this kind of protracted litigation, and thereby, wasting time and precious resources, putting unnecessary burden on the justice delivery system for which they must be visited with the exemplary cost, which is



2024:DHC:1152



quantified at Rs. 5,00,000/-, that is by all means a token amount given the claim amount involved, which shall also be payable to the respondent/claimant within one month from today, failing which they shall be entitled to recover the same with interest @ 15% p.a. till realisation.

29. The appeal, along with all the pending applications, is disposed of accordingly.

30. A copy of this judgment be sent to the learned Trial Court for information and records.

DHARMESH SHARMA, J.

FEBRUARY 15, 2024

Sadique