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IN THE HIGH COURT OF DELHI AT NEW DELHI***Decided on: 25th July, 2024***

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O.M.P. (COMM) 264/2024**KVR AQUA CLARE PVT. LTD.****.....Petitioner**

Through: Mr. V. Chitambaresh, Sr. Advocate
with Mr. Tom Joseph, Mr. Govind
Venugopal, Ms. Arya Krishnan,
Advocates.

versus

**INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LIMITED (IRCTC)****.....Respondent**

Through: None.

CORAM:**HON'BLE MR. JUSTICE PRATEEK JALAN****PRATEEK JALAN, J. (ORAL)****I.A. 32224/2024(Exemption)**

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

**O.M.P. (COMM) 264/2024, I.A. 32223/2024 (application for stay) I.A.
32225/2024 (application seeking permission to file lengthy list of dates)&
I.A. 32226/2024 (application seeking permission to file additional
documents)**

1. This petition under Section 34 of the Arbitration and Conciliation Act [“the Act”] is directed against an arbitral award dated 11.04.2024, by



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which a learned sole Arbitrator has adjudicated disputes between the parties under a Concession Agreement dated 15.09.2014 [“Concession Agreement”]. The learned Arbitrator has rejected the claims of the petitioner herein and awarded various counterclaims raised by the respondent.

2. The Concession Agreement was executed pursuant to a tender for construction and operation of plants for packaged drinking water [“PDW”] under the brand name “Rail Neer”. The petitioner was the successful bidder in a tender issued on 08.11.2013 and was granted a letter of award dated 10.07.2014, following which the parties executed the Concession Agreement on 15.09.2014. The Concession Agreement was on a Design, Build, Finance, Own, Operate and Transfer [“DBFOOT”] model. In terms of the contract, the petitioner was to construct the plant on the land licensed to it by the respondent and to manufacture PDW in the said plant. For this purpose, it was liable to pay license fee for the land and was entitled to recover manufacturing costs in terms of a formula provided in the contract. The proceeds of sale of PDW were to be made over to the respondent.

3. The parties conducted their business under the contract smoothly until March, 2020 when manufacturing and demand for Rail Neer were both interrupted by COVID-19 pandemic, with the consequent lockdown and suspension of train services.

4. The petitioner, which claims to have invested a sum of approximately ₹8 crores in the plant, was faced with continuing fixed costs and unsold stock. It sought waiver of license fee and various other



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reliefs from the respondent. The parties entered into a “Rider Agreement”, on 21.01.2021, which *inter alia* provided for shortfall compensation and for a revision in the manufacturing rate payable to the petitioner. The petitioner sought implementation of the revised price of manufacturing with effect from 01.04.2017 and reimbursement of excess pay, as well as revision of the performance bank guarantee and payment of compensation for the shortfall in supply.

5. As the parties were unable to agree upon the aforesaid demands, the petitioner invoked arbitration on 17.09.2021. The respondent disputed the claims, *inter alia*, on the ground of *force majeure*. The learned arbitrator was appointed by an order of this Court dated 02.03.2022 in ARB.P. 60/2022.

6. Before the learned Arbitrator, the petitioner raised five claims, tabulated below:

Claim No.	Particulars	Amount claimed
1.	For payment of revised manufacturing P ₀ rate.	Rs. 78,57,679 /-
2.	Against shortfall compensation for FY 2020-21 and FY 2021-22.	Rs. 2,27,95,944/-
3.	Against input credit amount deposited to IRCTC at the rate of 24% interest.	Rs. 58,43,941/-
4.	Interest at the rate of 18% per annum compounded monthly.	-



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5.	Costs	-
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7. The respondent disputed the petitioner's claim, and also asserted the following counterclaims:

"a. Rs.2,68,94,766/- as sale collections not having been deposited in terms of clause 5.1.3(d)(x) till April, 2022;

b. Rs.81,09,839/- as licence fees from April, 2022 to March, 2023 for the year 2022-23;

c. Rs. 18,71,447/- against the amount directed by EPFO to be paid by IRCTC against the dues of KACPL;

d. Rs.54,11,586/- for payment made by IRCTC against electricity bill of KSEB for the month of February, 2022; and

e. Legal expenses.

f. Additionally, IRCTC has claimed interest at the rate of 12% per annum in paragraph 136; while 18% has been sought in paragraph 141 of the statement of defence."

8. After completion of pleadings the learned Arbitrator framed the following points for determination on 23.11.2022:

"1. Whether the Claimant is entitled to the claims as set out in the Statement of Claim? OPC

2. Whether the Claimant is entitled to pendente lite interest @ 18% per annum till realization? OPC

3. Whether the Claimant is entitled to costs? OPC

4. Whether Respondent has illegally and wrongly did not re-fix the P0 calculation of manufacturing cost to the Claimant as followed by the Respondent with other plants? OPR

5. Whether Respondent has illegally held the shortfall compensation for the Financial Year 2020-2021 and Financial Year 2021-2022? OPR



6. *Whether the Claimant regularly defaulted in remitting the collection from the sale of Packaged Drinking Water in terms of Clause 5.1.3(d)(x) of the Concession Agreement? OPC*

7. *Whether the Concession Agreement was affected by COVID-19 Pandemic, and if so, the effect of it on the workings under the Concession Agreement? OPC*

8. *Whether the Claimant regularly failed to make payment of the salaries of the staff working at the plant at Parassala and has also withheld making payment of statutory dues such as employees' provident fund? OPR*

9. *Whether the Respondent is entitled to electricity dues under the Concession Agreement? OPR*

10. *Whether the Respondent is entitled to recover an annual license fee from April, 2022 to March, 2023? OPR*

11. *Whether the Respondent is entitled to recover the costs from the Claimant along with pendente lite and future interest @ 18% per annum until payment of the aforesaid rate of interest? OPR"*

9. The parties agreed that oral evidence was not required and that the disputes would be decided on the basis of pleadings and documents which had been filed by them. This is also recorded in the impugned award in the following terms:

"31. On the very same day, learned counsel for both the parties submitted that it was not necessary to lead oral evidence and the matter can be decided on the basis of pleadings and documents already filed. Accordingly, the matter was kept for arguments."

10. The parties then led oral arguments, and also filed written submissions. It appears from the impugned award that, after the arguments of the petitioner herein [claimant before the learned Arbitrator] had concluded, the respondent filed certain additional documents, alongwith its written submissions on 10.04.2023. The petitioner thereafter also filed additional documents with its written submissions, after the



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arguments of the respondent herein had concluded. Neither party filed an application for taking the additional documents on record. In the impugned award, the learned Arbitrator declined to consider the additional documents so filed at the stage of arguments, without leave of the tribunal.

11. Upon a consideration of merits of the case and documents originally filed by both parties, the learned Arbitrator has found against the petitioner on the claims raised by it and also awarded the counterclaims of the respondent.

12. Mr. V. Chitambaresh, learned Senior Counsel for the petitioner, pressed the challenge only with regard to denial of the petitioner's Claim No. 1, and award of Counterclaim (d). In this connection, he also raised two legal arguments:

- a) that the learned Arbitrator had wrongly ignored the additional documents filed by the parties; and
- b) that this Court must consider the substantive pleas of the petitioner only after issuing notice to the respondent and requisitioning the arbitral record.

13. The arguments before this Court were limited to these aspects. The relevant findings of the learned Arbitrator and specific arguments in support of the grounds of challenge, are discussed, in turn, below.

A. Claim No. 1 (For payment of revised manufacturing P₀ rate):



14. Mr. Chitambaresh submitted that the petitioner was contractually entitled to recover the price for manufacturing services, computed in accordance with a formula in Clause 14.2 of the Concession Agreement. The formula is reproduced below:

$$“R_I = (R_0/100) * [40 + 34 * (P_1/P_0) * (W_1/W_0) + 4 * (C_1/C_0) + 2 * (B_1/B_0) + 6 * (S_1/S_0) + 7 * (L_1/L_0) + 7 * (F_1/F_0)]”$$

15. Mr. Chitambaresh contended that one of the factors in the above formula, viz., P_0 , was wrongly taken by the respondent, ignoring a trade discount offered by the concerned manufacturer, as a result of which P_0 was inflated, and the manufacturing price consequently reduced.

16. It is evident from the above formula that several variables go into the ultimate computation of manufacturing price, including P_0 . P_0 is defined as the “price of RELPET GRADE-G5801 as on 15th of preceding tender opening month”. The petitioner’s claim was that a rate of ₹110.90 per kg had been incorporated in the formula, whereas the manufacturer Reliance Industries Ltd. had, in fact, offered a respondent a trade discount of ₹8000 per metric ton [Rs. 8 per kg] in a communication dated 01.12.2013. According to the petitioner, P_0 , therefore, ought to have been fixed after taking into account the trade discount, which would have led to a higher manufacturing cost being payable to the petitioner. This claim is elaborated in paragraphs 50 to 50.12 of the statement of claim, and the communication dated 01.12.2013 has been exhibited therewith, as exhibit CD-36.

17. The learned Arbitrator has rejected this claim, principally on the ground that P_0 was to remain constant during the entire tenure of the



contract and had been fixed at ₹110.90 per kg, upon the suggestion of the petitioner itself. For this purpose, the learned Arbitrator noted paragraph 50.5 of the statement of claim and held as follows:

“49. As per the own case of KACPL, IRCTC had sought the opinion of KACPL in this regard; which had suggested the rate of Rs. 110.90 per kg. **The relevant averments in the statement of claim are as under:**

"50.5. However, in the present case, the Respondent without disclosing the price of RELPET from the Reliance website sought Claimant's opinion for fixation of P0 at a price of RELPET Grade- G5801 (resin). Since Claimant was novice to such business who had no knowledge fixation of P0 at a price of RELPET Grade- G5801 (resin), it enquired from the available suppliers and the Claimant vide letter dated 21.06.2018 informed Respondent that one of its suppliers M/s. Manjushree Techno Pack Limited has confirmed the price of Rs. 110.90/- as the value of P0 but this price was never accepted by the Claimant for fixation of P0 as evidently M/s. Manjushree Techno Pack Limited was not the manufacturer of the RELPET Grade-G5801 but only a supplier in market for the same. (Exhibit CD-35)."

(Emphasis Supplied)

50. Interestingly, KACPL admits having itself suggested the rate of Rs.110.90/kg for RELPET Grade-G5801; however, in the same breath, says that the very price was not accepted by it. Neither of the parties placed the letter dated 21.06.2018 on record with their pleadings. In any case, it is not disputed that the rate of Rs. 110.90/kg was fixed at the suggestion of KACPL only. **Once, KACPL had suggested the rate in response to a query of IRCTC and IRCTC had accepted the rate, it does not lie in the mouth of KACPL to suggest that the rate was not acceptable to it.** There is another reason to hold so. IRCTC had taken P0 at Rs. 110.90/kg and implemented it with effect from 01.04.2017. It was only on 17.02.2020 that KACPL requested revision of P0 by deducting the trade discount being offered by M/s Reliance Industries Limited. As such, KACPL had remained mum on the rate being taken by IRCTC for quite some time.

51. **Even otherwise, the only basis for resiling from P0 is that M/s Manjushree Techno Pack Limited was not the manufacturer of**



REL PET Grade-G5801, but only its supplier. The Concession Agreement does not talk about the price of REL PET Grade-G581 from its manufacturer and merely refers to its price. The price would inevitably refer to the price at which the resin is available in the market. As such, merely because M/s Manjushree Techno Pack Limited was a supplier does not mean that the rates quoted by it could not be taken as a benchmark for fixing P₀. That apart, even if one were to assume that KACPL was under some mistake as to M/s Manjushree Techno Pack Limited being a supplier or manufacturer, the same would not affect the binding nature of rate fixed between the parties [see section 22 of the Indian Contract Act]¹.”

18. I find no reason to interfere with the aforesaid analysis in the impugned award. Mr. Chitambaresh did not dispute the finding in the award that P₀ had been fixed at ₹110.90 per kilogram at the suggestion of the petitioner. Indeed, it was so admitted in the statement of claim itself. The learned Arbitrator has therefore held the petitioner bound to the rate of P₀ suggested by it. The learned Arbitrator has also rejected the petitioner’s contention that the rate suggested by it ought not to have been accepted, as it was based upon an offer made by a supplier [M/s Manjushree Techno Pack Limited], and not by the manufacturer. The learned Arbitrator has found no support in the contract for the argument that P₀ was intended to be only the price offered by the manufacturer. Mr. Chitambaresh has also been unable to point me to any clause to this effect.

19. In such matters, the finding of an arbitral tribunal is amenable to interference only if it is found to be perverse or manifestly arbitrary. The analysis in the impugned award is based upon the petitioner’s pleadings

¹ Emphasis supplied.



itself, to which it has been bound, and upon a plausible interpretation of the definition of P₀. I find no reason to interfere with the said reasons.

20. Mr. Chitambaresh also assailed the award on the basis of an alternative rationale contained in paragraph 53 of the award, which reads as follows:

“53. There is another reason for rejecting the claim of KACPL. The request to change PO is premised in the letter dated 01.12.2013 issued by M/s Reliance Industries Limited to IRCTC wherein discount of Rs.8000/MT has been provided. This letter was filed as exhibit CD-36 and is completely illegible. The typed copy is at page 352. The letter stands denied by IRCTC and no effort was made by KACPL to prove the letter or its contents. Hence, the point of determination is decided in favour of IRCTC and against KACPL.”

21. Mr. Chitambaresh submitted that the parties having agreed not to lead oral evidence, and to proceed on the basis of the documents filed by them, the learned Arbitrator ought not to have rejected the communication dated 01.12.2013 on the ground that it had not been properly proved. He drew my attention to paragraph 117 of the statement of defence wherein, according to him, the letter dated 01.12.2013 was not in fact denied by the respondent, and to paragraph 31 of the award in which the parties in any event had agreed to go by the documents filed without oral evidence.

22. The observations in paragraph 53 of the award are merely an alternative rationale to support the conclusion arrived at by the learned Arbitrator on Claim No. 1. I am, therefore, of the view that the argument does not impeach the core basis of the award, so as to invite interference of the Court under Section 34 of the Act. The primary reason rests upon the admitted fixation of P₀ at the suggestion of the petitioner, and an



interpretation of the formula in clause 14.2. In the statement of defence, the respondent clearly disputed the relevance of the letter dated 01.12.2013, and the learned Arbitrator has accepted that contention. That is sufficient to have arrived at the conclusion reached by the learned Arbitrator. While exercising jurisdiction under Section 34 of the Act, the Court must be mindful that an arbitral award is not to be interfered with lightly, but only if it contains a fundamental deficiency which goes to the root of the matter. Reference may be made in this connection to the judgment of Supreme Court in *Dyna Technologies (P) Ltd. vs. Crompton Greaves Ltd.*². Where an award is sustainable on the basis on a line of reasoning clearly articulated therein, I am of the view that it is unnecessary to examine the alternative rationale offered.

B. Counterclaim (d): Rs.54,11,586/- for payment made by IRCTC against electricity bill of KSEB for the month of February, 2022

23. Mr. Chitambaresh assailed the award on Counterclaim (d) - reimbursement of electricity charges paid by the respondent - on the ground that no evidence of actual payment had been led by the respondent.

24. It is the admitted position that the petitioner was to operate the plant in terms of the agreement, including payment of all operational dues, of which electricity charges are one. One of the counterclaims raised by the respondent pertained to payment of electricity dues by it.

² (2019) 20 SCC 1, paragraph 24.



The statement of defence and counterclaims, in regard to this claim reads as follows:

“IX. ELECTRICITY DUES:

70. *The electricity dues in relation to the said plant are paid by the Claimant to the Kerala State Electricity Board (hereinafter referred to as "KSEB").*

71. *An amount of Rs. 54,11,586/- had accrued for the month of February, 2022 which was raised by the KSEB vide an electricity bill dated 04.03.2022 (hereinafter referred to as the "said electricity bill"), a copy whereof is annexed hereto and marked as Annexure R-35. However, the Claimant failed and/or neglected to make payment in respect thereof.*

72. *In order to ensure that the operations at the said plant are not hindered or stopped in any manner on account thereof, the IRCTC was constrained to make payment of the said electricity bill to the tune of Rs. 54,11,586/-."*

25. In the reply to the counterclaim, the petitioner dealt with this aspect as follows:

“IX. ELECTRICITY DUES:

40. *The contents of the corresponding paragraph 70 and 72 of the SOD are denied and disputed, save and except those which are matter of record. The matter pertains to the Kerala State Electricity Board (hereinafter referred to as "KSEB"), which is not the subject matter of the present Arbitration and the same does not fall within the ambit of the IRCTC. It may also be noted that electricity bill due to KSEB are due to non-payment of shortfall compensation to the Claimant/DCO by the Respondent."*

26. The learned Arbitrator allowed the counterclaim, holding that the factum of IRCTC having paid the bill was not disputed. He rejected the defence as to arbitrability of the claim. Mr. Chitambaresh submitted that the award on this claim is unsustainable, as the respondent had not adduced any evidence of actual payment.



27. This argument does not commend to me. The bill was adduced in evidence, and paragraph 72 of the statement of defence and counterclaim contains an express assertion of the payment having been made. Other than a general omnibus denial, the averment has not been specifically traversed in the reply to the counterclaim. None of the facts pleaded by the petitioner suggest that this counterclaim was otherwise fanciful. It is the petitioner, which was responsible for operation of the plant. Its reply makes it clear that it had not in fact paid the electricity dues, and also does not suggest that electricity dues remained unpaid.

28. Consequently, the conclusion of the learned Arbitrator cannot be said to be devoid of evidence altogether. The sufficiency of evidence, the weight to be attached to it, and the factual conclusions which derive therefrom, are all aspects of evidentiary assessment which fall within the province of the learned Arbitrator³. On this aspect also, I find no perversity or manifest arbitrariness, so as to justify interference under Section 34 of the Act.

C. Non-Consideration of additional documents

29. Mr. Chitambareish submitted that the learned Arbitrator had erred in ignoring the additional documents filed by the parties, alongwith their written arguments. He urged that, the parties having agreed to forgo oral evidence, all documents filed by them at any stage were liable to be considered by the learned Arbitrator. Learned Senior Counsel argued that

³ *Reliance Infrastructure Ltd. vs. State of Goa* (2024) 1 SCC 479, paragraph 77; and *Bharti Airtel Limited vs. Jamshed Khan* 2023 SCC OnLine Del 7201, paragraph 53.



the parties had accepted each other's documentary evidence and should have been bound by such acceptance, even in respect of documents subsequently filed.

30. I find no justification in law for this argument. Paragraph 31 of the award, quoted above, clearly refers to the agreement of the parties for a decision "on the basis of pleadings and documents already filed". The parties may accept the veracity of documents filed by the other side, without binding themselves to an anticipatory admission with regard to documents not yet filed, which they did not have sight of.

31. In arbitral proceedings, it is for the learned Arbitrator to determine the procedure, so long as the procedure adheres to the rules of natural justice, parties are given a full opportunity to present their case, and are treated equally.

32. It is not suggested that parties were not given opportunity to file documents or to lead evidence. The documents filed by them at the appropriate stage have been duly considered. They chose to file additional documents belatedly, at the stage of written submissions, after the conclusion of each other's arguments. No leave was sought for such belated filing. The learned Arbitrator was, in my view, well within his power to decline reference to such documents. To accept the documents would potentially have led to the matter, which was at the stage of final hearing, being taken back to the stage of evidence, if the party opposite denied the documents and required formal proof thereof.



33. In connection with this argument, Mr. Chitambaresh cited the judgment of the Supreme Court in *Canara Nidhi Limited vs. M. Shashikala and Others*⁴, which holds that evidence can be led even before the Court in Section 34 proceedings. He submitted that in such circumstances, documentary evidence could have been accepted by the learned Arbitrator even at a belated stage. The argument is misconceived. Even if the law recognises a limited scope for leading evidence in Section 34 proceedings, it does not enjoin a duty upon an arbitrator to accept all documents, whenever filed. Such an approach would lead to undue prolongation of arbitral proceedings, which is wholly inconsistent with the objective of efficient and expeditious dispute resolution. The matter was one that was within the discretion of the learned Arbitrator, and does not call for the Court's interference.

D. Whether the Court is bound to issue notice in every petition under Section 34 of the Arbitration and Conciliation Act, 1996

34. Mr. Chitambaresh's final submission concerns the procedure of this Court in dealing with petition under Section 34 of the Act. He submits that the jurisdiction of this Court is conferred by statute, and the Court is bound, in each and every case, to issue notice to the other side and to requisition the arbitral record, in order to determine whether the award is liable to be set aside. He argues that, under the Act, the Court is not conferred with any power analogous to Order XLI Rule 11 of the Code of Civil Procedure, 1908 ["CPC"], by which an appeal against a decree can be dismissed in *limine* in certain limited circumstances.

⁴ (2019) 9 SCC 462, paragraph 20.



35. This argument, with respect, betrays a fundamental misconception as to the limited scope of interference under Section 34 of the Act. The power of the Court is neither an appellate power nor a supervisory power, but one of limited scrutiny, within closely confined parameters. The jurisprudence on this point no longer admits of any doubt or ambiguity; suffice it to refer to the judgments of the Supreme Court in *Associate Builders vs. Delhi Development Authority*⁵, *Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI)*⁶, *Larsen Air Conditioning and Refrigeration Company vs. Union of India and Ors*⁷ and *Konkan Railway Corporation Limited vs. Chenab Bridge Project Undertaking*⁸.

36. It is in the context of the plenary appellate power conferred by the CPC, that a decree is liable to be examined on merits by the appellate Court after calling for the record. Order XLI Rule 11 of the CPC provides for a qualified exception to this rule, but its absence in the Arbitration Act, by no means implies that the Court is obliged to issue notice and call for the arbitral record in each and every case. The purpose of alternative resolution of disputes by arbitration is to establish an efficient, expeditious and reliable system of adjudication. To insist upon an elaborate second tier review in all arbitration cases, merely on the asking by the unsuccessful party, would tend to impair these fundamental objectives. If, on careful consideration of the material put forth by a party assailing an arbitral award, no ground whatsoever is made out within the

⁵ (2015) 3 SCC 49, paragraph 56.

⁶ (2019) 15 SCC 131, paragraph 76.

⁷ 2023 SCC OnLine SC 982, paragraph 15.



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discipline of Section 34 of the Act, I am of the view that the Court is not just entitled, but bound, to close the proceedings at the threshold. The present case offers an appropriate example for the exercise of such a power.

CONCLUSION:

37. For the reasons aforesaid, I find no merit in the present petition under Section 34 of the Act. The petition is dismissed. All pending applications also stand disposed of.

PRATEEK JALAN, J

July 25, 2024
'pv/Kb'

⁸ (2023) 9 SCC 85, paragraph 19.