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

Date of decision: 06.11.2024

\+ FAO(OS) (COMM) 241/2024, CM APPL. 64965/2024 –Ex. CM APPL. 64966/2024 –Stay

BHARAT BROADBAND NETWORK LTD .....Appellant

Through: Mr. Chandan Kumar and Mr. Vikram Sharma, Advocates

versus

PARAMOUNT COMMUNICATIONS LTD .....Respondent

Through: None.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI
HON'BLE MR. JUSTICE SAURABH BANERJEE

REKHA PALLI, J (ORAL)

1. The present appeal under Section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 [**the Act**] read with Section 13 (1A) of the Commercial Courts Act, 2015 seeks to assail the order dated 22.08.2024 passed by the learned Single Judge in OMP (COMM.) 355/2024. Vide the impugned order, the learned Single Judge has rejected the appellant's challenge to the arbitral award dated 20.05.2024 by way of a petition under Section 34 of the Act.

2. The brief factual matrix as emerging from the record shows that the appellant issued a Notice Inviting Tender [**NIT**] on 03.04.2013 for supply of 24 Fibre Metal Free Optical Fibre Cable with double HDPE Sheath (G.652D) and accessories divided into Six Packages (Package 'A' to

Package ‘F’). The respondent submitted an invitation which was accepted and consequently, two Purchase Orders both dated 25.03.2014 were issued in favour of the respondent, the first being in respect of package ‘A’ for Rs.30,25,28,952.07/- and the second being in respect of package ‘F’ for Rs.71,79,72,748.61/- [collectively **goods in issue**]. It may also be noted that as per the terms of the NIT, excise duty payable on the goods to be supplied by the respondent was fixed @10.30% by taking the classification of the goods to be supplied under ED Tariff Head 85.44. The NIT, however, included Clause III.12.2(a) providing for change of taxes under certain eventualities, which reads as under:-

> *“For changes in taxes /duties during the scheduled delivery period, the unit price shall be regulated as under:*
>
> *“(a) Prices will be fixed at the time of issue of purchase order as per taxes and statutory duties applicable at that time.”*

3. After the supplies were made, the respondent raised a claim against the appellant seeking reimbursement of the differential amount of excise duty paid on the goods supplied under the contract. It was the appellant’s case that upon reclassification of the goods the respondent was required to pay excise duty @ 12.36%, as against the duty of 10.30% envisaged under the contract. The respondent’s demand was resisted by the appellant on the ground that the change in classification of the goods would not amount to change in law and, therefore, the respondent could not seek reimbursement of the amount paid towards the enhanced duty.

4. It is this dispute which led to invocation of arbitration proceedings by the respondent before the learned Arbitrator wherein it raised the following claims:-

> "*(i) Claim of Rs.67,26,437/- against refund of deductions made on account of excise duty, central sales tax, entry tax and testing charges in respect of Package A;*
>
> *(ii) Claim of Rs.1,85,70,315/- against refund of deductions made on account of excise duty, central sales tax, entry tax and testing charges in respect of Package F;*
>
> *(iii) Claim of Rs.9,97,58,113/- being interest at the rate of 18% till 29.02.2020; and*
>
> *(iv) Claim of Rs.26,54,043/- towards interest on excess margin money deposited with the bank for issuance of PBG, extra commission paid to the bank for issuance of PBG and interest on extra commission paid to bank for the issuance of PBG.*"

5. The above, consequently led to passing off an arbitral award on 20.05.2024, wherein the learned Arbitrator accepted the respondent's plea and came to a conclusion that the demand raised by it was covered within the ambit of aforesaid Clause III.12.2(a) of the NIT as it was pertaining to the excise duty payable on the goods in issue.

6. We may at this stage itself note that though in the Advance Purchase Orders [**APO's**], the goods had been classified by the appellant under Customs and Excise Tariff Head No.90011000 and were excisable to duty @ 12.36%, the very same goods in the subsequent Purchase Orders were classified under Customs and Excise Tariff Head No.85447090, this time excisable to duty @ 10.30%.

7. Being aggrieved thereby, the appellant filed the petition under Section 34 of the Act, which upon rejection by the learned Single Judge has led the appellant to approach this Court by way of the present appeal.

8. In support of the appeal, learned counsel for the appellant besides reiterating the submissions made before the learned Single Judge, primarily

contends that both the learned arbitrator as also the learned Single Judge have failed to appreciate that the *"change in taxes"* was only on account of a change in classification of the goods, which in itself would not qualify as the *"change in law"* envisaged under Clause III.12.2(a) of the NIT. He submits that, even otherwise, any change in law would require a statutory backing and it is only those eventualities that were included within the ambit of the NIT.

9. He further submits that both the learned Arbitrator as also the learned Single Judge have overlooked the fact that the certificate produced by the respondent in support of his plea that Excise Duty had been paid @ 12.36% was not verified. In the wake of the aforesaid submissions, learned counsel for the appellant, therefore, prays that the appeal be allowed.

10. We have considered the submissions of the learned counsel for the appellant and perused the documents on record as well.

11. At the outset, we may note that though the learned Arbitrator agreed with the appellant that the parties were bound by the terms reflected in the Purchase Orders, it found that the claim of the respondents seeking differential amount of excise duty fell within the ambit of the contract and consequently held that the respondents were entitled to receive a sum of Rs.51,10,050/- and Rs.1,19,66,589/- alongwith interest thereon @ 9 % per annum and costs from the appellant.

12. We find that the learned Arbitrator while dealing with the claims of the respondent being on account of a *"change in taxes"*, held them to be within the meaning of Clause III.12.2 of the NIT which envisaged that "*For changes in taxes/ duties during the scheduled delivery period, the unit price*

shall be regulated as under… …" for which purpose he relied on the decision of the Hon'ble Supreme Court in ***Forward Construction Co. v. Prabhat Mandal***, (1986) 1 SCC 100. The learned Arbitrator therefore concluded that the claim of the respondent was in consance with the terms of the contract as the term change in taxes would include change in classification leading to levy of higher tax.

13. Further, the learned Arbitrator also analyzed the two competing classifications for levy of excise duty, one applied by the appellant and the other applied by the excise authorities. For the sake of completeness, we may note these two classifications, which read as under:-

> *"Head 8544*
>
> *"Insulated (including enamelled or anodised) wire, cable (including co-axial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors"*
>
> *xxxx xxxx xxxx*
>
> *Head 9001(also described as 90011000)*
>
> *"Optical fibers and optical fiber bundles; optical fiber cables other than those of heading 8544; sheets and plates of polarising material; lenses (including contact lenses), prisms, mirrors and other optical elements, of any material, unmounted, other than such elements of glass not optically worked.""*

14. After examining the technical specification of the goods as stipulated in the Purchase Order, and considering the decision of the Authority for Advance Rulings, New Delhi in Re: ***Alcatel India Ltd.***, 2006 SCC OnLine AAR-IT 26, the learned arbitrator agreed with the respondent that the goods

had been correctly classified under the Tariff Head No. 9001 (also described as 90011000).

15. It would also be apposite to note that the respondent had while dispatching the goods under the Customs and Excise Tariff Head mentioned in the Purchase Orders, informed the appellant vide its communication dated 19.06.2014 that any demand/ show cause issued by the revenue authorities would be at the risk and cost of the appellant. This was followed by yet another communication dated 13.11.2014 wherein the appellant was informed that the Excise Department had classified the goods under the Customs and Excise Tariff Head No.90011000 and was therefore demanding the differential amount of excise duty. This communication was followed by further reminders and consequently the respondent paid excise duty @ 12.36%, which fact was confirmed by a certificate dated 30.09.2015 issued by the Excise Department. The grievance of the appellant qua the aforesaid certificate was disbelieved by the learned Arbitrator.

16. The learned Single Judge after considering the submissions of the appellant as also the findings rendered by the learned Arbitrator, found no merit in the appellant's petition under Section 34 of the Act and consequently dismissed the same vide the impugned order.

17. Now adverting to the present appeal, we may begin by noting the settled legal position that the scope of interference under Section 37 of the Act is extremely limited. Interference is called for only when it is absolutely necessary or when it shocks the conscience of the Court or when it is found that the arbitral award is in contravention of any prevailing law and/ or provisions of the Act and/ or any terms of the contract. The Court may also

interfere when the award is found to be patently illegal or in conflict with the public policy of India.

18. In this regard, reference may be made to the decisions in ***UHL Power Company Limited vs State of Himachal Pradesh***, (2022) 4 SCC 116; ***Delhi Airport Metro Express Private Limited vs Delhi Metro Rail Corporation Limited***, (2022) 1 SCC 131 and ***Haryana Tourism Limited vs. Kandhari Beverages Limited***, (2022) 3 SCC 237, wherein it has been held that it is impermissible for the Court to reappreciate evidence and that when two plausible interpretations of the Arbitral Award are possible, fault cannot be found with the tribunal if it proceeds to accept any one of the two interpretations.

19. The record reveals that in the present case the appellant has neither raised any dispute qua any of the invoices raised by the respondent nor has it amended any of the terms of the Purchase Orders. The only plea of the appellant both before the learned Single Judge and before us is that Clause III.12 of the Purchase Orders would not include a demand towards higher duty paid by the respondent due to change in classification of the goods. We however find no merit in this plea, as in our opinion as well, the expression, "*change in taxes/ duties*" can also pertain to the change in classification. In any event, this being a plausible view arrived at by the learned Arbitrator and upheld by the learned Single Judge calls for no interference in the present appeal under Section 37 of the Act, where the scope is as it is very minimal.

20. Though the learned counsel for the appellant had tried to urge that the interpretation of the Clause III.12.2 of the Purchase Orders given by the

learned Arbitrator is incorrect, we are of the view that we cannot sit in appeal over the said possible interpretation rendered by the learned Arbitrator which has also been accepted by the learned Single Judge.

21. In this regard, reference may be made to the decision of the Hon'ble Apex Court in ***MMTC Ltd. vs M/s Vedanta Ltd.***: (2019) 4 SCC 163 wherein it was held as under:

> *"12. 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 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. "*

22. Reference may also be made to the decision of the Hon'ble Apex Court in ***Anglo American Metallurgical Coal Pty. Ltd. vs MMTC Ltd.***: (2021) 3 SCC 308 wherein it was held as under:

> *"14. 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 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.*

23. The same view has recently been reiterated by the Hon'ble Apex Court in ***Punjab State Civil Supplies Corporation Ltd. & Anr. vs. Sanman Rice Mills & Ors.*** 2024 SCC OnLine SC 2632.

24. In view of the aforesaid, we find no reason to interfere either with the impugned arbitral award or the impugned order passed by the learned Single Judge. The appeal being meritless is alongwith all accompanying applications dismissed.

(REKHA PALLI)
JUDGE

(SAURABH BANERJEE)
JUDGE

NOVEMBER 6, 2024/So