In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division

The Hon'ble Justice Sabyasachi Bhattacharyya

E.C. No.52 of 2024

AB Enterprises
Vs
Union of India

With

AP-COM No.522 of 2024

Union of India, represented by General Manager,
South Eastern Railway
-Vs-
AB Enterprises

For the decree-holder in EC No.52 of 2024 & for the respondent in AP-COM No.522 of 2024:	Ms. Noelle Banerjee, Adv. Ms. Rashmi Singhee, Adv. Mr. Dipanjan Dey, Adv. Ms. Sucheta Mitra, Adv.
For the judgment-debtor in EC No.52 of 2024 & for the petitioner in AP-COM No.522 of 2024:	Mr. Mohit Gupta, Adv. Ms. Sarda Sha, Adv.
Hearing concluded on :	01.10.2024
Judgment on :	07.10.2024

Sabyasachi Bhattacharyya, J:-

1. The present challenge under Section 34 of the Arbitration and Conciliation Act, 1996, bearing AP-COM No. 522 of 2024, has been preferred by the South Eastern Railway against an award directing the

petitioner/Railway to reimburse Service Tax to the respondent to the tune of Rs.49,53,763/- along with interest paid by the respondent to the Tax Authorities.

2. The short background of the case is that the respondent participated in a tender floated on April 14, 2015 by the petitioner/Railway for escorting job of coach attendant for bed-roll distribution for various trains at Santragachi Coaching Depot for a period of one year. The respondent participated and came out successful. Accordingly, a Letter of Award (LoA) was issued to the respondent on June 25, 2015 and consequentially an agreement was executed between the parties on September 26, 2015. The respondent completed the work and raised invoices and was paid the dues for such work by the petitioner.

3. On November 17, 2017, a show-cause notice was issued by the Tax Authorities to the respondent claiming Service Tax on the work done under the contract, along with interest. The respondent ultimately paid the dues at a discounted rate under the Sabka Vishwas Legacy Dispute Resolution Scheme, 2019 and made a demand for such amount from the petitioner. The petitioner having not acceded to such claim, the matter was referred to arbitration, the respondent claiming the entire amount of Service Tax and interest paid thereon.

4. The Arbitral Tribunal granted such claim by its award dated November 28, 2023, against which the present challenge has been preferred by the Railway.

5. Learned counsel for the petitioner/Railway argues that in terms of Clause 2.2 of the contract, the rates quoted by the tenderer shall

include all incidental charges, *inter alia* including VAT, Sales Tax, Excise Duty, Octroi and other taxes and duties, etc.

6. As per the Tax Authorities, the nature of services provided by the respondent became liable to service tax since July, 2012. However, by a subsequent Notification dated May 27, 2014, Service Tax was made inapplicable for work done for the Railways. Such exemption was again withdrawn by a Notification dated March 1, 2015. The said Notification was implemented by a further Notification dated May 26, 2015. Thus, as on the date of opening of the bids in the tender-in-question, Service Tax had been reimposed in respect of works done for the Railways.

7. It is contended that the Arbitral Tribunal deviated from the contract between the parties, particularly Clause 2.2 thereof, by directing Service Tax plus interest to be borne by the petitioner-Railway, although the rates quoted by the bidders, as per Clause 2.2, were to include all incidental charges, including taxes and duties. Thus, the award violated Section 28(3) of the 1996 Act and is accordingly vitiated by patent illegality, which is a ground of challenge under Section 34 of the said Act. Learned counsel for the petitioner/Railway cites *State of Chhattisgarh and another v. SAL Udyog (P) Ltd.*, reported at *(2022) 2 SCC 275* in support of such proposition.

8. The respondent has relied on a purported Estimate which is not a part of the contract between the parties, nor a part of the tender document.

9. Also, there was no correspondence between the parties at any point of time to cast liability on the Railway to pay Service Tax in the teeth of Clause 2.2 of the contract.

10. Thus, it is argued that the impugned award directing the petitioner/Railway to reimburse Service Tax and interest ought to be set aside on the ground of patent illegality.

11. Learned counsel for the respondent controverts the said arguments of the petitioner and contends that the Estimate of Costs issued by the petitioner/Railway itself was the premise of the price for work reflected in the tender document. The said Estimate did not include Service Tax as one of the components of the costs to be incurred for the work. As such, it is argued that the Service Tax component was not included in Clause 2.2 of the contract.

12. It is submitted by learned counsel for the respondent that the respondent raised bills for Service Tax which were accepted without demur by the petitioner/Railway, although no payment was made on such account. It is argued that since the scope of work was manpower supply, the work does not attract VAT, Sales Tax, Excise Duty or Octroi as mentioned in Clause 2.2, nor does it involve lifting, descent, insurance, etc., mentioned as incidental charges in the said Clause. Thus, the general terms included in Clause 2.2 of the contract have no applicability to the instant case.

13. It is argued that the Arbitral Tribunal took into consideration the approximate cost of work as mentioned in the tender, the break-up of which was to be found in the detailed Estimate annexed to the

Affidavit-in-Opposition of the respondent. The said breakup did not contain Service Tax. The Arbitral Tribunal further found that Service Tax was nowhere mentioned in the agreement and could not have been considered by the petitioner while quoting its price. Learned counsel argues that even the Railway was not aware about the potential liability of Service Tax and as such, the inclusion of Service Tax in the price quoted could not have been contemplated in Clause 2.2 of the contract.

14. Since the Arbitral Tribunal proceeded on a logical basis on the premise of the materials on record and came to a plausible conclusion, there is no scope of interference under Section 34 of the 1996 Act.

15. Learned counsel for the respondent cites *Associate Builders v. Delhi Development Authority*, reported at *(2015) 3 SCC 49* and *National Highways Authority of India v. Hindustan Construction Co. Ltd.*, reported at *(2024) 6 SCC 809* for the proposition that the correspondence exchanged between the parties as well as the material placed before the Arbitral Tribunal are to be considered for the purpose of construing the contract. In the present case, the Arbitral Tribunal rightly considered the estimate and other materials before it while passing the impugned award.

16. Learned counsel appearing for the respondent next cites *UHL Power Co. Ltd. v. State of Himchal Pradesh*, reported at *(2022) 4 SCC 116*, where the Supreme Court took the view that the interpretation of the relevant clauses of the agreement by the Tribunal, if possible or

plausible, could not be interfered with merely because another view could have been taken.

17. In *K. Sugumar v. Hindustan Petroleum Corpn. Ltd.*, reported at *(2020) 12 SCC 539*, the Supreme Court held that when the parties have chosen to avail of an alternative mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the Arbitrator and the role of the Court should be restricted to the bare minimum. A Section 34 Court cannot re-appreciate the findings returned by the Arbitral Tribunal by taking an entirely different view in respect of the interpretation of the relevant clauses of the agreement governing the parties.

18. In *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, reported at *(2019) 20 SCC 1*, it was held that if the reasoning provided in the award is implied, unless the award portrays unpardonable perversity, the court needs to be cautious in differing from the view taken by the Tribunal.

19. It is argued that the authorities cannot pick and choose, for which proposition, learned counsel for the respondent cites *Shivappa v. Chief Engineer and others*, reported at *2023 SCC OnLine SC 2027*.

20. Thus, it is argued that the tests of Section 34 of the 1996 Act are not satisfied and the present challenge ought to be dismissed.

21. Upon hearing learned counsel for the parties, the Court arrives at the following conclusions:

22. The pivot of the arguments is Clause 2.2 of the "Instructions to Tenderers and Terms & Conditions of Tendering" which finds place in

Part I of the tender document, which comprises the contract between the parties.

23. Clause 2.2 is set out below:

> ***"2.2 UNIT PRICES:***
>
> *The Rates quoted by the Tenderer and accepted by the purchaser shall hold good till the completion of the work and no additional individual claim will be admissible on account of fluctuation in market rates etc.*
>
> *The rate quoted by the Tenderer shall include all incidental charges like, freight transport, loading/unloading handling of material, lifting, descent, insurance overage of Bankers charges, Indemnity Bond, VAT, Sale Tax, Excise Duty, Octroi and other taxes and duties etc.*
>
> *Tenderer should carefully read as clearly explained in the explanatory schedule."*

24. Certain relevant dates are also to be taken note of while adjudicating the issues at hand.

25. The tender was floated on April 14, 2015 and the bids were opened on May 27, 2015. LoA was issued to the respondent on June 25, 2015, pursuant to which an agreement was entered into between the parties on September 26, 2015.

26. Insofar as the applicability of Service Tax to work done for the Railways is concerned, a Notification dated May 27, 2014 made Service Tax inapplicable to Railway works. Such exemption was, however, withdrawn by a subsequent Notification dated March 1, 2015 with effect from April 1, 2015, by which the Railways were made liable to pay 100 per cent of Service Tax. However, the said Notification was implemented only by a further Notification of May 26, 2015.

27. Thus, Service Tax was again made applicable to work done for the Railways on May 26, 2015, with effect from April 1, 2015.

28. In respect of the tender-in-question, the bids were opened on May 27, 2015, the day after the implementation of the Notification for Service Tax was published. The LoA was issued in favour of the respondent a month thereafter on June 25, 2015 and the agreement was entered into between the parties in pursuance thereof after three months on September 26, 2015. Hence, as on the date of issuance of the LoA and the subsequent agreement, the parties ought to have been aware of applicability of Service Tax to Railway works.

29. Thus, the respondent was well aware that Service Tax was payable in respect of the work to be done by it for the Railway under the contract when the respondent took up the LoA and entered into the agreement, incorporating the tender clauses and the associated terms and conditions, with its eyes wide open.

30. Clause 2.2 does not restrict itself only to the taxes and duties mentioned therein such as VAT, Sales Tax, Excise Duty and Octroi but also supplements the same with the expression "and other taxes and duties, etc.", thus, covering all other taxes and duties even apart from those specifically mentioned in the said clause. Since on the date of the contract between the parties Service Tax was already payable for Railway works, the expression "and other taxes and duties, etc." included Service Tax.

31. Clause 2.2 of the contract is unambiguous on such score. Hence, no external aid of any other document is required for interpreting the said clause.

32. An internal Estimate of the petitioner-Railway was relied on by the Arbitral Tribunal for interpreting Clause 2.2 of the contract. However, such approach was patently perverse for three reasons.

33. First, the Estimate was dated March 27, 2015, that is, much prior to the LoA being issued to the respondent. As on the date of the Estimate, Service Tax was not made applicable to Railway works. Thus, there cannot arise any question of the Estimate including the Service Tax component.

34. Secondly, and more importantly, the Estimate was merely a wage calculation, which is self-evident, and no tax component was incorporated in it. The Estimate was only for the purpose of calculation by the Railway Authorities themselves in order to arrive at a rough estimated cost of the work for the purpose of issuing the tender. Neither was the Estimate communicated to the respondent, nor was it incorporated in any manner either in the tender or the contract itself or referred to any subsequent correspondence between the parties.

35. The bidders were to raise quotations by taking into account not only the Estimate of the Railway, which was its own internal document and restricted to the wages payable for the work, or the cost of work mentioned in the tender, but also taking into account estimated taxes and/or duties or other similar liabilities which they would have to

incur in order to do the work. The bidders took a calculated commercial risk and it was their prerogative to raise their quotations in such a manner so as to cover probable expenses on account of taxes and duties and nothing compelled the bidders to restrict the quotation only to the estimated amount. Since the applicability of Service Tax was already public knowledge prior to the agreement being entered into part by the parties, nothing prevented the respondent from seeking clarification or recusing from the work if it had any objection to paying Service Taxes.

36. Thirdly, when the Estimate was drawn up on March 27, 2015, it was never the intention of the Railway Authorities to include any component of tax therein. It was merely a working basis for calculating the rough Estimate of the wages payable to the workmen by the contractors.

37. Hence, the Estimate was not a reflection, nor was it intended to be so, of the actual prices to be quoted by the bidders. The Estimate was, as it suggests, merely a calculation of the probable wages payable to the workmen in terms of the Minimum Wages Act. It was entirely for the bidders to take into account the probable tax components to arrive at their respect quotation of rates. Hence, the Estimate was a perverse basis for interpreting the contract, since it had no connection whatsoever with the contract nor was it a part of the contract.

38. Taking resort to such external aid where there was no ambiguity whatsoever in Clause 2.2 is in itself a patent illegality which vitiates the impugned award.

39. It is an entrenched principle of Indian law that the courts cannot rewrite a contract between the parties. The said concept is an integral part of the fundamental policy of Indian law. Violating the same tantamounts to contravention with the fundamental policy of Indian law and being in conflict with the most basic notions of justice. Hence, such contravention affords a ground under Section 34(2)(b)(ii), including its Explanations.

40. Section 28(3) of the 1996 Act provides that while deciding and making an award, the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction. Since the terms of the contract between the parties in the present case were unambiguous, contravention of the same by the Arbitral Tribunal tantamounts to a patent illegality within the contemplation of Section 34(2-A) of the 1996 Act, as reiterated in the *State of Chhattisgarh (supra).*

41. Insofar as the statutory payability of Service Tax is concerned, the impact and incidence of such tax is segregated by the statute itself, which impels the renderer of the service at the first instance to make the payment which may be ultimately realizable from the recipient of the service. If the impact and incidence of Service Tax were simultaneous, it might still have been argued by the respondent that the parties could not retract from a statutory liability by agreement between themselves. However, the statute merely imposes Service Tax. The payability, being divided into two components, impact on one entity an incidence on another, the impact and incidence can be

segregated and one of the components may very well be waived by the parties. Hence, Clause 2.2, insofar as its applicability to incidence of Service Tax is concerned, does not tantamount to Estoppel against the law.

42. Learned counsel for the respondent places reliance on *Associate Builders (supra)* and *National Highways Authority of India (supra)* to argue that the Arbitral Tribunal could very well have considered materials on record and correspondence between the parties to interpret the clauses of the contract. However, a judgment carries a ratio in the context of its facts and cannot be blindly applied to all and sundry cases. It is equally well-settled that when the terms of a contract are unambiguous, no external aid need be resorted to for the purpose of interpretation of the same. In the present case, the expression "and other taxes and duties etc." in Clause 2.2, without any iota of ambiguity and doubt, mandates that the rate quoted by the tenderer has to include all taxes and duties and the like applicable to the works under the contract. Therefore, there is no scope of taking aid of any further document to interpret the same.

43. Also, the Estimate, which was relied on by the Arbitral Tribunal to interpret the clause, is neither a part of the contract nor an agreement between the parties but, as discussed above, is an internal document of the petitioner/Railway for arriving at the estimated bare price of the work. Furthermore, the estimate deals only with the wages of the workmen in terms of the Minimum Wages Act and does not constitute the rates to be quoted by the individual bidders. The estimate merely

provided the minimum rates, since if rates were quoted below the same, it would imply that the workmen would be deprived of their legitimate dues under the Minimum Wages Act. It was for the bidders to take into account such minimum price and add to it their own estimates of taxes payable, in the light of Clause 2.2 which mandates that the rates must include all taxes and duties etc. which are applicable to the work done under the tender. Hence, the reliance by the Arbitral Tribunal on the Estimate to interpret Clause 2.2 was patently perverse and illegal, vitiating the impugned award itself.

44. Insofar as the ratio *UHL Power Company (supra)* is concerned, the reliance on the Estimate to cast duty on the Railway for payment of Service Tax is palpably *de hors* the contract between the parties and thus is a perverse view which is not "possible or plausible" from any reasonable perspective.

45. Even going by the tests of interference laid down in *K. Sugumar (supra)*, the impugned award is vitiated on at least two counts contemplated in Section 34 - violation of the fundamental policy of Indian law and basic notions of justice as well as patent illegality, which are contemplated respectively in sub-sections (2) and (2-A) of Section 34 of the 1996 Act.

46. There is no question of the authorities picking and choosing, since Clause 2.2 is universal in its application to all prospective bidders in the tender. As such, the reliance on *Shivappa (supra)* by the respondent is entirely misplaced.

47. Thus, in view of the above discussions, the Arbitral Tribunal acted with patent illegality and against the fundamental policy of Indian law and basic notions of justice in awarding reimbursement of Service Tax along with interest to the respondent by the petitioner/Railway.

48. Accordingly, AP Com No. 522 of 2024 is allowed, thereby setting aside the impugned award dated November 25, 2023.

49. As a necessary corollary to the award being set aside, nothing remains to be executed. Thus, E.C. No. 52 of 2024 is hereby dismissed.

50. There will be no order as to costs.

51. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)