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

Decided on:22.08.2024

\+ **O.M.P. (COMM) 355/2024 & I.As. 36554/2024, I.A. 36555/2024**

BHARAT BROADBAND NETWORK LTD. .....Petitioner
Through: Mr. Chandan Kumar, Advocate.

versus

PARAMOUNT COMMUNICATIONS LTD. .....Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. By way of this petition, under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner assails an arbitral award dated 20.05.2024, by which disputes have been adjudicated under two Purchase Orders ["POs"] dated 25.03.2014, placed by the petitioner upon the respondent. The learned arbitrator has partially allowed the respondent's claims and awarded a sum of Rs. 1,70,76,639/-, out of the total claims of Rs. 12,77,08,909/-, alongwith interest thereupon at the rate of 9% per annum, and costs of Rs. 5,00,000/-.

A. Facts

2. The petitioner issued a Notice Inviting Tender dated 03.04.2013 ["NIT"], for supply of optical fibre cable of the stated specifications, and accessories. The tender was divided into six packages [Package A to Package F], each dealing with a different part of the country. The disputes in the present case concern supply under Package A [North-West India]

and Package F [East and North-East India]. The respondent submitted its bid for these two packages, and Advance Purchase Orders ["APOs"] were issued on 28.01.2014, in the sum of Rs. 119,73,05,950.51/- for Package A and Rs. 187,29,38,962.66/- for Package F. The APOs were amended subsequently, which were accepted by the respondent, and POs were ultimately issued on 25.03.2014, in the sums of Rs. 30,25,28,952.07/- and Rs. 71,79,72,748.61/- respectively.

3. The only claim of the respondent, which has been allowed by the impugned award, relates to excise duty payable on the goods in question. There is a difference in classification of the goods by the petitioner, and the classification adopted by the Excise Department, upon which the respondent has raised its invoices.

4. In the APOs, the goods were classified by the petitioner under Customs and Excise Tariff Head No. 90011000, which was exigible to duty at the rate of 12.36%. However, in the POs, the goods were classified under Customs and Excise Tariff Head No. 85447090, which attracted duty at the rate of 10.30%. The case of the respondent is that the Excise Department classified the goods under Customs and Excise Tariff Head No. 90011000, as a result of which the petitioner is liable to pay excise duty at the rate of 12.36%. The respondent wrote several letters to the petitioner bringing this on record, and also requesting issuance of amended POs. This was not done, but the petitioner nonetheless paid the respondent's invoices only partially.

5. In addition to the difference in excise duty on this account, the respondent also claimed difference in central sales tax and other deductions made by the petitioner.

6. The respondent, therefore, raised the following claims in arbitration:

> "*(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.*"

7. The petitioner resisted these claims on the basis of Clause III.12.2 of the NIT, which provided that prices would remain fixed. According to the petitioner, the claims of the respondent did not arise out of any "*changes in taxes*", for which provision was made in the NIT. It was also stated that vendors for Packages C and E had confirmed the classification adopted by the petitioner, and that, in any event, a dispute of this nature, relating to classification of the goods for the purposes of excise duty, was not arbitrable.

8. The learned arbitrator found, in favour of the petitioner, that the contract between the parties is reflected from the POs and not from the APOs, but allowed the respondent's claims, to the extent that they relate to difference in excise duty. The learned arbitrator held that the excise duty differential is arbitrable, and that it falls within the scope of a "change" in tax, within the meaning of Clause III.12.2 of the NIT. The learned arbitrator has also held that the other claims of the respondent were not based upon proper pleadings, and therefore rejected them.

9. In sum, as against claims of Rs. 67,26,437/- and Rs. 1,85,70,315/-

on account of Package A and Package F respectively, the learned arbitrator has awarded, in favour of the respondent, the sums of Rs. 51,10,050/- and Rs. 1,19,66,589/-, alongwith interest thereupon at 9% per annum, and part of its costs.

B. Submissions on behalf of the petitioner

10. Mr. Chandan Kumar, learned counsel for the petitioner, submits that the learned arbitrator has committed a jurisdictional error in entering into a disputed question of excise classification, as classification of goods for tax purposes is a sovereign function, which cannot be adjudicated by a contractual and consensual dispute resolution mechanism.

11. Mr. Kumar further submits that Clause III.12.2 of the NIT permitted a revision of price on account of "change" in tax. Quite apart from the fact that the POs were not actually revised, Mr. Kumar argues that a disputed question of classification does not constitute a "change" in tax. He submits that the rate of excise duty, in each of the two potential classifications, remained unchanged. He contends that the impugned award has effectively rewritten the contract between the parties, by substituting the Excise Tariff Head mentioned in the POs, with a different entry.

12. Mr. Kumar's last submission is that, in the impugned award, the learned arbitrator has referred to authorities, including a judgment of the Supreme Court in *Forward Construction Co. v. Prabhat Mandal (Regd.)*[1], which are distinguishable from the facts of the present case, having been rendered in an entirely different context. He argues that the petitioner did not have an opportunity to distinguish the said cases before

[1] (1986) 1 SCC 100.

the learned arbitrator, as the cases were neither cited by the respondent in argument, nor put to the parties by the learned arbitrator.

13. In support of these contentions, Mr. Kumar relies upon certain authorities, which are dealt with at the appropriate place below.

C. Analysis

14. The arguments advanced by Mr. Kumar, require determination of the following three issues:

a. Whether the disputes between the parties were arbitrable?

b. Whether the respondent's claims were on account of a "change" in taxes, within the meaning of Clause III.12.2 of the NIT, or whether the same constituted a revision in the POs?

c. Whether the respondent was entitled, on facts, to recover the price alongwith excise duty at the rate mentioned in the invoices raised by it?

15. On the first question, i.e. whether the claims in question are arbitrable, the learned arbitrator has held that the dispute is one between two commercial entities, and not an adjudication *in rem*. It, therefore, does not constitute an adjudication regarding a sovereign function of the State, within the meaning of the judgment of the Supreme Court in *Vidya Drolia v. Durga Trading Corpn.*[2], and the judgments cited therein. He has also observed that the petitioner had not taken any such objections under Section 16 of the Act, although an application under Section 16, challenging the jurisdiction of the tribunal, was made in the course of proceedings, and was withdrawn.

16. I do not find any error in the view taken by the learned arbitrator on

[2] (2019) 20 SCC 406.

this account. The question of a sovereign function would arise if the liability to tax, or even the rate at which duty must be paid to the revenue authorities, was in issue. This question is distinct from the dispute raised, which is whether the petitioner was liable to pay to the respondent the price of the goods supplied, alongwith excise duty at the rate stipulated in the invoices. To partake the character of a dispute relating to a sovereign function, it must have some effect on the rights and obligations of the State. In the present case, the revenue authorities were not even party to the dispute, which concerned only two commercial entities, who had *inter se* disputes as to the proper classification of the goods. Such disputes have rightly been held to be capable of resolution by arbitration.

17. Before turning to the merits of the dispute, it may be noted that the learned arbitrator held[3] that the rights and obligations of the parties were governed by the POs, and not by the APOs. The respondent had raised this issue, in view of the fact that the value of the APOs was substantially higher than the value of the goods stated in the POs, *inter alia* on account of the excise classification under Tariff Head No. 90011000 in the APOs, and Tariff Head No. 85447090 in the POs. As this point was decided in favour of the petitioner, it is not necessary to dwell upon it.

18. The most important question requiring adjudication is as to whether the contract permits the respondent to claim any amount in excess of the POs, on the ground of a difference as to classification for the purposes of excise duty. The decision on this aspect turns on an interpretation of Clause III.12 of the NIT, which provides as follows:

> "*III.12 PRICES*
>
> *III.12.1. Prices charged by the supplier for goods delivered and*

[3] In paragraph 38 of the impugned award.

services performed under the contract shall not be higher than the prices quoted by the Supplier in its Bid ***except for variation caused by change in taxes/ duties*** *as specified in Clause-12.2 mentioned below.*

III.12.2 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 the time.

(b) In case of reduction of taxes and other statutory duties during the scheduled delivery period, purchaser shall take the benefit of decrease in these taxes/ duties for the supplies made from the date of enactment of revised duties/ taxes.

(c) ***In case of increase in duties/ taxes during the scheduled delivery period, the purchaser shall revise the prices as per new duties/ taxes for the supplies, to be made during the remaining delivery period as per terms and conditions of the purchase order.***

III.12.3 Any increase in taxes and other statutory during/ levies after the expiry of the delivery date shall be to the supplier's account. However, benefit of any decrease in these taxes/ duties shall be passed on to the Purchaser by the supplier."[4]

19. The learned arbitrator has relied upon the judgment of the Supreme Court in *Forward Construction Co.*[5], as also a purposive approach, to conclude that the respondent's claim was contractually justified.

20. In matters of contractual construction, the Court interferes under Section 34 of the Act, only if the construction is found to be manifestly unreasonable or implausible. I do not find the petitioner's arguments to meet this standard. Clause III.12.1 specifically provides for variation in prices caused by "*changes in taxes/ duties*". The learned arbitrator has held that such a change may encompass the issue of classification, and not just a change of rates of duties within a given classification. He has also related this to the purpose of a permitted revision, which is to place the burden of the applicable excise duty upon the petitioner. There is no

[4] Emphasis supplied.
[5] Supra (note 1).

implausibility in this analysis at all.

21. Mr. Kumar cited judgments of the Supreme Court in *PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*[6] and *Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum*[7], to submit that an arbitrator is not entitled to rewrite the contract between the parties or to restructure the transactions, but must decide in accordance with the contractual provisions. While there can be no dispute as to the proposition advanced, I am of the view that the argument is misconceived in the facts of this case. As held above, there is no ground to challenge the construction placed by the learned arbitrator on Clause III.12.1. If so, the petitioner was duty bound to pay the invoices as raised by the respondent. If any amendment was required in the POs, it was for the petitioner to issue revised POs. The petitioner cannot take advantage of its own failure to do so. For the aforesaid reason, Mr. Kumar's submission that the respondent's claims were dependent upon a revision of the POs, or that the learned arbitrator has rewritten the contract, do not commend to me.

22. As far as the proper classification of the goods is concerned, the learned arbitrator has noted the two competing classifications as follows:

> "*Head 8544*
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> *"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*

[6] 2021 SCC OnLine SC 508.
[7] (2022) 4 SCC 463.

> *"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."*"

23. On the basis of the technical specification provided in the POs, and relying upon the judgment of the Authority for Advance Rulings, New Delhi, in *Re: Alcatel India Ltd.*[8], the learned arbitrator found that the proper classification of the goods is under Tariff Head No. 90011000.

24. Mr. Kumar submitted that the learned arbitrator had effectively given a declaration as to the proper classification of the goods for excise purposes, for which there was neither any prayer in the statement of claims, nor any jurisdiction vested in the learned arbitrator. As noted above, I am of the view that the learned arbitrator has correctly exercised jurisdiction to determine an *inter se* dispute between the parties as to the quantum of liability towards excise duty. The observations of the learned arbitrator were only for this purpose, and do not constitute a declaration *in rem*, or a binding determination in respect of any dispute between an assessee and the revenue authorities.

25. Mr. Kumar cited a judgment of the Customs Excise and Service Tax Appellate Tribunal ["the CESTAT"] in *Flextronics Technologies (I) P. Ltd. v. Commr. of C. Ex., Bangalore*[9], in support of his contention that a dispute as to classification of the goods could only have been decided by the concerned revenue authorities. I do not find the said judgment to be of much assistance in the facts of this case. The Commissioner of Central Excise disallowed capital goods credit claimed by the assessee on the strength of excise invoices issued by the manufacturer of the goods.

[8] 2006 SCC OnLine AAR-IT 26.

The CESTAT allowed the appeal, holding that the Commissioner having jurisdiction over the assessee, which was the recipient of the goods, had no jurisdiction to change the classification of the goods. In the present case, however, the respondent was the supplier of the goods and the petitioner was the recipient. The observations of the CESTAT are thus consistent with the effect of the impugned award also.

26. In fact, the learned arbitrator further noted that, by a communication dated 19.06.2014, the respondent had informed the petitioner that it was dispatching the goods under the Excise Tariff Head given in the POs, but any demand/show cause issued by the revenue authorities would be at the risk and cost of the petitioner. The respondent thereafter further informed the petitioner, by a communication dated 13.11.2014, that the Excise Department had demanded the differential amount of excise duty, in view of its classification of the goods under Customs and Excise Tariff Head No. 90011000. Several reminders have also been referred to. The learned arbitrator has thereafter noted that the excise duty deposited by the respondent, was admittedly at the rate of 12.36%, which was confirmed by a certificate dated 30.09.2015 issued by the Excise Department. Although the petitioner raised a grievance that the certificate had been issued at the request of the respondent, the learned arbitrator found no grounds to disbelieve its contents.

27. The above analysis in the impugned award also does not suffer from arbitrariness or perversity, so as to justify interference under Section 34 of the Act. The respondent had anticipated the controversy, and kept the petitioner notified of the possibility of additional excise duty

[9] 2010 SCC OnLine CESTAT 4770.

becoming payable on the goods. The evidence on record, including the certificate dated 30.09.2015, was sufficient to support the conclusion that the revenue authorities had, in fact, recovered excise duty at the rate of 12.36%, in respect of the goods in question. Even *de hors* the question of correctness of the classification adopted, this, in itself, would have been sufficient to allow the respondent's claim on this account. I do not find any reason to interfere with the manner in which the learned arbitrator has dealt with the documentary evidence placed before him. The assessment of evidence, and weight to be attached thereto, are ordinarily matters within the domain of the arbitral tribunal, which in the present case, has come to entirely reasonable and justifiable conclusions.

28. The only remaining ground of challenge is with regard to reference to certain judgments in the impugned award, which, according to Mr. Kumar, were neither cited in the course of arguments nor brought to the notice of learned counsel. The judgment of the Orissa High Court in *Jindal India Thermal Power Ltd. v. Quartz Infra and Engineerings Pvt. Ltd.*[10], clearly holds that judgments may be cited without reference to counsel. In any event, in the present case, the underlying legal argument was admittedly raised and contested during the course of hearing. The judgments cited in the impugned award, elaborate and elucidate upon the argument being analyzed in the award, but do not *per se* go to the root of the award. An award is liable to be interfered with, only if it contains errors which go to the root of the matter.[11] Two caveats may, however, be placed. The first is that factual material must be disclosed to all parties, and the second is that it would remain open to the parties to assail the

[10] 2023 SCC OnLine Ori 6957.
[11] *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.* [(2019) 20 SCC 1].

arbitral tribunal's reliance upon the authorities and the conclusions derived therefrom, within the parameters provided in Section 34 of the Act.

D. Conclusion

29. For the reasons aforesaid, I do not find any merit in the present petition, which is hereby dismissed, alongwith all pending applications.

PRATEEK JALAN, J

AUGUST 22, 2024
SS/