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

\+ **Date of Decision: 12.04.2021**

% FAO(OS) 14/2021

STEEL AUTHORITY OF INDIA LIMITED ..... Appellant

Through: Mr. Harvinder Singh Phoolka, Sr. Advocate with Mr. Shaiwal Srivastava, Advocate.

versus

M/S MOHAN STEEL LIMITED ..... Respondent

Through: Mr. Sriharsha Peechara, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

CM APPL. 13248/2021

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

FAO(OS) 14/2021 & CM APPL. 13246/2021,CM APPL. 13247/2021(to seek condonation of delay of 360 days in filing the appeal)

1. We have heard learned senior counsel for the appellant, and perused the record. Learned counsel for the respondent is also present on advance notice.

2. Mr. Phoolka, at the outset, points out that the delay is not of 360 days as stated in the application considering the fact that the order was passed on 04.03.2020, whereafter the lockdown was imposed due to the pandemic, and

the running of limitation was suspended by the orders of the Supreme Court.

3. Be that as it may, since we have heard Mr. Phoolka on the merits of the appeal, and we do not find merit in the present appeal, we are not inclined to deal with the issue as to what is the quantum of delay, and what is the justification therefor.

4. The present appeal is directed against the order dated 04.03.2020, passed by the learned single Judge allowing the respondents objection filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking setting aside of the award dated 29.06.2015, passed by the Sole Arbitrator, and seeking a declaration that the recovery made by the appellant herein is illegal and arbitrary.

5. The brief facts relevant for the determination of the present appeal have been noted in the impugned order, and we quote the same from the impugned order itself.

> *"2. Brief facts germane to the present petition are that the petitioner was appointed as a Conversion Agent for the first time in the year 2006 by the respondent which is a Government Company for conversion of TMT Bars. A contract was entered into for a period of three years i.e. from 2006 till 2009 (hereinafter referred to as „Contract-I") Under Contract-I, conversion charges payable to the petitioner were to be increased @ 2% every year. Consequently, the respondent revised the conversion charges for the year 2007-2008 vide letter dated 17.03.2007 as well as for the year 2008-2009 vide its letter dated 30.05.2008 and accordingly reimbursed the money at increased rate every year till the conclusion of Contract-I.*
>
> *3.* ***On 05.02.2009, petitioner entered into a fresh agreement with the respondent (hereinafter referred to as „Contract-II").***

Contract-II had a different clause with regard to the rates of escalation and reads as under:
"ESCALATION OF RATES The conversion charges finalized in the tender shall be kept firm for 1 year w.e.f the date specified for commencement of work in the work order. At the end of one year, the conversion charges will be revised based on the following weightage and neutralization for each of the components:-

Components	*Weightage*	*Neutralization*	*Basis*
Labour	*10%*	*100%*	*Min or statutory wages as per Notification of labour department of the concerned state government*
Fuel (Furnace Oil)	*20%*	*607*	*IOC Retail Outlet*
Electricity	*25%*	*60%*	*Unit Electricity rate as per Electricity Provider co/ SEB in the concerned locality*
Overheads	*30%*	*50%*	*End month/ end year RBI Index on machinery and M/c Tools and transport equipment and parts on a simple average basis*
Profit	*15%*	*Nil*	*-*

4. Pursuant to Clause 8, as mentioned above, respondent after completion of one year of the agreement vide letter dated 24.05.2010 approved the revised conversion charges w.e.f.

05.02.2010 and consequently, the petitioner raised the invoices and was paid at the revised rates. The charges were once again revised w.e.f. 05.02.2011 by the respondent vide its letter dated 08.11.2011 and the petitioner was paid at the revised rates till the conclusion of Contract-II.

5. It is the case of the petitioner that at the end of Contract-II, respondent issued „No Dues Certificate" and the Bank Guarantees submitted by the petitioner to the tune of Rs. 1.25 Crores and Rs. 75 Lacs were released, without any demur.

6. As the chronology goes, the petitioner then entered into a third Contract with effect from 18.02.2012 for three years valid upto 17.02.2015 referred to as Contract-III. The escalation clause in Contract-III, according to the petitioner, was identical to the Clause in Contract-II and the petitioner therefore, had no doubt that the escalation was based on weightage and neutralization of various components such as labour, electricity etc. and was to be determined every year by the respondent. This understanding of the petitioner according to it was fortified by the fact that even under Contract-III after completion of each year, the respondent vide its letters dated 30.09.2013 and 12.06.2014 revised the conversion charges for the years 2013-2014 and 2014-2015 respectively and in accordance with Clause 8, paid at the revised rates."

(emphasis supplied)

6. Since, the appellant sought to recover Rs.3,78,74,189/- from the respondent herein on account of over-payment allegedly mistakenly made under Contract – II, the respondent invoked the Arbitration agreement between the parties, which resulted in making of the Award.

7. The relevant extract of the impugned award may now be set out, and the same reads as follows:

"*<u>Issue no. 2</u>*

As per the Claimant, escalation charges are typically inbuilt in the contract to cover to cover year-to-year inflation and to ensure that the contract becomes attractive for potential bidders/conversion agent. The SAIL quantified and approved the first escalation rates after the conclusion of one year of work contract, the Respondent quantified and approved the same vide letter dated 05.02.2010 which was duly informed vide letter dated 24.05.2010 marked as Annexure IV of the petition. At the end of the second year as well, the said escalated amount was approved on 05.02.2011 and was duly paid by the SAIL vide their letter dated 08.02.2011. As alleged by the Claimant, the conversion charges were paid after due approval of Regional Office of the Respondent. The Respondent has however raised the recovery of the second escalation amount amount of Rs. 78,74,189.00 when they failed to make the payment, the said amount was recovered by the Respondent and communicated to them vide there letter dated 14.10.2014 issued by SAIL as the same was paid inadvertently.

The Respondent submits that the Agreement dated 05.02.2009 is sacrosanct and is valid for three years from 05.02.2009 to 04.02.2012 and it is pertinent to mention as per their version the escalation rates in dispute shall be applicable only once after one year of date of work order. The Respondent has also referred to the various master circulars (for internal circulation) to show that the language of master circulars pertaining to the Escalation rates were different for different years indicative where the intent was to give for every year, the same was duly provided by the Respondent as in the Master Circular No. of 2003. Further, the Respondent clarifies that the terms and conditions towards escalation charges keep varying as per the changing price indices.

Perusal of the escalation clauses of the previous years show that the Respondent is explicit in mentioning about its intentions that the escalation rates are to be revised at the end of one year alone. The principle of interpretation of contract essentially signifies that the words in the contract are to be

construed in their ordinary and popular sense. The underlining principle being that parties to a contract, as reasonable men must have intended to use the word in its commonly used sense. If the wording of a clause is ambiguous, and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. In view of the same, I am of the opinion that present contract is clearly non-ambiguous for this clause based on perusal of the circulars placed on record, therefore, the doctrine of Contra Proferentum relied by the Claimant has no basis and the argument of the Respondent that the said escalation charges were paid inadvertently and the same is liable to be returned as it would cause loss to public exchequer, is allowed. *I see no merit in the plea to interpret the clause by stretch of imagination to extend the explicit escalation clause to mean otherwise. Further, the Arbitrator has no power to write the contract between the parties to give it a interpretation desired by either party except for a role to interpret the clause of the contract as per law. Further, the Conversion Agent was fully aware of the terms and conditions of contract. Simply an inadvertent payment/payment made under mistake of fact, if made by a party in a contract would not mean, that the clause in the contract would be interpreted differently. Additionally, the Claimant has not placed on records any law that prevent recovery of payment of dues under a contract determined by time. They only state the same is void ab initio but fail to draw attention and therefore the argument has no basis to stand.*

Award

In view of the above, the deductions are justified on part of the SAIL done under mistake of fact and it has rightfully adjusted the amount under clause 19.9 of terms and conditions of Annexure IV of the agreements provided under contract dated 05.02.2009 and 18.02.2012. Hence the claim petition is dismissed. Regarding the loss of working capital incurred by the Claimant as alleged, the Claimant has only provided the

details and no other cogent evidences to the same and hence the same is not allowed under the present petition."

(emphasis supplied)

8. While setting aside the impugned award, the learned Single Judge takes note of the fact that, firstly, the appellant had sought to place reliance on certain internal master circulars which were produced before the Arbitral Tribunal. These internal circulars were neither incorporated in the terms and conditions of the tender, nor in the contract entered into between the parties. The learned Single Judge, therefore, finds this to be a clear error on the part of the Arbitral Tribunal to have relied upon documents which do not form part of the binding contract between the parties. Secondly, the learned Single Judge observes that by reading Clause 8 of Contract–II — with which we are concerned, such that, at the end of the words "*at the end of one year*" , the word "*alone*" or "*only*" should be understood to have been inserted, the Arbitral Tribunal has sought to vary the terms and conditions of the Contract. Clause 8 of the Contract – II with which the Arbitral Tribunal was concerned reads as follows:

"Escalation of Rates
The conversion charges finalized in the tender shall be kept firm for 1 year w.e.f. the date specified for commencement of the work in the work order. ***At the end of one year, the conversion charges will be revised based on the following weightage and neutralization for each of the components****: … The base indices for the above elements will be considered as On date which is 60 days prior to the date of opening of tender, except for fuel which shall be deemed to be a date which is 15 days prior to the date of opening of the tender."* (emphasis supplied)

9. The submission of Mr. Phoolka, learned senior counsel for the

appellant is that the Escalation that the contractor was entitled to under Contract–I amounted to only about 2% increment every year. However, under the formula adopted under Contract – II, the Escalation after the first year itself amounted to 11%. He submits that, in view of the higher escalation which the respondent was entitled to under Contract – II, the Escalation provided in Clause 8 of the Contract – II was only for one year, and not for the second year.

10. We do not find any merit in this submission of Mr. Phoolka for several reasons. Firstly, this was not even pleaded before the Arbitral Tribunal; this does not form the basis of the reasoning adopted by the learned Arbitral Tribunal for rendering the award. Moreover, as to what would be the escalation at the end of one year was something that neither party could have predicated upon, since the Escalation itself was based on rising prices of labour etc in the future.

11. The submission of Mr. Phoolka is that though this argument was raised before the learned Single Judge, she has not dealt with the same. We are not impressed by this argument for the reason that it is for the appellant to raise its defences before the Arbitral Tribunal, and none could have been added at the stage of hearing of objections under Section 34 of the Arbitration and Conciliation Act, 1996. The learned Single Judge was, therefore, not obliged to examine the said submission of the appellant/ objector. Even in an appeal against an order or a judgment, the Court may not permit raising of fresh pleas – though, an appeal is considered as a continuation of the original proceedings, and – unless the scope is restricted, the appellate Court may re-appreciate the facts and legal submissions.

However, that is not the scope of objections under Section 34 of the Act. The Court while dealing with the objections to the award does not sit as a court of appeal and the scope of its enquiry is undertaken within the bounds of Section 34.

12. We find ourself in complete agreement with the reasoning adopted by the learned Single Judge while setting aside the Award by the impugned judgment. We are, therefore, not inclined to interfere with the impugned order, and dismiss the present appeal.

13. The result of the impugned Award being set aside is that the respondents have failed to provide any justification for the recovery of Rs. 378,74,189/- sought to made from the respondents in respect of the Contract – II. Resultantly, the respondent is entitled to the said amount from the date of recovery at Simple Interest @ 9% per annum till the amount is recovered.

VIPIN SANGHI, J

REKHA PALLI, J

APRIL 12, 2021
N.Khanna