

(2020) 03 DEL CK 0261

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 349 Of 2020,
Miscellaneous Application No. 1862-64 Of 2020

Steel Authority Of India Ltd.(Sail)

APPELLANT

Vs

Primetals Technologies India Pvt. Ltd. (Formerly Known As
Siemens Vai Metals Technologies Pvt.Ltd)

RESPONDENT

Date of Decision : 12-03-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9(1), 34
Central Sales Tax Act, 1956 — Section 6(2)

Citation : (2020) 03 DEL CK 0261

Hon'ble Judges : Rekha Palli, J

Bench : Single Bench

Advocate : Sandeep Sethi, Puneeth Ganapathy, Ishita Mathur, P.C.Markanda,
V.K.Sharma, Rajesh Markanda, Reema Soni

Final Decision : Disposed Of

Judgement

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Rekha Palli, J" ,,,,,

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 filed by Steel Authority of India Limited, who was the" ,,,,,

respondent before the learned Arbitrator, assails the arbitral award dated 15.10.2019 whereunder the claims of the respondent have been allowed with" ,,,,,

actual costs of arbitration and interest @ 14% per annum.,,,,,

2. The brief facts as emerge from the record are that the petitioner, which is engaged in the business of inter alia manufacturing steel, awarded a" ,,,,,

contract for setting up a Coupled Pickling Line and Tandem Cold Mill at Bokaro Steel Plant to a consortium of M/s Siemens VAI Metals,,,,,

Technologies Pvt. Ltd., M/s Siemens VAI Metal Technologies GmbH & Co, Austria and M/s McNally Bharat Engineering Co. Ltd. The parties," ,,,,,

therefore, entered into a contract bearing No. TC/M/AGT-963 on 03.03.2008 which specified the project commencement date as 03.03.2008 and the" ,,,,,

date of completion as 03.09.2010. As per the terms of the contract entered into between the parties, it was envisaged that M/s Siemens VAI Metals" ,,,,,

Technologies Pvt. Ltd. (hereinafter referred to as "Siemens") would procure the items, as set out in the contract, from such manufacturers as" ,,,,,

identified by the petitioner and that the price of each item would include a) Basic price, b) Excise Duty (ED) and c) Central Sales Tax (CST). The" ,,,,,

parties had also agreed that Siemens would pass on a minimum CENVAT credit of Rs.33,06,70,252/- to the petitioner. On 19.06.2015, the contract" ,,,,,

was amended and Siemens was substituted by the respondent and therefore the respondent also became bound by the terms of the contract executed" ,,,,,

between the petitioner and Siemens on 03.03.2008. ,,,,,

3. While the work under the contract was still underway, the respondent raised invoices towards the work done wherein, besides seeking" ,,,,,

reimbursement of the input sales tax paid by it towards purchase of items used for carrying out the work under the contract, the respondent also" ,,,,,

sought reimbursement of sales tax paid by its sub-contactors/vendors while executing the contractual work. On 04.09.2015, the respondent raised RA" ,,,,,

Bill No.34 for a total sum of Rs.6,66,68,750/- which was subsequently reduced to Rs.5,93,64,168/- towards 2.5% milestone against the completion" ,,,,,

certificate, in accordance with Article 2.1.4 of the contract. As the CENVAT credit which the respondent actually passed on to the petitioner was" ,,,,,

admittedly for an amount of Rs.19,70,32,185/-, as against the guaranteed amount of Rs.33,06,70,252/-, the petitioner refused to make any payments to" ,,,,,

the respondent until necessary documents were submitted by the respondent to show that the guaranteed amount of Rs.33,06,70,252/- towards" ,,,,,

CENVAT credit would be passed on to the petitioner. The respondent claimed that in terms of the price schedule as set out in the contract, it was" ,,,,,

entitled to deduct the shortfall in CENVAT credit from the contract price at serial No.15 of the summary price schedule. Per contra, the" ,,,,,

respondent's stand was that deductions to the extent of shortfall in CENVAT credit could only be made from the gross contract price at serial" ,,,,,

No.12 and not the net contract price at serial No.15. As a result of these contrary positions, the respondent invoked arbitration and the matter was",,,,,,

referred to the learned Sole Arbitrator by the Honâ??ble Supreme Court vide its order dated 14.09.2018 passed in Arbitration Case(C) No.31/2018.,,,,,,

4. Before the learned Arbitrator, the respondent raised five claims and the petitioner raised two counter claims. The learned Arbitrator, after noticing",,,,,,

that the parties were ad idem that work had been duly executed in terms of the contract, set out that the disputes between these parties had to be",,,,,,

adjudicated in the following terms:-,,,,,

â??1) non-reimbursement of Central Sales Tax (CST) amounting to Rs. 2,83,86,010.53/- to the Claimant by the Respondent (now reduced to",,,,,,

Rs.1,90,56,702.38/-after the acknowledgement of receipt of Rs.92,16,537.03 by the Claimant.",,,,,

2) non clearance of RA Bill No. 34 dated 04-09-2015 of the Claimant, for an amount of Rs.6,66,68,750/- (now reduced to Rs.5,93,64, 168/-",,,,,,

in view of the Interim Award dated 06-03-2019 pursuant to which Rs. 73,04,582/- had been paid by the Respondent on 12-04-2019)",,,,,,

pertaining to commissioning activities, on account of difference in interpretation of the Contract covenants relating to shortfall in Minimum",,,,,,

Guaranteed CENVAT Credit.,,,,,,

3) non clearance of RA Bill No. 43 dated 20-03-2017 of the Claimant of Rs 1,07,75,482.06/- (now reduced to Rs. 2,93,293.29/-, in view of",,,,,,

payment of Rs.1,04,82,088.77/- on 05-12-2018 by the Respondent) pertaining to capital goods on account of difference in interpretation of",,,,,,

the Contract covenants relating to shortfall in Minimum Guaranteed CENVAT Credit.,,,,,,

4) Interest,,,,,

5) Costâ??,,,,,,

5. Before the learned Arbitrator, the plea of the respondent was that once the summary price schedule provided for two separate contract prices; one",,,,,,

including the minimum guaranteed CENVAT credit (â??gross priceâ??) and the other net of CENVAT and Input Tax Credit (ITC) on VAT/Entry,,,,,

Tax ('net price'), the petitioner could make deductions only out of the gross price at serial No.12 and not from the net price at serial No.15, which did",,,,,,

not include the components of CENVAT credit and ITC. The respondentâ??s plea

thus was that the shortfall of Rs.5,01,47,631/- in CENVAT credit",,,,,,
could be deducted only from the figure of Rs.305,06,47,252/-, i.e., the gross price, and not from the net price of Rs.271,99,77,000/-. The respondent",,,,,,
also claimed before the learned Arbitrator that once clause 11.2.1 of the contract clearly provided for the reimbursement of all duties, taxes & levies",,,,,,
etc. to the respondent by the petitioner, subject to a ceiling prescribed under the price schedule, the petitioner could not refuse to reimburse the Central",,,,,,
Sales Tax paid by the respondent's sub-contractors/vendors for procurement of material for execution of the contract which had been borne by,,,,,
the respondent.,,,,,,

6. On the other hand, the petitioner opposed the respondent's claims by urging that once the respondent had admittedly failed to fulfil its obligations",,,,,,
under the contract by not passing on the minimum guaranteed amount of CENVAT credit to the respondent, the petitioner was fully justified in making",,,,,,
deductions from the net contract price of Rs.271,99,77,000/- on this ground. It was further claimed by the petitioner that the CST was reimbursable to",,,,,,
the respondent only to the extent of the amount directly paid by the respondent; reimbursement of the taxes paid by its sub-contractors/vendors was,,,,,
not envisaged under the contract.,,,,,,

7. In support of their respective stands, both parties led evidence before the learned Arbitrator who, after considering the pleadings, evidence and",,,,,,
submissions of the parties, passed the impugned award. The learned Arbitrator, while accepting the respondent's claims and rejecting the",,,,,,
petitioner's counter claims, granted pre-award, pendente lite and post award interest @ 14% per annum on the awarded sum, besides directing the",,,,,,
petitioner to pay the entire costs of arbitration to the respondent. The relevant directions of the learned Arbitrator in the impugned award read as,,,,,
under:-,,,,,

a) the claim of the principal amount Rs.2,82,73,811.35/- by way of reimbursement of CST is allowed. The sum of Rs.92,16,537.03/-",,,,,,
already paid by the Respondent on being adjusted against this amount, the Claimant is entitled to the payment of the balance amount of",,,,,,
RS.1 ,90,56,702.38/- together with interest thereon @ 14% per annum, from the date on which it had fallen due in terms of Clause 12.1.6 of",,,,,,
the GCC, till the date of actual payment. The counter claim of the Respondent for

Rs.92,16,537.03/- is rejected." ,,,,,

b) the Claimant's claim of the principal amount Rs.6,66, 13,750/- against its RA Bill NO.34 dated 04.09.2015 is allowed, together with" ,,,,,

interest thereon @ 14% per annum from 23.10.2015 till 12.04.2019. Further, the Claimant is also entitled to interest @ 14% per annum on" ,,,,,

the balance principal amount of Rs.5,93,64,168/- from 12.04.2019 till the date of actual payment. The counter claim of the Respondent for" ,,,,,

Rs.5,01 ,47,637/- is rejected." ,,,,,

c) the Claimant's claim of the principal amount of Rs.1,07,75,482.06/- against its RA Bill No.43 dated 20.03.2017 is allowed together with" ,,,,,

interest @ 14% per annum thereon from 04.05.2017 till 05.12.2018. Further, the Claimant is also entitled to interest @ 14% per annum on" ,,,,,

the balance principal amount of Rs.2,93,293.29/- from 05.12.2018 till the date of actual payment." ,,,,,

d) costs as above.â?? ,,,,,

8. Assailing the award, Mr.Sandeep Sethi, learned Senior Counsel for the petitioner, besides reiterating the submissions made before the learned" ,,,,,

Arbitrator qua the issue of deduction of CENVAT credit and reimbursement of CST, contends that the award of interest @ 14% per annum and" ,,,,,

actual costs is wholly unwarranted. ,,,,,

9. He submits that the learned Arbitrator, while allowing the respondentâ??s claim for release of the amount withheld by the petitioner on account of" ,,,,,

its admitted failure to pass on the guaranteed amount of CENVAT credit to the petitioner, has re-written the terms of the contract and has in fact" ,,,,,

rendered important clauses thereof absolutely redundant. He submits that the learned Arbitrator has failed to appreciate that in terms of the specific" ,,,,,

note at the bottom of the summary price schedule, in lieu of the respondent's failure to provide the guaranteed CENVAT credit to the petitioner under" ,,,,,

the contract, the petitioner was entitled to deduct the amount due from the net contract price. The respondentâ??s failure to abide by the terms of the" ,,,,,

contract could not simply be condoned by directing that the said amount be deducted/reduced from the CENVAT amount at serial No.15 of the" ,,,,,

summary price schedule appended to the contract. As a consequence of the respondentâ??s failure to comply with the contractual terms, the" ,,,,,

petitioner was entitled to make the requisite deductions from the net contract

price of Rs.2,71,99,77,000/- at serial No. 15. He submits that since the",,,,,
note in the summary price schedule clearly stated that deductions were to be
made from the gross contract price at serial no. 12, a necessary corollary",,,,,
thereof would be that the deduction had to also be made from the net contract
price at serial No. 15. He thus contends that the Arbitrator, having",,,,,
misread the unambiguous terms of the Contract Agreement and the GCC, has
interpreted the same in a totally alien manner to pass the impugned",,,,,
award, which violates public policy and is liable to be set aside.",,,,,

10. Mr.Sethi further submits that the learned Arbitrator's directions to the
petitioner to reimburse the CST paid by the respondent's sub-,,,,,

contractors/vendors was beyond the terms of the contract. By drawing my
attention to clause 11.2.1 of the GCC, he submits that the taxes which",,,,,

were reimbursable to the respondent were only those which had been directly
paid by the respondent and not those paid by its sub-,,,,,

contractors/vendors. He further submits that as per the contract, it was for the
contractor to bear the taxes payable by its sub-contractors/vendors.",,,,,

Thus, in essence, the contention of Mr.Sethi is that the contract envisaged
reimbursement of only those taxes which were levied on the direct",,,,,

transactions between the respondent and the petitioner and not those which
were levied on the respondent's transactions with third parties",,,,,

irrespective of whether those transactions were for the purpose of executing any
work under the contract; the Arbitrator could not have awarded the,,,,,

same to the respondent by blatantly overlooking the specific terms of the
contract.,,,,,

11. Next, Mr.Sethi contends that even the award of interest @ 14% per annum
was wholly unjustified and unduly harsh. He submits that the said rate",,,,,

is highly exorbitant and is not in consonance with the prevailing rate of interest.
By placing reliance on the decision of the Supreme Court in Vedanta,,,,,

Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd. (Civil Appeal
No.10394/2018), he prays that the rate of interest be reduced to 9 %",,,,,

per annum.,,,,,

12. Assailing the award of costs, Mr.Sethi submits that the learned Arbitrator,
while awarding an amount of Rs.64,57,107/- towards costs of arbitration",,,,,

as claimed by the respondent, has not only failed to give any reasons therefor
but has also failed to appreciate the plausibility of the petitioner's",,,,,

defence by deeming it frivolous. He, therefore, contends that the learned Arbitrator was not justified in awarding the entire costs of arbitration in" ,,,,,
favour of the respondent.,,,,,

13. Mr.Sethi finally submits that even though, as on date, the total amount claimed by the respondent besides the amount of Rs. 19,70,32,185/- towards" ,,,,,

CENVAT credit is about Rs.267,09,84,999/-, the respondent is likely to raise further claims towards escalation. This would not be permissible in view" ,,,,,

of the prohibition contained in Article 4.2 of the contract which stipulates that in case the actual physical quantities of civil work and weights of the ,,,,,

mechanical equipment differ from those indicated in the contract, the contractor would not be entitled to get any additional price. He, therefore, urges" ,,,,,

this Court to clarify that the respondent will not be entitled to raise any further claims in this regard.,,,,,

14. On the other hand, Mr.P.C.Markanda, learned Senior counsel appears on advance notice on behalf of the respondent and supports the impugned" ,,,,,

award. He submits that the claims made by the respondent before the learned Arbitrator were strictly in accordance with the terms of the contract ,,,,,

and the GCC and have, therefore, been rightly allowed under the impugned award. He submits that once the contract and GCC provided a separate" ,,,,,

head for CENVAT credit and specifically stipulated that the shortfall therein would be deductible from the gross contract price of Rs.305,06,47,252/-" ,,,,,

at serial No.12 of the summary price schedule and not from the net contract price of Rs. 271,99,77,000/-, the petitioner could not arbitrarily and" ,,,,,

unilaterally elect to deduct the same from the net contract price. He thus contends that the learned Arbitrator has therefore rightly held that the ,,,,,

deduction on account of shortfall in CENVAT credit could be made only from the gross contract price.,,,,,

15. Mr.Markanda takes a similar plea in respect of the award of CST in favour of the respondent and submits that under clause 11.2.1 of the GCC," ,,,,,

though the respondent was liable to bear the initial burden of the sales tax payable by its sub contractors/vendors, the same had to be ultimately" ,,,,,

reimbursed by the petitioner. Insofar as the grant of interest at the rate of 14% per annum under the impugned award is concerned, he submits that" ,,,,,

since the learned Arbitrator exercised his discretion in this regard after considering the entire facts and circumstances of the case, this Court ought

not" ,,,,,

to interfere with the same. With respect to the award of actual costs of arbitration in favour of the respondent, he contends that even though the same" ,,,,,

was fully justified, the respondent is agreeable to modification of this direction to the extent that instead of full costs, 50% of the costs be paid to the" ,,,,,
respondent. ,,,,,

16. I have heard learned counsel for the parties. It is well settled that the scope of interference by this Court in a petition under Section 34 of the ,,,,,

Arbitration Act is extremely limited, especially when the objections raised therein primarily hinge on contractual interpretation. However, since both" ,,,,,

parties have made extensive references to various clauses of the contract, summary price schedule appended thereto and the GCC, I have carefully" ,,,,,

examined the same at their instance. Therefore, before dealing with the rival contentions of the parties, it would be appropriate to reproduce the" ,,,,,

relevant contractual clauses which read as under:- ,,,,,

Contract dated 03.03.2008 ,,,,,

â??4.2 ,,,,,

Should the actual physical quantities and weight differ from the indicated ones, neither the Contractor shall be entitled to get any additional" ,,,,,

price from the Employer not the Employer is entitled to deduct any amount from the Contract Price due to variation in physical quantities ,,,,,

and weight. ,,,,,

11.2. The Contract Price shall comprise basic price (base price), Excise Duty, Sales Tax/VAT (including Sales Tax/VAT on Works" ,,,,,

Contract/works Contract Tax) for the Erection & Civil Work portion of the contract only, Octroi, Turn Over Tax (TOT), Service Tax, " ,,,,,

Education Cess and any other duties, taxes and levies, as may be applicable and prevailing on base date of the Contract. While the basic" ,,,,,

price will constitute the consideration under the Contract, the payment of duties, taxes, levies, etc., will be reimbursed (on actuals) against" ,,,,,

documentary evidence (except freight and Insurance which shall be paid limited to quoted amount incorporated in the Contract) to be ,,,,,

produced by the Contractor, subject to a ceiling indicated in Price Schedule given in Appendix 1." ,,,,,

In no case the reimbursement towards duties and taxes, etc. shall exceed the amount indicated in Appendix 1 towards duties, taxes, levies," ,,,,,

etc. except as indicated in Sub-Clause 14.6.1, hereof. This clause is applicable for the portion for which prices have been quoted in Indian" ,,,,,

Rupees. ,,,,,

Entry Tax: ,,,,,

Entry Tax shall not be payable by the Contractor. ,,,,,

Service Tax and Excise Duty shall mean to cover applicable Education Cess any other surcharge thereon as applicable. ,,,,,

14.1 Except as otherwise specifically provided in the Contract, the Contractor shall bear and pay all taxes, duties, levies and charges" ,,,,,

assessed on the Contractor, its sub-contractors or their employees by Municipal State or Central Government Authorities." ,,,,,

However subject to stipulations of the Contract, the payment of duties taxes, levies etc, will be reimbursed (on actual) against documentary" ,,,,,

evidence to be produced by the Contractor, subject to a ceiling indicated in price schedule(s) of the Contract. In no case the reimbursement" ,,,,,

towards duties and taxes etc, shall exceed the amount indicated in price schedule(s) of the contract towards duties, taxes, levies etc, except" ,,,,,

on account of statutory variation in Taxes & Duties and/or imposition of new taxes and duties. ,,,,,

All taxes & duties payable outside India in respect of performance of the Contract shall be borne & paid by the Contractor. The Employer, ,,,,,

shall have no liability whatsoever on this account. ,,,,,

Entry Tax: ,,,,,

Entry Tax shall not be payable, by the Contractor." ,,,,,

14.5.3, ,,,,,

Excise invoices for all indigenous plant, equipment & materials shall be made consigned to Steel Authority of India Limited â?" BOKARO" ,,,,,

Steel Plant for availing CENVAT Credit under relevant Rules and shall be furnished by the Contractor to the Employer for availing CENVAT, ,,,,,

credit. ,,,,,

14.5.6, ,,,,,

Contractors to indicate Minimum Guaranteed CENVAT Credit that can be availed

by the Employer against materials supplies for subject,,,,,
work. In case of any shortfall in CENVAT Credit from that Guaranteed by the Contractor the shortfall shall be deducted by the Employer,,,,,
from the Contractor. In case of excess of CENVAT, 50% of the excess CENVAT amount will be paid." ,,,,,

14.6.1,,,,,

For the purpose of the Contract, it is agreed that the 'Contract Price' specified in Article 2 ("Contract Price" & "Terms of Payment") of the" ,,,,,

Contract Agreement is based on the taxes, duties, levies etc. and charges prevailing on Base date (hereinafter called "Tax" in this Sub-" ,,,,,

Clause 14.6 hereof). If any rate of tax is increased or decreased, a new tax is introduced, an existing tax is abolished, or any change in" ,,,,,

interpretation or application of any tax occurs in the course of the performance of Contract, which was or will be assessed on the" ,,,,,

Contractor, Sub Contractors or their employees in connection with performance of the Contract, an adjustment of the Contract Price shall" ,,,,,

be made as Sub-Clauses 14.6.2 & 14.6.3, hereof, by addition to the Contract Price or deduction therefrom, as the case may be." ,,,,,

14.6.1.1,,,,,

The adjustment in the Contract Price towards variations in taxes shall be applicable for the variations in the taxes enacted within the" ,,,,,

scheduled Contractual delivery/ execution period provided the Facilities are completed within the "Time, for completion" of the Contract." ,,,,,

For any upward variations in taxes enacted after the Contractual delivery / execution period, the adjustment in the Contract Price shall not" ,,,,,

apply in case the reasons for delay are attributable to the Contractor not withstanding extension to the "Time for Completion" is granted." ,,,,,

However, if the completion of the Facilities is delayed due to reasons attributable to the Employer and extension to the "Time for" ,,,,,

Completion" is granted variations in taxes enacted after the Contractual delivery/ execution period, the adjustment in the Contract Price" ,,,,,

shall be allowed within the extended" Time for Completion" of the Contract." ,,,,,

However, if the completion of facilities is delayed beyond scheduled date of the "Time for Completion" due to reasons attributable to both" ,,,,,

the parties, then the period for delay attributable to the Employer will be

considered as initial delay and the price adjustment shall be" ,,,,,,

applicable during this period as well.,,,,,,

14.6.1.2.,,,,,,

The adjustment in the Contract Price towards imposition of new taxes or abrogation of existing taxes, shall be applicable only if the new tax" ,,,,,,

S.No,Description,Prices (Currency),,,

,,Foreign Portion (Euro),,, "I ndia n Portion

(INR)",

,,SVAIMT Linz,SVAI MT India,MBE,

A,B,C,D,E,

1,"D e s i g n &

Engineering" ,,,,

a,"Imported (FOB)

(Refer Table-1)", "7,085,916",---,---,

b,"Indigenous (At

site) (Refer Table

2)", "127,707,252",,,

2,"Supply of Plant &

Equipment" ,,,,

a,"Imported (FOB)

(Refer Table 4A

& 4B)", "51,813,384",---,---,

b,"Indigenous (At

site) (Refer Table

4A & 4B)", "2,372,225, 000/-", "385,222,400",

3,"S u p p l y of

Refractories" ,,,,

a,"Imported (FOB)

(Refer Table 5)", n.a.,---,---,

b,"Indigenous (At

site) (Refer Table
 6)",,n.a.,n.a.,
 4,"S u p p l y of
 Commissioning
 Spares",,,,
 a,"Imported (FOB)
 (Refer Table 7)","Included in Table
 3",---,---,
 b,"Indigenous (At
 site) (Refer Table
 6)",,"Included in Table
 4A","Included in Table
 4B",
 ,5,"Civil Engineering
 Work including
 supplies (Refer
 Table 9) Supply
 & Ejection of
 Fabricated
 Building Steel",n.a.,n.a.,n.a.
 ,6,"Structures at site
 including sheeting,
 glazing and final
 painting (Refer
 Table -10)",n.a.,n.a.,n.a.
 ,7,"Storage, Handling,
 Erection
 Commissioning
 and P.G.Tests of
 Plant &

Equipment (Ref
Table 11)",---,"103,849,0 00","320,563,080
,8,"Foreign
Supervision
Charges in India
during Erection,
Start up,
Commissioning
and PG Tests of
plant and
Equipment (Refer
Table 12)","Included in SVAI
MT India Price","303, 372, 000",---
,9,"Training Charges
(Refer Table 13)","150,000","Included in Table
11A",
,10,"O c e a n Freight
Customs
Clearance
(excluding Import
Duty), Port
Clearance &
Inland
Transportation for
imported items for
which prices are
quoted in foreign
currency
(inclusive of
Service Tax &

Education Cess

Rs. 11,347,000)", "n.a.", "103,157,000", ---

, 11., "Comprehensive

Marine cum

Erection

Insurance (Refer

Clause no. 36 of

GCC) (Incl. o

Service Tax &

Edu. Cess

Rs4,437,000)", "n.a.

f", "40,337,000", ---

, 12., "Total Contract

Price (1 to 11)", "59,049,300", "3,050,647,252", "705,785,480

, "Total Contract

Price (1 to 11)

Total Euro &

INR Values", "59,048,300", "3,756,432,732",

13., "Guaranteed

amount of

CENVAT credit

on total contract

price", "330,670,252", "87,669,480",

14., "Guaranteed

amount of input

tax credit on

VAT", "14,816,000",

15., "Total contract

price net of

CENVAT &

input tax credit on

VAT ENTRY

TAX",,"271,99,77,000","603,300,000",

Total Contract Price (Net of CENVAT &VAT/ ENTRY TAX):,,,,,

Indian Currency (in words) (SVAI MT India Portion): Rupees Two hundred seventy on

crore ninety nine lakh seventy seven thousand only" ,,,,,

Indian Currency (in words) (Mchally Bharat Portion): Rupees Sixty crore thirty three lakh

only" ,,,,,

Foreign Currency (in words) (SVAI MT Linz Portion): Euro Five crore ninety lakh fort

nine thousands three hundred only." ,,,,,

the order of precedence shall be the order in which the Contract Documents are listed in Article 1.2 (Contract Documents) above. (emphasis,,,,,

supplied),,,,,,

A plain reading of the Articles of the Contract Agreement quoted hereinabove, testifies that the documents listed in Article 1.2, constitute the" ,,,,,

contract and are to be read and construed as an integral part thereof and that in the event of any ambiguity or conflict between these, the" ,,,,,

order of precedence for determining the primacy thereof would be the order in which these are listed in Article 1.2. In other words, in case" ,,,,,

of conflict between any provision of the Contract Agreement and the Appendices thereto and that of the General Conditions of Contract and,,,,,

Annexures thereto, for an instance, surfaces, the provision in the Contract Agreement and the Appendices thereto, would prevail." ,,,,,

63. Whereas to reiterate, a combined reading of Article 2.1 of the Contract Agreement and Clauses 11.2.1, 14.1 and 14.1.1 quoted herein" ,,,,,

above, evinces that the Total Contract Price is inclusive of all taxes and duties as on the Base date and the Basic price constitutes the" ,,,,,

consideration under the contract. Clause 14.5.6, requires the Contractors to indicate Minimum Guaranteed CENVAT Credit that can be" ,,,,,

availed by the Employer, against materials supplies for subject work, so much so that in case of any shortfall in CENVAT credit from that" ,,,,,

guaranteed by the Contractor, the shortfall shall be deducted by the Employer from the Contractor and in case of excess of CENVAT, 50%",,,,,

of the excess CENVAT amount would be paid to the Contractor.,,,,,

Clause 14.6 deals with variations in taxes and duties and Clause 14.6.1, 14.6.1.1 and 14.6.1.2 of the GCC comprehend adjustment in",,,,,

Contract,,,,,

Price on variation in the rate of tax abolition of any tax imposition of new tax. Clause 14.6.1 in particular reiterates, that the ""Contract",,,,,

Price"" specified in Article 2 of the Contract Agreement is based on the taxes, duties, levies etc., and charges prevailing on Base date and",,,,,

prescribes that, if any rate of tax is increased or decreased, a new tax is introduced and existing tax is abolished or any change in",,,,,

interpretation or application of any tax occurs in the course of performance of the contract, which was all to be assessed on the Contractor,",,,,

sub-Contractor or their Employees in connection with the performance of the contract, an adjustment of Contract Price shall be made as",,,,,

per Clauses 14.6.2 and 14.6.3, by addition to the Contract Price or deduction therefrom as the case may be.",,,,,

â?|â?|.,,,,,

71. The cognate provisions of the Contract Agreement and GCC on the issue as set out hereinabove, present a complete scheme, to be",,,,,

interpreted in a manner, to sustain the cohesiveness and the efficacy thereof, as intended by the parties. They ought not to be interpreted in",,,,,

isolation to be in conflict with each other and be mutually extinctive, making the Contract Agreement and the GCC unworkable. The 'Note'",,,,,

to the Summary Price Schedule, Clause 14.5.6 and 14.6 of the GCC and Clause 3 of the MOU, thus, have to be read with harmonious",,,,,

orientation. Apart from the fact that Clause 14.5.6 of the GCC and Clause 3 of the MOU, in the comprehension of the Tribunal, do not",,,,,

permit the deduction of the shortfall amount in minimum guaranteed CENVAT credit, otherwise than from the Total Contract Price, had the",,,,,

parties intended, such deduction from the Running Bills of the Contractor, these Clauses would have been expressly worded to that effect.â??",,,,,

20. The petitioner's challenge to the learned Arbitrator's directions with respect to reimbursement of the CST paid by the respondent's sub-,,,,,

contractors/vendors to the respondent is equally meritless. I find that the learned Arbitrator has, after examining Clause 14.1 of the contract," ,,,,,

concluded that the price agreed upon between the parties clearly includes all taxes to be reimbursed to the respondent. Therefore, merely because" ,,,,,

some input taxes were not paid directly by the respondent but by its sub-contractors/vendors in respect of goods used in the execution of the contract," ,,,,,

the same could not be a ground for the petitioner to refuse reimbursement thereof to the respondent. In this regard, the learned Arbitrator has" ,,,,,

observed as under:- ,,,,,

44. On a combined consideration of all the materials on record, this Tribunal is of the view that the Claimant's remaining claim for" ,,,,,

reimbursement of CST for the amount of Rs.1,90,56,702.38 deserves to the allowed in full and the denial thereof by the Respondent on" ,,,,,

grounds urged by it, is wholly unsustainable in law and on facts. Further, the Respondent having made the payment of the Excise Duty" ,,,,,

component in the same sale transactions, its approach to deny reimbursement of the CST paid by the Claimants/Vendors in the first interstate" ,,,,,

sales, having regard to the entire conspectus of law, the contractual stipulations and the materials on record is wholly in defiance of logic." ,,,,,

The materials on record evince, that the parties on a correct understanding of the terms and conditions thereof pertaining to the nature of" ,,,,,

sale transactions to be undertaken, did participate therein and in the process, the statutory form/certificate had been issued on due" ,,,,,

verification of all aspects and endorsed by the Tax authorities as well. The Respondent's specious plea of denying the reimbursement of CST ,,,,,

to the Claimant on the ground that it did not charge CST on the sale value of the transaction of sale by it to the Respondent, flies in the face," ,,,,,

not only of the statutory provisions involved and the judicial enunciation thereof as well as the contemporary documents on record ,,,,,

including the letters dated 05.03.2010 and 25.06.2014 of the Respondent acknowledging the sales in favour of the Respondent as "Sale-in-" ,,,,,

Transit", the Respondent's demurer, that it being a predetermined buyer at the stage of the first interstate sale, the subsequent sale in its" ,,,,,

favour does not qualify for a sale in transit, is in view of the above referred judicial renderings, flawed and indefensible, as the law permits" ,,,,,

two successive sales and it is wholly inconsequential whether the ultimate buyer at the stage of first sale is known or not.,,,,,,

To reiterate, the Respondent having consciously acknowledged the sale in its favour to be a sale in transit, had issued Form ""C"" and had",,,,,

availed the concessional rate of tax of 2%, its plea against estoppel, in the facts and circumstances of the case also cannot be sustained. As",,,,,

a matter of fact, as is borne out by the records, the Respondent continued to issue such Form ""C"" pertaining to the subsequent sales in the",,,,,

Claimant's favour even after the letter dated 05.08.2014 of its expert, Mr.B.S.P. Roy. As the sales by the Claimant in favour of the",,,,,

Respondent, being sale-in-transit, were exempt from CST, the latter's contention that it was not liable to reimburse the CST as the same was",,,,,

not charged by the Claimant on such sales, is patently fallacious.",,,,,

xxx.,,,,,

54. The plea of the Respondent, in the above overwhelming perspectives that as the Claimant has not raised CST invoice in respect of the",,,,,

sales made by the Claimant to it (Respondent) and that therefore, Section 9(1) of the Act is attracted, is to be mentioned only to be rejected.",,,,,

Such sales being in form and substance, sale-in-transit, as per Section 6(2) of Act, 1956, this contention is non est in law. Its avowal that the",,,,,

amount of CST paid by the vendors/Claimant in the first Interstate sale had been included in the cost price of the Claimant and that by,,,,,

seeking reimbursement thereof, it was endeavouring to reap undue benefits is also in the realm of speculation, more particularly in the face",,,,,

of categorical denial thereof by the Claimant in its rejoinder and the failure of the Respondent to discharge its burden with regard thereto.,,,,,

Even otherwise, a bare perusal of Table 4A, would unequivocally proclaim that ST/VAT/CST can by no means be a part of the Total Basic",,,,,

Price and is independent and severable therefrom. Mere reference of any commercial business practice by the Respondent to this effect,,,,,

does not, in the opinion of the Tribunal, prove this imputation against the Claimant.",,,,,

The Respondent's plea that it did not stand to gain in the bargain, though CST at concessional rate of 2% had been charged on the first",,,,,

interstate sales and that the subsequent sales in its favour had been exempted

therefrom, also belies logic and is on the face of records," ,,,,,,

unsound and unsustainable. Its plea, that the Claimant's invoices referring to the expression ""Price Enhancement"" though labelled as" ,,,,,,

CST/Tax invoices, do not qualify for reimbursement of CST also, in the facts and circumstances of the case is untenable and is rejected." ,,,,,,

xxx ,,,,,,

56. The interstate sales referred to and proved by the Claimant in the instant proceedings and which form the basis of its claim for ,,,,,,

reimbursement of CST, do constitute ""sale in transit"" in terms of Section 6(2) of Act, 1956." ,,,,,,

The supplies made by the Claimant to the Respondent, pursuant to the interstate sales involved, are in accordance with the Contract" ,,,,,,

Agreement between the parties and the relevant clauses of the GCC more particularly Clause 33.2 of the GCC and having regard to the ,,,,,,

arrangement effected to execute the sale-in-transit, no separate/ fresh Contract between the Claimant and the Respondent was necessary" ,,,,,,

after the interstate sales between the Claimant and its vendors. The interstate sales in succession between the Claimant and the vendors and ,,,,,,

the Respondent, in a progressive sequence in continuum, are valid in law and as contemplated by the parties." ,,,,,,

Having regard to the scheme of the Contract Agreement and the GCC pertaining to ""sale in transit"", the fact that the Respondent was a" ,,,,,,

predetermined buyer at the time of the first interstate sales between the Claimant and its vendors, is inconsequential and does not in any way" ,,,,,,

render the sale in transit in the instant case, under Section 6 (2) of Act 1956, non est." ,,,,,,

The Respondent's plea that it did not in any way participate in the sales in transit, in the face of the overwhelming materials on record to the" ,,,,,,

contrary is negated. The Respondent, having consciously issued the declarations in Form 'C' qua the sales in transit after actively" ,,,,,,

participating therein, being aware of all the relevant facts and circumstances and the significance of the sale dispatch documents involved," ,,,,,,

it cannot be permitted to take refuge under the cover of the plea of no 'estoppel against law'. It having issued the Form 'C' qua the sales in ,,,,,,

transit involved, in discharge of its statutory obligations and being fully cognizant

of the significance and consequences thereof, if cannot" ,,,,,

be permitted wriggle out of its responsibilities on such plea. It having acted in accordance with law in issuing the Form â??C? in terms of ,,,,,

Act 1956 and the contractual stipulations, it cannot be allowed to retrace its path and avoid its obligations under the Contract. To reiterate, " ,,,,,

the Respondent's contention that the CST paid by the Claimant's vendors had been included in the Total Basic Price! Cost of the Claimant as ,,,,,

per the normal commercial practice also does not commend for acceptance, in absence of pleadings or proof with regard thereto, and thus" ,,,,,

is wholly speculative warranting rejection thereof. ,,,,,

57. In view of the determination made hereinabove, the Claimant's claim of reimbursement of CST of Rs.2,82,73,811.35 is upheld. The" ,,,,,

payment of Rs. 92,16,537.03 by the Respondent towards this head is in accordance with the relevant contractual provisions and Act 1956, " ,,,,,

and the rules framed thereunder. Resultantly, the Claimant's claim for balance principle amount of Rs.1,90,56,702.38 is allowed, on a" ,,,,,

consideration of all aspects bearing on the issue. The Respondent's counter claim of Rs.92,16,537.03 is rejected.â??" ,,,,,

21. It is thus evident that the learned Arbitrator has, after interpreting the various clauses of the contracts, including clause 14.1 of the GCC, arrived at" ,,,,,

a categorical conclusion that the respondent was entitled to reimbursement of the CST paid by its sub-contractors/vendors, with which conclusion I" ,,,,,

find no reason to interfere. Even otherwise, when the findings of an award rest on an interpretation of the provisions of the contract between the" ,,,,,

parties, the Court, while examining the award under Section 34 of the Act, cannot interfere with the same, even if another interpretation is possible. In" ,,,,,

this regard, reference may be made to paragraph 22 of the decision of this Court in Union of India through Ministry of Youth Affairs and Sports" ,,,,,

Department of Sports CWG Delhi 2010 Cell vs. GL Litmus Events Private Limited OMP(COMM.)30/2020 dated 29.01.2020, which reads as under:-" ,,,,,

â??22. Even otherwise, the impugned award hinges upon the interpretation of Clauses 11.4 and 38 of the Agreement by the Tribunal; this" ,,,,,

must be considered in the light of the settled legal position that once the arbitrator interprets the provisions of an agreement between the ,,,,,

parties, the Court while examining the award under Section 34 of the Act will not

interfere with the same merely because another" ,,,,,

interpretation is possible. In any event, in the present case, I am of the view that the interpretation of Clause 38 by the Tribunal is not only" ,,,,,

correct but is the only possible interpretation. In this regard, reference may be made to the decision in National Highways Authority of India" ,,,,,

vs. ITD Cementation India Ltd. (2015) 14 SCC 21 wherein the Supreme Court was dealing with the question of interpreting the terms of a ,,,,,

contract, which formed the basis of the dispute, and proceeded to reiterate the settled legal principles in that regard as under:-" ,,,,,

â??25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the ,,,,,

view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The ,,,,,

Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator ,,,,,

construes the contract in such a way that no fair-minded or reasonable person could do.â?? ,,,,,

22. At this stage, reference may also be made to paragraph 17 of the GL Litmus Events Private Limited (supra) which reads as under:-" ,,,,,

â??17. Before I deal with the rival contentions of learned counsel for the parties, a reference may be made to a recent decision in" ,,,,,

Hindustan Construction Company Limited & Ors. Vs. Union of India & Ors. 2019 (16) SCALE 823 wherein the Supreme Court reiterated ,,,,,

the scope and grounds of judicial interference in an arbitral award under Section 34 of the Act; the relevant paragraph reads as under: ,,,,,

â??49. Further, this Court has repeatedly held that an application Under Section 34 of the Arbitration Act, 1996 is a summary proceeding" ,,,,,

not in the nature of a regular suit - see Canara Nidhi Ltd. v. M. Shashikala. As a result, a court reviewing an arbitral award Under Section" ,,,,,

34 does not sit in appeal over the award, and if the view taken by the arbitrator is possible, no interference is called for - see Associated" ,,,,,

Construction v. Pawanhans Helicopters Ltd. (2008) 16 SCC 128 at paragraph 17. ,,,,,

50. Also, as has been held in the recent decision Ssangyong Engineering & Construction Co. Ltd. v. NHAI 2019 SCC Online 677, after the" ,,,,,

2015 Amendment Act, this Court cannot interfere with an arbitral award on merits (see paragraph 28 and 76 therein).â??",,,,,

23. Mr.Sethi has also vehemently urged that the learned Arbitrator erred in awarding interest at an exorbitant rate of 14% per annum, for which",,,,,

purpose he has relied on Vedanta v. Shenzhen Shadong Nucleur Power Construction Co. Ltd. Civil (2019) 11 SCC 465 wherein the Supreme Court,,,,,

held as under:-,,,,,

â??9. The discretion of the arbitrator to award interest must be exercised reasonably. An Arbitral Tribunal while making an award for,,,,,

interest must take into consideration a host of factors, such as: (i) the â??loss of useâ? of the principal sum; (ii) the types of sums to which",,,,,

the interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v),,,,,

whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an,,,,,

economic standpoint;,,,,,

(vii) the rates of inflation; (viii) proportionality of the count awarded as interest to the principal sums awarded.,,,,,

xxx xxx xxx,,,,,

16. The imposition of a high rate of interest @ 15% post-120 days is exorbitant, from an economic standpoint, and has no co-relation with",,,,,

the prevailing contemporary international rates of interest. The award-debtor cannot be subjected to a penal rate of interest, either during",,,,,

the period when he is entitled to exercise the statutory right to challenge the award, before a court of law, or later. Furthermore, the",,,,,

Arbitral Tribunal has not given any reason for imposing a 15% rate of interest post 120-days.â??",,,,,

24. Though Mr.Markanda has tried to justify the award of interest at the rate of 14% per annum by contending that the same was based on a,,,,,

consideration of the facts and circumstances of the present case, and therefore this Court should not interfere with the same. I, however, find that the",,,,,

learned Arbitrator, while awarding interest at the rate of 14%, per annum has given absolutely no reason for the same; which, admittedly, is much",,,,,

higher than the prevailing rates of interest. In this regard, Mr.Sethiâ??s reliance on Vedanta (supra) is merited. I am, therefore, of the opinion that",,,,,

the award of interest @ 14% per annum by the learned Arbitrator is not only unreasoned but is, even otherwise, highly excessive and virtually in the" ,,,,,

nature of a penal interest when considered in the light of the prevailing rates. The grant of such a rate of interest in today's scenario is against ,,,,,

public policy and, therefore, the same is liable to be reduced. Accordingly, the rate of interest awarded in favour of the respondent under the impugned" ,,,,,

award is reduced to 10% per annum, which is in tune with the prevailing market conditions, applicable for all the three periods, i.e., pre-award, " ,,,,,

pendente lite award and post-award periods. ,,,,,

25. Insofar as the petitioner's challenge to the costs of arbitration awarded in favour of the respondent is concerned, since the respondent has" ,,,,,

fairly expressed its willingness to accept 50% of the costs of arbitration, instead of full cost as granted under the impugned award, I need not delve" ,,,,,

into this aspect. Accordingly, the direction in this regard is modified and the petitioner is directed to pay 50% of the actual costs of arbitration amount" ,,,,,

incurred by the respondent as determined by the learned Arbitrator. ,,,,,

26. Before I conclude, I may note that Mr. Sethi has vehemently urged that in view of Clause 4.2 of the contract, the respondent is not entitled to" ,,,,,

claim any escalation or raise any future bills towards escalation qua the contract. However, since this issue was not the subject matter of the" ,,,,,

impugned award, I have consciously refrained from examining this aspect despite the petitioner's vehement arguments in this regard. It is, " ,,,,,

however, made clear that in case any claim is raised by the respondent in the future towards escalation, the same would be considered on its own" ,,,,,

merits. ,,,,,

27. The petition along with pending applications are, accordingly, disposed of in the aforesaid terms." ,,,,,