SUPREME COURT OF INDIA

Numaligarh Refinery Ltd.

Vs.

Daelim Industrial Company Ltd.

C.A.No.4079 of 2007

(A.K.Mathur and Markandey Katju JJ.)

06.09.2007

JUDGMENT

A.K. MATHUR, J.

1. Leave granted.

2. Both these appeals arise out of the order dated 24.8.2006 passed by the Division Bench of the High Court of Gauhati at Guwahati in Arbitration Appeal No.1 of 2002. Therefore they are taken up together and disposed of by this common order.

3. Brief facts which are necessary for disposal of these appeals are that the respondent, Daelim Industrial Company (hereinafter to be referred to as 'DIC') is a company incorporated in Seoul, Korea having its registered office there. During the pendency of the arbitration proceedings, Daelim Engineering Company Limited (DEC) got merged with Daelim Industrial Company Limited (DIC), and therefore DEC ceased to exist. For our convenience we will take up DIC for all practical purpose. The appellant, Numaligarh Refinery Limited (hereinafter to be referred to as 'NRL') is a Government of India undertaking incorporated under the Companies Act, 1956, having its registered office at Guwahati, in the State of Assam. NRL through its consultant Engineers India Limited (hereinafter to be referred to as 'EIL'), also a Government of India undertaking, on 22.11.1993 invited global quotations for building of a Cogeneration Captive Power Plant for its Petroleum Refinery at Numaligarh in Assam. DIC with its consortium partner, Turbotecnica SPA of Italy, contested the global bid and after negotiation with NRL, the contract was awarded to DIC by its fax of intent dated 31.1.1995. Three contract agreements were signed between NRL and DIC and Turbotecnica. The total contract price embodied in the above contract agreements dated 11.4.1995 was on a Turnkey basis and the time schedule for completion of the works as per the consolidated contract was as follows :

" (i) First train of Gas Turbine Generator (GTG), Heat Recovery Steam Generator (HRSG) and Utility Boiler (UB) within 21 months of the issue of Fax Intent i.e. by 31.10.1996 and (ii) balance plant within 24 months of issue of the Fax Intent i.e. by 30.01.1997."

In course of the execution of the project disputes arose between the parties and therefore, in terms of Clause 9(b) of the Consolidated Agreement, DIC referred the matter on 7.8.1997 before the International Chamber of Commerce; International Court of Arbitration, Paris for resolution thereof and claimed Rs.37.9 crore under different heads. NRL disputed the claim and submitted its written

reply on 20.9.1997 and a rejoinder was filed by the DIC on 4.11.1997. In terms of the International Chamber of Commerce's Arbitration Rules, 1988, (hereinafter to be referred to as the 'Rules') the DIC and NRL nominated their Arbitrator. The International Court of Arbitration confirmed the appointment of Arbitrators and nominated a third Arbitrator-cum-Chairman to constitute the Arbitral Tribunal. Meanwhile, DIC updated its claim to be at Rs.55.8 crore to which NRL submitted its written reply. DIC in response thereto, submitted its rejoinder. However, no counter claim was made by NRL. The Tribunal framed necessary issues. The majority award of the Arbitrators by the order dated 23.9.2000 held that the respondent was entitled to Rs.29.76 crore and further an amount of US $ 170,000 being 50% of the cost of arbitration paid by it, in addition to its share of the total cost of US$ 340,000. The appellant having refused to pay its portion thereof interest at the rate of 12% per annum pendente lite on Rs.29.76 crore from 7.8.1997 till the date of the award was also sanctioned. In addition, the appellant, NRL was saddled with the liability of post award interest at the rate of 18% per annum on the above awarded amounts in case of its failure to make the payments within 60 days of the receipt the award. However, Justice M.M.Dutt, Member of the Arbitral Tribunal gave a dissenting award. He awarded DIC an amount of Rs.13,74,55,272/- with interest at the rate of 10% till realization, in case of failure on the part of NRL to disburse the sum. DIC was also further awarded an amount of Rs.1.65 crore to be recovered from the Customs authorities exacted on goods not chargeable to duty. Being aggrieved with the majority award dated 23.9.2000, NRL filed application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as the' Act') in the Court of the District Judge at Golaghat which was registered as Misc. Arbitration Case No.1 of 2001. Notice was issued and in pursuance of such notice the respondent appeared. The learned District Judge after hearing the parties and on consideration of the materials on record, set aside the award. Aggreived against that order of the District Judge an appeal was preferred by the DIC before the High Court. DIC itemized their claims as under :

" A. Transfer of US$ 6 million : Rs.9.6 crores B. Turbotecnica's Contract price : Included in Item C C. Countervailing Duty : Rs.13.0 crores D. Excess Custsoms Duty due to Fluctuation of exchange rate : Included in Item C E. Liquidated damages for delay In approval of Design and Engineering : Rs.8.9 crores F. Excess expenses due to lack of infrastructure : Rs.4.6 crores G. Additional expenses cost by Schedule delay : Rs.12.0 crores H. Interest for borrowed funds, Delayed opening of LC for Design : Rs.0.5 crore I. Escalation : Rs.4.1 crores J. Change Order : No dispute K. Extra tax burden as per AGSI With effect from 1st May 1997 : Rs.3.1 crores L. Indian statutory taxes included in Item No.C.

(Total Claim of DEC) [Rs.55.8 crores]"

No counter claim was filed by NRL. With regard to transfer of US $6 million equivalent to Rs.9.6 crore, the issue framed was to the following effect.

" Is the claimant entitled to a sum of Rs.9.6 crores as claimed under heading Transfer of US $ 6 million "

Under this heading it was pleaded by the DIC that the overseas contract required supply by it of various imported items priced at US $8,750,000. However, after ascertaining the indigenous sourcing of a good number of such items to be satisfactory, DIC vide its letter dated 13.9.1995, requiring the bidder to bid on the basis of indigenization scope to the maximum extent possible. The request was based on clause 14.3 of the ITB, which prescribed that items quoted in the bid to be imported could be subsequently transferred to indigenous supply for which NRL was to pay at

actuals maximum whereof to be limited to the computed value on site delivery basis on the pricings quoted originally for that of the imported origin. Clause 14.3 of the Instructions to Bidders reads as under:

" In case any item, quoted as imported in the bid, but is subsequently transferred to the Indian category, the total cost on project-site-delivery basis for such item will be payable by Owner at actuals but maximum limited to the computed value on site delivery basis based on the pricings quoted originally for that of imported origin."

Though this was agreed by NRL but it delayed the formal decision and DIC arranged procurement of the substituted indigenous materials by undertaking market survey, selecting Indian manufactures, supplying of design and drawing to the manufacture, ensuring product with quality control and supplies of finished project within a stipulated time frame for which it incurred cost and expenses to the tune of Rs. 25.3 crore which included the cost borne by DIC towards procurement , service charges, inspection and expediting charges, overhead expenses and profit. NRL duly approved the indigenous manufacturers from whom the substituted items were procured and permitted them to be incorporated in due execution of the contract. NRL extended its formal approval for the substitution eventually by its letter dated 13.3.1997. Though the DIC had claimed Rs.25.3 crore incurred as the total cost, but it limited its claim to Rs.21.7 crores being the procurement cost of indigenous materials by applying the conversion rate of Rs. 36.28 per US $ as on 26.2.1996.

Rs.12 crores was paid by NRL and therefore DIC registered its claim under the above head to the extent of Rs.9.6 crores. For computing the actual cost of Rs. 25.3 crores, the DIC took into consideration various factors; like bare cost, Excise duty, Central Sales tax, freight and insurance, procurement service charges, inspection and expediting charges, overhead expenses, profit and tax deduction at source. The majority of the arbitrators after considering all the materials placed before them came to the conclusion that since EIL was the prime consultant of NRL for the execution of the project, assessed the value of Rs.17.68 crores by applying its mind to the submission of DIC, the majority of the Arbitrators accepted the value expressed by EIL by its communication dated 4.11.1996 and the majority of the Arbitrators as per clause 14.3 accepted, the advice of EIL. Though NRL tried to withhold this letter, however same was brought on record and the majority of the Arbitrators accepted it and they added 15% profit margin and that worked out to Rs.2.65 crores State of Gujarat [AIR 1984 SC 1703]. The majority of the Arbitrators accepted the claim of the DIC to the extent of Rs.20.33 crores (Rs.17.65 crores + Rs.2.65 crores). An amount of Rs.12.19 crores under this head was already received by the DIC therefore, rest of the claim amount was accepted and awarded in favour of DIC i.e.

Rs.8.14 crores with US $ exchange rate at $1 = Rs.36.28 as equivalent on 26.2.1996. As against this, the minority Arbitrator, Justice M.M.Dutt held that the original documents and vouchers were not produced by DIC as it was their duty to have produced the whole vouchers to justify the purchases made in India for the substituted materials. The minority arbitrator took the view that since the claim of the DIC was to the tune of Rs.21.77 crores, Rs.12.19 crores having been paid, there remains only Rs.9.58 crores. But according to the minority award, as per the cost given by NRL their liability comes to Rs.14.19 crores and therefore, DIC is not entitled to beyond this amount. NRL also contested the expenses on account of procurement service, inspection and expediting for Rs.97 lakhs and overhead for Rs.3.47 crores as well as the claim of profit for Rs.3.14 crores and tax deduction at source for Rs.1.32 crores was not payable. After discussion, Justice M.M.Dutt took the view that the claimant was entitled to Rs.141,920,735.00 plus Rs.1,32,13,395.00

as tax deduction at source aggregating to Rs.15,51,34,130.00 only out of which the claimant has received Rs.10,69,83,850.00.

Therefore, the claimant was entitled to receive the balance amount of Rs.4,81,50,272.00 only and not Rs.9.6 crores as claimed. The District Court disapproved the approach of the arbitrators and emphasized that the word 'actual' occurring in Clause 14.3 means that the party should have produced the necessary evidence to substantiate it. The High Court however did not approve the same and took into consideration the letter dated 4.11.1996 of the EIL as the basis and observed that the Tribunal has rightly accepted the letter and set aside the order of the District Court. The High Court further held that while construing the 'actuals' under Clause 14.3. the DIC in addition to the charges is also entitled to reasonable margin of profit amounting to 15 per cent of the cost amount of Rs.17.68 crores which does not appear to be illogical or arbitrary and confirmed the finding of the majority award of the Arbitrators.

4. After considering the findings given by the majority and minority Arbitrators and the view taken by the High Court on the interpretation of Clause 14.3, in normal course the parties should have led evidence to substantiate their claims with reference to vouchers and other documents in evidence in order to justify their claim, but in the present case we find that when NRL through the communication dated 4.11.1996 have accepted the total value to the extent of Rs.14.19 crores, then there is no reason why this should not have been accepted as they have examined all the items in their letter. Be that as it may, the fact remains that the DIC has purchased the indigenous materials and substituted that as permissible under Clause 14.3, then there is no reason to deny them the cost for the same especially when intrinsic evidence is available i.e. an independent body NRL which is a Government of India undertaking and conceded the amount to the extent of Rs.14.19 crores as the actual cost. Therefore, taking that Rs.14.19 crores as the actual and Rs.12.19 crores having been paid, we think under this head, the DIC is legitimately entitled to a sum of Rs.2 crores against their claim of Rs.9.6 crores. However, the view taken by the minority Arbitrator with regard to procurement service, inspection and expediting, overhead and claim of profit appears to be correct and that has been rightly disallowed by the minority Arbitrator and we uphold that view. M/s. Brij Paul's case (supra) related to breach of contract under section 73 of the Contract Act and while allowing the petition, 15% was assessed as loss of fright. This case was decided on peculiar facts, it cannot provide any assistance to the contractor.

Hence, so far as the claim under Item No.1 for the substituted material the respondent DIC is entitled to a sum of Rs.2 crores.

[Rs.2 crores allowed under item No.1]

5. Now, coming to another head Turbo technical price, under this head Turbocechnica SPA of Italy, a consortium partner of DIC in the contract agreement with NRL, had to supply various imported items for a consideration of US $4150000 and DM 22990000 as specified in the Price Schedule of the Overseas Contract. The said consideration under Item No.2.1.1 was a consolidated figure including payment on account of service like third party inspection charges, ocean fright and marine insurance. Note 1 of the above Price Schedule permitted DIC / Turbotechnica to furnish list of goods with CIF (cost insurance and freight) value of NRL for availing concession in payment of customs duty payable in respect of import from overseas. Note 2 reiterated that third party inspection charges were included in the above price. DIC vide letter dated 13.9.1995 requested NRL to bifurcate the total consideration of the import items into CIF cost and service cost and to amend the contract agreement for that purpose but no amendment was made. It was pointed out that if no

amendment was made for the relevant portion, Turnotechnica shall have to declare the entire contract value as CIF cost to the customs authority and since payment of customs duty was DIC's responsibility, DIC will have to pay customs duty on service portion also. DIC vide letter dated 25.11.1995 pointed out to NRL that contract price consisted of CIF value, cost of design and engineering and supervision and other incidental costs and requested for break-up of costs, so that DIC may not pay customs duty on the total contract price when such duty was payable on CIF value by the owner. Therefore, the amendment not being carried out by the NRL, DIC could not avail necessary concession in customs duty.

Therefore, they claimed under this head a sum of Rs.1.65 crores and the same was accepted by the majority of the Arbitrators. The majority took the view that DIC had to unnecessarily pay the customs duty on service portion of the price consideration and as such allowed the claim. As against this, Justice M.M.Dutt in minority took a contrary view and held that NRL was not responsible for framing of such agreement and it was held that it was the fault of DIC and as such the claim was turned down. However, it was observed that DIC could justify and claim the said amount from the Customs department but NRL could not be held responsible for the extra duty paid by the DIC. The District Judge agreed with the minority award. However, the Division Bench of the High Court reversed the finding and approved the view taken by the majority of the Arbitrators. We have heard learned counsel for the parties and find that it depends upon the framing of the terms of the agreement, if the DIC would have been vigilant then they could have excluded the service charges; like design engineering etc. It was their duty to have excluded the services charges but they have not properly framed the contract and they cannot insist on amendment of the contract. If all the services were subjected to duty which they could have segregated the same but since they did not do this, therefore they could claim the benefit.

No direction could be given to the contracting party to amend their agreement. It is a mutual affair of the contracting party. The view taken by the High Court does not appear to be correct. Secondly, it was not possible for the NRL to amend the agreement as the same has already been registered with the Customs authorities and the Reserve Bank of India/ Hence, the DIC is not entitled to the aforesaid amount of Rs.1.65 crores under this head.

{ Claim of Rs.1.65 crores under this head not allowed]

6. Next issue is with regard to countervailing duty. DIC claimed a sum of Rs.8.78 crores which was paid on account of excise duty.

The claim of the DIC was that in fact at the time when the agreement was executed between the parties, countervailing duty was not there and it was introduced with effect from 1.1.1995 by Customs Tariff (Amendment) Ordinance, 1994. New Sections 9, 9A and 9B were introduced. This Ordinance was subsequently replaced by Customs Tariff (Amendment) Act, 1995 which was deemed to have come into force with effect from 1.1.1995. DIC submitted its initial bid on 16.3.1994 and final bid on 23.11.1994 by taking into consideration customs duty on imported materials at 25% as operative then. DIC could not have imagined the levy of countervailing duty at 12.5 % brought into force with effect from 1.1.1995. Bid settlement was made on 24.1.1995 and NRL finally awarded the contract to DIC by fax of intent dated 31.1.1995. Therefore, the submission of DIC was that at the relevant time there was no countervailing duty and it came into force subsequent to the contract, therefore as per Section 64-A of the Sale of Goods Act, 1930, the DIC is entitled to get this claim reimbursed. NRL contended that as per Clause 14.1 in the statement of claim pertaining to the contract clear instructions were given to the bidders under

clauses 15, 15.1, 15.2, 15.3 that entire customs duties or levies including the stamp duty and import licence fee levied on the equipments by Government of India or any State Government will have to be borne by DIC. The payment of countervailing duty was allowed by both the Arbitrators i.e. the Majority and Minority. But the Division Bench of the High Court reversed the finding. Aggrieved against this part of the order, appeal has been filed by DIC which has been registered as Civil Appeal arising out of S.L.P.(c) No.4409 of 2007.

7. In order to appreciate the submission of rival parties it will be appropriate to refer to necessary clauses of the agreement; Clause 6 of the Consolidated Agreement read with Clauses 1.8, 13.2, 15.3.

The crucial clause is Clause 6 which reads as under :

" It is specifically understood and agreed between the parties hereto that if there is any liability towards taxes/ duties (including custom duty on foreign component of supply portion) as may be assessed/ claimed/ demanded by the concerned Indian or Foreign authorities, it shall be the sole responsibility/ liability of the contractor to pay all such taxes/ duties and that the owner shall not be responsible at all the payment of such taxes/ duties. "

Mr.Ganguli, learned senior counsel for the appellant in this case submitted that the view taken by the High Court is not correct and as per Section 64-A of the Sale of Goods Act, 1930