



SHRADDHA
KAMLESH
TALEKAR

Digitally
signed by
SHRADDHA
KAMLESH
TALEKAR
Date:
2025.02.26
11:03:37
+0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 458 OF 2021
WITH
INTERIM APPLICATION NO. 3020 OF 2021
IN
ARBITRATION PETITION NO. 458 OF 2021

Union of India
through PCMM,
Central Railway

Versus

Emami Agrotech Ltd.

...Petitioner

...Respondent/Orig.
Claimant

Mr. T.J. Pandian *a/w. Gautam Modanwal and Noorjahan Khan, for
Petitioner.*

Ms. Priyanka Desai *a/w. Mr. Rohit Balani i/b M/s. The Fort Circle, for
Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : February 20, 2025

Pronounced on : February 26, 2025

JUDGEMENT :

Context and Factual Background:

1. The challenge in this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("**the Act**") is to an arbitral award dated February 1, 2020 ("**Impugned Award**"), which allows a claim made by the Respondent, Emami Agrotech Ltd. ("**Emami**") against the Petitioner, the Central Railway ("**Central Railway**").

2. The Central Railway had deducted an amount of Rs. 48,75,400 from the amounts payable to Emami towards purchase of bio-diesel, primarily in reliance upon a “*Fall Clause*” contained in: (i) the purchase order dated January 19, 2016 issued by Central Railway to Emami (“*Purchase Order*”); and (ii) the Indian Railways Standard Conditions of Contract (“*Standard Terms*”).
3. A brief summary of the factual matrix would be necessary. Pursuant to a tender floated by the Central Railway, Emami made a bid dated October 29, 2015, for supply of 4,100 kilolitres¹ (“*KL*”) of bio-diesel at an “*all-inclusive rate*” of Rs. 45,300 per KL. The destinations at which the bio-diesel was to be delivered were Wadi, Daund and Pune (all in Maharashtra). In this bid, the “*basic rate*” was meant to be Rs. 43,142.86 per KL, and Central Sales Tax was to be applied at 5%. In its bid, Emami quoted that it would not charge anything towards freight. Emami emerged as the lowest bidder when the bids were opened on October 30, 2015.
4. On November 16, 2015, the Central Railway negotiated with Emami and brought the “*all-inclusive rate*” down to Rs. 44,000 per KL (down by Rs. 1,300 per KL). This was broken up as a “*basic rate*” of Rs. 41,904.76 per KL with Central Sales Tax of 5% on such rate. That freight would be at Emami’s expense, remained unchanged. This revised offer was accepted on December 3, 2015, resulting in the formation of a contract.
5. The parties agreed that the price in the contract was on “Free on Rail / Road on Destination” basis (“*FOR on Destination*”). The contract between the parties explains the implications of FOR on Destination as part of the “general terms” governing “delivery and transportation of goods”. It provides that for supplies made on FOR

¹ 1 Kilolitre is 1,000 litres.

on Destination basis, the seller (in this case, Emami) would need to deliver the goods to the transporter nominated by the seller, but the seller has to bear the cost of carriage necessary to deliver the goods to the named destination (in this case, the three locations in Maharashtra). Such cost of carriage borne by the seller would be for delivery by the transporter until the location of the godown of the transporter nearest to the buyer (in this case, Central Railway). The seller must indicate the insurance cover taken for this journey, and the buyer may acquire, at the buyer's expense, a higher insurance cover.

6. Pursuant to such agreement, the Central Railway placed the Purchase Order for supply of 3,335 KL out of the 4,100 KL contract. On February 2, 2016 (shortly after the Purchase Order), Eastern Railway placed a purchase order for supply of 500 KL of bio-diesel deliverable to Jamalpur, Bihar ("*Eastern Railway Order*"), which was priced at Rs. 42,100 per KL, broken up as a base price of Rs. 39,000 per KL, freight of Rs. 1,150 per KL and Central Sales Tax of 5%.
7. The Eastern Railway Order entailing a price of Rs. 42,100 led to Central Railway claiming that the price for the supply under the Purchase Order would stand reduced from Rs. 44,000 to Rs. 42,100 per KL. Emami protested this interpretation of the Purchase Order, and submitted that the Fall Clause was not attracted at all. From the next payment due to Emami, an amount of Rs. 48,75,400 was withheld by Central Railway. Moreover, the contractual right to enhance the supplies was invoked by Central Railway to demand an additional 1,230 KL at a price of Rs. 42,100 per KL. Central Railway only paid amounts as if the price under the Purchase Order stood revised to Rs. 42,100 per KL.
8. Emami invoked arbitration, and after hearing the parties and

appreciating the evidence presented by the parties, the Learned Arbitral Tribunal passed the Impugned Award, upholding Emami's contentions and rejecting Central Railway's reading of the facts and the contract. The Learned Arbitral Tribunal ruled that Central Railway was comparing incomparable data points, and the terms on which Emami quoted its price to the Eastern Railway were different from the terms on which Emami quoted a price to Central Railway.

9. Before analysing the submissions made by the parties, it must be stated that the supplies for both deliveries were to come from Emami's facilities located near Kolkata. The deliveries for Central Railway were to be made to the three designated locations in Maharashtra – about 2,000 km away. The delivery to Eastern Railway was to be made to the designated location in Bihar – about 300 km away.

Contentions of Counsel:

10. I have heard Mr. T.J. Pandian, Learned Counsel on behalf of Central Railway and Ms. Priyanka Desai, Learned Counsel on behalf of Emami. I have perused their respective written notes on submissions and examined the record with their assistance.
11. The key grievance of Central Railway is that the FOR on Destination price was inclusive of freight. Emami had shown freight cost as NIL. Therefore, when comparing the price under the Purchase Order with the price under the Eastern Railway Order, Mr. Pandian would submit, no adjustment ought to be made for the cost of freight. Therefore, he would argue, one must compare the "all-inclusive" Purchase Order price of Rs. 44,000 per KL with the "all-inclusive" Eastern Railway Order price of Rs. 42,100 per KL. Therefore, reducing the price under the Purchase Order must be reduced to Rs.

42,100 per KL.

12. Mr. Pandian pleads that the term “free delivery” would mean that the delivery charges ought to be to the account of the supplier. Therefore, he would contend, adjusting it against the Purchase Order price for making a comparison between the two prices is impermissible. Mr. Pandian would submit that the very definition of “FOR on Destination” means that Emami had to deliver the goods to the transporter and “*in addition*” to such delivery, bear the cost of carriage until it reaches the transporter’s godown nearest to the destination. Therefore, Mr. Pandian argues, freight cannot be an element of the base price.
13. The Learned Arbitral Tribunal, having accepted that freight is not factored into the price quoted to Central Railway, and yet factoring it in when comparing the Purchase Order with the Eastern Railway Order, Mr. Pandian would submit, has committed a fundamental error. Such a view is not even plausible, he would submit, resulting in the Impugned Award being perverse.
14. On the other hand, Ms. Desai on behalf of Emami argued that the price quoted in the Purchase Order included the freight cost which meant that it was not to be passed on to Central Railway. The price quoted to the Eastern Railway Order had a separate element of freight cost to the extent of Rs. 1,150, which meant that freight cost was passed on to Eastern Railway to that extent. Ms. Desai would submit that one cannot expect the cost of covering a distance of 300 KM between West Bengal and Bihar to have the same economic cost of covering the distance of 2,000 KM between West Bengal and Maharashtra. Therefore, she would submit, the Learned Arbitral Tribunal had passed an impeccable award that makes commercial sense. It is not for this Court to sit in judgement over whether

another view is possible and to substitute its view with the view of the Learned Arbitral Tribunal.

15. For purposes of these proceedings, and on the basis of the issues pressed by the Petitioner in this Court, the implications of the Fall Clause is the only relevant element for this judgement. There was another element in the contract – Central Railway had a right to vary the quantities purchased by 30%. After Emami disputed the resort to the Fall Clause, Central Railway used this provision asking Emami to deliver even more bio-diesel at the reduced price. That element has not been pressed in issue in the hearings before me and does not form part of the written submissions canvassed on behalf of the parties. Suffice it to say, the core issue is whether the Fall Clause was attracted.
16. The approach of the parties and the Learned Arbitral Tribunal appears to have been that if the Fall Clause were not attracted, the enhanced purchase quantum would not follow. In any case, in exercise of this Court's powers under Section 34 of the Act, I can only determine the sustainability of the Impugned Award.
17. The key question that arises is whether the price quoted by Emami to the Eastern Railway is lower than the price Emami quoted to the Central Railway. It is only if the Eastern Railway Order were to at a price lower than the price contained in the Purchase Order, that Central Railway would get to re-price its contract with Emami.

Analysis and Findings:

Import of the Fall Clause:

18. At the threshold, it would be useful to examine the "Fall Clause". As

stated at the threshold, there are two versions of this provision – one in the Purchase Order and another in the Standard Terms. These are extracted below:-

Purchase Order:

*In case other Railway **has finalised the tender on same firm at lower rate** for the bio-diesel **that lower rate will be applicable for this P.O.** as well. Firm should give certificate that no lower rate P.O. is placed on them by other Railways.*

[Emphasis Supplied]

Standard Terms:

*The **price charged** for the stores supplied under the contract by the contractor **shall in no event exceed** the **lowest price at which the contractor sells the stores** or offers to sell stores of identical description **to any person** / organisations including the purchaser or any Department of Central Government or any Railway office or any Railway Undertaking as the case maybe, **during the period, till performance of all supply orders** placed during the currency of the contract. The **lower price will be applicable to supplies made after the date of** coming into force of **such reduction** or sale or offered to sell at a reduced rate.*

[Emphasis Supplied]

19. The Purchase Order, executed as of a certain date uses the phrase “has finalised” – which would require that another tender with a lower price ought to have been finalised before the Purchase Order. As regards the Standard Terms, a lower price quoted in future would become applicable to the present contract, for supplies that are to be made under the present contract, after the date of such reduction.
20. Therefore, the reduction has to be effected under the Purchase Order if the other Railway has finalised the tender at the lower price. Likewise, under the Standard Terms, the reduction has to be prospective and applicable to future supplies effected after the reduced price in any other tender. Evidently, these provisions are meant to ensure that the price quoted is a clean price and there is no gaming of two different arms of the Railways on the price for the

same product supplied by the same supplier.

21. The Fall Clause is meant to alter a pre-negotiated and agreed firm contracted price. Therefore, necessarily inherent in this determination in order to disturb a firm contracted price, is the need to effect a “like-for-like” comparison to make the price revision logical and consistent with the contracting intent of the parties to the contract. A price contracted by parties to a contract is a reflection of the consideration changing hands for the promises and reciprocal promises made between the parties. To effect an automatic change to such firm contracted price, on the basis of another contracted price, it would go without saying that the price point in the other contract ought to be a derivative of the same terms. If it is not, one would need to effect adjustments to examine if the two incomparable price points can be made comparable. Put differently, apples cannot be compared with oranges. However, an effort may be made to see if the difference between two price points is capable of being bridged by adjusting for the variable elements.

22. The Impugned Award has essentially held that the price contracted under the Purchase Order is not comparable with the price contracted under the Eastern Railway Order. This is because the Learned Arbitral Tribunal has come to the view that the Purchase Order made no provision for freight, which was entirely at the expense of Emami. Emami was expected to factor in this element of the bargain, when it made its price bid to Central Railway. On the other hand, the Eastern Railway Order is based on a “base rate” coupled with a provision for freight of Rs. 1,150 per KL. Therefore, the price in the Purchase Order cannot be simplistically compared with the price in the Eastern Railway Order, since it would not be a like-to-like comparison.

23. The key finding in this regard is that since freight was not factored in the FOR on Destination rate quoted to the Central Railway, there is no separate freight element to be borne by Central Railway. This is why the amount towards freight was shown as NIL in Emami's bid. It is true that for pricing, the freight component is not to be borne by Central Railway. This is why the freight would be "in addition" to the price quoted. That does not mean that the element of freight is irrelevant when the price quoted is sought to be compared with another price where freight borne by Eastern Railway (to the extent of Rs. 1,150 per KL) is an essential element of the price quoted.
24. To see if the two price points can be compared, the element of freight would need to be adjusted. The freight cost ought to be factored into both, or the freight cost ought to be removed from both, to compare the two price points. It is in this context that the Learned Arbitral Tribunal has remarked that it would not be possible to contend that the sum of base price of the material supplied, coupled with transportation of that material to any location whatsoever, ought to be the same all over the country. The Learned Arbitral Tribunal has rightly held that the cost of transportation is dependent on the distance, handling of goods and such other activity, because of which, one cannot expect the same cost for transport from Kolkata to Jamalpur, Bihar and also for the cost of transport from Kolkata to Wadi, Pune and Daund in Maharashtra.
25. In the words of the Learned Arbitral Tribunal, even if the basic price may be the same, the "landed cost" would have to be different in different parts of the country, when the supply is coming from the same location. Towards this end, the Learned Arbitral Tribunal has stated that even adopting the freight rates quoted by Indian Railways (adopting the per-ton cost), the movement of goods from Haldea to Daund would be Rs. 3,103 per ton. Therefore, it has held that

although the basic material supplied would be the same, the conditions under which the rates are quoted are not identical and thereby are not comparable. In the result, the Impugned Award has declared that the Eastern Railway Order would not enable Central Railway to invoke the Fall Clause.

26. Essentially, the finding in the Impugned Award is that Emami was to bear the entire freight cost in supplying to Central Railway to the designated destinations, all of which were situated in Maharashtra. Emami had to incur freight charges out of its own pocket, and naturally, this was factored into the price quoted to Central Railway. Along with taxes, the all-inclusive price amounted to Rs. 44,000 per KL. On the other hand, the Impugned Award found that when it came to Eastern Railway, freight costs to the extent of Rs. 1,150 per KL was to be borne by Eastern Railway. It is evident that such freight, coupled with the base price of Rs. 39,000 per KL applicable in the Eastern Railway contract, would take the price to Rs. 40,150 per KL. Along with taxes, the price point for Eastern Railway amounted to Rs. 42,100 per KL.
27. In my opinion, the Impugned Award has applied basic commercial common sense and arrived at its view that the aforesaid two price points are not comparable for purposes of invocation of the Fall Clause. This view cannot be said to be implausible. To compare the price derived out of differently structured price provisions without adjusting for the variations, would be arbitrary, irrational and would require one to inflict violence to the clauses in the contract. A contract where freight cost is passed on to the customer would have to be treated on par with a contract where freight cost is not passed on to the customer. If one needs to inflict violence to the terms of two differently structured price provisions in order to make them comparable, it would stand to reason that the jurisdiction of the Fall

Clause is not attracted.

28. However, it would not be strictly correct to state in absolute terms that the price quoted to the Central Railway could never be compared to the price quoted to the Eastern Railway merely because the parameters adopted are different. This is because when parameters vary, there can be an adjustment of the varying parameters to draw a reasonable comparison. It would be equally inaccurate to state that without any adjustment of varying factors, one can simply compare a price arrived under one bargain with another price arrived at under a different bargain.
29. On appreciation of evidence and the material before it, the Learned Arbitral Tribunal has arrived at a just and fair conclusion that the comparison sought to be effected by Central Railway is incorrect because it was simplistically comparing incomparable data points. This is a reasonable and logical conclusion. In my opinion, the Impugned Award, in its terms, is well protected from interference on the ground that it holds out an implausible view in interpreting the evidence.
30. In my opinion, the facts are rather simple. The quote from Emami to Central Railway, indeed showed that freight costs quoted were NIL. This was imperative simply because Emami was required to make it clear to Central Railway that no freight cost was being passed on to Central Railway. In the bid given to Eastern Railway, Emami intended to pass on freight costs to the extent of Rs. 1,150 per KL to Eastern Railway. This too is evidently a price condition. In reality, the actual freight cost could be higher or lower than Rs. 1,150 per KL, but what is being passed on to Eastern Railway is Rs. 1,150 per KL. In comparison, nothing is being passed on under the head of freight cost to Central Railway. Therefore, it is totally inappropriate to

simply compare the two price points – Rs. 44,000 per KL quoted to Central Railway on the basis of a certain package of rights and obligations, with Rs. 42,100 per KL quoted to Eastern Railway on the basis of a different architecture of rights and obligations. Merely because the phrase “all-inclusive” is used to describe the price in each contract, it would not obviate the need to examine the components of the price to make them comparable. If no adjustment is made, the two price points are indeed incomparable. The stance of Central Railway as is seen from its letter dated December 15, 2016, to invoke the Fall Clause is to simplistically compare these two price points. The Learned Arbitral Tribunal is right in holding that these two price points are not comparable.

Consideration of Potential Adjustments:

31. I am conscious that this Court must refrain from re-appreciating evidence when considering the validity of an arbitral award impugned under Section 34 of the Act. The stance of Central Railway, once accurately held by the Learned Arbitral Tribunal to be wrong, the matter could well end there. However, purely to explain why I am of the view that the Impugned Award is not perverse and cannot be regarded as having an error that conflicts with the most basic notions of justice or morality, I have examined the numbers associated with freight costs as available on the record.

32. The Learned Arbitral Tribunal has noticed the argument of Emami that just assuming that the bio-diesel had been moved by rail from West Bengal to Maharashtra, the freight cost would have been Rs. 3,456 per KL. If one were to factor this into the pre-tax base price of Rs. 41,904.76 per KL quoted to the Central Railway, then the freight-adjusted base price (deducting this freight cost) would become 38,448.76 per KL. In the Eastern Railway Order, freight is separately

provided for, and there is nothing to deduct from the pre-tax and pre-freight base price of Rs. 39,000 per KL. Therefore, with the removal of a reasonable benchmark of freight (and that too with a cheaper option of rail movement), the rate quoted to Central Railway comes to below the rate quoted to Eastern Railway. Therefore, the outcome in the Impugned Award cannot be held to be perverse or in conflict with the most basic notions of justice or morality.

33. The Learned Arbitral Tribunal, in its wisdom has applied commercial common sense to state that the two price points are simply not comparable. I have conducted the above exercise only to examine if one could assail the Learned Arbitral Tribunal's approach as a product of ignoring relevant evidence. By doing so, I have only sought to examine if the Impugned Award becomes vulnerable on the basis of patent illegality or perversity.
34. The Learned Arbitral Tribunal has put it differently – it has stated that when adopting FOR on Destination, it would be inappropriate to expect the same landed price all over the country since the freight component would vary depending on the distance to be travelled. Effectively, the upshot of this observation is that when one seeks to adjust the price for freight costs, there would be varying outcomes depending on the location involved in the FOR on Destination price. The Learned Arbitral Tribunal has rightly noticed that the terms of the price bid for Central Railway was to quote the price on the FOR on Destination basis, with details of excise duty and central sales tax being shown separately. In an FOR on Destination price bid, the price to be quoted would essentially mean that the supplier would bear the transportation cost. While the Learned Arbitral Tribunal has held that the two price points are not comparable, the Learned Arbitral Tribunal has indeed indicated that with an assumed adjustment for freight (taking rail freight into account), the adjusted price would be

lower for Central Railway compared with the price quoted to Eastern Railway.

35. The Learned Arbitral Tribunal has noted that the price quoted to Central Railway is FOR on Destination plus taxes while the price quoted to Eastern Railway is base price plus freight plus taxes. Therefore, the Learned Arbitral Tribunal is right in stating that the two price points are not comparable.
36. The material on record shows that data on the actual freight costs had been shared by Emami with Central Railway. However, Central Railway's stance has been steadfast – to compare the “all-inclusive” price point of Rs. 42,100 per KL for Eastern Railway (which included freight of Rs. 1,150 per KL) with the “all-inclusive” price point of Rs. 44,000 per KL for Central Railway (which is on FOR on Destination basis). According to Central Railway, freight costs are irrelevant to the price quoted to Central Railway since it was to be borne entirely by Emami. As stated earlier, merely because the phrase “all-inclusive” is used, it would not follow that when components of what is included and excluded in that price varies, the Fall Clause can be lightly invoked to amend an element of contract as firm as a binding price.
37. Emami has claimed that freight costs were to the tune of Rs. 4,300 per KL in the supplies made to Central Railway. Emami has claimed that it had paid tax on the base price of Rs. 41,904.76 which is the price inclusive of freight of Rs. 4,300 per KL and that the consequent base price is actually Rs. 37,604.76 per KL. The taxable base price and the 5% sales tax would aggregate to a price of Rs. 44,000 per KL.
38. On the other hand, Mr. Pandian has submitted that freight cost was to be “*in addition*” to the price quoted. Learned Counsel is right, but

an extrapolation that such price point can be compared with another price point which includes freight costs, is incorrect. It cannot be said that the freight cost is an irrelevant factor for price point comparison since the element of difference between the price points being compared is the freight cost.

Conclusions:

39. While the two price points are indeed not directly comparable for purposes of invoking the Fall Clause, I find that even if the differences were sought to be reconciled, it would be fair to state that the Learned Arbitral Tribunal, which is the master of the proceedings has drawn a fair inference from an assessment of evidence by considering the benchmark of the rail freight for moving goods from the railway station closest to Emami's plant to the designated destinations in Maharashtra.
40. The reasoning of the Learned Arbitral Tribunal being commercially commonsensical, fair and rational, it would not be possible to conclude that anything in the Impugned Award would conflict with the public policy of India under Section 34(2)(b)(ii) of the Act or that the Impugned Award betrays patent illegality, for purposes of Section 34(2-A) of the Act. Nothing in the Impugned Award is in contravention of the fundamental policy of Indian law and nothing in its a reasoning would conflict with the most basic notions of morality or justice.
41. It would also go without saying that no commercial entity would strike a bargain that would evidently be irrational and inflict on itself serious economic injury.

42. For the aforesaid reasons, I conclude that it would not be appropriate for me to interfere with the Impugned Award. With the aforesaid findings of fact writ large on the face of the Impugned Award, it is unnecessary to deal with the case law tendered by Emami on the subject of the scope of this Court's powers under Section 34 of the Act.
43. In these circumstances, the Impugned Award is upheld and the appeal contained in this Petition is dismissed. The Petition, as well as any interim applications connected with it, are hereby *finally disposed of*.
44. In the peculiar facts of the case, and taking into account Mr. Pandian's persuasive skills to demonstrate that a valid question had been raised, costs will not follow the event.
45. The amounts deposited in Court shall be released by the Registry of this Court no later than two weeks from the pronouncement of this judgement. Any additional dues that would flow from the Impugned Award shall also be paid no later than two weeks from the pronouncement of this judgement.
46. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]