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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 55/2010

Date of decision: 9th April, 2019

UNION OF INDIA

..... Petitioner

Through : Mr. Satyendra Kumar , Advocate
(M.No.9868240416)

Versus

M/S UNICON TECHNOLOGY
INTERNATIONAL PVT LTD.

..... Respondent

Through : Mr. Shiv Khorana, Advocate
(M.No.9810006115)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996(hereinafter, the 'Act') has been filed challenging the award dated 30th September, 2009 passed by the Ld. Sole Arbitrator rejecting the claim of UOI against M/s Unicon Technology International Pvt. Ltd (*hereinafter 'supplier'*). The supplier was awarded the tender for supply, erection and commissioning of four numbers of *Jib Cranes* on 28th July, 1989. The order was placed on the supplier, with the delivery period being three to four months from the date of approval of the GA drawings. Thus, the original supply was contemplated to be around February, 1990. There was a delay in the approval of the GA drawings and finally after several extensions, two of the cranes were received by UOI on 13th November, 1991. The remaining two cranes were received on 30th May, 1992. On 3rd January, 1992, after the supply of the initial cranes, a letter was

written by UOI to the supplier that the cranes were not of acceptable quality and that the engineering team should be deputed to rectify the same. The correspondence exchanged by the parties, including several letters and telex messages, is on record. At some stage, the Department also sought modification of the cranes, which was agreed to by the supplier. 90% of the purchase price was paid in advance after inspecting the cranes. Since the cranes could not be put to use by UOI, the present dispute arose between the parties and UOI sought refund of the entire amount paid, as also rental amounts for storing the cranes on a per day basis.

2. The Ld. Arbitrator, after perusing the entire correspondence between the parties, came to the conclusion that the GA drawings were approved by UOI prior to the manufacture. Thus, the allegation that the manufacture was not as per the drawings, is incorrect. Further, Ld. Arbitrator notes that an Inspector had been deputed by the UOI to inspect the cranes prior to their being dispatched and it is only after Inspector had seen the said cranes, the amounts were paid. The Ld. Arbitrator further came to the conclusion that the UOI had a period of rejection of 45 days from the date of supply. There is no rejection letter till 23rd May, 1997 and modifications were in fact sought by the UOI of the cranes.

3. The allegation of UOI that the modification of the cranes was not as per the terms of the contract was also rejected by the Ld. Arbitrator.

4. As per the conditions contained in contract dated 28th July, 1989, security deposit to the extent of 5% of the contract value i.e. Rs.97,044/- was to be submitted by the contractor. Supplies were to be made within 3 to 4 months from the date of approval of GA drawing by 28th February, 1989. The purpose of the cranes was for using by Southern Railways-Perambur,

Chennai. Inspecting officers were nominated and the clause relating to appointment of inspecting officers reads as under:

*“b) Inspecting Officer : 1. Director of Inspection, NI Circle, New Delhi or his authorized representative of the area concerned for initial inspection at firm’s work before dispatch of stores.
2. The Director of Inspection, Madras or his authorized representative for final inspection after erection and commissioning at consignee’s end.”*

5. The clause relating to terms of the payment is 19(a), which reads as under:

*“19. Special Instruction
a) Terms of payment: 90% payment will be made on proof of dispatch to consignee after initial inspection at firm’s works and balance 10% after receipt and completion of erection and commissioning of stores at site and final inspection and acceptance by the consignee thereafter.”*

6. As per the above terms, 90% of the payment was to be made on proof of dispatch to the consignee at Perambur. After the initial inspection at the supplier’s location and the remaining 10% was to be paid after receipt and completion of erection and commissioning as contained therein. The clause relating to guarantee/warrantee i.e. clause 19(e) reads as under:

*“Clause 19(e)
e) Guarantee / Warrantee:-*

The contractor / seller hereby declares that goods / articles sold to the buyer under this contract shall be of the best quality and workmanship and shall be strictly in accordance with the specification and particular are contained/ mentioned in clause 20 hereby and the contractor/ seller hereby guarantees that the said goods / stores / articles would continue to conform to the description and quality aforesaid for a period of 18 months from the date of supply of 12 months from the date of commissioning whichever is earlier and that notwithstanding the fact that the purchaser (Inspector) may have inspected and / or approved the said goods / stores / articles, if during the aforesaid period not conform to the description and quality aforesaid or have deteriorated the purchaser will be entitled to reject the said goods / stores / articles or such portion thereof as may be discovered not to conform to the description and quality and the decision of the purchaser on-that behalf will be final and conclusive. On such rejection the goods / stores / articles will be at seller's risk and all the provisions herein ----- relating to rejection of goods, etc. shall apply. The contractor /seller shall as so called upon to replace the goods / stores / articles within a period of 3 months or such further period as may be extended from time to time by the purchaser on its discretion on an application made therefor by the contractor, the goods / stores / articles or such portion thereof as is rejected by the purchaser and in such event the above mentioned warranty period shall apply to the goods / stores / articles replaced from the date the replacement thereof, otherwise, the contractor/ seller shall pay to the purchaser such damages as may arise by reason of the breach of the conditions herein contained. Nothing herein contained shall prejudice any other rights of the purchaser in that behalf under this contract or otherwise.”

7. After the initial supply on 13th November, 1991, on 18th December,

1992, a telegram was sent by the Department to the supplier which reads as under:

“REFER DGS&D A/T No. ST-6/502/46/6.7.87/26/COAD/UNICON/395 dated 28.7.89 AND OUR TELEGRAM dt.25th, 29th Nov., 91 SEND ENGINEER FOR JOINT INSPECTION OF DAMAGED CRANE CONSIGNMENT BEFORE 22-12-1991. CHIEF WORKSHOP MANAGER/LOCO WORKS/S/R.LY/AYAMAVARAM/MADRAS-23”

8. Thus, it appears that the two cranes which were part of the first supply were damaged. This was followed up with another letter dated 3rd January, 1992 wherein the supplier was informed that the cranes had many design defects and manufacturing inadequacies. On 31st January, 1992, the supplier agreed to undertake several works and the team was agreed to be deputed. There are several letters, telegrams and replies which have been exchanged between the parties. On 22nd April, 1992, certain further changes/modifications were suggested by Chief Works Manager at Perambur. The supplier agreed to carry out the modifications as suggested. Even at this stage, the UOI did not ask the supplier to stop the supply of the remaining two cranes which were received on 30th May, 1992. Thereafter, the correspondence continued between the parties and several modifications were continued to be suggested. A meeting was held on 26th February, 1993 wherein it was agreed that various modifications would be carried out in the Jib Cranes. This document is signed by both the parties. The supplier took the stand that the modifications that were sought were out of the scope of the contract, but in view of the good relations with the department, it agreed to carry out the same. The said letter is set out herein below:

“Ref.No.UI/5649/93/RSN

Dated: 27.5.93

The Director General of Supplies & Disposal

New Delhi-110001

*Sub: 4 Nos. Jib Cranes supplied against your A/T No.
ST-6/502/0046/6-7-87/26/COAD/Unicon/395 dated
28.7.89*

Dear Sir,

This is in reference to your letter dated 7.5.93 and our telecon discussions with the Consignee on 24th and 25th instant. As per our discussions we are deputing our Erection and commissioning team by 15.6.93 to take up erection commissioning of 1st Crane. Please Note that the modification to be carried out are out of the scope of contract but to keep up our good relations with D.G.S D. and consignee, we will extend full Company-operation to complete the work at the earliest. We only request you to give us sufficient time to carryout the modification and complete the work. We hope you will find the above in order.”

9. On 7th June, 1993, the Perambur Workshop Manager informed the DGS&D that the supplier had not carried out the required modifications. On 3rd June, 1993, the supplier again agreed to depute its erection team. Finally, on 3rd April, 1995, the DGS&D served notice in terms of the General Conditions of Contract. The DGS&D gave extensions to the contractor for completing the erection and commissioning up to 31st August, 1997. On 23rd February, 1999, the DGS&D called upon the supplier to refund the money, failing which, arbitration would be invoked. There was a complete stalemate and hence the matter was referred to arbitration. The Ld. Arbitrator arrived at the following conclusions:

- a) That the GA drawings were approved by the claimant;
- b) That the inspector had checked the cranes before dispatch;

- c) That the consignee had a right of rejection within 45 days, which was not done;
- d) The rejection was much later beyond the 45 day period;
- e) The Department itself asked for modification in the cranes;
- f) That the modifications were not as per the contract. As per the correspondence, the Department did not know which kind of cranes were required by them;
- g) That the claim of the Government for refund and for ground rent was rejected. The balance 10% was awarded in favour of the supplier.

10. A perusal of the correspondence on record shows that the responsibility till erection and commissioning was that of the supplier. The correspondence also shows that the Department was showing enormous urgency in the non-working of the cranes. Repeated telegrams have been issued to the supplier. The telegrams are as early as within a few days from the date of supply. The first supply on 13th November, 1991 and telegrams which are on record are from 25th November, 1991 calling upon the supplier for joint inspection. On 3rd January, 1992, the list of discrepancies in the crane was sent to the supplier and its team was asked to be deputed. This was agreed to by the supplier vide letter dated 31st January, 1992. At that stage, the supplier never stated that it was not willing to carry out the required work. Letter dated 31st January, 1992 is set out herein below:

*“The Chief Works Manager Dated: 31st Jan., 1992
Loco Works,
Permabur Workshop,
Perambur,
Madras -23*

*Sub: 4 Nos. Jib Cranes supplied to you against
DGS&D A/T No.ST-
6/502/46/6.7.87/26/COAD/UNICON/395 dated
28.7.89.*

Dear Sir,

At the outset we thank you very for the courtesy extended to our Mr. Surjit Singh Waryah, Chief Executive (Sales), during his visit to your works on 13 and 14th Jan., 1992. During the discussion, it has been agreed that following work will be undertaken during the erection of the cranes.

- 1. Locking blocks would be provided to the axles of pulley block.*
- 2. Reaction roller nut will be locked properly.*
- 3. Proper procedure will be explained to replace the main bearings of the masts in our operating instructions manual.*
- 4. We also confirm that the damaged/missing parts of the cranes will be rectified/replaced by us free of cost during the erection and commissioning.*

As already intimated to you vide our Savingram No.UI/J33/RSN/5449 (F) dated 30.1.1992, we would be deputing our erection team within one week and you are requested to provide the site to enable us to take up erection of the cranes. You are also requested to confirm the availability of the site per return post.

Thanking you."

11. The correspondence continued between the parties and finally a joint report was prepared and duly signed. The said joint report dated 26th February, 1993 reads as under:

"1. The King Post pipe is to be extended through the bottom carriage and rigidly anchored with the mounting flanges and top and the bottom plates of the end carriage, as discussed.

2. In lieu of the CI rings shown in the modified drawing, a set of reaction rollers with proper housing arrangement are to be provided both at the top and bottom of the jib frame to take up the lateral thrusts on the King Post.

3. The distance between the top reaction rollers is to be adjusted to suit the existing top guide rail such that the King Post is kept vertical after assembling.

4. The spindles of the rollers are to be locked with the split cotter pins to prevent working out after assembling.

5. The end pulley arrangement is to be modified to make it easily replaceable.

6. Shri R.S. Nalwa of M/s Unicon stated that the required damping effect in the slowing motion will be achieved by the thruster brakes that have been provided, which will be set out the time of assembly to provide the desired damping effect.

This will be observed that at the time of trial after erection.

7. The present arrangement of the fastening of the King Post with the top bracket is not strong and is worked out. The location is to be strengthened further by provision of additional plates with welding etc.

Shri R.S. Nalwa, MD of M/s Unicon promised that early arrangements will be made to carry out the aforesaid modifications in addition to any other incidental work required for erection, commissioning and efficient operations of the cranes. The modifications will be carried out by M/s Unicon with their men and materials in the premises of Loco Works, Perambur.

Initially one crane will be modified and trial runs will be carried out to be followed by other cranes.

Shri Nalwa has been requested to carry out the modifications and erect and commission the cranes expeditiously.”

12. Thus in the meeting dated 26th February, 1993, the supplier clearly agreed to carry out the modifications and commission the cranes expeditiously.

13. Despite this, the supplier did not take any action, leading finally to the commencement of arbitral proceedings. The finding of the Ld. Arbitrator that there was no rejection prior to 45 days, is therefore incorrect. The cranes were urgently required for the Railways as they were using outdated cranes and the mere fact that they kept notifying the supplier of the deficiencies and defects and asking the supplier to rectify the same does not mean that the right of rejection was foregone. So long as the supplier has been notified of the defects and the supplier had agreed to carry out the same, which it finally refused to do, the Department must be deemed to have exercised its right of rejection. The further finding that the initial supplies were as per the drawings given, may not also be completely correct inasmuch as there were defects in the design. The defects were attached in the form of a note as Annexure B to the claim petition. The note explains the defects in the design and shows that the Ld. Arbitrator's finding that the cranes were as per the design is also incorrect. The mere fact that the Government may have agreed for modifications in the design in order to make the cranes workable, does not mean that the defects in the initial supply, the defects in the packing and the fact that the cranes were received in damaged condition, can be ignored. The note containing the defects is extracted herein below:

"The cranes supplied by the respondent firm are defective in design, as shown in the figure below:

Moreover, the packing of the cranes was not good enough as the cranes were received in damaged

condition as discussed in the claim statement. The welding workmanship was also very poor, far from satisfaction, as seen from the transit damages noticed and shown to the respondent firm. The respondent was aware that the crane was supposed to carry the molten metal, hence the cranes ought to have been designed and fabricated with foolproof technical design & safety.

The crane is a cantilever type of crane which itself will have an inherent problem of stability during working, unless adequate safety measures are taken. There will be tendency of the crane to topple and to go out of its moving path. Since the crane is supposed to handle molten metal, it will endanger the lives of workers working in the vicinity as even with little tilt will lead to spilling and splashing of the molten metal. This will also cause fire hazards.”

14. The entire purpose of giving guarantee/warranty is that the product supplied ought to be useful for the purpose for which it has been supplied. The mere fact that an inspector may have checked the crane prior to it being dispatched does not act as an estoppel against the Department for rejecting the cranes if it is found that the cranes are defective. This is clear from a reading of clause 4.2 of the conditions of contract, which reads under:

“Consignee’s right of rejection - Notwithstanding any approval which the Inspector may have given in respect of the stores or any materials or other particulars or the work or workmanship involved in the performance of the contract (whether with or without any test carried out by the contractor or the Inspector or under the direction of the Inspector) and notwithstanding delivery of the stores where so provided to the interim consignee, it shall be lawful for the consignee on behalf of the purchaser to reject the stores or any part, portion or consignment thereof (i) within forty five days after actual delivery at the place

or destination specified in the schedule and (ii) in the case of stores the condition of contract in respect of which are dealt in any of the forms DGS&D-71, 72 and 73 within 90 days reckoned from the date of receipt of complete equipment with spares and accessories, as ordered if such stores or part, portion or consignment thereof is not in all respects in conformity with the terms and conditions of the contract whether on account of any loss, deterioration or damage before despatch or delivery or during transit or otherwise howsoever;

Provided that where, under the terms of the contract, the stores are required to be delivered to an interim consignee for the purpose of despatch to the consignee, the stores shall be at the purchaser's risk after their delivery to the interim consignee; but nevertheless it shall be lawful for the consignee on behalf of the purchaser to reject the stores or any part, portion or consignment thereof upon their actual delivery to him at the destination if they are not in all respects in conformity with the terms and conditions of the contract except where they have been damaged or have deteriorated in the course of transit or otherwise after their delivery to the interim consignee.

The provisions contained in clause 17 relating to the removal of stores rejected by the Inspector shall mutatis mutandis apply to stores rejected by the consignee as herein provided.

15. In ***Union of India v. A-1 Sanat & Co. Pvt. Ltd. & Anr.*** 2010 (1) AD (Delhi) 88, a Ld. Single Judge of this Court has, rejected a similar contention to the effect that once the inspector clears the product, no further issues can be raised. In fact, the correspondence and the joint report prepared proves that the goods were defective and in fact could not be put to use at all. The telegrams are dated almost immediately after the supplies

were made and the finding that there was no rejection within 45 days is contrary to the record. Since inception, UOI's consignee had been in continuous touch with the supplier. Several meetings were held, repeated reminders were sent. The supplier in fact, after agreeing to repair and carry out modifications to make the crane workable, completely reneged from the same. The evidence on record has been completely ignored by the Ld. Arbitrator. None of the telegrams, letters, internal report, etc. have been considered. Under these circumstances, following the judgment in *Union of India v. A-1 Sanat & Co. Pvt. Ltd. & Anr.* (supra) the award is set aside. Parties are left to bear their own costs.

16. OMP is disposed of.

PRATHIBA M. SINGH
JUDGE

APRIL 09, 2019/Rahul
(corrected and released on 15th April, 2019)