



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

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Reserved on : 06.10.2023

Pronounced on : 18.10.2023

IN THE MATTER OF:

+ O.M.P. (COMM) 244/2018 & I.A. 7570/2018

SHRI RAM RAJA SARKAR LOK KALYAN TRUST THROUGH
ITS DIRECTOR Petitioner

Through: Mr. Sanjay Sarin, Ms. Gagan Deep
Kaur, Advocates.

Versus

ENERGY EFFICIENCY SERVICES LIMITED THROUGH ITS
ADDITIONAL GENERAL MANAGER Respondent

Through: Mr. Raman Kapur, Senior Advocate
with Mr. S. Sanjay, Mr Ashish Kumar
Sharma and Mr. Varun Kapur,
Advocates.

AND

O.M.P. (COMM) 266/2018 & I.A. 8527/2018

ENERGY EFFICIENCY SERVICES LTD Petitioner

Through: Mr. Raman Kapur, Senior Advocate
with Mr. S. Sanjay, Mr Ashish Kumar
Sharma and Mr. Varun Kapur,
Advocates.

Versus



SRI RAM RAJA SARKAR LOK KALYAN TRUST..... Respondent

Through: Mr. Sanjay Sarin, Ms. Gagan Deep
Kaur, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

MANOJ KUMAR OHRI, J.

1. The present petitions have been filed raising cross objections under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, the '*A&C Act*') against the arbitral award dated 21.02.2018 (hereafter, the '*Impugned Award*') delivered by the Arbitral Tribunal comprising of Sole Arbitrator (hereafter, '*AT*').
2. The impugned award came to be delivered in the context of six Contract Agreements dated 04.01.2016 (hereafter, the '*Contracts*') which came to be executed in consequence of Public Tenders invited by Energy Efficiency Service Limited (hereafter, the '*Principal Employer*') for distribution of LED bulbs in six States i.e., Delhi, Karnataka, Rajasthan, Maharashtra, Uttar Pradesh and Uttarakhand. Ram Raja Sarkar Lok Kalyan Trust (hereafter, the '*Contractor*') was declared as the successful bidder and was awarded the works vide separate letters of award for all the six States. The Contract price was fixed at Rs.7,03,26,658.50 i.e., 1,35,76,575 bulbs @ Rs.5.18 per bulb w.r.t Rajasthan. Similarly, for other States, the Contract price was fixed at varied rates. The Contract price was exclusive of all applicable taxes and duties but inclusive of loading/unloading/installation/commissioning, transportation, lodging and



boarding, travel expenses, etc. The other charges/costs/TA/DA were also included in the Contract Price.

DISPUTES BEFORE THE ARBITRAL TRIBUNAL

3. The Contractor approached the AT and filed three claims. The first claim related to payment of distribution cost (commission charges) of Rs.89,01,321/- towards deposit of Rs.10 crores and sale of LED bulbs in the six States. By Claim No.2, Contractor claimed damages to the tune of Rs.1,84,19,651/- for the extra expenditure incurred by it in publicity and promotion of sale as the Principal Employer had failed to carry out the minimum awareness programme among the public. Vide Claim No.3, Contractor claimed compensation of Rs.3,09,32,165/- towards loss of expected profit which it would have earned had the Principal Employer not prevented it from carrying out the work.

4. The Principal Employer resisted the claim and had also filed three Counter Claims. In Counter Claim No.1, it claimed Rs.3,42,55,670.50 towards non-remittance of the cash collected from the public by the Contractor in all the States. In Counter Claim No.2, the Principal Employer claimed Rs.2,33,07,690/- as the value of balance stock of LED bulbs which the Contractor failed to return. Vide Counter Claim No.3, compensation of Rs.1,25,00,000/- was claimed towards the costs incurred by the Principal Employer in getting the balance work done through other agencies in six States.

IMPUGNED AWARD

5. **Claim No.1:** AT noted that as per Clause 7 under 'Payment Terms' of



the tender document, the Principal Employer was under obligation to pay the distribution costs (commission charges) within 15 days from the date of the deposit. The Principal Employer negated the claim on the ground that the Contractor did not comply with the three conditions enumerated under Clause 7 for payment of commission charges i.e., Acceptance of Letter of Award and signing of the Agreement; Submission of the Performance Bank Guarantee; and Fulfilment of the Pre-distribution Activities as listed in Section 4. Out of the aforesaid three conditions, the Contractor had failed to fulfil the last. Further, the Contractor not only failed to complete the work, but also committed breach of the Contract by siphoning off the LED bulbs and selling the same at higher price. It also failed to achieve the daily and weekly target. AT noted that the Contractor had deposited the entire cost of LED bulbs totalling Rs.10,40,58,501/- and that the Principal Employer had deducted TDS of Rs.1,70,071/- on commission charges of Rs.89,01,321/-. AT further noted that the Contractor had issued demand notices in response to which the Principal Employer issued a show cause notice on 28.03.2016 thereby asking the Contractor to stop all the sale activities and transfer the stocks of LED bulbs to the Principal Employer's other agencies. The controversy related to stock of 50,000 LED bulbs that went missing from one of the sub-vendors of the Contractor, namely, Jitender in the State of Uttar Pradesh. The entire amount claimed was allowed and the Principal Employer was directed to pay the amount within three months with 9% interest per annum.

6. **Claim No.2:** AT rejected the claim by observing that the Contract stipulated that only minimum media awareness programme would be carried out by the Principal Employer and if the Contractor wanted to create more



awareness, it could have undertaken the said activity at its own expense, though with a right to incorporate the extra expenditure in the cost of the LED bulbs. As the Contractor did not carry out any activity and no expenditure was incurred, the claim was rejected.

7. **Claim No.3:** AT noted that the Contractor premised the said claim on three grounds i.e., failure of Principal Employer to carry out the publicity, sudden stoppage of distribution of LED bulbs on account of which balance remaining bulbs could not be distributed, and transfer of stock to other agencies on the direction of Principal Employer. AT while disagreeing with the first ground, accepted the latter two. AT further noted that there were no clear details about the breakup figure and while using its discretion, awarded compensation of Rs.1,50,00,000/- towards loss of expected profit.

8. **Counter Claim No.1:** The Counter Claim was discussed State-wise.

(i) For the State of Karnataka, the Principal Employer had claimed that against the supply of 7,55,000 LED Bulbs, the Contractor collected Rs.1,62,49,970/- and remitted only Rs.89,00,000/- to the Principal Employer leaving an outstanding of Rs.73,49,970/-. The Contractor denied the claim and submitted that only 6,45,000 LED bulbs were received by it, resulting in collection of distribution amount of Rs.1,01,48,030/-, thus leaving an outstanding of only Rs.12,48,030/-. AT observed that the Contractor had indeed received 7,55,000 LED Bulbs and thus held the Principal Employer entitled to receive Rs.73,49,970/- from the Contractor after deduction of the commission charges alongwith 9% interest per annum from March, 2016 till payment.

(ii) For the State of Rajasthan, the Principal Employer claimed supply of 6,89,150 LED bulbs. Though the collection was Rs.6,37,71,100/-, the



Contractor deposited only Rs.5,58,53,000/- leaving an outstanding of Rs.73,60,000/-. The Contractor stated that 3,04,150 LED bulbs were transferred to other agencies and after deducting the missing/stolen and defective stock, the collection was only Rs.5,75,97,100/-. Thus, the outstanding amount was Rs.17,44,100/-. AT observed that the Principal Employer had established supply of the LED bulbs and was entitled to receive Rs.73,60,000/- after adjusting commission charges alongwith 9% interest per annum from March, 2016 till payment.

(iii) For the State of Delhi, the Principal Employer claimed supply of 3,88,940 LED Bulbs resulting in collection of Rs.2,69,70,744/-. The Contractor had deposited Rs.2,17,19,251/- leaving an outstanding of Rs.52,51,493/-. The Contractor agreed with the quantity of supply however, claimed that only Rs.44,57,459/- was outstanding which was further reduced to Rs.22,13,741/- at the time of filing of written submissions. The AT found the claim justified and directed release of Rs.52,51,493/- after adjusting commission charges alongwith 9% interest per annum from March, 2016 till payment.

(iv) For the State of Maharashtra, the Principal Employer claimed supply of 3,82,650 LED Bulbs resulting in collection of Rs.87,99,170/-. The Contractor had deposited Rs.43,48,400/- leaving an outstanding of Rs.44,57,770/-. The Contractor claimed supply of 2,84,200 LED bulbs and collection of Rs.56,06,180 leaving an outstanding balance of Rs.12,57,780/-. The AT agreed with the Contractor and directed release of Rs.12,57,780/- after adjusting commission charges alongwith 9% interest per annum from March, 2016 till payment.

(v) For the State of Uttar Pradesh, the Principal Employer claimed supply



of 2,20,000 LED Bulbs resulting in collection of Rs.73,02,400/-. The Contractor had deposited Rs.48,22,900/- leaving an outstanding of Rs.24,79,500/-. The Contractor claimed supply of 1,42,350 LED bulbs and collection of Rs.76,91,200, with deposit of Rs.51,57,100/- leaving an outstanding balance of Rs.25,34,100/-. At the time of filing of written submissions, the Contractor revised the outstanding to Rs.24,79,500/-. AT agreed with the Principal Employer and directed release of Rs.24,79,500/- after adjusting commission charges alongwith 9% interest per annum from March, 2016 till payment.

(vi) For the State of Uttarakhand, the Principal Employer claimed supply of 1,79,876 LED Bulbs resulting in collection of Rs.1,54,44,587.40/-. The Contractor had deposited Rs.80,80,750/- leaving an outstanding of Rs.73,63,837.50/-. The Contractor claimed supply of 2,17,700 LED bulbs and collection of Rs.89,24,050/- leaving an outstanding balance of Rs.8,43,300/-. AT agreed with the Contractor and awarded Rs.73,63,837.50/- after adjusting commission charges alongwith 9% interest per annum from March, 2016 till payment.

9. **Counter Claim No.2:** The Principal Employer had alleged illegal retention of LED bulbs by the Contractor.

(i) For the State of Karnataka, a balance of 76,150 LED bulbs were sought to be returned, which the Principal Employer varied in its later written statement stating that only 67,146 bulbs were sought to be returned. The Contractor claimed that no stocks were left. AT agreed with the claim and awarded equivalent cost of the bulbs to be returned i.e., Rs.67,14,600/- alongwith 9% interest per annum from March, 2016 till payment.

(ii) For the State of Rajasthan, a balance of 9665 LED bulbs were sought



to be returned. The Contractor disputed the number of bulbs that were delivered. It claimed that a number of bulbs were transferred to other agencies as well as returned to the Principal Employer. It further claimed that 8,000 bulbs were stolen and 9384 bulbs were found missing. It claimed that no stock was left with it. AT rejected the said counter-claim by observing that the Principal Employer had not given correct figure of delivered bulbs.

(iii) For the State of Uttar Pradesh, a balance of 81953 LED bulbs were sought to be returned. The Contractor disputed the number of bulbs that were delivered. It claimed no responsibility for the missing 50,000 LED bulbs by Jitender Kumar. AT agreed with the Contractor and observed that the Contractor could not be held liable for the missing 50,000 bulbs as Jitender Kumar was found not to be the sub-vendor of the Contractor.

(iv) For the State of Delhi, a balance of 450 LED bulbs were sought to be returned. The Contractor disputed the number of bulbs that were delivered. It claimed that no stock was left with it. AT rejected the said counter-claim.

(v) For the State of Maharashtra, a balance of 77,774 LED bulbs were sought to be returned. The Contractor disputed the number of bulbs that were delivered. It claimed that number of bulbs were transferred to other agencies as well as returned to the Principal Employer. It claimed that no stock was left with it. AT rejected the said counter-claim.

(vi) For the State of Uttarakhand, a balance of 4791 LED bulbs were sought to be returned. The Contractor disputed the number of bulbs that were delivered. It claimed that number of bulbs were transferred to other agencies and some others were missing and defective. It claimed that no stock was left with it. AT rejected the said counter-claim.



Resultantly, AT held that the Contractor was liable to return 67146 bulbs with respect to State of Karnataka and directed the Contractor to pay the equivalent amount of Rs.67,14,600/- alongwith 9% interest per annum from March, 2016 till payment.

10. **Counter Claim No.3:** The Principal Employer had claimed compensation for the cost incurred for getting the balance work executed through other agencies. As no evidence was led by the Principal Employer, the counter claim was rejected.

SUBMISSIONS BEFORE THIS COURT

11. On behalf of the Contractor, it was contended that the impugned award is liable to be set aside for not providing reasons for conclusion. It was contended that the AT returned erroneous finding in paragraphs 12 and 13 in view of the admitted position that the Principal Employer had prevented the Contractor to sell the balance LED bulbs, thereby causing loss of profit. The Contractor had claimed expected loss of profit @ 10% of the cost of Rs.30,93,21,650/- which comes out to Rs.3,09,32,165/-. As the AT only partially allowed the claim @ 5% of the cost, the Contractor sought setting aside of the award on the ground of patent illegality. Further, the Contractor also disputed the impugned award with respect to the counter claims.

12. Insofar as Counter Claim No.1 is concerned, it was contended that the impugned award was factually incorrect in respect of State of Rajasthan on the ground that the AT had failed to take into account the evidence in the form of invoice dated 08.12.2015 as per which 50,000 bulbs were consigned to another agency at Bhilwara but were shown to be debited to the



Contractor's account. The Contractor also assailed the finding with respect to State of Karnataka as V.S.N. Kartheek, who was shown to have received 110000 bulbs was not the Contractor's authorized person but was the Consultant Finance of the Principal Employer. As Counter Claim No.2 was allowed only with respect to State of Karnataka for 67146 bulbs, the finding was assailed on the afore-noted ground.

13. It was next contended that the impugned award being composite arising out of a single contract executed between the parties, the same is not severable. The claims and counter claims were dealt as composite and evidence being common, the findings on claims and counter claims cannot be segregated. During the course of rejoinder submissions, learned counsel conceded that only Claim No.3 can be segregated.

14. The Principal Employer assailed the findings with respect to Claim No.1 on the ground that the AT had failed to take into account the terms of the tender document which stipulated that the commission charges were payable only upon Contractor complying with the conditions. The Contractor had not followed the prescribed procedure and did not forward the weekly reports. It was also contended that the AT incorrectly recorded that the Contract was terminated. In fact, on coming to know of missing of 50,000 bulbs by the sub-vendor of the Contractor, it was asked to stop the work in the State of Uttar Pradesh vide letter dated 28.03.2016 while the Contractor continued to carry out work in other States till April whereafter it abandoned the work. The responsibility of 50,000 missing bulbs in Uttar Pradesh lied with the Contractor as the sub-vendor was shown in the Contractor's list of employees. The Principal Employer had no privity of Contract with the vendor.



15. The impugned award with respect to award of Claim No.3 was assailed on the ground that the calculations given by the Contractor were incorrect. It was submitted that the Contractor instead of deducting the work done from the total contract price deducted the commission charges and thereby claimed inflated amount. Further, it did not provide any basis to claim 10% towards the loss of expected profit. The Contract did not stipulate any provision for making such a claim. The award of claim to the extent of 50% of the claim amount was also assailed on the ground of being arbitrary and without any justification.

16. The Principal Employer also assailed the impugned award to the extent of award of Counter Claim No.1 for the State of Maharashtra. It was contended that the AT while awarding the claim incorrectly relied upon letter dated 12.04.2016 as per which stock of 2,84,200 LED bulbs were delivered. In fact, vide subsequent letter dated 23.07.2016, copy of which was placed on record, stock of 3,82,650 LED bulbs was admittedly received by the Contractor. AT ought to have allowed the claim with respect to the status of LED bulbs as per letter dated 23.07.2016.

17. The Principal Employer also assailed the rejection of Counter Claim No.2 with respect to the States of Rajasthan, Uttar Pradesh, Maharashtra and Delhi. However, during the course of submissions, the challenge regarding rejection of counter claim with respect to Delhi was not pressed. Challenge was also raised to the rejection of Counter Claim No.3.

18. On the aspect of segregation, it was contended that claims being different, there is no impediment in partial setting aside the award with respect to different States even if it was raised under one claim.



DISCUSSION AND CONCLUSION

19. **Claim No.1:** AT allowed the entire claim. While awarding this claim, AT returned a finding that the Contractor did not invoke the provision relating to termination of the Contract. Even otherwise, a perusal of letter dated 28.03.2016 would show that the Contractor was asked to stop the work only in relation to State of Uttar Pradesh when the Contractor shirked away from its liability for the missing 50,000 bulbs due to acts of its sub-vendor Jitender. The Principal Employer is correct in contending that it had no privity of contract with Jitender who was shown as an employee by the Contractor. As per the evidence on record, Jitender was indeed the Contractor's agent and thus the Contractor could not have absolved itself of the responsibility by blaming its employee for the missing bulbs. The AT committed a patent error by reading the evidence produced contrary to what it so clearly proves regarding the relationship between the Contractor and Jitender, which became the basis of the finding that Contractor was not liable for missing of 50,000 LED bulbs. For this reason, claim No.1 in as much as it pertains to the State of UP is liable to be set aside.

20. **Claim No.2:** Contractor has not pressed its challenge to the rejection of this claim. Even otherwise, this Court finds the reasoning in the award to be correct.

21. **Claim No.3:** The claim was partially allowed to the extent of 50% of the claim amount. The claim was premised on three grounds. AT noted that the Contractor had not provided any breakup figures in respect of each of the ground. AT went on to observe that in the absence of breakup figures, an



Arbitrator has the discretion to award reasonable compensation. After noting so, and without assigning any further reasons, it allowed the claim to the extent of 50%. There is no discussion as to why and how AT allowed the claim to the aforesaid extent. AT committed an error by holding that it had discretionary powers to award sums in the absence of evidence produced in support of each of the claims. AT's decision to award 50% of the sum claim is arbitrary and does not show a judicial approach in dealing with the claim. AT has not explained the basis for awarding 50% and not some other amount. Some justification for awarding the sum with reference to evidence produced was warranted. Reference has also been made to the decisions in Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited and Anr.¹, National Highways Authority of India v. Hindustan Construction Co. Ltd.² and Maula Bux v. Union of India³. The said decisions do not justify the absence of complete reasoning by the arbitrator in awarding Claim No.3. Thus, the award under the said claim is set aside.

22. Before dealing with the Counter Claims, this Court deems it fit to first advert to the issue as to whether the claims for each State can be segregated. In this context, it is worthwhile to note that the Principal Employer had floated six different tenders for each State resulting in six different letters of award. Even separate contracts were executed for each State. In its Statement of Defence filed before the AT, the Principal Employer had claimed separate amounts with respect to each State. Indeed, the amounts claimed for each State were clubbed and were presented as one counter claim. Even the impugned award has dealt with the counter claims for each

¹ (2022) 1 SCC 753

² (2022) 287 DLT 158

³ (1969) 2 SCC 554



State separately.

23. The question to answer is whether aggregation of state wise claims into one counter-claim makes the counter claim an inseparable amalgamation? To this court's benefit, there is a very comprehensive survey of legal position undertaken by the Co-ordinate Bench of this Court in National Highways Authority of India vs Trichy Thanjavur Expressway Ltd.⁴, where perceived misgivings about the courts ability to modify an award under Section 34 have been sought to be dispelled.

24. Trichy (Supra) has now explained, with which this court is in complete concurrence, that the judgement of the Supreme Court in Project Director, NHAI vs M. Hakeem and Anr.⁵ only forbade a modification by the court under Section 34 based upon court's reappraisal of evidence as if the court were the arbitrator set out to decide the claim all over again, thereby supplanting AT's findings with its own view. It is to remind the Section 34 courts the principle of minimal intervention that the Supreme Court in Hakeem (Supra) stated to be the maximalist legal position whereby the courts lack the power to modify an award. However, within the maximalist position there is enough space available to the courts to manoeuvre to set aside parts of the arbitral award that are severable from the other parts so long as moving one part will not lead to collapse of the whole award. Trichy (Supra) tells us that the test is that the findings under scrutiny by the court should not be so inseparably intertwined with the other parts of the awards so as to get their sustenance from each other.

25. The present impugned award has to be judged within the above-

⁴ 2023 SCC OnLine Del 5183

⁵ (2021) 9 SCC 1



mentioned legal framework. No doubt the whole counter claim no.1 is the sum of its state wise parts but each state wise claim arises out of a separate contract. Even the evidence led to prove the state wise claims is distinct and not common to the claims.

26. In view of the aforesaid, this Court is of the opinion that in the facts of the present case noted hereinabove, the Counter claims for each State are severable as they arise out of different contracts and transactions. The award for each State is independent and distinct.

27. **Counter Claim No.1:** The award under the said claim is premised on transactions that are documented. There is no error apparent on the face of the record which would justify interference with the award except with respect to the State of Maharashtra. AT failed to take into account the correct position of LED bulbs that were admittedly received by the Contractor as per letter dated 23.07.2016. AT incorrectly relied upon a previous status reflected in letter dated 12.04.2016. While maintaining the award for other States, the award to the extent of State of Maharashtra is set aside.

28. **Counter Claim No.2:** The challenge was restricted to the award of claim with respect to the States of Rajasthan, Uttar Pradesh and Maharashtra. For Rajasthan, the Contractor vide its letters dated 01.06.2016 and 07.07.2016 admitted missing stock of 9384 LED bulbs. AT failed to take into account the aforesaid communications while rejecting the claim. The award with respect to State of Uttar Pradesh and Maharashtra is also liable be set aside for the reasons noted hereinabove while discussing Claim No.1 and Counter Claim No.1 respectively.

Accordingly, the award under the Counter Claim No.2 is set aside



with respect to claim for the States of Rajasthan, Uttar Pradesh and Maharashtra.

29. **Counter Claim No.3**: Admittedly, the Principal Employer did not lead any evidence to substantiate the counter claim. In the considered opinion of this Court, AT rightly rejected the counter claim.

30. The petitions are disposed of alongwith pending applications in aforesaid terms.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 18, 2023
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