$~
* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
38.
\+ **O.M.P. (COMM) 506/2016 & IA Nos. 14406/2016 & 14407/2016**

THEME ENGINEERING SERVICES PVT. LTD ..... Petitioner
Through: Mr. Vibhor Vardhan with Mr. Shwetank Shailkwal, Advocates.

versus

RAIL VIKAS NIGAM LTD. ..... Respondent
Through: Mr. Udit Seth, Advocate.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **22.11.2016**

1.The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 18th November, 2015 and rectified Award dated 7th December, 2015 passed by the learned Sole Arbitrator in the disputes between Theme Engineering Services Private Limited ('Petitioner') and Rail Vikas Nigam Limited ('Respondent').

2. The facts leading to the filing of this petition are:
(i) The Petitioner, which is engaged in consultancy work, applied for Project Management Consultancy ('PMC') for construction of road bed, major and minor bridges, general electrical work etc. in connection with doubling work in Kharagpur Division of Southern-Eastern Railways in the State of West Bengal in response to the Request for Proposal ('RFP') of the Respondent. The Petitioner deposited a demand draft in the sum of Rs. 5,000 towards the cost of the RFP document and a proposal security for Rs. 8.33 lacs as Bank

Guarantee ('BG') bearing no. 4434ILG003611 dated 27th June, 2011 issued by Punjab National Bank, Jaipur.

(ii) The Petitioner's bid was accepted and Notification of Award (Letter of Acceptance) was issued on 7th November, 2011. Finding that the inclusion of payment of service tax was not in conformity with Clause 4.3.6 of the Instruction to Consultant ('ITC') contained in the RFP and Note 1 to Form 14 of the Bid Document, the Petitioner by letter dated 9th November, 2011 requested the Respondent to issue a corrected Notification. The Petitioner's request was acceded to and the Respondent issued a corrigendum dated 28th November, 2011.

(iii) In compliance with the terms of the contract, the Petitioner deposited a BG in the sum of Rs. 20,75,200. However, neither party signed the contract. According to the Petitioner, despite several reminders and personal visits by its Consultant, Mr. S.C. Saxena, the Respondent did not sign the contract. Thereafter, the Petitioner commenced steps for mobilizing the team from 13th December, 2011 i.e., within 15 days of the issue of the revised Letter of Acceptance, in terms of Clause 11.2 of the ITC.

(iv) Not being satisfied with the CVs of the key personnel, the Respondent issued a 14 days' show cause notice on 12th March, 2012 to the Petitioner for rectification of defaults. The Petitioner replied on 20th March, 2012 denying all charges. Subsequently, the Respondent by letter dated 4th April, 2012 terminated the contract in terms of Section 15.01(a) of Article XV of the Bid Document and forfeited the BG in terms of Section 15.03.

(v) Upon failure of the parties to settle the disputes amicably or appoint an Arbitrator, Arbitration Petition No. 153/2013 under Section 11(6) of the Act was filed in this Court. A sole Arbitrator was appointed by an order dated 14th August, 2013.

3. The Petitioner filed 6 claims before the learned Arbitrator. The Respondent filed 4 counter-claims. On the basis of the claims of the Petitioner, Issues 1 to 9 were framed which read as under:

> "1. Which of the Notification of Award either dated 07.11.2011 or dated 28.11.2011, resulted into binding contract between the parties? OP (parties).
>
> 2. Whether the disputes in this case raised by the Claimant are with the Rail Vikas Nigam Ltd. i.e. RVNL, Calcutta or RVNL, Delhi? OPR
>
> 3. Whether the Claimant has fulfilled the eligibility and minimum qualification criteria/requirements of their key personnel and whether the qualified personnel were deputed by the Claimant at site for performance for the contract, if not, its consequences? OPC
>
> 4. Whether the Claimant is responsible for delaying the commencement of the contract and subsequent defaults right from the date of Notification of Award till the termination of contract i.e. dated 04.04.2011? OPR
>
> 5. Whether the termination of the contract was in accordance with the terms of contract? OP (parties)
>
> 6. Whether the Claimant is entitled to recover Performance Guaranteed for Rs.20,75,200/- on account of wrongful encashment by the Respondent as claimed in claim No.1 of claim petition? OPC

> 7. Whether the past performance of other contracts Awarded to the Claimant by the Respondent were not satisfactory, if so, it s consequences? OPR.
>
> 8. Whether the Claimant is entitled for the compensation due to loss of business and profits as claimed in claims no. 2 and 3 of the Claim Petition? OPC
>
> 9. Whether the Claimant is entitled for the compensation for loss of reputation, litigation expenses, interest @ 18% p.a. and cost of the proceedings? OPC"

4. Issues 10 to 13 pertained to the Respondent's counter-claims, which in any event, were rejected by the learned Arbitrator and, therefore, do not require to be discussed in the present order.

5. The summary of findings of the learned Arbitrator in regard to each of the above 9 issues, is as under:

(i) The learned sole Arbitrator, in deciding issue no. 1 against the Petitioner herein, held that since all material particulars were provided in the Notification of Award dated 7th November, 2011, a minor typographical mistake would not have weakened the contents of the Notification or made a significant impact on the case. Hence, the contract stood concluded between the parties vide Notification dated 7th November, 2011.

(ii) As regards issue no. 2, the learned sole Arbitrator held that Rail Vikas Nigam Ltd., Delhi had not been wrongly impleaded. He referred to Section 16.03 (d) of the Bid Document which mentioned the office of the Respondent at New Delhi as the venue of arbitration. Reference was also made to the petition filed under Section 11 of the Act before this Court, which then referred the matter to arbitration.

(iii). Insofar as issue no. 3 is concerned, the learned sole Arbitrator relied on Para 1.8 of Annexure 3, Section 4 of the ITC which, in relevant part, provided that the "decision of the Employer shall be final and binding" and noted that the wordings clearly indicated that the ultimate and last decision rested with the Respondent for approval of CVs of the key personnel and that the Petitioner had failed to provide the Respondent the list of key personnel as contemplated in terms of the ITC.

(iv) As regards issue no. 5 pertaining to delay on the Petitioner's part in commencement of the contract, the learned Arbitrator noted that 21 days' delay was caused by the Petitioner because of a minor typographical error in the Notification Award dated 7th November, 2011 and owing to such delay in finalizing of the Notification of Award, many experts preferred not to wait. Further, the Petitioner delayed submitting the BG by a week, thereby not utilizing the 28-day period as stipulated in the Notification. The Petitioner also paid no heed to the Respondent's letter dated 22nd November, 2011 wherein it was specifically requested to depute the key personnel at an early date. Later, instead of providing the Petitioner with a complete list of suitable and experienced key personnel, the Petitioner submitted only a piecemeal list. Hence, the Petitioner was responsible for delay in commencement of the contract.

(v) As regards issue no. 5, the learned sole Arbitrator came to the conclusion that the contract was validly terminated in terms of Section 15.01 of Article XV of the General Conditions of Contract when the consultant could not take steps to deploy competent and adequate number of key personnel.

(vi) The sole Arbitrator noted that the Petitioner could not adduce strong proof to substantiate his claim as regards issue no. 6 and held the forfeiture and subsequent encashment of the BG on part of the Respondent to be valid in terms of Section 3.04 of Article III of the General Conditions of Contract.

(vii) In rejecting the Respondent's contention that the Petitioner did not have key personnel to depute for the project and the PMC Contract had been taken by making misrepresentations in the bid, the learned Arbitrator held that the "failure or success of one project cannot be criteria to judge reliability of a particular company".

(viii) The Petitioner's claim for compensation due to loss of business and profits under issue no. 8 was rejected by the Arbitrator stating that the said claim was based on imagination and supposition and there was no proof that the Petitioner was prohibited or restrained from submitting bids for other projects. Issue no. 9 was also decided, accordingly.

6. Claim No. 1 of the Petitioner before the learned Arbitrator was for revocation of the wrongful termination of the contract and recovery of the BG in the sum of Rs. 20,75,200/- wrongly encashed by the Respondent. As regards Claim No. 1, the Petitioner states that pursuant to the amended Notification of Award on 28th November, 2011, despite the contract not having been signed by either party, the Petitioner submitted a BG in the sum of Rs. 20,75,200 strictly as per the terms of conditions of the RFP. The Petitioner contends that in terms of Clause 9.1 of the ITC, the contract should have been made available to the Petitioner for signature. The contract was also not made available to Mr. S.C. Saxena, an authorized representative of the Petitioner, who contacted the Chief Project Manager of the Respondent at Kolkata and tried to provide all administrative and technical services as well as feedback. It is further pointed out that no Notice to Proceed (NTP) under Clause 11.2 was issued by the Respondent.

7. The Petitioner further submits that the expected date for commencement of consultancy services in terms of Clause 11 of the ITC read with the General Conditions of Contract as contained in Section 5 of the Bid Document was 30th July, 2011. However, the Respondent did not want to engage a consultant since the progress of work was slow and it did not want to incur monthly expenditure on a consultant. Consequently, according to the Petitioner, the Respondent did not approve the CVs of key personnel. The Petitioner's request to the Respondent by letter dated 31st December,

2014 to make available copies of certain “office files and their office note sheets”, was denied by the Respondent by letter dated 14th January, 2015 stating that as the contract was terminated, “the question of handing over Respondent’s office files and their office note sheets does not arise”. It is thus contended by the Petitioner that the Respondent’s conduct in terminating the contract and encashing the BG was vitiated by fraud.

8. The learned sole Arbitrator in deciding against the Petitioner noted that the material ground of termination was the non-deployment of key personnel. The learned Arbitrator held as follows:

> “A letter dated 20.03.2012 Ex. CW1/2 was forwarded by the Claimant in response denying the contents the show cause notice dated 12th March, 2012. The response received to the notice was found by the Respondent to be unsatisfactory as the claimant could not even depute Project Manager, as the main key personnel for the Project for the last 4 months. The Project was of much importance to the Respondent. The delay in execution of work could not be settled despite efforts made by the parties However the Respondent played safe by terminating the contract vide letter dated 04th April, 2012Ex. R-10/A-11. The issue is according decided in favour of Respondent.”
>
> …
>
> “In the instant case, when the claimant was not in a position to submit list of key personnel within the stipulatedperiod, the Bid security in the form of Bank Guarantee dated 27th June, 2011 for Rs.8.33,000/- was not encashed and it automatically lapsed on 26th December, 2011 after expiry of its validity period. The RVNL was not efficient to take advantage of the above instructions. Thus under the above instructions forfeiture of performance guarantees not permissible to the Respondent. However, taking advantage of Section 3.04 of Article Ill of General Condition of Contract, the Respondent forfeited the performance guarantee and encashed the same, when the contract was terminated under section 15.01 of Article XV of GCC. The claimant could not adduce reliable and

> strong proof for entitlement of this claim under theprovision of the Bid document Ex.A-1."

9. The main contention of the learned counsel for the Petitioner was that till such time the amended notification of Award correcting the clause concerning inclusion of payment of service tax was issued, there was no contract in conformity with clause 4.3.6 of the ITC contained in the RFP. Therefore, the Petitioner was justified in not proceeding to take further steps and that the delay in this regard was entirely attributable to the Respondent.

10. The finding of the learned Arbitrator was that the discrepancy in the notification of the Award dated 7th November, 2011 was a minor typographical one. It was observed that clause 4.3.6 of the RFP document (Ex.A-1) made it explicit that the Consultant was liable to "pay taxes as applicable". It further made clear that "the service tax will be reimbursed as applicable to the Consultant by the employer while all other taxes shall be paid by the Consultant". Therefore, merely mentioning remuneration "including service tax" in place of "excluding service tax" would not exonerate the Consultant from paying the service tax.

11. The conclusion reached by the learned Arbitrator that it was only a minor typographical error cannot be said to be an implausible view to take. The Court finds no legal infirmity in such a conclusion. Indeed, the Petitioner could not have taken advantage of this minor mistake to delay the discharge of its obligations under the contract.

12. It is also not possible to accept the contention of the Petitioner that it had

acted strictly in accordance with the terms of the RFP documents and that the Respondent had wrongly terminated the contract and encashed the BG. The Award in respect of Issues 1 to 3 therefore calls for no interference.

13. As regards Issue Nos. 4, 5 and 7, the Petitioner indeed has not been able to make out a case that the encashment of the BG/performance security was vitiated by fraud. The learned Arbitrator has carefully analysed the evidence on record and negatived the plea of the Petitioner in this regard.

14. Issue Nos. 8 and 9 pertain to the Petitioner's Claim No. 2 relating to compensation due to loss of business, Claim No. 3 relating to compensation for loss of business and profit, Claim No. 4 for loss of reputation, Claim No. 5 for litigation expenses and Claim No. 6 for interest and costs.

15. The learned Arbitrator has characterised the said claims as being based on 'assumptions and presumptions' which were beyond the scope of the contract. The Petitioner failed to furnish proof that it was restrained from submitting the bids for other projects. The Court is not persuaded to come to any different conclusion as regards the said claims.

16. With no grounds having been made out for interference with the impugned Award as far as the Petitioner is concerned, the Court finds no merit in the petition and it is dismissed as such with no order as to costs. The pending applications are also disposed of.

S. MURALIDHAR, J

NOVEMBER 22, 2016
dn