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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.105 OF 2015

Spanco Limited in liquidation by the
Official Liquidator, High Court, Bombay ..Petitioner.
V/s.
Wipro Limited ..Respondent.

Mr.Rakesh Reddy i/b. Phoenix Legal for the Petitioner-Official Liquidator.
Ms.Yogini Chauhan, Deputy Official Liquidator – present.
Mr.Swananand Ganoo i/b. Mr.Rajesh Ravindran for the Respondent.

CORAM : N.M.Jamdar, J.

DATED : 17 January, 2017

ORAL ORDER

By this petition, the Petitioner Spanco Teleystem & Solutions Limited, through the Official Liquidator, has challenged the Award of the Arbitral Tribunal, consisting of three learned Arbitrators, directing the Petitioner to pay an amount of Rs.16,98,52,237/- to the Respondent with interest at the rate of 12% per annum and also costs of arbitration quantified at Rs.24,00,000/-. The Award is dated 4 July, 2014.

2. The Petitioner had placed purchase order on 23 March, 2007 with the Respondent for supply of SUN servers, with the necessary attachments. The purchase order was accepted and the Petitioner agreed to pay an amount of Rs.54,62,59,280/-. After execution of the purchase order dated 23 March, 2007, Master Supply Agreement was executed between the parties wherein it was stated that the BSNL has awarded a contract to UT Starcom, who in turn has placed order with Houston Technologies Limited, who in turn placed the order Houston Technologies Limited, who in turn placed the order with ORG Informatics Limited and ORG Informatics Limited, who in turn has placed order with Spanco Telesytems & Solutions Limited i.e. the Petitioner. As agreed between the parties, the servers was to be supplied to UT Starcom at their designated warehouses at Chennai and Gurgaon. Dispute arose between the parties, which led to the Respondent invoking the arbitration clause in the agreement and Arbitral Tribunal consisting of three learned Arbitrators was constituted. The Arbitral Tribunal, after considering the material which placed on record, came to the conclusion that the goods were duly supplied and the Petitioner failed to make the payment in respect of the goods stated to be supplied at Chennai and proceeded to pass the impugned Award.

3. Heard Mr.Rakesh Reddy for the Petitioner and Mr.Swanand Ganoo for the Respondent. Mr.Reddy, the learned

counsel for the Petitioner submitted that the parties were governed to the terms and conditions of the Master Supply agreement and this agreement was substantially deviated from, as subsequently Escrow Agreements were entered into on 21 August, 2008 and 19 September, 2008, which constituted a novatio of the terms and payment in the Master Supply Agreement dated 23 March, 2007. He submitted that the view taken by the learned Arbitrators that these Escrow Agreements only constituted modalities, is incorrect.

4. I have considered this submission. This argument was advanced before the Arbitral Tribunal and the Arbitral Tribunal found that there was no change in liability of the Petitioner to pay the amount and the Escrow Agreement only constituted a modality for the payment. The learned counsel for the Respondent has also pointed out that to the Escrow Agreement dated 21 March, 2007, the Respondent was not a party and in the subsequent agreement dated 21 August, 2008, this agreement has not been referred. As regards the Escrow Agreement dated 21 August, 2008 is concerned, in clause 7.9, it was specifically provided that no failure or delay of any parties in exercising any right under this agreement shall operate as a waiver of such right and will not preclude the exercise of any such other rights. The parties, therefore, fully understood that the Escrow Agreement will not bar the Respondent from claiming the amount under a Master Supply Agreement, which is further borne out from the fact that after the Escrow Agreement was executed on

21 August, 2008 and 19 September, 2008, the Petitioner paid an amount of Rs.2,08,80,253/- to the Respondent which was outside the Escrow Agreement. This fact is also admitted by the witnesses of the Petitioner. The Arbitral Tribunal considered this position and came to the conclusion that there was no change or novatio and there was no change of liability of the Petitioner to pay the amount. The Arbitral Tribunal was well within its jurisdiction to interpret the contract between the parties accordingly and taking note of the conduct of the parties pursuant to the contracts.

4. As regards the supply of goods is concerned, arguments were advanced by the learned counsel for the Petitioner in respect of the lorry receipts and certain discrepancies in the cross-examination. The Arbitral Tribunal has dealt with this aspect relying on the C-form issued by the Petitioner that the goods were duly supplied to UT Starcom. As pointed out by the learned counsel for the Respondent, the C-form could not have been issued unless the goods were received. Thus, the view of the Tribunal based on the C-form is clearly a factual finding. Once there is a documentary evidence of delivery of goods, this finding also cannot be interfered.

5. The learned counsel for the Petitioner then submitted that in the Master Supply Agreement, in clause 2.10, it was mandatory on the part of the Respondent to supply, install, test, commission the equipments to the satisfaction and requirements of

the BSNL. He submitted that there is no such certificate issued by the BSNL and in spite of this position, the learned Arbitral Tribunal has proceeded to foist the liability on the Petitioner.

6. As per the agreement between the parties, the goods were to be directly supplied by UT Starcom. It was asserted by the Respondent in the evidence that UT Starcom has acceptance certificate. Furthermore, the clause relied upon by the Petitioner only refers to the satisfaction of the BSNL. There is no such stipulation that unless the acceptance in writing is produced, dues will not be released to the Petitioner. The Arbitral Tribunal has taken note of the Minutes of the Meeting and the report of the BSNL itself dated 22 December, 2008. In this respect, after analsying the goods so supplied, the Committee has recorded that all the systems are working satisfactorily. UT Starcom was asked to supply one additional domain hardware of 4 CPUs, free of cost. Pursuant to this suggestion of the committee, the Respondent has supplied goods worth Rs.22,00,000/- free of costs. Thereafter, the goods have been utilised in the project. Taking note of these facts, the Tribunal recorded a finding in respect of clause 2.10 as regards the satisfaction of the BSNL. This view taken by the Arbitral Tribunal is a possible view based on the report of the committee of the BSNL.

7. The learned counsel for the Respondent has also pointed out that in respect of the goods supplied to the warehouse at

Gurgaon, the amount was released in October, 2007 itself. This being the position, the Petitioner only sought to evade its liability raising some technical points, which have been rightly rejected by the Abitral Tribunal. Considering the limited scope of section 34 of the Arbitration and Conciliation Act, 1996, no case is made out for interference with the impugned Award of the Arbitral Tribunal. The petition is accordingly dismissed.

(N.M.Jamdar, J.)