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

COMMERCIAL ARBITRATION PETITION NO.189 OF 2016
WITH
NOTICE OF MOTION NO.130 OF 2016

Hindustan Construction Co. Ltd. … Petitioner
Versus
Ace Pipeline Contracts Pvt. Ltd. … Respondent

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Mr. Gaurav Mehta a/w Ms. Prachi Ojha and Ms.Priyanka Shetty i/b Advaya Legal for the Petitioner.
Mr. Karan Bhosle a/w Mr. Aziz Khan, Mr. Deepak Singh and Promit Sengupta i/b Divya Shah Associates for the Respondent.

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CORAM : S.C.GUPTE, J.

DATE : 5 JULY 2017

P.C. :

. Heard learned Counsel for the parties.

2 This commercial arbitration petition challenges the award passed by the sole Arbitrator on 13 June 2016 in an arbitration reference between the parties. The Petitioner was the contractor for a contract of construction of pipeline awarded to it by the State of Gujrat. The Petitioner sub-contracted a few parts of this contract to the Respondent. The disputes between the parties arose out of this sub-contract.

3 There were in all five claims made by the Respondent sub-contractor before the arbitral forum. The learned Arbitrator awarded three out of these five claims. The Petitioner challenges this part of the award by the

present petition. These claims pertain to (i) principal amount of Rs.30,00,000/-, which was retained as retention money by the Petitioner and not paid to the Respondent despite successful completion of the sub contract work; (ii) sum of Rs.39,00,000/-, which was deducted towards service tax by the Petitioner from out of the amount payable to the Respondent; and (iii) sum of Rs.55,00,000/-, which was deducted from the amount payable to the Respondent on account of deduction by the employer, namely, State of Gujrat. As far as the first two items are concerned, there is practically no contest worth dealing with. There is no case for the Petitioner to withhold the retention money of Rs.30,00,000/-. There is no contest that the retention money was payable after successful completion of sub-contract work; that the sub-contract work was successfully completed; and this amount, despite such completion of work, was withheld by the Petitioner. The only ground pressed by the Petitioner before this Court is that there was an NOC to be submitted by the Respondent at the time of payment of its final bill certifying that it had no further claim against the Petitioner. It is submitted that since this NOC was not submitted, the Petitioner continues to retain this amount. Non-submission of such NOC cannot be a ground to withhold the retention amount despite successful completion of sub-contracted work. As for the tax amount of Rs.39,00,000/- deducted towards the service tax, it is an admitted position that this amount has not been paid into the treasury by the Petitioner so far towards service tax. The matter as to whether or not service tax was payable in the present case was not within the purview of the arbitral tribunal. The arbitrator was only concerned with the authority of the Petitioner to retain this amount in the facts of the case. The Petitioner could not have kept the amount with itself without depositing the same into treasury, if it was its case that service tax was payable on the amount paid to the Respondent towards the sub-contract. The contract work was completed by the Respondent as far as back as in 2007 and there has been no demand till date from the State towards any service tax and no deposit has been made by the Petitioner into the treasury. In the premises, there is no authority for withholding the sum of Rs.39,00,000/- purportedly deducted towards the service tax. The Respondent's account has been duly audited and there is no liability found on the part of the Respondent towards the payment of service tax in connection with the sub-contract work.

4 As for the third claim, namely, the sum of Rs.55,00,000/- deducted from the amount payable to the Respondent towards the Intelligent Pigging charges, the learned Arbitrator has come to a conclusion based on the contract between the parties, the correspondence produced by them before him and other materials on record, that the work of intelligent pigging was not within the scope of the Respondent. It is a matter of fact, and not disputed by the Petitioner, that the MoU between them, based on which the sub-contract was awarded to the Respondent, in the first place, does not make any mention of intelligent pigging work as part of the work to be carried out by the Respondent. It appears that this item was introduced for the first time in the Letter of Intent (LoI) issued by the Petitioner to the Respondent in connection with the sub-contract work. Immediately after receipt of the LoI, the Respondent protested on the ground that the work of intelligent pigging added to the LoI was never quoted for or agreed to earlier. Further correspondence ensued between the parties in this behalf. This correspondence ended with the Respondent's letter dated 24

November 2005, taking an unequivocal position that intelligent pigging was not either quoted or part of their job. It appears that thereafter a formal work order was issued by the Petitioner to the Respondent. Mr. Mehta, learned Counsel appearing for the Petitioner, submits that the work order does include a reference to intelligent pigging as part of the sub-contract work to be carried out by the Respondent. Learned Counsel submits that this work order is signed by the Respondent. It is a matter of fact and borne out by work order that each individual item of work to be carried out by the Respondent is set out in the work order, assigning both quantities and values to the item. None of these items includes intelligent pigging work on the part of the Respondent. Learned Counsel for the Petitioner draws my attention to the item mentioned under the description “other associated works” forming part of the work order. There is an item designated thereunder as “a”, namely, Electronic Geometric Pigging (EGP). The quantity mentioned against this item is '1' and rate and amount are Rs.19.35 lacs. This particular item was infact carried out by the Respondent and for which, the Respondent was even paid. In any event, it was not the case of the Petitioner before the learned Arbitrator that this item described in the sub-contract work as Electronic Geometric Pegging (EGP) was the item of Intelligent Pigging for which a sum of Rs.55,00,000/- was deducted by the Employer, i.e. State of Gujrat.(The value assigned against this particular item “a”, namely, Electronic Geometric Pigging, is Rs.19.35 lacs.) The view expressed by the Arbitrator in this behalf is supported by evidence. It cannot be said to be a conclusion based on no evidence. It also cannot be termed as a view which is so contrary to the materials on record that no reasonable person instructed in law could have arrived at the same. In other words, it is a possible view, which this Court is not expected to interfere with in its jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

5 In the premises, there is no merit in the Commercial Arbitration Petition. The petition is dismissed. No order as to costs.

6 In view of the dismissal of the petition, Notice of Motion No.130 of 2016 does not survive and the same is also disposed of.

(S.C. GUPTE, J.)