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

Date of decision: 17th April, 2018

\+ O.M.P. (COMM) 158/2018

BALFOUR BEATTY GROUP LIMITED ..... Petitioner

Through: Mr.Parag P. Tripathi, Sr. Adv. with Mr.Yashwant Mathur & Mr.Kunal Bahri & Mr.Abhyudai Singh, Advs.

versus

KALINDEE RAIL NIRMAN (ENGINEERS) LIMITED ..... Respondent

Through: Mr.Dhruv Dewan, Mr.Arjun Pall, Ms.Sheetal Srivastav, Mr.Kostubh Devnani & Ms.Durga Manda, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.5125/2018 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 158/2018 & I.A. No.5124/2018 (Stay)

1. Issue notice. Notice is accepted by Mr.Dhruv Dewan, Advocate on behalf of the respondent. He has been heard at length in opposition of the prayer made in the petition.

2. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Interim Arbitral Award dated 03.01.2018 passed by the Sole Arbitrator.

3. The facts on which there is no dispute between the parties are that the Rail Vikas Nigam Limited (RVNL) had issued a tender for execution of MMTS-PH-II corridors- Quadrupling of track for the sections between

Ghatkesar-Maulali-'C' Cabin, and patch doubling between Moulali-gate Cabin-Seethafalmandi (Package-I), Doubling between Sanathnagar-Moulali-'C' Cabin, restoration of track between Telapur-Ramachandrapuram (Package-II) and doubling between Medchal-Balarum & Falaknuma – Umdanagar (Package-III)- Construction of Roadbed, bridges, supply of blast, Track linking, Yard arrangements (excluding supply of rails & line sleepers), construction of Booking offices, other service buildings, platforms, platform shelters, FOBs, Electrical (railway Electrification and General Electrification), Signaling and Telecomunication works in Secunderabad and Hyderabad Divisions of South Central Railway, Andhara Pradesh, India in 3 (three) Packages (hereinafter referred to as "RVNL Project"). Clause 4 of Section 1 of the said tender notice for invitation of bids required the bidder, in case it was a joint venture, to submit Memorandum of Understanding (MOU) or Joint Venture Agreement as per the form given in Section 4 of the said bid notice.

4. The parties herein executed three MOU(s) dated 08.05.2013 in terms of the form given under the said tender document.

5. The parties have thereafter admittedly executed another Memorandum of Understanding dated 11.06.2013. Some of the terms thereof that are relevant for the purpose of the present petition are reproduced hereinunder:-

"MEMORANDUM OF UNDERSTANDING
Relating to the formation of a Joint Venture between the two Parties in general and for the upcoming Eastern DFCC Systems Packages and the Composite RVNL Packages in particular.
xxxxxx
WHEREAS:
A. The Parties have agreed to the following:
i. The Parties will jointly bid for the upcoming Eastern DFCC System

Packages and the Composite RVNL Packages which together comprise the identified Projects through an integrated unincorporated Joint Venture.

ii. The Parties will work on all other projects on a case to case basis and for the avoidance of doubt such other projects are excluded from the terms of this Agreement unless the Parties agree otherwise in writing that such other project is an Identified Project for the purposes of this Agreement.

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B xxxxxxx

***IT IS AGREED as follows**:*

1. DEFINITIONS AND INTERPRETATION

1.1 xxxxx

"Composite RVNL Packages" means the combined packages of civil, tracks, signal & telecommunication ("S&T") and OHE Works (but excluding individual packages for S&T and OHE) which will be put out to tender by Rail Vikas Nigam Limited and "Combined RVNL Package" shall mean any one of them.

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"Identified Projects" means all of the Composite RVNL Packages and Eastern DFCC System Packages and "Identified Project" shall mean any Eastern DFCC System Package or Composite RVNL Package as the context requires.

2. PARTIES' MUTUAL OBLIGATIONS

2.1. The Parties have agreed to form the Joint Venture for the purpose of preparing and submitting a PQ and/or Tender (as appropriate) for each Identified Project to the Employer.

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2.3. Where an Identified Project does not require a PQ or the JV has submitted a PQ and pre-qualified to submit a Tender for the Identified Project and the Parties agreeing to submit such a Tender, then the following shall apply:

2.3.1. The Parties shall agree on the extent of their Scope of Works including the interface between them so that taken together they comprise the whole of the Works for that Identified Project;

2.3.2. The Parties shall jointly prepare and submit the Tender to the Employer and each Party shall promptly provide the other with all information and assistance reasonably required for the purposes of the preparation of the Tender;

2.3.3. The Parties shall jointly agree the terms and conditions of all aspects *of the Tender which shall include the terms of the Contract that they are prepared to negotiate with the Employer and the technical content and pricing of each Party's share of the Tender as defined in its Scope of Work shall be entirely within the discretion of each of the Parties but the Parties agree to maintain as far as possible a uniformity of presentation and will in any event ensure full compatibility of all aspects of their respective Scopes of Work.*

2.4. If the Tender is accepted by the Employer and the Contract is entered into between the Employer and the Parties, the Parties shall execute and complete the Works in accordance with the terms and conditions set out in this Agreement as more fully developed in the Joint Venture Agreement for that Identified Project.

2.5. The respective Financial Interests of each Party shall be:

Balfour Beatty	*50%[Fifty Percent Only]*
Kalindee	*50%[Fifty Percent Only]*

and all rights, interests, liabilities, obligations, risks, profits and losses arising out of the Contract for each Identified Project and/or the Joint Venture shall be shared or borne by the Parties in proportion to the Financial Interests.

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2.15 Prior to submission of a Tender for an Identified Project the Parties shall enter into a Joint Venture Agreement for that Identified Project.

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3. PARTIES' LIABILITIES

3.1. Neither Party shall be liable to the other for:

3.1.1 any failure of the Parties to secure the award of any Contract to them;

3.1.2 loss of contract or business opportunity; or

3.1.3 loss of profit production or revenue; (and in the case of Clauses 3.1.2 and 3.1.3, whether such loss is direct, indirect or consequential) or

3.1.4 any other direct, indirect or consequential loss or damage.

in each case arising under or from this Agreement.

xxxxx

11.2 Nothing in this Agreement and no action taken by the Parties pursuant to this Agreement shall be construed as creating a partnership of any kind between the Parties or as constituting either Party as the agent of the other Party for any purpose whatsoever."

6. The parties further entered into a "Cross Indemnity for Bid Security" Agreement dated 05.08.2013, which, in its preamble refers to the three packages for the bids that have been notified by RVNL. In paragraph A of the recital, it also refers to the MOU dated 11.06.2013 executed between the parties.

7. As certain disputes arose between the parties, the respondent sought reference of the same to arbitration and a Sole Arbitrator was appointed by the Supreme Court vide its order dated 27.04.2017, passed in Arbitration Case (Civil) No.48 of 2016. Paragraph 2 of the said order is relevant and is quoted herein below:-

> *"2. The arbitrator shall adjudicate upon the controversy only after determining the particular contract, under which the claim for arbitration has been/can be raised, before entering upon the arbitral dispute. Arbitral proceedings shall be initiated, after complying with the provisions under Section 12, of the Arbitration and Conciliation Act, 1996."*

8. The Arbitrator by his Impugned Interim Award has adjudicated upon the applicability of the MOU(s) to the reference and has held that the MOU(s) dated 08.05.2013 should be the basis of the arbitration proceedings. The Arbitrator has further held that on a reading of the MOU dated 11.06.2013 as a whole, it was established that it was applicable only for future transaction or future course of business which both the parties might adopt and did not pertain to the bids submitted by the parties to RVNL on 14.06.2013. The Arbitrator has further held that the MOU dated 11.06.2013 cannot be read as superseding the Agreement dated 08.05.2013 and

therefore, the arbitration proceedings should be conducted in the light of the Agreement dated 08.05.2013.

9. The learned senior counsel for the petitioner submitted that the MOU dated 11.06.2013, in fact, superseded the MOU(s) dated 08.05.2013 and governed the relationship between the parties. I do not find any substance in this argument. As noted by the Arbitrator, the MOU dated 11.06.2013 does not make any reference to the MOU(s) dated 08.05.2013. In any case, it is not denied that the petitioner had submitted the bid to RVNL on 14.06.2013, that is after the execution of the MOU dated 11.06.2013, however, alongwith this document only the MOU(s) dated 08.05.2013 had been submitted to RVNL. In my view the Arbitrator has given cogent reasons for rejecting the submissions of the petitioner and concluding that the MOU dated 11.06.2013 does not in any manner supersede the MOU(s) dated 08.05.2013 executed between the parties.

10. In the alternative, the learned senior counsel for the petitioner, drawing reference to the emails, correspondence and specifically paragraphs 5 and 6 of the reply to the application for placing on record additional documents filed by the respondent, as well to the Cross Indemnity Agreement dated 05.08.2013, submits that the Arbitrator has erred in concluding that the MOU dated 11.06.2013 would have absolutely no bearing on the adjudication of the disputes that have arisen between the parties. He submits that while the correspondence exchanged between the parties, wherein the respondent itself has made reference to the MOU dated 11.06.2013, has been brushed aside by the Arbitrator by stating that though no satisfactory explanation has been given by the respondent for referring to the said MOU in such correspondence, a reading of the MOU dated

11.06.2013 does not indicate that the MOU(s) dated 08.05.2013 have been superseded, the Arbitrator has not given any finding on the alternative argument of the petitioner that though the MOU dated 11.06.2013 may not be held to have superseded the MOU(s) dated 08.05.2013, however, the same will still have some bearing on the adjudication of the relationship between the parties and the claims of the respondent and, therefore, cannot be kept aside at this stage of the proceedings itself as being irrelevant thereto.

11. I find some merit in the submission of the petitioner in this regard. The alternate argument of the petitioner that even if it is held that the MOU dated 11.06.2013 does not supersede the MOU(s) dated 08.05.2013, it may still have some effect on the *inter se* relationship between the parties has not been adjudicated upon. For this purpose, as noted above, the petitioner had relied upon not only the emails and other correspondence exchanged between the parties, but also on the pleadings of the respondent itself, as contained in paragraph 5 and 6 of its reply to the application of the petitioner seeking to place additional documents on record.

12. Paragraph 5 and 6 of the said pleadings are relevant and are reproduced herein below:-

> *"5. In fact, the documents now filed by the Respondent do not support its case at all. <u>At the highest, these documents reveal that the June MOU was to be furnished to the bank issuing the Bid Security and was to govern the parties' internal understanding insofar as sharing of the costs and expenses, etc. of the Bid Security was concerned.</u> The correspondence does not show that the parties while entering into the June MOU intended to or in fact abandoned or novated the May MOUs. It is clear from the correspondence now sought to be placed on record that the June MOU did not operate to displace the operation of the May MOUs insofar as the works under*

the Tender Document were concerned. In fact, the June MOU was a general framework agreement that was entered into between the parties as would be apparent from the documents annexed hereto and marked as ***Annexure "W" (Colly).***

6. In specific response to paragraph 5 of the Respondent's Application, it is submitted that the Respondent's emphasis on the fact that the Bid Security was arranged by the Respondent in terms of the June MOU is of limited avail. The June MOU only governed the parties' internal understanding and did not operate to dislodge the May MOUs insofar as they governed the parties' relationship as the unincorporated joint venture of Balfour Beatty Group Limited-Kalindee JV that had jointly bid for and had been awarded the works by RVNL under the Tender Document. The submissions advanced and additional documents placed on record by the Respondent fail to address this submission of the Claimant, which remains unrebutted.

(emphasis supplied)"

13. A reading of paragraph 5 and 6 and especially the portion emphasised therein, clearly shows that the respondent did concede that at least for the aspect of "parties' internal understanding", this MOU was of some relevance. Equally, the reference to the MOU dated 11.06.2013 in the Cross Indemnity Agreement dated 05.08.2013, which admittedly, is in relation to the work awarded by RVNL, would lend support to the arguments of the petitioner that the MOU dated 11.06.2013 cannot be completely excluded from consideration for the purpose of adjudication of the disputes between the parties. The only plea taken by the petitioner at this stage is that this document should not be completely kept out of consideration at the time of final adjudication of the disputes. Whether this MOU would have any effect on the claim made by the respondent in the final adjudication of the disputes is not a question being considered today or being answered.

14. As noted above, the Impugned Award, so far as it holds that the

arbitration between the parties has to be governed by the MOU(s) dated 08.05.2013, cannot be faulted, however, at the same time, whether the MOU dated 11.06.2013 will have any effect on the claims raised by the respondent, is a question that can be determined only upon evidence being led by the parties and the said MOU, in my opinion, cannot be excluded from consideration at the preliminary stage itself.

15. The learned counsel for the respondent has submitted that as the Arbitrator has given a cogent reason for arriving at the conclusion that the MOU dated 11.06.2013 will have no relevance to the arbitration proceedings, this Court cannot interfere with the same in exercise of its power under Section 34 of the Act. For this purpose he places reliance on the judgment of this Court in ***CMDR. S.P. Puri v. Alankit Assignments Ltd.,*** 2008 (105) DRJ 635 to contend that if the reasons given by the Arbitrator are germane, merely because he has not dealt with all the submissions made by the opposite party, the award cannot be set aside. Relying upon ***Associate Builders v. Delhi Development Authority*** (2015) 3 SCC 49, he submits that the award cannot be said to be in contravention of the fundamental policy of Indian Law and, therefore, cannot be interfered with.

16. Though I am in full agreement with the legal proposition contended by the learned counsel for the respondent, however, in the present case the same would have complete application only insofar as the final finding of the Sole Arbitrator that the arbitration proceedings are to be governed by the agreement dated 08.05.2013. As far as the complete exclusion of the MOU dated 11.06.2013 from consideration is concerned, as noted above, there were other circumstances and evidence led before the Arbitrator and the

Arbitrator could not have arrived at a final conclusion of the same one way or the other, at this stage, without calling upon the parties to adduce evidence in this regard. As held in ***Associate Builders*** *(Supra)*, where Arbitral Tribunal ignores the vital evidence in arriving at its decision, such decision cannot be sustained. Equally, denial of opportunity to lead evidence on this aspect would amount to denial of Natural Justice.

17. In view of the above, the Impugned Award so far as it holds that the agreement dated 08.05.2013 should be the basis for the arbitration proceedings, is upheld, however, it is made clear that the Arbitral Tribunal shall consider the effect of MOU dated 11.06.2013 on the claim made by the respondent, being uninfluenced by any observation made in the Impugned Award or in the present order.

18. The petition is disposed of in the above terms, with no order as to costs.

NAVIN CHAWLA, J

APRIL 17, 2018/*rv*