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

Date of decision: 7th May, 2018

+ O.M.P. (COMM) 296/2016 & IAs 7148/2016, 862/2018
AIRPORT AUTHORITY OF INDIA Petitioner
Through: Mr.Sachin Datta, Sr. Adv. with Mr.Sonal
Kumar Singh, Ms.Swati, Mr.Yatender, Advs.

versus

SMITH DETECTION (ASIA PACIFIC) PTE. LTD. Respondent
Through: Ms.Payal Chawla, Ms.Snigdha Dash,
Ms.Hina Shaheen, Advs.

(10) O.M.P. (COMM) 301/2016
SMITH DETECTION (ASIA PACIFIC) PTE. LTD. Petitioner
Through: Ms.Payal Chawla, Ms.Snigdha Dash,
Ms.Hina Shaheen, Advs.

versus

AIRPORT AUTHORITY OF INDIA Respondent
Through: Mr.Sachin Datta, Sr. Adv. with Mr.Sonal
Kumar Singh, Ms.Swati, Mr.Yatender, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

1. These cross petitions have been filed challenging the Arbitral Award dated 22nd January, 2016 passed by the Sole Arbitrator adjudicating the disputes between the parties in relation to the award of tender for the supply of Explosive Trace Detectors at various

airports in India. In the present order, Airport Authority of India is being referred to as the ‘petitioner’ and Smith Detection (Asia Pacific) PTE. Ltd. is being referred to as the ‘respondent’.

2. In the global tender floated by the petitioner on 16th August, 2006 for availing the ‘Supply of Explosive Trace Detectors at various airports in India’ the price was to be quoted in two parts; SOQ-I and SOQ-II. The respondent submitted its bid in the said tender, quoting the following price against SOQ-II:

<i>Sr.No.</i>	<i>Description</i>	<i>Qty</i>	<i>Rate(In INR)</i>	<i>Unit</i>	<i>Amount(INR)</i>
<i>SH-2</i>	<i>Freight, Insurance and Transportation etc.</i>				
<i>1</i>	<i>Cost of Freight and Insurance of ETD from port of origin to port of entry in India i/c handling charges for ETD and accessories.</i>	<i>200</i>	<i>23,500.00</i>	<i>Job</i>	<i>4,700,000.00</i>
<i>2</i>	<i>Inland transportation Charges for ETD and accessories from port of landing to</i>	<i>200</i>	<i>381,056.00</i>	<i>Job</i>	<i>76,211,200.00</i>

	<i>respective airports i/c clearing and warehousing charges, loading, unloading, insurance etc. but without customs duty. (Customs duty to be paid by AAI directly to Customs Authorities)</i>				
	<i>Total amount in INR</i>				<i>80,911,200.00</i>

3. The respondent, by its letter dated 17th January, 2007 offered a discount of 5% to the petitioner on the offered FOB price. Admittedly, this was only for SOQ-I and not for SOQ-II items. In fact, it is the admitted case of the petitioner that there were no negotiations held between the parties as far as SOQ-II items are concerned.

4. The supply order was placed upon the respondent on 31st January, 2007 and a contract was also executed between the parties in this regard on 14th February, 2007.

5. On the supply of the equipment, the respondent raised invoices upon the petitioner for the SOQ-II items. In the invoice(s) dated 16th November, 2007 and 19th December, 2007, the unit rate quoted by the

respondent was Rs.3,81,056/-, which is the price quoted by the respondent while submitting its tender. In the third invoice dated 31st March, 2009, the unit price claimed by the respondent was Rs.3,45,472.34, which is lesser than the unit price quoted in the tender document.

6. The petitioner thereafter, called upon the respondent to submit *inter alia* the actual bills paid for the inland transportation, clearing, loading and unloading, inland insurance etc. The respondent, vide its letter dated 17th May, 2010, while claiming that this was a lump sum contract wherein the respondent had offered a consolidated price of transportation etc., provided the details of applicable tax rates and the actual taxes paid as also the statements of inland transportation and inland insurance charges paid by the respondent with actual receipts.

7. As the petitioner did not, in spite of receipt of such information, release the payment in favour of the respondent, a dispute arose between the parties which was referred to arbitration and has resulted in the Impugned Award.

8. The Arbitrator in the Impugned Award after referring to various clauses of the Agreement, has held that the Agreement between the parties was a lump sum contract and the respondent was under no obligation to justify its price quoted in the tender. The Arbitrator has further held that the insistence of the petitioner on submission of actual bills and vouchers by the respondent shall be contrary to the express terms of the contract and by asking for the same, the petitioner was in breach of the Agreement. The Arbitrator has further held that withholding of the amount cannot be allowed in guise of

defence of public interest and public policy. The Arbitrator holds that the respondent was entitled to tender sum of Rs.7,62,11,200/- towards SOQ-II items against which it had received a sum of Rs.1,11,90,015/- and in the statement of claim had not made any claim for an amount of Rs.1,66,01,767/- and, therefore, was entitled to a sum of Rs.4,84,19,418/- from the petitioner. The Arbitrator further directed the petitioner to pay the said amount within 45 days from the publication of the award, alongwith certain other sums which are not in dispute before me, and directed that incase the said amount is not paid within 45 days, the petitioner shall pay interest calculated at one and a half per cent per month.

9. Learned senior counsel for the petitioner relying upon clauses 2.8.3, 2.9, 2.12.6 and 2.36.2 submitted that in terms of the Agreement between the parties, the petitioner was entitled to call upon the respondent to justify its invoice(s) raised for SOQ-II items and in case it was found that the respondent was over-charging for the same, to withhold the payment to the respondent for such items. Clauses 2.8.3, 2.9, 2.12.6 and 2.36.2 are reproduced hereinbelow:-

“2.8 Insurance

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2.8.3 Any loss or damage to the equipment due to mishandling, transportation etc., till such time the equipment is delivered to the consignee, shall be to contractors account. The contractor shall be responsible for preferring of all claims and to made good for the damage or loss by way of repairs and/or replacement of the portion of equipment damaged or lost. The contractor shall provide the purchaser with a copy of the insurance policy and documents taken out by him in pursuance of the contract. Such copies of the documents shall be submitted

to the purchaser immediately after the insurance coverage.

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2.9. *Payment towards Transportation and Insurance*

Transportation and Insurance charges shall be paid to the contractor on pro-rata to the value of the equipment received at port/site and on production of the invoices by the contractor. However, wherever equipment wise inland transportation charges have been called in the bid proposal sheet and have been furnished by the contractor, the payment of the inland transportation charges shall be made after receipt of equipment at site based on charges thus identified by the contractor in his proposal and incorporated in the contract.”

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2.12.6 *Airports Authority of India shall pay to the contractor in the following manner unless agreed upon otherwise between the contractor and the Airports Authority of India.*

A: *SH I - Supply Items*

In case of foreign firms

Payments of Explosive Trace Detector

AAI shall pay 100% of FOB amount by way of an irrevocable Letter of Credit as under:-

- a. 70% of FOB value of Supply Items of the schedule, against dispatch clearance certificate and presentation of proof of shipping documents and transit insurance of material in the name of AAI by the contractor as detailed in Para 2.11.5.*
- b. 10% of FOB value of supply items after receipt of material at respective site in good condition i.e. on physical verification and evaluation by the authorized representative of Airports Authority of India of all the material received at respective site in good condition and after presentation of a certificate issued by concerned Engineer in charge of respective site to this effect. In case some material are not found to be in good condition i.e. are found to be in damaged/deficient in any manner, suitable amount will be withheld till such time the deficiency are made up and repairs/replacement actually carried out by the contractor. Engineer-in-Charge will be the*

final authority to decide upon the amount to be withheld in this respect. Contractor shall properly insure the complete material (for which, beneficiary shall be AAI) against theft, fire, damage etc. till the same is handed over to AAI at respective Airport/location.

*c. Insurance & Freight from port of dispatch to port of entry in India & from port of entry to the site, Clearing, forwarding, inland transportation up to site & other miscellaneous charges etc. shall be paid in INR on receipt of material at site in good condition (**SH-II: Freight, Insurance, Transportation, etc., of Schedule of Quantity**).*

d. The value of the contract less, amount paid under (a), (b), & (b) above, i.e. against the goods/equipment delivered at site shall be paid on completion of Testing and Commissioning of the system jointly by AAI and the firm and issue of completion certificate by AAI.

Payment of spares

a. 70% of FOB value against dispatch proof and balance 30% on receipt of material in good condition at site.

b. Insurance & Freight from port of dispatch to port of entry in India & from port of entry to the site, Clearing, forwarding, inland transportation up to site & other miscellaneous charges etc. shall be paid in INR on receipt of material at site in good condition.

In case of Indian firms:

Payment of Explosive Trace Detector

a. 80% of value of Supply Items of the schedule of quantity shall be paid on receipt of material at respective sites in good conditions.

b. Balance payment against Supply of items shall be made on completion of Testing and Commissioning of the system jointly by AAI and the firm and issue of completion certificate by AAI.

Payment of Spares

100% of value against receipt of material in good condition at site.

B: Testing & Commissioning

The authorizes representative of supplier & AAI shall issue commissioning certificate jointly & warranty of EXPLOSIVE

TRACE DETECTOR shall start from the date of issue of Installation/Commissioning certificate or six months after the date of supply of EXPLOSIVE TRACE DETECTOR at site, whichever is earlier.

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2.36 RECOVERING THE DUE FROM THE CONTRACTOR

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2.36.2 *Airports Authority of India shall have the right to cause an audit and technical examination of the works and the final bills of the contractor including all supporting Vouchers, abstract, etc. To be made after payment of the final bill and if as the result of such audit and technical examination, any sum is found to have been overpaid in respect of any work done by the contractor under the contract or any work claimed by him to have been done by him under the contract and found not to have been executed, the contractor shall be liable to refund the amount of over payment and it shall be lawful for Airports Authority of India to recover the same from him in the manner prescribed in sub-Para 2.37.1 of this clause or in any other manner legally permissible; and if it is found that the contractor was paid less than what was due to him under the contract in respect of any work executed by him under it, the amount of such under payment shall be duly paid by Airports Authority of India to the contractor.”*

10. Further, relying upon clause 4.1.2 of the Agreement read with Clause 3.25.3 of the same, it is submitted that the respondent was under an obligation to provide training to the officers of the petitioner for which the petitioner was only to meet the expenditure of travelling, lodging and boarding. The learned senior counsel for the petitioner submits that the break-up of SOQ-II items submitted by the respondent shows that it has even included charges for the training of

the staff in the said item and, therefore, the petitioner was entitled to withhold such payment to the respondent.

11. Clauses 4.1.2 and 3.25.3 are quoted hereinbelow:-

“4.1.2 Training of AAI officials on operation and maintenance of the equipment.

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3.25. Training of Staff

3.25.1 Contractor shall be responsible for training such of the Purchaser's Staff whom the purchaser may nominate for proper operation and maintenance of the equipment. Cost for providing such training shall be deemed to have been included within the cost quoted.

3.25.2 On job training at each site on all aspects of operation, programming and maintenance shall be provided by the contractor or his authorised representative to the concerned AAI officials/operators/users (at least 2 operators and 1 technician per machine) for a period of at least 2 days during the warranty period.

3.25.3 In addition to the above at least 25 engineers of AAI shall be provided technical training on the offered EXPLOSIVE TRACE DETECTOR, at the factory of the OEM as under:

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| <i>i. 15 Engineers from Non-Metro Airports</i> | <i>One week</i> |
| <i>ii. 10 Engineers from Metro Airports</i> | <i>One week</i> |

Expenditure on travelling, Lodging and Boarding shall be borne by AAI. The training program shall include the following:

- a. Detailed training preferably upto component level of circuit for each module.*
- b. Fault finding procedure.*
- c. Installation of Explosive Trace Detector.”*

12. I have considered the submissions made by the learned senior counsel for the petitioner, however I am unable to accept the same.

As is evident from the tender submitted by the respondent, the charges quoted by the respondent under SOQ-II items were lump sum in nature. Clause 2.8.3 merely obliges the respondent to provide to the petitioner a copy of the Insurance Policy and the documents taken out by it in pursuance of the contract. Clause 2.8.3 is a part of Clause 2.8 which is in relation to the insurance and, therefore, provides that any loss or damages to the equipment till such time the equipment is delivered to the petitioner, shall be on respondent's account. I am unable to appreciate as to how this clause is relevant for interpreting the price quoted by the respondent under SOQ-II or casting an obligation on the respondent to provide documentary proof of various components of the price quoted therein.

13. Equally, the Clause 2.9 of the Agreement provides that the equipment-wise inland transportation charges shall be paid by the petitioner "after receipt of equipment on site", based on the charges as proposed by the Contractor in the tender and incorporated in the contract. In the present case, the respondent had not quoted the price giving breakup of the various components of the SOQ-II items but had given a lump sum figure for such work. Therefore, under Clause 2.9 of the Agreement, once the equipment was delivered, the petitioner was under an obligation to pay the agreed amount as mentioned in SOQ-II items of the contract.

14. Clause 2.12.6 again states that inland transportation charges shall be paid on receipt of material on site in good condition. It has no bearing on the interpretation of the Agreement that is now sought to be placed by the petitioner for insisting upon the respondent to

justify the various components of the price quoted by it and agreed to be paid by the petitioner as SOQ-II items.

15. As far as Clause 2.36.2 is concerned, it should be noted that the same is a part of the General Conditions of the Contract. It gives a right to the petitioner to cause an audit and technical examination of the work and final bill of the contractor. In a lump sum contract, this Clause certainly has no application and in any case it does not authorise the petitioner to seek a breakup of lump sum quoted account and/or a justification thereof *post-facto*, that is, after the contract has been awarded and performed by the respondent.

16. As far as the reliance on Clauses 4.1.2 and 3.25.3 of the Agreement are concerned, though it is correct that in terms of the Agreement, the respondent was under an obligation to train the officers/employees of the petitioner, it would have no effect on the amount being claimed by the respondent under SOQ-II items. As noted above, the respondent was under no obligation to give a breakup as to how it arrived at the figure quoted under SOQ-II items. As long as it is not making any separate claims against the petitioner for the training of its officers/employees on the equipment, it cannot be said to have violated Clause 4.1.2 or 3.25.3 of the Agreement in any manner.

17. The submission of the learned senior counsel for the petitioner that the respondent having itself given a breakup of the invoice under SOQ-II items, is somehow estopped from now challenging the authority of the petitioner to scrutinize the same, cannot also to be accepted.

18 Learned senior counsel for the petitioner submits that the respondent itself having given up its claim for the quoted SOQ-II price with respect to the octroi taxes not paid by it to the concerned authorities, the petitioner was entitled to claim documents for the amount that the respondent was claiming to have paid as such octroi taxes to the concerned authorities.

19. This submission of the learned senior counsel for the petitioner cannot be accepted. It is not the case of the petitioner that the octroi tax was payable separately from the quoted price. As noted above, this is a lump sum contract inclusive of all taxes. If the respondent, out of its own goodwill extends the benefit in the form of unpaid octroi tax to the petitioner, the petitioner cannot then turn around and claim from the respondent a justification of the octroi taxes claimed to have been paid by the respondent. The respondent was, in terms of the Agreement, under no obligation to pass on this benefit of saving to the petitioner. Therefore, merely because it acted in good faith, it cannot now be burdened with extra- contractual obligations which are not borne out from the Agreement itself.

20. In *Union of India vs. Hardeep Engineers P. Ltd.*, 148 (2008) DLT 562, this Court had explained the difference between a contract where the taxes are paid separately from a contract where the price is inclusive of taxes. It was held that where the offer is a lump sum and price quoted is not split into a basic price and taxes separately, irrespective of the taxes applicable, price has to be paid unless the terms of the acceptance record otherwise. Therefore, in my opinion, the respondent was under no obligation to justify the octroi taxes

which had been paid to the relevant authorities under the contract.

21. In *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, the Supreme Court has cautioned the court of Appeal in exercising its jurisdiction in the following terms:

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the

grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under By-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

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42. In the 1996 Act, this principle is substituted by the ‘patent illegality’ principle which, in turn, contains three subheads:

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42.3 (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute.-(1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract shall taken into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something

that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.”

22. Learned senior counsel for the petitioner further challenges the award of Interest in favour of the respondent. In terms of Section 31(7) of the Act, award of Interest is at the discretion of the Arbitrator. In ***Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa*** (2015) 2 SCC 189, the Supreme Court has discussed the Arbitral Tribunal’s power to award post-award interest as follows:

“21. In the result, I am of the view that S.L. Arora case is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the substantive claim does not refer to interest pendent lite awarded on the “sum directed to be paid upon award” and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language..

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26. Section 31(7)(a) of the Act deals with grant of pre-award interest while clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, the longer would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance with the award. Pre-award interest is at the discretion of the Arbitral Tribunal. While the post-award interest on the awarded sum is mandate of the statute – the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act i.e. 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.”

23. In ***Hyder Consulting (UK) Ltd. vs. State of Orissa***, 2016 (6) SCC 362, Supreme Court held that the High Court had erred in modifying

the rate of interest awarded by the Arbitrator, who had awarded interest @ 18% with quarterly rest.

24. In view of the above pronouncements and even otherwise, I do not find the rate of interest awarded by the Arbitrator in the present case to be unreasonable or exorbitant. I, therefore, find no merit in the said objection.

25. Learned counsel for the respondent submits that she would not be pressing the objection petition filed by the respondent against the Impugned Award. She further submits that many of the objections raised by the petitioner during the course of the arguments today were in fact not even part of their Statement of Defence filed before the Arbitral Tribunal.

26. In view of the above, both the petitions are dismissed.

27. The petitioner shall pay the cost of the present petition quantified as Rs.50,000/- to the respondent.

NAVIN CHAWLA, J

MAY 07, 2018

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