IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.28 OF 2018

Union of India	…	Petitioner
Vs.		
Kalimata Ispat Industries Pvt. Ltd.	…	Respondents

Mr. Suresh Kumar a/w. Ms Priyanka Tiwari, Ms Suman Yadav, Mr. Pritish Chatterjee and Ms Smita Thakar for Petitioner.
Mr. Prathamesh Seth i/b. Mr. Joseph B. Fernandes for Respondents.

CORAM : R. G. KETKAR, J.
DATE : JULY 3, 2019

P.C. :

Heard Mr. Kumar, learned Counsel for the petitioner and Mr.Seth, learned Counsel for the respondents at length.

2. By this Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Act'), the petitioner has challenged the Award dated 25.08.2017 made by Mr. Virendra Goyal, Sole Arbitrator & Dy. Chief Engineers (C), P & D, Western Railway, Ahmedabad. By that Award, the Arbitral Tribunal directed the petitioner to waive the liquidated damages imposed on the respondents amounting to a deduction of Rs.7,53,573/- from the respondent's bill. The petitioner is further directed to pay a variation of CST @ 1% increase during the original Delivery Period (for short “DP”) for the full ordered quantity as per the Notification issued by Government of West Bengal against the documentary proof as per the condition of Purchase Order (for short 'PO') (paragraph 7.2) along with excess recovery on account of Price Variation Clause covered in the PO, if any. In so far as the claim of the respondents for interest or damages whatsoever on this count or any other ground in respect of any sum of money withheld or retained vide

paragraph 2403 of Indian Railway Standard Conditions of Contract was rejected.

3. On 25.04.2012, petitioner published E-Tender No.126022. The respondents were one of the participants. The E-Tender was for manufacture and supply of fish bolts size 25 x 140 mm with nuts to RDSO Drawing T-1899. On 19.11.2012, petitioner issued acceptance letter in favour of the respondents. The petitioner issued two invoices being purchase orders No.17.2012.6022.1.88008 dated 01.03.2013 and 17.2012.6022.1.88009 dated 01.03.2013 for manufacture and supply of 2,52,455 fish bolts and nuts to RDSO Drawing No.T/1899 (for Valsad Consignee) and 58,367 fish bolts and nuts to RDSO Drawing No.T-1899 (for Sabarmati consignee) respectively on or before 01.10.2013. As per clause 7.2, any variation or any statutory taxes being imposed during the currency of contract (upto original delivery period) was admissible against the documentary proof. Variation or new statutory taxes imposed during the extended contract were not admissible on supplies made during the extended period.

4. On 04.04.2013, respondents informed the Chief Engineer / Track Supply, Western Railway that as per the rules of West Bengal Value Added Tax Act, 2003, the rate of VAT against the ordered item was 4% upto 31.03.2013 as specified under Schedule 'C' (Sr. No.171 of Part-III). Recently, as per West Bengal Finance Act, 2013, the rate of VAT for the item (fish bolts and nuts) has been changed from 4% to 5% with effect from 01.04.2013. A copy of the Circular issued by Government of West Bengal and Schedule 'C' (Part-I, Part-II and Part-III, Sr.No.171) duly notarized was attached for ready reference. The respondents, therefore, requested to issue necessary amendment for the change of rate of CST at the earliest.

5. On 29.04.2013, Deputy Chief Engineer (TS) addressed a letter to the respondents informing that no Modification Advice for change in CST was required. On 06.05.2013, respondents once again requested to amend the terms as regards change of CST from 4% to 5%. This request was reiterated by the respondents on 05.07.2013.

6. On 05.07.2013, respondents addressed a communication to the Chief Engineer / Track Supply, Western Railway, Head Quarters Office, Mumbai referring to the Purchase Orders, both, dated 01.03.2013 for manufacture and supply of fish bolts and nuts, total quantity 3,10,822 numbers conforming to latest IRS Specification IRS/T-23-67 and as amended upto date of opening the tender. It was set out therein that respondent has recently submitted one inspection call to RITES/Kolkata against Southern Railway's Purchase Order for manufacture and supply of fish bolts and nuts to RDSO Drawing No.T-1899. The said call letter was cancelled by RITES/Kolkata vide their call cancellation letter dated 25.06.2013 stating that modification is required from purchaser for material description against Drawing No.T-1899 with latest alteration as amended up to date to exact alteration. The respondents, therefore, requested to issue necessary amendment duly specifying the exact amendment No.of IRS Specificaton No.T-23-67 with extension of delivery period for a further period of 03 months from the date of receipt of Modification Advice without Liquidated Damages and without Default Clause so the materials can be manufactured as per petitioner's exact alteration of specification and execute the orders duly inspected and passed by RITES / Kolkata. Along with this communication, Call Cancellation Letter dated 25.06.2013 addressed by RITES was enclosed. Clause 7 of this letter sets out following remark:

> “Modification is required from purchaser for material description against Drg. No.T-1899 with latest alteration as amended up to date to exact alteration. Hence, call is being cancelled.”

7. On 29.07.2013, respondents addressed two communications to RITES requesting the latter to let them know whether inspection of material will be undertaken as per the description of material mentioned in the Purchase Order or necessary Modification Advice is required from the purchasing authority in respect of mentioning of exact upto date amendment No. of IRS Specification IRS/T-23-67 instead of amendment up to date of opening of tender. On 07.08.2013, Senior Deputy General Manager / Civil of RITES clarified that inspection of fish bolts and nuts and plate screw will not be carried out till receipt of clarification regarding “latest alteration” with respect to Drawing and specification. The respondents were advised to approach the Purchasing Authority for getting the same clarified and intimate them for taking further necessary action. On 08.08.2013, respondents informed the petitioner the response of RITES. By a communication dated 16.08.2013, petitioner called upon the respondents to supply the material as per the terms and conditions of Purchase Order so that the supplies can be completed during the stipulated period of 01.10.2013. On 24.09.2013, respondents requested to extend the Delivery Period without Liquidated Damages and Denial Clause. On 26.09.2013, respondents intimated the petitioner to amend the changes of rates of CST from 4% to 5%. By a communication dated 04.10.2013, period was extended with Liquidated Damages.

8. Accordingly, the respondents supplied the items on 04.12.2013. The petitioner levied Rs.7,53,573/- as Liquidated Damages for supplying the material belatedly as also denied raise of CST from 4% to 5% beyond 01.10.2013 being the original Delivery Period upto 04.12.2013. The matter was therefore, referred to the arbitration over the settlement of claims and disputes arising out of purchase orders dated 01.03.2013. By the impugned award, the Sole Arbitrator made the

Award as indicated earlier. It is against this Award, the petitioner has instituted the present Petition.

9. In support of this Petition, Mr. Suresh Kumar strenuously contended that the respondents were supposed to complete the manufacture and supply of the items from 01.03.2013 to 01.10.2013. The respondents, however, did not supply the material on or before 01.10.2013 and supplied the material by 04.12.2013. Mr. Suresh Kumar relied upon clause 18 of the contract dealing with material specifications. He submitted that material specification for fish bolts and nuts is IRS/T-23-67, and therefore, no clarification could have been sought by the respondents. The petitioner levied Liquidated Damages of Rs.7,53,573/- and the same was accepted by the respondents without any protest. The Sole Arbitrator was, therefore, not justified in directing the petitioner to pay the Liquidated Damages of Rs.7,53,573/-. He further submitted that during the extended period i.e. from 01.10.2013 to 04.12.2013, respondents are also not entitled to variation of CST @ 1% increase. He relied upon clause 7.2 in support of this contention.

10. On the other hand, Mr. Seth supported the impugned Award. He has invited my attention to clause 1.1 of the terms and conditions of the Purchase Order as also clause 7.2. He has also taken me through the correspondence exchanged between the parties. He submitted that the interpretation of the clause of contract is within the domain of the Arbitrator and therefore, no case is made out for interfering with the impugned Award.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, two Purchase Orders, both dated

01.03.2013, were issued by the petitioner in favour of the respondents for manufacture and supply of 2,52,455 fish bolts and nuts to RDSO Drawing No.T/1899 (for Valsad Consignee) and 58,367 fish bolts and nuts to RDSO Drawing No.T-1899 (for Sabarmati consignee) respectively. The manufacture and supply was to be made on or before 01.10.2013. It is material to note that immediately thereafter on 01.04.2013, the State of West Bengal increased the CST from 4% to 5%. This was brought to the notice of the petitioner by the respondents vide letter dated 04.04.2013. That apart, on 05.07.2013, the respondents also informed the petitioner about the Cancellation of Call by RITES on 25.06.2013. In terms of clause 1.1, inspection of finished material is required to be done by the Regional Manager (Inspection), RITES, Eastern Region, Kolkata. Thus, the material to be supplied by the respondents was required to be inspected by RITES. As the RITES informed the respondents to seek Modification Advice from the petitioner, the correspondence was made by the respondents seeking Modification Advice. The petitioner on their own took time for issuing clarification which resulted in delay of one month and 18 days. The respondents, therefore, cannot be held liable for not delivering the materials on or before 01.10.2013. The reliance placed by Mr. Suresh Kumar on clause 18 of the contract, therefore, does not advance the case of the petitioner. In view thereof, I do not find that the Arbitral Tribunal has committed any error in making the Award.

12. In the case of ***Mcdermott International INC. Vs. Burn Standard Co. Ltd.***, **(2006) 11 SCC 181**, the Apex Court held that interference on the ground of patent illegality is permissible only if the same goes to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. 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 making the award by taking into consideration the conduct of the parties. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. Once it is held that the arbitrator has the jurisdiction, no further question can be raised and the Court will not exercise its jurisdiction unless it is found that there exists any bar of the face of the award.

13. Applying the tests laid down by the Apex Court in **Mcdermott International INC** (*supra*), I do not find that petitioner has made out any ground under Section 34 of the Act for setting aside the award. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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