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

+ **FAO(OS) (COMM) 296/2019 and CM APPL. 46275-46277/2019**

MINISTRY OF YOUTH AFFAIRS & SPORTS Appellant
Through: Mr. Rohit K. Aggarwal, Advocate

versus

SWISS TIMING LTD Respondent
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Ashim, Ms. Roopali Singh, Ms. Sayobani
Basu, Mr. Rhythm Barua and Mr. Arman Pratap
Singh, Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

% **21.10.2019**

1. The appellant is aggrieved by the judgment dated 25.07.2019, passed by the learned Single Judge, dismissing a petition filed by it under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'A&C Act'), assailing an Arbitral Award dated 21.06.2017, passed by an Arbitral Tribunal, comprising of three retired Judges of the Supreme Court.
2. The dispute between the parties was in relation to Timing, Scoring and Results System Services Agreement dated 11.03.2010, executed between the Organizing Committee, Commonwealth Games, 2010, Delhi that was subsequently transferred to the appellant/Ministry, by virtue of a Resolution dated 04.07.2017 and the respondent, Swiss Timing Ltd. (in short, 'STL'). In accordance with the terms and conditions of the Agreement dated 11.03.2010, the appellant was required to pay a sum of CHF

24,990,000 to the respondent/STL. On 15.07.2010, the appellant paid 95% value of the said contract to the respondent. When the respondent/STL raised an invoice dated 27.10.2010, demanding release of CHF 1,249,500 towards the balance payment of 5% and the predecessor-in-interest of the appellant claimed a set off for the said amount against counter claims raised against the respondent, disputes arose between them. As a result, the respondent/STL invoked the arbitration clause governing the parties, which has resulted in the Arbitral Award dated 21.06.2017.

3. Before the Arbitral Tribunal, the respondent/STL claimed the balance 5% payment from the appellant and in addition thereto, raised a claim for a sum of Rs.15 lakhs, towards refund of the earnest money deposit and damages on account of loss of reputation. The predecessor-in-interest of the appellant/Ministry had also filed three counter claims on the following heads:-

“(a) Claim in the sum of CHF 596,000/- (Rs.2,73,37,745/- approx) on account of non-functioning of the Games Information System(GIS) from 03.10.2010 to 08.10.2010 (GIS Counter Claim)

(b) Claim in the sum of CHF 34,45,500/- (Rs.15,75,76,078 approx) on account of non-handing over Legacy Board along with its working manuals, operating systems, software and other necessary technical support (Legacy Board Counter Claim)

(c) Claim in the sum of Rs.1,78,27,637/- on account of custom duty liability which the Petitioner was compelled to pay due to non supply of necessary documents towards custom duty exemption by the Respondent (Custom Duty Counter Claim)”

4. Rejecting all the counter claims filed by the appellant/Ministry, the Arbitral Tribunal awarded 5% of the balance payment and a sum of Rs.15 lakhs towards refund of the earnest money in favour of the respondent/STL, but it turned down its claim for damages on account of loss of reputation. Besides the above, costs of Rs.25 lakhs was imposed on the appellant/Ministry towards the arbitral proceedings. Aggrieved by the aforesaid award, the appellant/Ministry preferred a petition under Section 34 of the A&C Act, which has been rejected by the learned Single Judge, with costs quantified at Rs.50,000/-.

5. Mr. Aggarwal, learned counsel for the appellant/Ministry has confined the challenge in the present appeal to the findings returned by the learned Single Judge in respect of the counter claim no.1 raised on account of non functioning of the Games information System (in short, 'GIS') and counter claim no.2 on account of non-handing over of the Legacy Board alongwith its working manuals, operating systems etc.

6. Coming firstly to the claim regarding non-functioning of the GIS from 03.10.2010 to 08.10.2010, it is stated on behalf of the appellant/Ministry that when the respondent/STL itself had admitted that the GIS was non-functional during the aforementioned period, then there was no question of the appellant/Ministry being required to prove anything further to demonstrate that it had suffered any loss on account of non-functioning of the said system. Learned counsel states that this aspect has not been appreciated by the learned Single judge in the correct perspective. It is further argued that Clause 33 of the Agreement cited in para 12 of the impugned judgment, would not be an impediment for the appellant/Ministry and non-issuance of a notice under the said Clause, could not be a ground to

reject the first counter claim.

7. Before referring to the observations made by the learned Single Judge while rejecting the aforesaid counter claim, it is considered necessary to examine the findings returned by the Arbitral Tribunal on this aspect, which are reproduced hereinbelow for ease of reference:-

“38. We have heard the parties and considered the material on record. We are unable to accept submission of Claimant that Respondent has not proved that the Games Data network did not work from 3rd October 2010 to 8th October 2010. The Respondent has averred this. Its witnesses have deposed about it. The Claimant has led no evidence to counter it or to deny it. On the contrary in its letter dt. 10th October 2010 the Claimant has admitted this but sought to put the blame on the Respondent for this failure. The operative portion of the letter dated 10th October 2010 reads:

“As any large scale system it requires lead time to set, configured, tested and stabilized and quality controlled; before going live when competitions start. We made clear several months in advance that this lead time has to be 2 weeks minimum. You know the most important part, the Games Data network (GDN), allowing connection and exchange of info between the venue, has been made available to us on Saturday October 2nd early morning only. This gave us 2 days.”

39. However in our view Claimant is right in saying that the Respondent is not entitled to this claim. The Respondent were to first provide all the necessary hardware before Claimant could provide the Games Data network. Except for claiming that they had so provided the Respondent has not proved that it had fulfilled its obligation in time for the Claimant to perform. Claimants case that the relevant material was only made available 2 days in advance has not been controverted.

40. We also find substance in Claimants' contention that this claim has been raised belatedly and as an afterthought. Respondent has not issued any notice under Clause 33 of the Agreement making such a claim and asking Claimant to rectify this defect. The only email sent by the Respondent was email dt. 6th October 2010. This email does not contain this complaint. The grievances raised in this email were answered by the Claimant on the same day i.e. 6th October 2010. Respondent accepted the explanation as is evident from fact that, at the relevant time, Respondent did not suspend payment as it was entitled to do under Clause 33 of the Agreement. More importantly the following chronology shows that such a claim has been made belatedly:

(a) After conclusion of the CWG 2010, Claimant raised an invoice bearing number 33574 on 27th October 2010 for the sum of CHF 1,249,500 towards the last instalment of the fee consideration. While the Respondent exchanged a number of letters/e-mails with Claimant on various issues, Respondent never once made a mention of the GIS services.

(b) Even thereafter, on 5th January 2011 Respondent replied to Claimants' reminder of 4th January 2011 seeking payment of its pending dues, but did not mention the GIS services.

(c) in its subsequent e-mail of 9th January 2011 Respondent again did not attribute any deficiency in Claimant's services due to the alleged difficulties faced in the GIS.

(d) On 7th February 2011 Respondent replied to Claimants' letter dated 4th February 2011 but yet again did not agitate or take issue regarding the GIS services.

(e) The first time that Respondent raised the issue of GIS was in its letter dated 21st March 2011 (Page 801,

Annexure C-48 of the Statement of Claim). However, even in this letter Respondent simply quoted excerpts from Claimants letter dated 10th October 2010. Similarly, Respondent in its letter dated 3rd May 2011 again simply referred to and quoted Claimants' letter dated 10th October 2010.

41. The Respondent has also not proved that it suffered any loss. For all the above reasons we hold that Respondent has not proved that it is entitled to CHF 5,96,000 on account of non-functioning of the Games information System from 3rd October 2010 to 8th October, 2010.” (emphasis added)

8. As can be seen from the above, the Arbitral Tribunal upheld the contention of the respondent/STL that the aforesaid counter claim has been raised by the appellant/Ministry belatedly. The other reason given for rejecting the said counter claim is that the appellant did not issue any notice to the respondent/STL as required under Clause 33 of the Agreement before lodging such a claim or calling upon it to rectify the said defect. Clause 33 of the Agreement relied on by the respondent/STL reads as follows:-

“33. Suspension of payments

33.1 If the Service Provider defaults in the performance of its obligations under this Agreement, Delhi 2010 may give notice to it to remedy the default specifying details of the default.

33.2 If the Service Provider fails to remedy the default specified in a notice under clause 33.1 within 5 Business Days after receipt of the notice, Delhi 2010 may suspend payment under this Agreement until the default has been rectified.

33.3 Suspension of payment will not in any way affect the continuing obligations of the Service provider under this Agreement and will be without prejudice to any other rights that Delhi 2010 may have against the Service Provider as a

result of the default.”

9. Clause 33 referred to hereinabove, clearly states that if the Service Provider defaults in performance of its obligation under the Agreement, a notice may be issued to it for remedying the default on specifying requisite details and upon the Service Provider failing to remedy the said default within a fixed timeline, the appellant/Ministry would be entitled to suspend payment under the Agreement until the default stands rectified. Noting that the appellant/Ministry did not suspend the payment, which it was well entitled to do under Clause 33 of the Agreement, the Arbitral Tribunal turned down the counter claim filed by it on account of non-functioning of the GIS, by referring to the chronology of events commencing from 27.10.2010, when the respondent/STL raised an invoice on the appellant/Ministry towards the last instalment of the fee consideration, right upto 07.02.2011, when the appellant/Ministry replied to the respondent's letter dated 04.02.2011, but did not take up the issue regarding the GIS services.

10. The only e-mail sent by the appellant/Ministry is dated 06.10.2010, which did not even refer to the aforesaid complaint. The contents of the e-mail dated 06.10.2010, have been reproduced in para 31 of the Arbitral Award, which simply states as under:-

“31. You know that getting the network 2 days instead of 2 weeks before the Games start, imposes us to do overnight, after competitions, what we could not do the weeks' before [..]”.

11. It is apparent from a reading of the aforesaid e-mail sent by the appellant/Ministry to the respondent/STL that it did not mention anything

relating to the non-functioning of the GIS. It was only on 21.03.2011, that the appellant/Ministry had written to the respondent/STL and for the first time, raised the issue of GIS, wherein it simply referred to the letter dated 10.10.2010 issued by the respondent/STL. The operative para of the letter dated 10.10.2010, addressed by the respondent/STL has been reproduced in para 38 of the Award and extracted above.

12. The submission made by learned counsel for the appellant/Ministry that the findings returned by the learned Single Judge are based on conjectures or surmises and that the respondent/STL having failed to lead any evidence to establish as to what was the mandatory timeline within which the appellant/Ministry was required to provide the Games Data Network (GDN), the claim of the appellant/Ministry could not have been rejected, is unacceptable since the GDN was to be put into operation before the Commonwealth Games were to start, as it was intended to be used during the Games.

13. The learned Single Judge has rightly observed that if the appellant/Ministry was of the opinion that the respondent/STL had defaulted in any service provided to it including non-functioning of the GIS, then it had the option of issuing a notice to the respondent/STL as also to suspend payment under the Agreement on failure to remedy the default, but no such notice was ever given by the appellant/Ministry to the respondent/STL and therefore, the Arbitral Tribunal cannot be faulted for rejecting the said counter claim. We are in complete agreement with the observation made by the learned Single Judge that the conclusion of the Arbitral Tribunal to the effect that the respondent/STL could not be blamed for non-functioning of the GIS at the relevant time, was purely a finding of fact that has been

returned on the appreciation of evidence led before it and the same did not deserve any interference by the Court as it was neither unreasonable, nor perverse.

14. Coming to the second submission made by learned counsel for the appellant/Ministry regarding rejection of the counter claim on account of non-handing of the Legacy Board alongwith its working manuals, software systems etc., the Arbitral Tribunal has held thus:-

“60. Respondents case for CHF 34,35,500 is on account of not handing over the Legacy Board along with its working manuals, operating systems, software and other necessary technical support. As pointed out above Claimant has raised a number of defences. However in our view the following findings are sufficient to deal with this Counter-claim. Even though in the letter dt. 14th March 2011 the Claimant accepts that there is delay in handing over the Legacy Boards we find that the Claimant is right in its submission that there is no provision in the contract for a formal handing over of the Legacy Boards. These Legacy Boards were already installed at Jawaharlal Nehru Stadium, Indira Gandhi Stadium and S.P Mukherjee Stadium. It is not disputed that the Legacy Boards were working during the 2010 CWG. Also to be noted that under Schedule 3 to the Agreement, the third instalment of payment of the contract value was conditional upon the delivery of all permanent Legacy Equipment and Scoreboards to Respondent. The fact that Respondent released the third instalment of payment suggests that the Respondent considered that Claimant had complied with all the formalities with regard to the delivery of the Legacy Boards. Respondent has not specified or set out details of what working manuals, operating systems, software and other necessary technical support was allegedly missing. The packing lists at time of handing over to SAI shows that some operating software was available. The Agreement does not provide for any technical support after conclusion of CWG 2010. Further it is an admitted position that the three Legacy

Boards were in the Respondent's custody for a period in excess of four months i.e. from 14th October 2010 (when the CWG 2010 concluded) till 20th February 2011 (when the Legacy Boards were handed over to SAI). Respondent has given no explanation for failing to prepare an inventory list for the Legacy Boards. Respondent has also offered no evidence to establish that the Legacy Boards and its equipment(s) were not susceptible to pilferage/breakage etc. by third parties during the time the Legacy Boards were in the Respondent's custody. Respondent has not adduced any evidence to demonstrate the conditions under which the Legacy Boards were stored and/or maintained after the completion of the CWG 2010 and before they were handed over to SAI. We also find substance in Claimants' contention that Respondent has not shown that it took any steps to mitigate the loss. We are also of the opinion that Respondent could not have claimed the whole value assigned to the Legacy Boards i.e. CHF-3435500/- when its case is limited to the alleged non-handing over of the certain manuals, accessories or software of the Legacy Boards. We therefore hold that claim of CHF-3435500/-, in relation to Claimant's alleged non-handing over of manuals, accessories, software of the Legacy Boards is not proved and the same is rejected.”

15. A glance at the aforesaid detailed observations made by the Arbitral Tribunal shows that the plea taken on behalf of the respondent/STC that there was no provision in the contract for a formal handing over of the Legacy Boards, has been upheld. Nothing to the contrary has been pointed out to us in the course of submissions. It was also observed by the Arbitral Tribunal that the Legacy Boards were already installed at the four Stadia in Delhi and that they were working during the period when the CWG 2010 was held. Noting that the appellant/Ministry had released the third instalment of payment of the contract value to the respondent/STL, the inference drawn was that it had complied with all formalities regarding

delivery of the Legacy Boards. We have also enquired from learned counsel for the appellant/Ministry if the Agreement governing the parties provides for any technical support upon conclusion of the CWG 2010, to which the reply is in the negative.

16. In view of the aforesaid facts and circumstances, we are of the view that the learned Arbitral Tribunal has rightly held that once it is not in dispute that the three Legacy Boards were in the custody of the appellant/Ministry for a period of over four months reckoned from 14.08.2010 to 20.02.2011 and no explanation had come forth from them regarding failure to prepare an inventory list of the Legacy Boards. In the absence of any evidence to establish that the said Boards and the supporting equipments were not susceptible to any pilferage, breakage etc. by third parties during the period when the said Legacy Boards were in the custody of the appellant/Ministry, there was no ground to allow counter claim No.2.

17. Moreover, the appellant/Ministry did not take any steps to mitigate the losses, if any, suffered by it on this count. In such circumstances, the Arbitral Tribunal cannot be faulted in holding that the appellant could not have claimed the complete value of the Legacy Boards and at best, they could have confined their claim to non-handing over of certain manuals, software etc. Taking into consideration the aforesaid factual position brought out in the Arbitral Award, the learned Single Judge has agreed with the Arbitral Tribunal that an adverse inference had to be drawn against the appellant/Ministry for failure to prepare an inventory list and for not leading any evidence to demonstrate the conditions under which the Legacy Boards were stored and/or maintained on completion of the CWG 2010. The statement of the counsel for the respondent/STL was also recorded to the

effect that the appellant/Ministry had failed to specify the exact manuals, software and other hardware components that had gone missing from the Legacy Boards at the time of handing them over by the respondent/STL, on a permanent basis.

18. We are of the opinion that the very fact that the appellant/Ministry had released the third instalment in favour of the respondent/STL in terms of Schedule 3 of the Agreement, is sufficient ground to conclude that it had received the Legacy Boards alongwith all supporting material intact and there was no deficiency of any nature based whereon, counter claim No.2 could have been allowed. There is no reason for this Court to take a different view than the one taken by the Arbitral Tribunal and upheld in the impugned judgment.

19. We are also mindful of the law on interference by the courts in respect of findings of facts based on appreciation of evidence, returned by the Arbitral Tribunal. In Sutlej Construction Limited Vs. Union Territory of Chandigarh reported as (2018) 1 SCC 718 the Supreme Court has held as follows:-

“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice”. Associate Builders v. DDA, (2015) 3 SCC 49.

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An

arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739.

13. The learned Single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case, the learned Single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court.”

20. In Ssangyong Engineering Construction Co. Ltd. vs. National Highways Authority of India reported as **2019 SCCOnline SC 677**, the Supreme Court has reiterated the aforesaid view in the following words:-

*35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of **Associate Builders (supra)**, i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the **Western Geco (supra)** expansion has been done away with. In short, **Western Geco (supra)**, as explained in paragraphs 28 and 29 of **Associate Builders (supra)**, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the*

award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of *Associate Builders (supra)*.

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of *Associate Builders (supra)*, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of *Associate Builders (supra)*, or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of *Associate Builders (supra)*. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that *Western Geco (supra)*, as understood in *Associate Builders (supra)*, and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous

application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.”

21. Reliance is also placed on a recent judgment dated 18.10.2019 passed by the Supreme Court in **SLP No.13117/2019, The State of Jharkhand and Ors. vs. M/s HSS Integrated SDN and Anr.**, wherein it has been emphasised that the Award passed by an Arbitral Tribunal can be interfered with in proceedings under Sections 34 and 37 of the A&C Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against public policy. In the instant case, none of the above circumstances exist for interference.

22. Given the facts and circumstances of the present case, we are of the opinion that the concurrent view expressed in the Arbitral Award and as upheld in the impugned judgment, does not warrant any interference. Resultantly, the present appeal is dismissed *in limine*, alongwith the pending applications.

HIMA KOHLI, J

ASHA MENON, J

OCTOBER 21, 2019

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