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

+ O.M.P. 1161/2012

Date of Decision : 8th July, 2019

THE DEPUTY COMMISSIONER OF POLICE Petitioner

Through: Mr.Ramesh Singh, Standing
counsel with Mr.Shlok
Chandra, Ms.Roopali
Wadhwan, Mr.Sharshvardhan
Sharma, Advs. alongwith
S.I.Manoj Kumar and ASI
Devender.

versus

SCORE INFORMATION TECHNOLOGIES LTD

.... Respondent

Through: Mr.Tejas Karia, Mr.Ravjyot
Ghuman and Ms.Amee Rana,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. 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 Arbitral Award dated 04.06.2012 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the Supply Order dated

15.03.2007, placed by the petitioner on the respondent for Supply and Installation of CCTV system within the Walled City, Delhi.

2. The primary dispute between the parties was whether it was the responsibility of the petitioner to obtain the necessary approvals from the Civic Authorities for the digging, road cutting and laying of cables. While the petitioner claimed that it was the responsibility of the respondent to seek such approvals, the respondent contended to the contrary.

3. The Arbitrator in the Impugned Award has held that the documents inviting Tender as also the Supply Order are conspicuously silent about the responsibility of the respondent to obtain the requisite permission from the local authorities. The Arbitrator thereafter considered the previous correspondences exchanged between the parties as also the Minutes of Meeting held between them on this issue. The Arbitrator has also placed reliance on the fact that the petitioner had placed four contracts of similar nature for installation of CCTV cameras on the respondent, including the one at Lajpat Nagar. For the contract in relation to Lajpat Nagar, the petitioner applied for the permission to the concerned authority. The Arbitrator held that the contract did not require the respondent to seek permission from the Municipal Corporation of Delhi (MCD) for the digging and excavation work and it was the responsibility of the petitioner to seek all necessary permissions before calling upon the respondent to start the work of digging and excavation.

4. Learned counsel for the petitioner has placed reliance on Clause 1.3 and 12.3 of the Tender Document to contend that in terms of these clauses the bidder had to fully acquaint himself with all local conditions and factors, which necessarily include the necessity of obtaining permission from the MCD, and the responsibility of the installation of the system was again that of the respondent. He submits that the Arbitrator therefore misconstrued the terms of the contract and the same being perverse, is liable to be set aside by this Court. In this regard he places reliance on the judgments of the Supreme Court in ***National Highways Authority of India v. ITD Cementation India Ltd.*** 2015 (3) Arb. LR 109 (SC) and of this Court in ***JSC Centrodostroy v. National Highways Authority of India***, 2014(1) Arb.LR 148 (Delhi) (DB).

5. Learned counsel for the petitioner further submits that, in any case, the subsequent correspondences exchanged between the parties as also the Minutes of Meeting would show that the respondent had taken upon itself the responsibility of obtaining the requisite permission from the MCD. The only demand of the respondent was that the petitioner must liaison with the MCD for such permission. He submits that in that manner, even assuming that in the contract there is no stipulation with regard to respondent's responsibility to obtain such permission, the contract stood novated with the respondent taking upon itself the responsibility for obtaining the said permissions. Relying upon the judgment of the Supreme Court in ***Mcdermott International Inc. v. Burn Standarad Co. Ltd. and Ors.***, (2006) 11

SCC 181, he submits that even the subsequent conduct of the parties would have a bearing on the construction of the agreement.

6. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same.

7. Clause 1.3 and 12.3 of the Tender Document relied upon by the counsel for the petitioner are reproduced hereinbelow:

“1.3 It will be imperative on each bidder to fully acquaint himself with all the local conditions and factors, which would have any effect on the performance of the contract and cost of the Stores. No request for the change of price or time schedule of delivery of Stores shall be entertained, on account of any local condition or factor once the offer is accepted by the Purchaser.”

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“12.3 The complete installation of the System at the Purchaser’s site shall be the responsibility of the Supplier.”

8. A reading of the above clauses does not in any manner support the contention of the counsel for the petitioner that it was the responsibility of the respondent to have obtained the necessary approvals/permissions from the MCD. I therefore, do not find any error in the observation of the Arbitrator that the contract was silent as far as the responsibility of the parties to obtain such permission is concerned.

9. The Arbitrator has also rightly relied upon the conduct of the petitioner with respect to similar contract granted for Lajpat Nagar, to conclude that even in that case, it was the petitioner who had applied to the MCD for requisite permission and therefore the contractual terms cast this obligation on the petitioner only.

10. As far as the subsequent correspondences and the Minutes of Meeting are concerned, learned counsel for the petitioner relied upon the letter dated 04.06.2007 by which the respondent had called upon the petitioner to obtain the necessary permission. In response to this letter, the petitioner vide its letter dated 20.06.2007 stated as under:

“With reference to yours letter No.NIL dated 04.06.2007 the subject cited above, I am directed to say that necessary permission from civic authorities may please be obtained, after completing the necessary formalities at your end. However, possible assistance will be provided as and when required.”

11. In the Minutes of Meeting held on 04.07.2007 the respondent again reiterated that it was for the petitioner to obtain the necessary permission and the following instructions were issued by the petitioner to the representative of the respondent:

“The representative was informed that the firm may apply for requisite permission, however, necessary liaison work will be done by local police. Mr.Atul Mahajan, representative of the firm, was informed the importance accorded to the project by PHQ and the requirement to complete the installation of CCTV at Walled City by 31st July, 2007 in view of Independence Day

Celebrations at Red Fort. The representative was informed that it looks strange that the firm is not applying for permission of civic authority and is trying to put the onus further on the Delhi Police Department although it is clearly a part of their responsibilities under clause 12.3 of Chapter-2 of the terms & conditions of the tender. He was informed that the installation of CCTV System at Walled City be launched on a war-footing from today onwards (4.7.2007) so as to ensure its completion before 31st July, 2007. The firm must immediate apply for clearance from Civic Agency and that local police may render necessary liaison.”

12. The respondent by its letter dated 07.07.2007, applied to the MCD for requisite permission and by a subsequent letter dated 09.07.2007 addressed to the petitioner, solicited the petitioner’s assistance in expediting the matter for obtaining such permission.

13. By another letter dated 12.07.2007, the respondent informed the petitioner of its stand with respect to the Minutes of Meeting held on 04.07.2007, contending, *inter-alia*, as under:

“4. However, subsequent to the subject meeting we have applied for the permission to the respective civic authorities on your behalf and once again reiterate our request to the Delhi Police to lead us in arranging the approval.”

14. In spite of the above communication, by internal correspondence dated 16.07.2007 addressed by the Deputy Commissioner of Police, Central District to Deputy Commissioner of Police, Provisioning and Logistic, it was asserted that as the

respondent has not taken any concrete steps to get permission from the MCD and its approach was dilly-dallying, necessary action be taken against the respondent in that regard.

15. Based on this advice, a Show Cause Notice dated 09.08.2007 was issued by the petitioner to the respondent, which was duly replied to by the respondent under the cover of its letter dated 06.09.2007. The petitioner, however, terminated the contract by its letter dated 07.12.2007.

16. The above correspondences do not, in any manner, support the contention of the petitioner that there was a novation of contract or by merely applying to the MCD, the respondent had agreed to take up upon itself the responsibility for obtaining such permission much less the contract had to be interpreted in a manner so as to cast such an obligation on the respondent due to such subsequent conduct. The above correspondence clearly shows that there was difference of opinion as to who had to obtain the necessary permission from the MCD. As a matter of settlement it was decided that while the respondent would apply to the MCD for necessary permission, the petitioner would conduct liaisoning work with MCD for obtaining such permission. This, however, is not sufficient to shift the burden of obtaining such permissions from the petitioner to the respondent or entitle the petitioner to terminate the contract merely because the permission from the MCD was delayed for some reason. Be that as it may be, the Arbitrator has considered all these correspondences in detail and has observed as under:

“26. Clearly when the claimant applied to the MCD for permission to dig, it did not do so in compliance of any term of the contract but by way of cooperation in the interest of the project.

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29. Thus it appears to me that the contract did not require the claimant to seek permission from the MCD and accordingly it was the responsibility of the claimant to obtain the permission before it could call upon the respondent to start the work of digging. Further, the above discussion shows that the claimant did request the MCD and carried out the wishes of the respondent in this regard but the respondent defaulted in taking it further by doing the necessary liaison work. This issue is therefore, decided in favour of the claimant.”

17. I have no reason to disagree with the above finding of the Arbitrator. In any case, as far as the matter of interpretation of contract and appreciation of evidence is concerned, the Arbitrator is the final judge of the same. The finding of the Arbitrator on the question of interpretation of contract and on appreciation of evidence cannot be interfered with by this Court unless the same are found to be totally perverse or unreasonable. Reference in this regard can be made to the judgment of the Supreme Court in ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49.

18. In view of the above, I find no merit in the submission of the learned counsel for the petitioner on this issue.

19. Learned counsel for the petitioner further submits that in terms of Clause 3.2, Chapter 2 (Conditions of Contract) of the Tender Document, the transfer of title of the goods supplied from the respondent to the petitioner was to take place only upon the inventory of Stores being jointly prepared by the parties. Admittedly, the inventory of the Stores was not prepared in the present case and therefore, the title of the goods never passed from the respondent to the petitioner. In fact, pursuant to the order dated 07.07.2010, passed by the Arbitrator, the respondent was directed to remove the goods from the Jama Masjid Police Station, therefore, even the possession of the goods was with the respondent.

20. Learned counsel for the petitioner further submits that under Clause 3.4 of the Conditions of Contract, the first payment of 60% cost of Stores was payable within 30 days from the date of “transfer of title of the Stores”. As the transfer of the title of the Stores never took place, stage of making first payment in terms of the Supply Order also never arose. In spite of this position, the Arbitrator has awarded in favour of the respondent 60% as cost of the Stores thereby acting in total breach of the terms of the contract between the parties.

21. Learned counsel for the petitioner further submits that even for the remaining 40% of the cost of Stores, Clause 3.5 of the Conditions of Contract provides that the same shall be payable only upon “Final Acceptance of system” and as the Final Acceptance of system had not been issued, the respondent was not entitled to such payment. Here

again, in spite of the contractual terms, the Arbitrator has awarded such claim in favour of the respondent.

22. I have considered the submissions of the learned counsel for the petitioner, however, do not find any merit in the same.

23. As far as the first payment of 60% of the cost of Stores is concerned, the Arbitrator in the Impugned Award has noted as under:

“40. The claimant pleads that the claimant supplied Stores to the respondent and sent the bills in respect of the same on 27th of June 2007 and re-submitted the same in the format desired by the respondent on 11th July 2007 and 19th July 2007. The claimant goes on to plead that the respondent has failed to make the payment of the claimant of 60% of the goods supplied by the claimant as stated in Clause 3.4 (extracted above). The value of 60% of the Stores supplied, claimed by the claimant is Rs.66,44,477/-.

41. The respondent in its reply to the claim petition does not deny the delivery of Stores alleged by the claimant. Nor does the respondent deny the value of the material supplied. The defence of the respondent is that as per terms and conditions of the tender the supplier firm had to make delivery of Stores at Delhi Police premises within 4(four) weeks of the date of the contract but the petitioner supplied the Stores much beyond the period of four (4) weeks and therefore the claimant is not entitled to get 60% of the value of the Stores supplied. The respondent further pleads that after supply of all the Stores within four (4) weeks it was obligatory for the claimant to set the system functional and since the claimant failed to do so it is not entitled to get 60% of the value of Stores. The claimant in its evidence has substantiated the supply of goods and

submissions of bills vide letters dated 27.6.2007, 11.7.2007 and 19.7.2007. The respondent did not prepare an inventory and did not invite the claimant for jointly taking the inventory of Stores. The preparation of the inventory would have transferred the title of the Stores supplied. The default being on the part of the respondent the claimant cannot lose its claim.

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44. *It is now required to be mentioned that vide this Tribunal's order dated 9.3.2010 the material supplied by the claimant for the Walled City project was inspected by a technical committee and the inspection was carried out on 19.3.2010. As per the report of independent surveyor Brig. Satish Malik the goods supplied were in accordance with the challans submitted by the claimant.*

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46. *So far as the first payment of 60% is concerned Clause 3.4 does not link the first payment with the installation of the system. Therefore the plea that the respondent is not liable to make payment of the goods on account of failure of system is not tenable.*

47. *Presently as per the Tribunal's order dated 7.7.2010 the Stores which were supplied at PS Jama Masjid have been removed and are now in the custody of the claimant in the capacity of a superdar. The goods belong to the respondent. Thus the claimant is entitled to 60% of the value of the goods supplied by the claimant. The claimant in a tabulated statement gave the list of the goods supplied and the value thereof and calculated 60% of the value of Stores as Rs. 40,53,151.80/-. The goods have to be restored to the respondent. Issue No.6 is decided accordingly." (Emphasis supplied)*

24. A reading of the above paragraphs would clearly show that the Arbitrator has found that the goods had been supplied by the respondent to the petitioner and even bills for the same had been raised on 27.06.2007 and resubmitted on 11.07.2007 and 19.07.2007. In terms of the Clause 3.2 of the Tender Document, joint inventory was to be prepared within five working days of the delivery. The reason for non preparation of such joint inventory was not pleaded by either party before the Arbitrator or before this Court, however, the petitioner in its reply before the Arbitrator did not deny the delivery of the Stores or value thereof. Its only plea was that there was a delay on the part of the respondent in making such supplies. The Arbitrator did not find any merit in such plea. The Arbitrator further found that pursuant to the order dated 09.03.2010 of the Arbitrator, the materials supplied by the respondent had been inspected by the Technical Committee of the petitioner to check whether the goods supplied were in accordance with the challans submitted by the respondent. It was found that the goods supplied were in accordance with the challans submitted by the respondent. The Arbitrator further held that there was no evidence led by the petitioner on its plea that the goods were substandard in quality.

25. As far as the effect of the order dated 07.07.2010 of the Arbitrator is concerned, the Arbitrator herself noted that the goods were removed by the respondent and were in its custody only as a *Superdar*. The said order was passed without prejudice to the contention of the respondent and therefore, cannot be used to deny its

claim. The counsel for the respondent submits that the goods are still available in the respondent's custody as a *Superdar* and the petitioner may collect the same in accordance with the direction of the Arbitrator.

26. In my view, no fault can be found with the finding of the Arbitrator and therefore, reliance of the counsel for the petitioner on Clause 3.2 and 3.4 of the Tender Document is unfounded. With the supply of goods, title of goods would have passed to the petitioner unless it was shown that the goods supplied were not of the requisite quality and quantity and onus of proving this issue was on the petitioner, which it failed to discharge in the present case.

27. In terms of Clause 3.5 of the Tender Document, the remaining 40% of the cost of the Stores was to be released to the respondent upon Final Acceptance of system. As the petitioner prevented the respondent from installing the system due to termination of contract, which the Arbitrator found to be illegal, the respondent in the opinion of the Arbitrator was entitled to seek specific performance of the Agreement. The Arbitrator found that in the meantime the petitioner had awarded the work in favour of a third party and therefore specific performance of the contract was no longer feasible. In light of such finding, the Arbitrator awarded the 40% of the cost of Stores in favour of the respondent. The same did not include the cost of installation or any other work. In my opinion, therefore, the Arbitrator has balanced equity and awarded remaining amount of 40% of the Stores in favour

of the respondent as damages in lieu of the relief of specific performance.

28. I may note that in the order dated 14.12.2012 of this Court, submission of the petitioner has been recorded that such amount has been awarded without there being specific claim in that regard made by the respondent in its Statement of Claim. Though not raised during oral arguments today, I do not find any merit in this submission.

29. In the Statement of Claim filed by the respondent before the Arbitrator, the respondent had claimed 60% of the cost of the supplies as relief (a). In relief (e), the respondent had prayed for specific performance of the contract. As noted above, the Arbitrator found that the relief of specific performance cannot be given as work in the meantime had been awarded to a third party. The Arbitrator, therefore proceeded to award the remaining 40% of the cost of the supply as damages in favour of the respondent in lieu of specific performance. Learned counsel for the respondent has rightly relied upon the judgment of the Supreme Court in *Jagdish Singh v. Natthu Singh*, (1992) 1 SCC 647 and of this Court in *Kamal Karmakar Walldorf Integration Solutions Ltd. v. S. Chand and Company Ltd. and Ors*, 2018 SCC OnLine Del 11557 and *Kiri Associates (P) Ltd. v. Pramod Kumar Mittal and anr.*, 2017 SCC OnLine Del 8935 to contend that even in the absence of a specific prayer for damages, the Court/Arbitrator is not without competence to award such damages.

30. Learned counsel for the petitioner has further challenged the rate of interest awarded by the Arbitrator. The Arbitrator has awarded

interest at the rate of 15% p.a. In terms of Section 31(7)(b) of the Act, the rate of interest is at the discretion of the Arbitrator. In fact, prior to the Amendment in 2015 the legislature itself contemplated 18% rate of interest as reasonable. I, therefore, do not find any merit in the said submission.

31. In view of the above, I find no merit in the present petition. The same is dismissed with no order as to cost.

JULY 08, 2019/vp

NAVIN CHAWLA, J



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