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

\+ O.M.P.(COMM)327/2017

***Date of Decision : <u>29th March, 2019</u>***

STERLITE TECHNOLOGIES LIMITED ..... Petitioner
Through Ms.Rajiv Tyagi and Mr.Rohit Gupta, Advs.

versus

BHARAT SANCHAR NIGAM LIMITED ..... Respondent
Through Mr.Dinesh Agnani, Sr. Adv. with Ms.Leena Tuteja, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**<u>NAVIN CHAWLA, J. (Oral)</u>**

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 15.04.2017 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Advance Purchase Order No.203-2/2004-MMS/Vol-II dated 18.03.2004 for supply of 13.199 Lakh of PIJF underground cable of different size, placed on the petitioner by the respondent for its Kerala circle.

2. The dispute between the parties was with respect to the following three claims raised by the petitioner; (a) towards alleged short payment of the value of sale invoices in respect of preponed supplies of cables by adopting the price of copper as on the date of

scheduled delivery instead of date of preponed delivery; (b) towards reimbursement of Octroi/Entry Tax and; (c) towards Liquidated Damages wrongly imposed/levied by the respondent.

3. The learned counsel for the petitioner submits that due to loss of software, majority of the documents to support such claim could not be retrieved and filed before the Arbitrator by the petitioner for the purpose of pursuing its claim. Further, there were certain discrepancies in the documents filed by the petitioner before the Arbitrator, however, only on the basis of this ground, the claim of the petitioner could not be stated to be frivolous or held to be not proven as has been done by the Arbitrator.

4. Learned counsel for the petitioner further submits that the petitioner had filed voluminous evidence running into 1575 pages of invoices before the Arbitrator. As against this, the respondent did not file any document alongwith its Statement of Defence, which was filed in January, 2013, however, it was only on 31.03.2014, that the respondent filed documents running into about 275 pages of invoices before the Arbitrator. Based on these documents, the petitioner infact, alongwith its rejoinder filed amended Ledger Accounts, however, the Arbitrator in the Impugned Award has drawn an adverse inference against the petitioner for claiming different amounts at different periods of time. He further submits that the Arbitrator has primarily drawn adverse inference against the petitioner on the basis of the amount claimed in the notice dated 07.05.2010 sent by the petitioner for invoking arbitration. He submits that merely due to such

discrepancy in amount, which has been adequately explained, no adverse inference could have been drawn against the petitioner, in any case, the entire claim of the petitioner could not have been held to be baseless merely upon this discrepancy in amount.

5. As far as the claim of Octroi/Entry Tax is concerned, learned counsel for the petitioner submits that the original challans for the amount paid as Entry Tax had been misplaced. The petitioner, therefore, had obtained certificates of payment from the relevant authority, that is, the Commercial Tax Department, Kerala and based on these certificates had claimed such amount before the Arbitrator. The Arbitrator has, however, rejected such claim on an incorrect basis.

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

7. The Arbitrator in the Impugned Award has considered not only the difference in the amounts claimed by the petitioner at various stages of the proceedings, but has also compared the invoices filed by the petitioner alongwith the documents filed by the respondent. On comparing the sample invoices, the Arbitrator found that the difference in the amounts claimed by the petitioner has been adequately explained by the respondent, for such invoices. The Arbitrator also found that the Statement of Accounts filed by the petitioner at various stages give different amounts for different invoices and, therefore, the statement being mere a printout cannot be relied upon. The Arbitrator, further held that the respondent had considered the claim of price variation in accordance with the letter

dated 12.06.2004 (actual date is 12.07.2004), which stipulates that such price variation is to be calculated on the basis of the index available on the date of inspection certificate issued by the Quality Assurance Unit or the scheduled date of delivery, whichever is lesser. The Arbitrator, therefore held that the petitioner has been unable to substantiate its claim towards short payment on account of price variation or alleged wrongfully deduction of Liquidated Damages. I do not see any reason to interfere with such finding of fact of the Arbitrator.

8. As far as the claim of Entry Tax is concerned, the Arbitrator had held that the petitioner has been raising invoices on the respondent from time to time in respect of the Entry Tax and the same was being reimbursed to the petitioner by the respondent after considering the Entry Tax receipt and taking into consideration the amount of Entry Tax payable by it. As in some cases, the quantity of cables supplied was short or not of the length as stated in the invoices, the respondent while dealing with such invoices reduced the Entry Tax amount accordingly. The Arbitrator, thereafter compared the invoices produced by the respondent with the documents filed by the petitioner and held that for the invoices where the petitioner had attached the receipt of payment, the respondent had duly reimbursed such Entry Tax, however, where no receipt was attached, the petitioner could not be paid/reimbursed such amount.

9. It is correct that the petitioner alleged that the receipts of such payment had been misplaced by it, however, the Arbitrator has

considered contemporaneous record to hold that all Entry Tax receipts available with the petitioner were actually submitted for reimbursement and such reimbursement has been obtained.

10. The Arbitrator, thereafter again compared certain invoices to conclude that the respondent had reimbursed all claims of Entry Tax made by the petitioner, while not paying the Entry Tax in respect of defective cables or in respect of short length cables or cables not supplied. In some cases, the respondent had also adjusted towards Entry Tax reimbursement, the amount over paid to the petitioner under some other invoices.

11. The above findings being purely on appreciation of evidence led by the parties before the Arbitrator, it would not be open for this Court to re-appreciate the same in exercise of its limited jurisdiction under Section 34 of the Act. It is to be remembered that this Court is not sitting as an appellate Court to re-appreciate such findings of fact given by the Arbitrator.

12. I, therefore, find no merit in the present petition. The same is dismissed with no order as to cost.

**NAVIN CHAWLA, J**

**MARCH 29, 2019/Arya**