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

Date of Decision : 25th July, 2019

+ O.M.P. (COMM) 371/2017 & IA 11992/2017

MINISTRY OF YOUTH AFFAIRS & SPORTS THROUGH:
MR.SUNIL GARG Petitioner

Through: Mr.Rajeev Mehra, Sr.Adv. with
Mr.R.K.Aggarwal, Ms.Gunjan Sinha Jain,
Advs.

versus

SWISS TIMING LTD Respondent

Through: Mr.Ashim Krishna, Ms.Roopali
Singh, Ms.Sayobani Basu, Mr.Aditya
Kumar, Ms.Senu Nizan, 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 21.06.2017, passed by the Arbitral Tribunal adjudicating the disputes that had arisen between the parties in relation to the Timing, Scoring and Results System Services Agreement dated

11.03.2010, executed between the Organizing Committee, Commonwealth Games, 2010, Delhi (assets and liabilities of which have been transferred to the petitioner via Resolution dated 04.07.2017) and the respondent.

2. In terms of the Agreement, the petitioner was to pay CHF 24,990,000 to the respondent. Admittedly, 95% of this contract value was paid by the petitioner to the respondent on 15.07.2010. The disputes between the parties arose on the balance payment of 5% for which the respondent had raised its invoice on 27.10.2010 for a sum of CHF 1,249,500. As the petitioner failed to make this payment, the arbitration proceedings commenced between the parties with the respondent claiming the above amount and in addition claiming a sum of Rs.15 lacs towards refund of the Earnest Money Deposit and damages on account of alleged loss of reputation.

3. On the other hand, the petitioner, *inter alia*, claimed the following amounts:

“(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 appro) 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. The Arbitral Tribunal has rejected the counter claims of the petitioner, which has been challenged by the petitioner in the present petition.

5. As far as the first counter claim of CHF 596,000 on account of alleged non-functioning of the Games Information System (GIS) from 03.10.2010 to 08.10.2010, learned senior counsel for the petitioner submits that the fact that the GIS did not function during the abovementioned period has been admitted by the respondent. The Commonwealth Games commenced on 04.10.2010 and concluded on 14.10.2010. The claim of the petitioner was not one of damages but was on account of non-provision/deficiencies in services by the respondent. He submits that therefore, in support of this counter claim, there was no requirement for proving any further loss suffered by the petitioner.

6. Learned senior counsel for the petitioner further submits that in the Agreement, there was no pre-requisite timeline prescribed within which the petitioner was required to make available the Games Data Network (GDN). The respondent did not lead any evidence on what would be a reasonable time for

providing the GDN. The petitioner, however, produced Mr.Bhoop Singh, Director General as a witness but the Arbitral Tribunal disregarded his evidence.

7. Learned senior counsel for the petitioner further submits that Clause 33 of the Agreement, which provides for a notice to be issued by the petitioner to the respondent to remedy any default, is merely directory in nature and for the absence of the same, the counter claim of the petitioner could not have been rejected.

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

9. Though it is proved on record that GIS did not function between 03.10.2010 to 08.10.2010, the submission of the respondent that the provision of GDN in timely manner was a pre-requisite for the same stood established.

10. It was further found that the respondent had made repeated representations in this regard to the petitioner, which at the relevant time were never disputed by the petitioner. The Arbitral Tribunal further found that on a perusal of the correspondence exchanged between the parties, it was evident that for the first time, the petitioner raised the issue of GIS only by its letter dated 21.03.2011. Even in this letter, the petitioner simply quoted excerpts from respondent's letter dated

10.10.2010. In the subsequent letter dated 03.05.2011 also, the petitioner merely referred to the respondent's letter dated 10.10.2010 without refuting the allegation of the respondent that the GDN should have been provided at least two weeks in advance from the starting of the Games but the same was provided only two days before the Games thereby leading to some teething troubles at the initial stages of the Games. The Arbitral Tribunal, therefore, concluded that the respondent could not have been blamed for the non-working of GIS during the above-mentioned period.

11. The above being a finding of fact arrived at by the Arbitral Tribunal on appreciation of evidence led before it, deserves no interference by this Court as it is not found to be unreasonable or perverse in any manner.

12. The Arbitral Tribunal has further relied upon Clause 33 of the Agreement, which is reproduced hereinbelow:

“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.”

13. A reading of the above provision would clearly show that incase the petitioner is to allege any default in service on part of the respondent, it must give a notice of the same to the respondent and on failure of the respondent to remedy such default within five business days, the petitioner had a right to suspend payment under the Agreement. No such notice was given by the petitioner to the respondent. For this reason as well, the counter claim of the petitioner has been rightly rejected by the Arbitral Tribunal.

14. As far as the second counter claim, which was for non-handing over the Legacy Board along with its working manuals, operating systems, software and other necessary technical support, the learned senior counsel for the petitioner submits that the respondent had admitted that there was a delay in handing over of the Legacy Boards by it. He submits that in terms of Schedule 3 and Schedule 16 of the Agreement, it was the obligation of the respondent to hand over the Legacy Boards to the petitioner. Such Legacy Boards had to be handed over along with the software, hardware and technical support, which obligation the respondent failed to discharge.

15. I again do not find any merit in the submission of the learned senior counsel for the petitioner.

16. As far as this counter claim is concerned, the Arbitral Tribunal in the Impugned Award has held as under:

“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 SA1 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 SAL). 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 SAL. 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.”

17. A reading of the above would show that the Arbitral Tribunal has held that there was no provision in the contract for a formal handing over of the Legacy Boards by the respondent to the petitioner. These Legacy Boards were already installed in the stadiums and there was no dispute that the same were working during the Games. Under Schedule III to the Contract, the third instalment of payment was conditional upon the

delivery of all Permanent Legacy Equipment and Score Boards to the petitioner. The petitioner released the third Instalment thereby suggesting that it had received the Legacy Boards and all supporting material along with the same. Infact, on an application of the respondent, the petitioner had produced the packaging list at the time of handing over of the Legacy Boards to the Sports Authority of India by the petitioner that showed that some operating software was available. The Arbitral Tribunal drew an adverse inference against the petitioner for not preparing the inventory list and not leading any evidence to demonstrate the condition under which the Legacy Boards were stored and / or maintained after the completion of the Games. Infact, as submitted by the counsel for the respondent, the petitioner had even failed to specify the manuals, software and other hardware components which were allegedly missing from the Legacy Boards at the time of handing over of the Legacy Board.

18. I do not find any reason to disagree with the finding of the Arbitral Tribunal on this counter claim.

19. The third counter claim of the petitioner was towards Customs Duty liability, which the petitioner allegedly was forced to pay due to non-supply of necessary documents by the respondent.

20. Learned senior counsel for the petitioner submits that in support of this claim, the petitioner had produced not only the

relevant orders from the Customs Department but also the challans for payments of such custom duty. In spite of production of these documents, the Arbitral Tribunal has rejected the said counter claim thereby committing a grave error in the Award.

21. On the other hand, learned counsel for the respondent has drawn my attention to the counter claim filed by the petitioner before the Arbitral Tribunal. He submits that the counter claim of the petitioner before the Arbitral Tribunal was premised on an allegation that in terms of the exemption notification, the respondent was exempted from paying custom duty on the equipments imported for the Games provided the same are taken out of the country /re-exported within three months/six months from the conclusion of the Games. The allegation of the petitioner was that as the respondent had failed to submit the documents of such re-export, the petitioner had been saddled with custom duty, which it was entitled to claim from the respondent. However, the orders of the Customs Department were on a totally different issue and had saddled the petitioner with liability not for any non-compliance to the customs duty exemption formality by the respondent and its alleged failure to produce documents in this regard, but for the failure of the petitioner to produce documents of consumption of the equipment within the period of three/six months of the Games

and to provide undertaking as required by the exemption notification.

22. I have considered the submissions made by the learned counsels for the parties. A reading of the counter claim filed before the Arbitral Tribunal by the petitioner and on perusal of the orders passed by Custom Department, it is clear that the orders have been passed on a basis that is distinct from the one pleaded by the petitioner in the counter claim. The Arbitral Tribunal has also held that the documents which had been filed by the petitioner, including the order of the Customs Department, were on totally different basis than what was urged by the petitioner in support of its counter claim in the Statement of Defence. A reading of the order of the Customs Department also does not reflect any default on part of the respondent.

23. I, therefore, find no merit in the submission made by the learned senior counsel for the petitioner in support of the third counter claim as well.

24. The last challenge of the petitioner is to the award of cost of Rs.25 lacs in favour of the respondent. The learned senior counsel for the petitioner submits that there was no supporting document in form of the memo of cost or otherwise, produced by the respondent in favour of such claim. The Arbitral Tribunal also does not give any reason for awarding a sum of Rs.25 lacs in favour of the respondent, which in the submission of the learned senior counsel for the petitioner is highly

exorbitant. He relies upon the judgment of this Court in *MMTC Ltd. vs. Karam Chand Thapar & Bros (Coal Sales) Ltd.* 2018 SCC OnLine Del 12295.

25. On the other hand, the learned counsel for the respondent has drawn my attention to the written submissions filed by the respondent before the Arbitral Tribunal alongwith which the respondent had filed a tabulated chart in support of its claim for cost. It had also been asserted that if the petitioner desires then memo(s) can be produced. He submits that the claim of cost before the Arbitral Tribunal was infact of a much higher amount and it should have been the respondent who should have been aggrieved by the award for the cost of such minimal amount.

26. In my view, the cost of Rs.25 lacs awarded in favour of the respondent cannot be said to be exorbitant, keeping in view the nature of claims and the arbitral proceedings. Even otherwise, the Arbitral Tribunal is empowered under Section 31A of the Act to award cost, including the fees and expenses of the Arbitrators, legal fees and expenses, administration fees and other expenses incurred in connection with the Arbitration or Court proceedings. Section 31A(2) of the Act provides the general rule that the unsuccessful party shall be ordered to pay the cost to the successful party.

27. In the present case, the Arbitral Tribunal has considered all the factors including the costs and has awarded a minimal

cost in favour of the respondent, which cannot be challenged in the present proceedings.

28. As far as the judgment of this Court in *MMTC Ltd.* (supra) is concerned, the Court was dealing with a case where the Arbitral Tribunal had similarly concluded that the respondent therein was entitled to full cost of the arbitral proceedings without quantifying the same. This Court held that in terms of Section 31A of the Act, it is the duty of the Arbitral Tribunal to quantify such cost and having failed to do so, the Award suffered from vagueness and was liable to be set aside. In the present case, as the cost has been quantified by the Arbitral Tribunal, this judgment would have no application.

29. In view of the above, I find no merit in the present petition. The petition and the pending application are dismissed, with costs quantified at Rs.50,000/-.

JULY 25, 2019
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NAVIN CHAWLA, J