IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.01.2020

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.742 of 2019
&
A.No.6956 of 2019

Electronic Corporation of
Tamil Nadu Limited,
Rep. by its Managing Director,
692, Anna Salai,
Nandanam, Chennai – 600 035. ... Petitioner

Vs

HCL Infosystems Limited,
E-4,5 & 6, Sector – 11,
Noida, Uttar Pradesh. ... respondent

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the impugned award dated 27.05.2019 passed by the Hon'ble arbitrator in the dispute arising out of the Tender dated 20.08.2011 and contract dated 09.02.2012.

For Petitioner : Mr.M.Vijayan
for M/s. King & Partridge

For respondent : Mr.Rahul Balaji

O R D E R

The respondent before the Arbitral Tribunal has challenged the award passed by the sole arbitrator in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (herein after called the Act). The sole Arbitrator was appointed by orders of this Court dated 29.08.2017.

2. Herein below is reproduced the contentions of the petitioner herein and the respondent herein as respondent and claimant respectively before the Arbitral Tribunal.

Respondent/Claimant's case:

3. The respondent is a public limited company engaged in the business of Information Technology Supply, Distribution and allied IT services including consulting in the field of Defence, Telecom, Power etc.

4. The petitioner is a wholly owned Government of Tamil Nadu

undertaking is engaged in the promotion, establishment and running of State Public Sector Enterprises for electronic items and for the advancement and development of Electronics and Information Technology.

5. The Government of Tamil Nadu had formulated a scheme for free of cost distribution of Laptop computers to Government Schools, Government Aided Schools and Government Colleges. On 20.08.2011 a tender was published inviting International Competitive bids for the supply and commissioning of 9.07 lakh Laptop computers throughout the State of Tamil Nadu.

6. On 04.10.2011 the tender was opened and the respondent herein was a successful bidder. They were awarded the contract for the supply and commissioning of 2 lakh Laptop computers amounting to Rs.265 Crores vide a Purchaser Order dated 15.02.2012. Thereafter, an additional Purchase order for 2000 Laptop computers were also directed to be supplied.

7. The respondent would contend that they had successfully supplied and commissioned the Laptop computers, set up Service Centres and the Call centre as well. However, the petitioner herein refused to clear the entire dues of the respondent and a shortfall of Rs.1,83,54,799/- was due. The reason given by the petitioner was that the amounts was deducted towards the failure on the part of the respondent herein to set up the requisite number of Service Centres and delay in delivery of the Laptops. This information was given by the petitioner vide their letter dated 03.06.2015. The respondent had refuted these contentions vide their reply dated 21.12.2015.

8. The respondent would contend that as per the purchase order issued to them only in 7 districts they had to set up the 24 Service Centres and 49 additional centres have been added unilaterally by the petitioner. The penalty of Rs.1,83,54,799/- levied by the petitioner was without any basis.

9. Further the petitioner has also levied liquidated damages which is per se wrong as the circumstances envisaged for levying

liquidated damages under the contract was not in existence. That apart as per the contract liquidated damages can be levied not on all the computers but on those Laptops which were delivered with a delay.

10. Apart from the above, the second claim was under the head of additional Custom Excise Duty on account of the enhancement of the duty by the Central Government. The petitioner refused to pay the same stating the price was fixed throughout the delivery schedule which included the extended period. The respondent on the other hand would contend that the price quoted did not include increase in duties / taxes payable and therefore the petitioner was bound to pay the sum of Rs.3,98,60,487/- towards the additional Customs & Excise duty.

11. On 04.04.2017 the respondent had issued a notice under Section 21 of the Act invoking the arbitration clause and requesting the petitioner to appoint a sole Arbitrator. Yet another notice dated 19.05.2017 was issued by the claimant. Since the petitioner did not

appoint the Arbitrator, the respondent was constrained to move an application before this Court for appointment of an arbitrator. By orders dated 29.08.2017 the sole arbitrator was appointed and he entered reference on 29.08.2017. The respondent filed the above claim seeking recovery of the sum of Rs.5,82,15,286/- together with pendente lite interest @ 12% per annum from date of claim till date of repayment.

12. An amendment to the claim statement was made in and by which the claimant had provided the break-up details for the sum of R.3,97,11,807/- as a sum of Rs.79,70,453/- towards additional excise duty and Rs.3,17,41,354/- towards additional Countervailing duty (CVD).

Petitioner/ respondent's statement of defense:

13. The claimant /respondent was issued Letter of Acceptance (LOA) on 02.11.2011 along with others. The respondent was given LOA for 2 lakh nos of Laptops. As per the schedule the respondent was supposed to complete the supplies within 135 days of the LOA i.e.,

by 16.03.2012. However, owing to heavy floods in Thailand, from where the respondent was sourcing the Hard Disk drives for the Laptop, the respondent had sought an extension. The period was extended upto December 2012.

14. On 15.02.2012 the Purchase Order was issued for supplying and commissioning of 2 lakh numbers Laptops out of the total of 9,07,000 nos of Laptop computers. The respondent commenced supplies in April 2012 and concluded only during October – December 2012 and they had not made the supplies as per the schedule of delivery in the subsequent contract.

15. The petitioner would state that the respondent had not fulfilled their obligations under the contract. The following were the defaults highlighted by the respondent/ claimant:

(a) Delay in establishing call centres.

(b) Delay in supply of Laptops.

(c) Non-establishment of Service Centres in 14 location.

16. The petitioner would further contend that the respondent was not entitled to the additional excise duty. They would contend that as per the terms of the contract as the price was fixed only after calculating the Central Excise Duty and Sales tax and therefore the respondent was not entitled to it. The sum of Rs.1,83,54,799/- has been deducted towards the delay in establishing Call Centres, supply of Laptop and non-establishments of Service Centres. The petitioner also sought to have the amendment dismissed.

Rejoinder of the respondent / claimant:

17. The respondent had successfully completed its obligation of supplying 2 lakh Laptop computers within the given schedule – end of 2012. The petitioner had unilaterally increased the number of Service Centres, which they had no right to do so. Even assuming without admitting that the petitioner could increase the number of Service Centres but however they cannot levy liquidated damages for the non-establishment of the Service Centres. The tender does not allow such retention. As regards the payment of additional excise duty the same was due and payable by the petitioner. In this regard the respondent

had placed reliance on clause 17 (b) of the Terms and Conditions of the purchase order and 3.15 (b) of the Tender document. The respondent reiterated that they are entitled to the claim.

Arbitral Tribunal:

18. The learned Arbitrator had framed the following issues and additional issues:

"1) Whether the claimant is entitled to the payments sought for?

2) Whether the parties have complied with their respective obligations under the Purchase Order dated 15.02.2012 and 22.01.2013?

3) Whether the deduction of Rs.1,54,021/- towards call centres and establishment charges is in accordance with terms of contract between the parties?

4) Whether the respondent is entitled to claim liquidated damages for the sum of Rs.2,79,472/- towards the alleged non-fulfilment of delivery schedule?

5) Whether the levy of liquidated damages for a sum of Rs.1,79,21,250/- towards the alleged on fulfilment of service level *agreement is in accordance with the terms of the contract?*

6) Whether the claimant paid the sum of Rs.3,98,60,487/- towards Excise Duty and if so, Whether the claimant is entitled to seek reimbursement of the same from the respondent?

7) Whether the claimant is entitled to interest and if so at what rate?

8) Whether the parties are entitled to cost?

9) To what other relief the parties are entitled to?

Further on the basis of amendment to the statement of claim, the following additional issues are framed:

1)Whether the claim of the claimant that it is entitled to claim the Excise Duty of Rs.79,70,453/- is sustainable in law?

2)Whether the claim of the claimant that it is entitled to claim the countervailing duty of Rs.3,17,41,354/- is sustainable in law?

3)Whether the claim made by the claimant for the total reimbursement of Rs.3,97,11,807/- or any part thereof, is barred by limitation?

In view of the additional issues framed in issue No.6 earlier has *to be read in the light of the additional issues framed."*

19. On a detailed consideration of the material on record the learned Arbitrator by his award dated 27.05.2019 held that the respondent / claimant is entitled to the sum of Rs.5,76,33,057/- together with interest @ 7.5% per annum on the amount awarded from the date of the statement of claim (08.11.2017) till date of payment. It is this award that is the subject matter of challenge in the instant petition.

Submissions:

20. Mr.Vijayan, learned counsel appearing on behalf of the petitioner had drawn the attention of this Court to the various clauses governing the disputes and would make his submissions under these heads:

(a) Shortfall in payment of Rs.1,83,54,799/-

He would submit that the above amount constituted the sum retained towards liquidated damages on account of the following delay / non-compliance of the terms of the contract by the respondent.

(b) In the supply of Laptops:

As per the delivery schedule given in clause 4.10 of the Tender and the contract the successful bidder was required to complete the supply within a period of 135 days from the date of the LOA. This schedule has not been adhered to by the respondent. The respondent had by their letter dated 10.01.2012 requested an extension of the delivery schedule contending that on account of the floods in Thailand factories had been closed down and the respondent was not in a position to procure the hard discs within the stipulated time.

The counsel would contend that as per the schedule in the Tender and Contract as on the date of this request the respondent ought to have supplied nearly 25% of the Laptops which they did not.

(c) Non-establishment of Service Centres:

The respondent who was under an obligation to establish Service Centres at 49 location spread over 25 districts had failed to do so. Clause 4.13 of the Tender and Contract casts an obligation on the respondent to establish Service Centres which they failed to do and hence liquidated damages have been levied as per clause 3.32.2 of the Tender document.

(d) Delay in setting up Call-Centres:

The counsel would further argue that the Call-centres had not been established on time and therefore liquidated damages have been deducted from out of the final bill.

(e) Payment of additional Excise Duty:

The learned counsel would contend that under the terms of the Tender contract and Purchase order it was made clear that the duties and Taxes applicable at the time of supply within the delivery schedule specified in the tender would be paid and any reduction of duty would be liable to be returned to the petitioner. He would submit that therefore the respondent cannot impose the revised duty on the petitioner as this revision had taken place after the original delivery schedule viz; 16.03.2012.

21. The counsel would therefore contend that the award is contrary to the agreed terms and the Arbitrator has exceeded his Jurisdiction and the terms of the contract in awarding the claim. He would rely upon the Judgement reported in ***2007 (4) SCC 697 –***

Food Corporation of India Vs. Chandu Construction and another with particular reference to paragraph nos. 10 – 16 to buttress his argument that the Arbitrator by disregarding the terms of the agreement had exceeded his Jurisdiction and committed legal misconduct.

22. Per contra, Mr.Rahul Balaji, learned counsel appearing on behalf of the respondent / claimant would contend that the delivery schedule had been extended by mutual agreement. The respondent by their letter dated 10.01.2012 had expressed their inability to maintain the delivery schedule given in the tender document reiterated in the LOA on account of a force majeure situation. He would further contend that in the very same letter the respondent had requested the petitioner not to hold them liable for any delay as per clause 3.34 of the tender. The request having been acceded to by the petitioner revising the delivery schedule to the end of the December 2012, the petitioner cannot renege on the agreed revised schedule of delivery and claim liquidated damages.

23. As regards the setting up of Service Centres, the learned counsel would contend that under the Tender document and Contract the respondent was required to set up Service Centres at 7 districts consisting of 24 centres. He would submit that thereafter unilaterally the petitioner had increased the number of the Service Centres without reference to the respondent. He would also submit that call centres were also established as per the agreed terms and the petitioner has not made out any case where the respondent had not attended to any complaints / service calls. He would further submit that even assuming without admitting that there has been a delay, the terms of the contract does not give any right to the petitioner to levy liquidated damages.

24. As regards the additional amount due towards Excise duty/ Countervailing duty the learned counsel would submit that once the delivery schedule has been mutually revised, the petitioner as per the agreement has to bear the additional duty. He would further submit that the learned Arbitrator has passed the award after considering the terms of agreement between the parties and has not moved out of the

confines of the agreement and therefore the argument advanced by the petitioner that the learned Arbitrator has exceeded his Jurisdiction is totally misplaced. He has relied on the following Judgements in support of his contentions:

i) ***2009 (10) SCC 63 – Steel Authority of India Ltd Vs. Gupta Brother Steel tubes Limited.***

In support of the argument that the terms of the agreement and the intention of parties has to be taken into consideration and in the instant case by extending the delivery schedule the earlier terms with reference to the delivery schedule had been novated.

ii) ***2012 (5) SCC 306 – Rashtriya Ispat Nigam Ltd Vs. Dewar Chand Ram Saran.***

Where two interpretations are possible and the Arbitrator has taken one view it cannot be said that the Arbitrator had exceeded his Jurisdiction.

Iii) ***2015 (3) SCC 49 – Associate Builders Vs. Delhi Development Authority.***

The award can be interfered with if it violates any of the grounds contained in Section 34 (2) of the Arbitration and Conciliation Act, 1996 and it suffers from perversity or a patent illegality.

The instant award does not suffer from any of these grounds and therefore should be sustained, is the argument put forward by the counsel for the respondent.

Discussion:

25. The learned Arbitrator has meticulously considered the various terms and conditions of the agreement entered into between the parties and the revised agreement to arrive at the conclusion that the respondent / claimant is entitled to an award in their favour. The award captures the arguments advanced, the documents and the clauses which the learned Arbitrator has relied upon to arrive at his conclussion.

26. The learned Arbitrator has considered the revised agreement entered into between the parties and taking into account the fact that there has been a delay in supply of Laptops as per the revised schedule in respect of 2000 Laptops has justified the imposition of damages of Rs.2,79,442/- as per clause 21.1 of the Purchase Order.

27. With reference to the levy of liquidated damage on account of the delay in setting up Call Centres, the learned Arbitrator has upheld the levy of a sum of Rs.2,96,756/- towards delay in establishment of Call Centre from May 2012 to February 2014 and rejected the claim towards payment to BSNL on the ground that no evidence has been produced.

28. With reference to the levy of liquidated damages for the non-establishment of Service Centres, the learned Arbitrator held that under the terms of the Purchase Order the respondent was required to set up 24 Centres in 7 districts which they had and the subsequent increase is an unilateral decision taken by the petitioner without reference to the respondent. The learned arbitrator also considered the fact that the petitioner has not come forward to prove the case that complaints had been received which had not been attended to by the respondent. He has also taken note of the fact that the terms of the contract did not confer any right on the petitioner to levy liquidated damages towards non-establishment of Service Centres and clause

3.32.2 of the Tender document, which the petitioner relied upon, only provided for liquidated damages in the case of a failure to rectify defects and restore the items to a good working condition. Therefore the learned Arbitrator rightly held that the petitioner was not justified in imposing penalty of Rs.1,79,21,250/- and held that this amount was liable to be reimbursed to the respondent.

29. With reference to the claim of additional excise Duty / Countervailing duty, the learned Arbitrator relying upon clause 3.15 of Tender, Clause 2(d) of the agreement dated 09.02.2012 and the Purchase Order has come to the conclusion that the claimant is entitled to the said sum. The clauses provided that duties and / or taxes applicable within the stipulated period would be payable by the petitioner. The learned Arbitrator has rightly interpreted the same to mean "within the period of supply". The learned Arbitrator having interpreted the clause in a manner which is definitely plausible this Court does not intend setting aside the same.

30. Considering the fact that the learned Arbitrator has based the award upon the terms of the written Contract between the parties and the correspondence between them it cannot be said that the learned Arbitrator has exceeded his Jurisdiction by travelling beyond the agreed terms. The petitioner has not been able to establish any of the grounds provided under Section 34 (2) of the Act nor has he been able to prove that the award suffers from a patent illegality or perversity.

31. In the result the Original Petition challenging the award is dismissed. Consequently, connected Application is also closed. No costs.

27.01.2020

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Index : Yes/No
Speaking order/non-speaking order

P.T.ASHA, J.,

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