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

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Reserved on: 27.11.2019
Pronounced on: 12.05.2020

+ **O.M.P. (COMM) 457/2018**

SCORE INFORMATION TECHNOLOGY LTD Petitioner

Through: Mr. Mukul Talwar, Senior
Advocate with Ms. Gunjan Sinha
Jain, Ms. Pallavi Saigal and Ms.
Aman Bhalla, Advocates.

versus

CENTRAL ORGANISATION, EX-SERVICEMAN

CONTRIBUTORY HEALTH SCHEME Respondent

Through: Ms. Monika Arora, CGSC with
Mr. Harsh Ahuja, Mr. Kushal
Kumar and Mr. Akash Deepgupta,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for setting aside the Arbitration Award dated 31.07.2018 whereby the Arbitral Tribunal has rejected four claims of the petitioner and has partially allowed one claim.

2. The facts that need to be encapsulated herein are that the petitioner is a MSME engaged in the business of providing Turnkey Information

Technology Solution and Services including supply of computer hardware, software, etc. The respondent has been established by the Ministry of Defence, Government of India to administer the Ex-servicemen Contributory Health Scheme (hereinafter referred to as ECHS).

3. The parties entered into an Agreement dated 31.05.2010 whereunder the petitioner was required to provide Personalized Smart Cards against the approved application of the beneficiary as provided by the respondent. Petitioner was also required to install and maintain specified quantity of computer hardware and software at 100 specified locations as per Clause 1.1.15 read with Clause 2.1.12 of the Agreement. In addition, as per Clause 2.1.2 and Clause 1.1.16, petitioner was required to maintain hardware and software supplied by the petitioner at another 127 locations. In terms of Clause 2.1.1, the petitioner had to provide one Technical Support Personnel at 114, ECHS locations which included Polyclinics, Regional Centres (RCs) and the Central Organisations.

4. As per the Agreement, the petitioner was required to supply Referral Authentication Kits (hereinafter referred to as the Kits) to the empanelled hospitals and laboratories for identifying patients referred by ECHS Polyclinics. The said hospitals / laboratories were required to procure the Kits only from the petitioner. Tenure of the Agreement was five years from 01.06.2010 to 31.05.2015. Initially, ECHS had 227 Polyclinics and 13 Regional Centres but later the number of Polyclinics increased to 426 and the Regional Centres to 28. As a result, the petitioner avers that it had to incur additional expenses in collecting approved application forms and providing additional software support.

Under Clause 5 of the Agreement, respondent agreed to pay a sum of Rs.135/- per smart card in the time and manner laid down in Annexure 'E' of the Agreement. Para 2 of Annexure 'E' provided that respondent would give Sales Tax Form 'C' once in a year against the invoices raised by the petitioner for supply of the Smart Card. Clause 5 of the Agreement and para 2 of Annexure E are extracted below :-

"5. CONSIDERATION

5.1 The Parties have agreed that for the Turnkey Solutions, SITL shall be entitled to receive Rs.135/- (Rupees One Hundred Thirty Five only) per Smart Card delivered, to be payable by the Department at the time and in the manner specified in Annexure E.

Annexure E

2. SITL will raise the invoice and the Department will give "Form C" against the invoices. One such form will be required to be given one a year from each Regional Center."

5. It is a case of the petitioner that the sum of Rs.135/- per Smart Card was one of the source of revenue generation for the petitioner to cover its expenses towards supply of Smart Cards and supply and maintenance of the hardware and software, coupled with payment of Statutory taxes and other costs of the employees. The only other source of revenue was receipts from the Kits, sold to the empanelled hospitals and labs.

6. Petitioner further avers that the petitioner mobilized its resources and commenced the work for the Smart Card Project till the end of the tenure on 31.05.2015. Respondent, however, continued to require the petitioner to render the services till 08.07.2015, but failed to make payments against the invoices raised for the Smart Cards. Respondent

also failed to provide Form 'C' to the petitioner as a result, the petitioner had to pay the differential Sales Tax / VAT for the supply of Smart Cards made to the respondent. Further, due to premature withholding of the approved application forms by the respondent, one month prior to the expiry of the Agreement and on account of non-provisioning of Advance Monthly Projections, six months before the expiry of the Agreement, petitioner was left with a huge number of unutilized inventory of Red ECHS Pre-Printed Cards and White ECHS Cards. The petitioner also avers that respondent failed to ensure that all empaneled hospitals / labs procured the Kits from the petitioner.

7. In the circumstances, the petitioner through a letter dated 15.07.2015 requested the respondent to make payment. However, except for some small payment, in respect of RRNs / invoices, other payments were not released. Respondent also failed to pay for services rendered between 31.05.2015 and 08.07.2015. Amicable negotiations also did not yield any result. By a letter dated 17.12.2015, petitioner issued notice for settlement of disputes by informal mediation, but the same failed. Petitioner invoked the Arbitration Agreement by a Notice dated 25.01.2016 and nominated its Arbitrator. Finally, this Court by an Order dated 09.11.2016 passed in Arb. Pet. 227/2016, constituted an Arbitral Tribunal.

8. Petitioner filed its Statement of Claim seeking the following reliefs:-

“(a) A sum of Rs.30,239/- being the amount of outstanding dues in respect of the supply of Smart Cards made by the Petitioner to the Respondent;

(b) A sum of Rs.80,77,215/- on account of the differential tax deposited by the Petitioner due to non-issuance of Sales Tax 'C' Forms by the Respondent alongwith interest thereon @ 21% from the date of deposit till 28.02.2017 to the tune of Rs.1 0587373/-;

(c) A sum of Rs. 66,89,250/- on account of unutilized 49,500 Red Pre-printed Smart Cards/ White Smart Cards;

(d) A sum of Rs.2,97,67,500/- on account of non-procurement of referral Authentication Kits (RAKs) by the empanelled medical facilities;

(e) A sum of Rs.4450440/- as reimbursement of the costs/ expenditure incurred by the Petitioner in providing services to the Respondent for the period 1.06.2015 to 8.07.2015.”

9. Respondent filed its Statement of Defence and also filed a Counter Claim, seeking cost of the proceedings.

10. The Arbitral Tribunal passed an Award dated 31.07.2018 and disallowed the claims of the petitioner, except for Claim No.1, which has been allowed partially with a direction to pay to the petitioner a sum of Rs.2025/- as outstanding dues on account of supply of the Smart Cards to the respondent. Post-Award interest at the rate of 12% p.a. has been awarded till the date of actual payment. Counter Claim of the respondent for award of cost of the Arbitration Proceedings has been disallowed.

11. It is this Award which is assailed by the petitioner in the present petition.

12. Arguing with respect to Claim No.2, learned senior counsel for the petitioner contends that the Arbitral Tribunal is silent on the terms of the Contract and has overlooked Clause 5.1 and Annexure 'E' to the

Agreement dated 31.05.2010. Annexure 'E' unequivocally casts an obligation on the Regional Centres of the respondent to issue Form 'C' against invoices at least once a year. The fact that Sales Tax at the rate of 5% was deposited by the petitioner was clearly established by the Sales Tax Challan marked as Exhibits C-15 and C-16. Had the respondent issued Form 'C', petitioner would have availed concession on the Sales Tax and would have paid at the rate of 2% instead of 5%, at which rate it was actually paid. There is thus a clear breach of the obligations by the respondent under the Agreement. Learned senior counsel further contends that the Tribunal has summarily held that the invoices for the year 2010-2013 could not be considered as the claims therein were barred by limitation. However, the Tribunal has not even referred to the provision of Limitation Act by which the claims are allegedly time barred. Limitation is a mixed question of fact and law but this aspect is not even considered by the Tribunal. Even otherwise, it is contended that the finding that the claim is time barred for three years is in the teeth of correspondences exchanged between the parties by which the petitioner had made repeated demands for issuance of Form 'C'. Learned senior counsel draws the attention of this Court to the various documents placed on record in this regard. It is argued that the demand was finally rejected by the respondent vide letter dated 07.05.2015 and it is on this date that the cause of action had accrued and the claims were certainly not time barred. The award under Claim No.2 is thus liable to be set aside being in conflict with the judgment of the Supreme Court in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49. Learned senior counsel further argues that reliance on the letter dated 21.11.2008 is

misplaced as the negotiations prior to the Agreement have no meaning in the eyes of law once detailed terms have been incorporated in the Agreement. Even assuming that the letter was relevant and the price of Rs.135/- quoted by the petitioner was inclusive of taxes petitioner cannot be denied the benefit of concession in payment of taxes on account of non-issuance of Form 'C'. Learned senior counsel further argues that the Tribunal has misinterpreted the statutory provisions of Central Sales Tax Act, 1956. It is not disputed by the respondent that it had availed the services of the petitioner for providing Smart Card which contained a unique memory chip. In addition thereto, petitioner was also required to install the hardware for implementation of the Smart Card Project and was to generate software and source of the software for the project. At the end of the Contract, the legal ownership of the hardware and software was transferred to the respondent. Therefore, the Smart Cards and the technology employed to make them operational will fall under the definition of 'goods' under Section 2(d) of the Act. Further, there was a sale of the goods for cash and hence, Section 2(g)(i) of the Act would also apply. The view of the Tribunal that respondent was not a dealer, is in ignorance of Explanation 2 to the definition of 'dealer'. It is argued that assuming it was a case of the respondent that Central Sales Tax was not applicable to the present Agreement, it ought not to have included Clause 2 in Annexure 'E'. It is not open to the respondent having drafted the document to now resile from the Agreement on the ground that there was an error in including the said condition in Annexure 'E'.

13. With regard to Claim No.1, learned senior counsel argues that no documentary evidence was furnished by the respondent to support the

oral testimony of RW-1 that payment of Rs.945/- due for 7 Smart Cards supplied to Regional Centre in Bangalore was made. Finding of the Tribunal rejecting the claim of Rs.13,499/- on account of Smart Cards supplied at Lucknow is bereft of reasoning. It is not the finding that 100 Smart Cards were not supplied to Regional Centre at Lucknow. On the contrary, letter dated 17.01.2017 issued by the Embassy of India, Kathmandu recommended the payment of 100 Smart Cards and also establishes that they may have been misplaced in transit to Kathmandu. It is argued that the finding of the Tribunal that the witness of the petitioner did not depose regarding the outstanding dues from Lucknow is incorrect and against the contents of Exhibit C-14. Admittedly, there is no cross-examination on the said exhibits by the respondent and hence, the contents are unrebutted. It is argued that while appreciation of evidence is the domain of the Tribunal but in the present case, the evidence has been completely overlooked by the Tribunal and this calls for interference by this Court.

14. In respect of Claim No.3, it is argued by the learned senior counsel that the Arbitral Tribunal has held that on an average, petitioner was required to supply 39,620 Smart Cards per month. As a logical sequitur, the act of the petitioner in maintaining an inventory could not have been faulted with. The Tribunal failed to consider that the respondent prematurely withheld the receipt of approved applications from the Regional Centres, one month before the scheduled completion of the Agreement. Failure to provide monthly projections would not have absolved the petitioner of the obligations to supply immediately on receipt of the approved applications. Pertinently, under Clause 1.1.51 and

Clause 7.1.9, petitioner was obliged to maintain stock for further supply of average volume of cards. Therefore, the respondent was in clear breach of its obligations under Clause 7.1.13 under which it was bound to supply monthly projections for the number of cards required during the next six months. The petitioner could not have foreseen that the respondent would abruptly curtail the supply of cards even though one month was remaining before the Contract was to expire. The petitioner in its evidence had clearly brought out that the entire inventory could be inspected as the same being voluminous could not have been brought before the Tribunal, in physical form. This part of the Award thus deserves to be set aside as per the petitioner.

15. With respect to the rejection of Claim No.4, learned senior counsel for the petitioner contends that the Tribunal completely lost sight of the fact that the petitioner was unable to sell the Kits due to the respondent's failure to act in accordance with Clause 3.1.12 of the Agreement, which required the respondent to facilitate the procurement of the Kits by the empaneled hospitals / labs. Not an iota of evidence was produced by the respondent to show that it had fulfilled its obligations under the Clause or that it had even issued a mandate to the hospitals to procure the Kits.

16. With respect to Claim No.5, learned senior counsel contends that the respondent had never denied availing the services of the petitioner after the expiry of the Contract on 31.05.2015. The petitioner had filed documents and letters and led evidence to show that the respondent availed the services of the petitioner upto 08.07.2015. In fact, the petitioner had provided the services of its Technical Support Staff even

after 08.07.2015 and the attendance was being counter-signed by the ECHS Incharge, at the respective locations.

17. Per contra, learned counsel for the respondent submits that the impugned Award is a well reasoned Award and under Section 34 of the Act, there is no ground brought out by the petitioner which calls for an interference. The Tribunal has interpreted the Clauses of the Contract and has appreciated the evidence before it and rejected the claims. The arguments made by the petitioner are virtually in the nature of re-appreciating the documents and evidence, as if this Court is an Appellate Court.

18. Without prejudice to the said contention, counsel for the respondent submits that with respect to Claim No.2, there is no error or illegality in the Award. The agreed rate between the parties as stipulated in the Contract was Rs.135/- per Smart Card. The rate quoted by the petitioner was inclusive of applicable taxes and other expenditures. This is evident from the letter dated 21.11.2008 written by the petitioner. As per Clause 8.1.6 of the Agreement, all information contained in the Bid Documents or subsequent documents prior to the Agreement are taken to be true and part of the Agreement. It is argued that vide letter dated 12.02.2014, Regional Centre, Patna had clearly intimated to the petitioner that the Sales Tax Form 'C' could not be issued by the respondent. It is further argued that under Clause 2.1.9, it was the petitioner who had to bear all the Statutory Taxes and charges relating to hardware, software and turn-key solution. It is further submitted that no doubt para 2 of Annexure 'E' does refer to Form 'C', but this was erroneously carried forward from para 2 of Annexure 'F' to the Contract dated 27.01.2004,

executed between the same parties. The exemption on account of Form 'C', can be claimed only in cases where the sale is made to a 'registered dealer' while in the present case, the respondent is not a registered dealer. Further argument is that under Section 8(1)(b) of the Central Sales Tax Act, 1956, Sales Tax on Inter-State Sale is 2% or State Rate, whichever is lower, provided the sale is to a 'registered dealer' and the goods are covered in the Registration Certificate of the purchasing dealer. Blank C Forms are issued by Sales Tax Authorities to the purchasing dealer who has made Inter-State purchases on concessional rate of CST. Thus, the exemption on the basis of Form 'C' cannot be availed by the petitioner in the present case.

19. It is further contended by the counsel for the respondent that even otherwise the claim relating to non-issuance of Form 'C' is barred by limitation. The exemption is claimed on the yearly basis and thus, the dispute, if any, ought to have been raised within one year of the alleged non-issuance. Having acquiesced to the fact that the respondent was not issuing the Form 'C' and having slept over for five years, it is not open to the petitioner to now raise this dispute. It is argued that to justify the claim on account of the concession in CST, Annexure -16 has been produced by the petitioner, before the Arbitrator. This, even according to the petitioner, does not relate to the supplies made only to the respondent. There is nothing in the document which indicates any Tax payment made towards the Smart Cards, supplied to the respondent.

20. With respect to Claim No.1, counsel for the respondent defending the Award, submits that as against the claims of outstanding payments with respect to Regional Centres, Bangalore, Hissar, Jammu and

Lucknow, the amounts due for Regional Centre, Bangalore and Regional Centre Jammu have already been paid and this is undisputed. In so far as Regional Centre, Hissar is concerned, a cheque for a claimed sum of Rs.2025/- was dispatched to the petitioner, but the same was returned undelivered. With respect to the payment claimed for Regional Centre Bareilly, the amount claimed by the petitioner has not been paid since the respondent is entitled to Liquidated Damages from the petitioner if the cards are not as per the specification or there is a delay in delivery or there is non-delivery. The cards sent to Bareilly were found to be defective and hence, the claim was not honoured. In so far as Regional Centre, Lucknow is concerned, the amount claimed was not paid as the Smart Cards were never received by the Centre.

21. The contention of the counsel for the respondent with respect to Claim No.3 is that the claim is per se contrary to Clause 9.1.3 of the Agreement. As per the said Clause, petitioner was to hand over all software source codes to ECHS one month prior to the expiry of the Contract. The requirement underscores the need for the petitioner and the respondent to stop work in the last month of the Contract so as to hand over the requisite softwares, etc. to the respondent. Clause 9.1.3 read with Clause 7.1.3 which records that the petitioner needed 25 days to produce the cards substantiates that the applications for supply of cards were to stop one month prior to 31.05.2015. Vide email dated 28.04.2015, respondent had reiterated that the Agreement would expire on 31.05.2015 and it had no intent to extend the Contract period. The petitioner was thus to hand over the software, etc. to the respondent within one month. Thus, no applications were approved with effect from

the month of May 2015 in terms of the Clauses of the Agreement. Without prejudice, it is argued that the petitioner has not even produced anything on record to show that, in fact, 49,500 cards remained unutilized due to withholding of the application forms. A specific question was put to the petitioner's witness during cross-examination, but nothing was brought out in the evidence to substantiate the claim. Attention is drawn to Question Nos.13 to 16 of the evidence recorded by the Tribunal on 11.12.2017. It is further argued that the cards supplied for the year 2013-2014 were around 3,21,259 while those for the year 2014-2015 were around 3,21,303. Thus, the monthly average was around 26,700 cards and it cannot be contended that the petitioner suffered loss on account of non-forwarding of the approved applications in the last month.

22. Defending the Award towards rejection of Claim No.4, learned counsel argues that beyond making payments for the Smart Cards actually supplied as per specification, there was no contractual obligations on the respondent under the Agreement. The petitioner was not able to point out any provision in the Agreement which mandated the respondent to ensure that all empaneled hospitals / labs procured the Kits. Rather, Clause 3.1.12 stipulated that the respondent would facilitate the hospitals and labs to procure the Kits from the petitioner. Admittedly, the respondent vide letter dated 11.05.2011, did request the empaneled hospitals to procure the Kits and due to the efforts of the respondent, the petitioner was in fact able to sell 45 Kits to 42 hospitals. Surely, the respondent could not impose itself on the hospitals.

23. With respect to Claim No.5, respondent completely denies that any order was placed on the petitioner for rendering its services, after the

expiry of the contractual period. To the contrary, Annexure C-19 which is an email dated 28.04.2015 issued by respondent to its Regional Centres with copy to the petitioner, shows that the petitioner was requested to return all the hardware and software to ECHS. This was in compliance with Clause 9.1.3. Even this requirement was not complied with by the petitioner. It is also argued that this argument of petitioner is contrary to its argument that the respondent had withheld applications one month prior to the expiry date. Moreover, RW-1 clearly deposed that vide the said email, petitioner was informed that the Agreement would not be extended. The petitioner has also failed in proving on record any expenditure incurred in providing the services allegedly beyond the contractual period.

24. I have heard learned counsels for the parties and examined their contentions.

25. Parties herein executed an Agreement dated 31.05.2010 and the tenure of the Agreement was five years from 01.06.2010 to 31.05.2015. Under the Agreement, petitioner was to provide Personalized Smart Cards against approved applications of the beneficiaries of ECHS, as provided by the respondent. Petitioner was also to install and maintain computer hardware and software at specified locations and maintain the same during the tenure of the Contract at certain other set of locations. The Smart Cards supplied are based on SCOSTA Technology, certified by NIC, Government of India. This has a memory chip, which stores the encrypted personal data of the holder including finger prints. The Polyclinics / Regional Centres of the ECHS are located across the country and provide medical facilities to the members of the Armed Forces, who

are retired Ex-Servicemen including the dependents of the pensioners. The beneficiaries requiring hospitalization, OPD treatments or diagnostic tests, etc. are referred to service hospitals managed by the Armed Forces or to the empaneled private hospitals / diagnostic centres by ECHS Polyclinics. The purpose of introducing Smart Cards was to authenticate the beneficiary by matching stored finger prints to the presented live finger prints so as to avoid impersonation, forgery, fraud and misuse of public funds.

26. It was agreed by the parties under Clause 5 of the Agreement that the respondent would pay a sum of Rs.135/- per Smart Card. The petitioner mobilized its resources and commenced the work for the Smart Card Project. According to the petitioner, it supplied a total of 23,77,180 Smart Cards to the respondent and received a sum of Rs.31,93,46,524/- against the said supply and certain amounts remained pending with regard to supplies in certain Regional Centres.

27. Claim No.2 of the petitioner before the Arbitral Tribunal was on account of non-issuance of Sales Tax C Forms by the concerned Regional Centres alongwith interest. According to the petitioner, Sales Tax at the rate of 5% has been paid on account of Smart Cards delivered. However, if the respondent would have issued the Form 'C', the petitioner would have got a concession by 3% and it is this difference which is claimed. Heavy reliance is claimed by the petitioner on para 2 in Annexure E to the Agreement to state that the parties contracted that the Form 'C' shall be given by the respondent.

28. The Tribunal notes that there is no evidence for proving the Sales Tax Challans filed by the petitioner and nor were the originals produced.

The deposition of PW-1, Rajendra Yadav, is noted wherein he admits that the amounts indicated in the Challan do not exclusively relate to the Smart Cards supplied to the respondent and also relate to the other parties as well. The Tribunal has further relied upon the price quoted by the petitioner itself which was Rs.135/- per card and which was evident from the letter dated 26.02.2009 (Exhibit C-1). The letter dated 21.11.2008 (Exhibit R-2) which was an admitted document by the petitioner is relied upon by the Tribunal to come to the conclusion that the price quoted by the petitioner was inclusive of Taxes. The said letter mentioned the revised commercial proposal and also that the quoted price included Rs.5/- towards taxes and Rs.2/- towards expenditure. The Tribunal, therefore, came to the finding that in the teeth of these documents, it was dishonest for the petitioner to even claim recovery on account of Tax. The Tribunal also notes that out of a total of 23,77,180 cards supplied, 2,38,465 cards were supplied to the Delhi Regional Centre, where admittedly no Central Sales Tax or C Form even applied. The Tribunal has also examined the legal position under the Sales Tax Act and the Central Sales Tax Act. Under Section 8(1) of the Act, a 'dealer' who sells to a registered dealer goods of the description referred to in Sub-Section (3) is liable to pay tax. Thus, it is only a registered dealer which can give Form 'C' under the Act. The Tribunal has come to a finding that the respondent is not a 'dealer' under Section 2(b) of the Act nor a 'registered dealer' with the Sales Tax Department under Section 7. Respondent has been established by the Ministry of Defence for providing Contributory Health Scheme to the beneficiaries under the Scheme and is not in any business so as to be termed as a registered

dealer for selling or buying cards. The Tribunal also observes that the Smart Cards supplied to the beneficiaries will not be termed as a sale or a resale under the Act. Respondent was, therefore, not liable to give any Form 'C' to the petitioner. On this account, Claim No.2 has been rejected.

29. I find substance in the contention of the respondent that on 21.11.2008, when the petitioner had quoted the price of Rs.135/- per Smart Card, it had clearly included Rs.5/- as an element of tax. Admittedly, 2% tax is payable by the petitioner even where exemption is allowed on the basis of Form 'C'. The petitioner allegedly paid 5% towards tax on account of non-issue of Form 'C'. The difference, i.e. 3% of Rs.135/- per card would be Rs.4.05/- per card as against Rs.5/- sought by the petitioner in its price of Rs.135/-. Hence, even otherwise no loss has been caused to the petitioner due to non-issue of Form 'C'. From this perspective, the argument that the petitioner was entitled to a concession under the Sales Tax Act as also that the respondent is a registered dealer becomes irrelevant. In my view, the Tribunal has committed no illegality in rejecting the said claim and there is no cause for interference by this Court.

30. Under Claim No.1, the petitioner had admitted that it had supplied 23,77,180 Smart cards and against this, he had received a payment of Rs.31,93,46,524/-. Petitioner had set up a case that the Regional Centres at Bangalore, Bareilly, Hissar and Jammu had failed to pay a sum of Rs.30239/- in respect of 2204 Smart Cards. Petitioner had relied upon Reimbursement Request Notes (RRNs) (Exhibit C-14). The Tribunal notices that the respondent in its affidavit sworn by Major General Ashok

Kumar had denied the contents of the said document. The Tribunal found that the photocopies of the invoices with respect to these claims had been placed on record, but the petitioner neither produced the originals nor the authors of the documents were examined. The Award also notes that during the arguments, senior counsel for the petitioner had submitted that all dues except from Regional Centre, Bangalore, Regional Centre, Hissar and Regional Centre, Lucknow were cleared. This unpaid amount totaled to a sum of Rs.16,469/-. However, the Tribunal further notes that PW-1 in his affidavit (Exhibit PW1/A) does not depose about the non-payment by RC, Lucknow. The invoice on the face of it did not pertain to the claimed amount because the amount of the invoice was Rs.41,309/- as against the claim of Rs.13,499/-. It was not the case of the petitioner that part payment on account of this invoice had been made. Similarly, in respect of the invoice of Regional Centre, Bareilly, the Tribunal notes that the amount on the invoice dated 30.05.2015 was far higher than the amount sought under the claim before the Tribunal and therefore, the invoice did not pertain to the claimed amount. Even otherwise, the Tribunal notes that it was admitted by the petitioner during the arguments that nothing was due from Regional Centre, Bareilly. With respect to Regional Centre, Bangalore, the Tribunal records that RW-1 in response to question no.44 had stated that the outstanding from this Centre had been cleared and this was not challenged by the petitioner. In so far as Regional Centre, Hissar is concerned, the cheque was sent but returned undelivered. With respect to Regional Centre, Lucknow during cross-examination of RW-1, a letter dated 17.01.2017 was placed wherein it was mentioned that 100 Smart

Cards had not been received. Taking this evidence into account, the Tribunal rejected the liability of the respondent for payment against this Centre. In my view, no patent illegality can be found in the rejection of the said claim except to the extent of Rs.2025/- which has been allowed towards the claim payable by Regional Centre, Hissar. It was for the petitioner to lead evidence to show that the invoices being filed in support of the claim pertained to the claim amounts, as also to show that the Smart Cards were actually delivered. In most of the claims under this Head, the petitioner failed to connect the invoices filed, with the amounts claimed while with respect to Regional Centre, Lucknow, the petitioner could not rebut the evidence of the respondent that the Smart Cards were even received.

31. In my view, this part of the Award calls for no interference in judicial review by this Court under Section 34 of the Act. Relevant part of the Award is as under :-

“During the arguments Ld. Senior Counsel for the Claimant had submitted that during the pendency of the proceedings, all dues except Rs.945/- from RC Bangalore, Rs.2025/-from RC Hissar and Rs.13499/- from RC Lucknow remain to be paid. Hence on this score only a sum of Rs.16,469/- is being claimed. This submission is also contained in the written synopsis filed by the Claimant on record.

Significantly PW1 Sh.Rajinder Yadav, in his affidavit Ex.PW1/A does not depose about non payment by RC Lucknow. Also on the face of it, copy of this invoice does not pertain to the claimed amount under this Claim No.1 because the amount of this invoice amounting to Rs.41,309/- is much more than the balance amount being claimed now. It is not the case of the Claimant that only part payment in respect of this

invoice on page No.178 in respect of RC Lucknow has been made and the remaining unpaid is being claimed now.

Also copy of the other invoice on page No.169 thereof is dated 30.05.2015 for 375 Smart Cards in respect of RC Bareilly and the amount is Rs.50,624/-. Also on the face of it, copy of this invoice does not pertain to the claimed amount under this Claim No.1 because the amount of this invoice is much more than the balance amount being claimed now. It is not the case of the Claimant that only part payment in respect of this invoice on page No.169 dated 30.05.2015 for 375 Smart Cards in respect of RC Bareilly has been made and the remaining unpaid is being claimed now. Even otherwise as mentioned above, it was admitted during the arguments payment from this centre has been received and nothing is due from it.

RW1 Col. Deepak Mohan Anand in response to question No.44 stated that Rs. 945/- by RC Bangalore stood paid to the Claimant on 07.03.2017 and this was not challenged. As regards payment of Rs.2025/- by RC Hissar, he admitted that the cheque sent was returned undelivered. So, this amount remains to be paid. As regards payment of Rs. 13499/- by RC Lucknow, during cross examination of RW 1 Col. Deepak Mohan Anand letter dated 17th January,2017 issued by ECHS Branch, Embassy of India, Kathmandu, Nepal, was put wherein it is mentioned that the relevant 100 Smart Cards had not been received. Hence in respect of this amount no liability can be fastened on the Respondent.

In view of the said materials, in respect Claim No.1, the Claimant is entitled to recover Rs.2,025/- only and its claim for the remaining amount stands rejected.”

32. Claim No.3 has been rejected by the Tribunal on the ground that the petitioner had not placed on record any documentary evidence to show that any order was placed on it during the subsistence of the

Contract for supplying the unutilized ECHS Pre-printed cards. The Tribunal observes, on the contrary that the petitioner admitted that under Clause 7.1.13, respondent was required to provide monthly projection of the required cards for the next month, six months prior to the expiry of the Contract. The petitioner also admitted that in November 2014 and thereafter the respondent never made any such projections. The Tribunal, therefore, was of the view that when the respondent did not place any order or sent monthly projections after November 2014, it could not be blamed for any unutilized inventory for the Smart Card and cannot be made liable on this account. The Tribunal also observed that the petitioner had not proved on record any document to show that it had spent the amount so claimed for getting / buying the cards and thus found the claim to be doubtful.

33. In my view, the Award suffers from no illegality leave alone a patent illegality. The respondent herein is right in its contention that the Agreement clearly underscored the need of the parties to stop the work in the last month of the Contract and hand over the software and the hardware to the respondent. The admitted position was that the petitioner required 25 days to deliver the cards towards any application approved and sent to it. Thus, on a given date in a given month, the Cards which were delivered were naturally ordered atleast 25 days prior thereto. The respondent had vide its email dated 28.04.2015 clearly reiterated that the Agreement would expire on 31.05.2015 and they had no intent to extend it beyond the said date. No applications as admitted by the petitioner were approved in the month of May 2015. Thus, the contention of the petitioner that it had suffered loss due to the unutilized cards on account

of the act of the respondent is misplaced. I also agree with the finding of the Tribunal that the petitioner has not even produced any evidence or document on record to show that 49,500 cards were made for use by the respondent and which remained unutilized. In the cross-examination, the petitioner's witness was specifically asked if there was any evidence to this effect but the witness gave no evidence to substantiate the claim. This part of the Award thus calls for no interference. The relevant part of the Award is as under:-

“34. It is also important to note that it is not the case of the Claimant that the Respondent in terms of clause 7 of the Agreement Ex.C 1 had sent Approved Application Forms required to be provided by it in terms thereof and that it i.e. the Claimant had procured the said pre-printed Smart Cards pursuant thereto.

Also the Claimant has not placed on record any documentary evidence to show that any order was placed on it i.e. the Claimant by the Respondent during the subsistence of the contract Ex.Cl, for supplying the said unutilised 49,500 Red ECHS pre-printed cards and White ECHS Cards. On the contrary, the Claimant is admitting that under clause 7.1.13 of the agreement Ex. C 1 between the parties, the Respondent was required to provide monthly projections of the required-cards, for the next month, six months prior to the expiry of the contract. It is also admitted by the Claimant that in November, 2014 and thereafter, the Respondent did not supply any such projections. It means the Respondent did not ask for any cards after November, 2014. It also implies there was no projections/no order was placed by the Respondent, for any Smart Cards after November, 2014. The email dated 28/4/15 Ex. C-19 (page276) which though has remained unproved, does not in any manner change the nature of rights of the parties under the agreement. From the total number of smart cards supplied by the claimant, average per month comes to around 39620 smart-cards. When the Respondent

did not place any order after November, 2014 or send monthly projection after Nov. 2014, the Respondent cannot be blamed for any unutilised inventory of 49500 smart cards. In the absence of any order or projections supplied by the Respondent after November, 2014, it is not liable to pay for the said unutilised smart-cards, after expiry of the contract on 31/05/15, between the parties and the claim of the Claimant, on account of the unutilised inventory of pre-printed cards, cannot be entertained and is hereby dismissed.

Also the Claimant has not proved on record any document to show that it had spent the said amount for getting/buying the said number of Cards. This is also a serious lapse which renders this claim doubtful.

The Claimant therefore is not entitled to get any money from the Respondent on this score. This Claim as such also stands dismissed.”

34. Claim No.4 was for recovery on account of non-procurement of the Kits by the empaneled hospitals / labs. The controversy under the present claim centres around interpretation of Clause 3.1.12 of the Agreement. The said Clause reads as under :-

“3.1.12 - The Department shall facilitate the empanelled medical facilities to procure referral authentication kit from SITL for identifying patients referred by ECHS polyclinics.”

35. The Clause stipulates the respondent would facilitate the empanelled hospitals / labs to procure the Kits from the petitioner for identifying the patients referred by the ECHS Polyclinics. This, according to the petitioner, was the second source of revenue, apart from the payment on account of sale of Smart Cards. The grievance of the petitioner was that the respondent failed in its obligation in issuing the

requisite mandate to the hospitals, etc. to procure the Kits from the petitioner. As a result, the petitioner could sell only 45 Kits to 42 number of hospitals out of the total of 1617 empanelled hospitals / clinics as on 31.05.2015. The petitioner thus suffered a loss and which was the claim before the Tribunal.

36. The Tribunal interpreted Clause 3.1.2 to signify that it only required facilitation by the respondent to the empaneled hospitals to procure the Kits from the petitioner. There was no specific stipulation that the respondent shall ensure that the hospitals buy the Kits from the petitioner. The Tribunal in its wisdom has interpreted the word 'facilitate' to signify recommendation or suggestion and not imposing or mandate. It is no longer res integra that interpretation of the Clauses of the Contract is the domain of the Tribunal. The Tribunal has given a particular interpretation to the Clause and in my view this is not only a possible but a plausible view requiring no interference. I find merit in the contention of the respondent that surely the respondent could not impose itself on the hospitals to procure the Kits from the petitioner. This was neither the mandate nor the obligation under the Contract nor can even be sustained in any commercial transaction or in the business common sense. Relevant part of the Award is as under :-

"It is important to note that Clause 3.1.12 of Ex.C 1, only mentions that 'the Department i.e. Respondent shall facilitate the empanelled medical facilities to procure Referral Authentication Kits from SITL for identifying patients referred by ECHS polyclinics.' Significantly it talks of facilitation by the Respondent to the empanelled medical facilities to procure Referral Authentication Kits from the Claimant. There is no specific stipulation in Ex. C-1 the

agreement dated 31/05/10 between the parties that the Respondent shall buy RAKs of the value of Rs.2,97,67,500/-. In the absence of any such stipulation, it cannot be said that there is any breach of the agreement committed by the Respondent.

It is not the case of the Claimant that it has supplied RAKs of the value of Rs. 2,97,67,500/-to the Respondent or that it had bought the RAKs for the Respondent which are lying with it. On the other hand the claim in this regard is about the alleged breach committed by the Respondent. Since there is no such binding clause including Clause No.3.1.12 in the agreement Ex.C1 which casts an obligation on the Respondent to buy RAKs worth Rs.2,97,67,500/-,the claim of the Claimant needs outright rejection and is accordingly dismissed.”

37. Claim No.5 was on account of costs / expenses for services allegedly rendered between the period 01.06.2015 to 08.07.2015. The Tribunal found as a matter of fact that the respondent in its affidavit of admission / denial of the claimants’ documents had denied the contents of the document (Exhibit D) filed in support of the claim. The petitioner in its statement of Claim had categorically mentioned that it would produce the relevant vouchers / bills / salary statements, etc. but for the reasons best known to it, it failed to do so. The Tribunal in the absence of any evidence on record proving that the petitioner had rendered services beyond 31.05.2015 came to a finding that the said Claim could not be allowed.

38. Having raised a claim, the onus of proving that the services were rendered by the petitioner was on the petitioner itself. Petitioner could not place any order on record by which the respondent had sought its

services beyond the contractual period. On the contrary, Annexure C-19 was an email dated 28.04.2015 issued by the respondent to its Regional Centres, with a copy to the petitioner, that the petitioner should return all the hardware and software to the ECHS, in compliance with Clause 9.1.3 of the Agreement. I also agree with the contention of the respondent that this Claim was in clear contradiction to the claim for unutilized Smart Cards. On one hand, the petitioner complained about withholding the applications which proved that the Contract was to end on 31.05.2015 while on the other hand, it urged that it worked beyond the contractual period. RW-1 had clearly deposed and proved the email dated 28.04.2015, but no attempt was made by the petitioner to demolish the testimony of the witness, in cross-examination. The relevant part of the Award is as under :-

“It is significant to note that Maj.Gen. Ashok Kumar in his affidavit of admission/ denial of the Claimant's documents has denied the contents of the same i.e. of the said documents Ex.D which are placed between pages 312 to 313 annexed with the Statement of Claim. It is important to note that the Claimant in its Statement of Claim had clearly mentioned that it would produce the relevant documents/ vouchers/ bills/ salary statements etc. in support of this claim in course of the proceedings before this Learned Arbitral Tribunal. However the Claimant for the reasons best known to it has failed to produce any such supporting documents in support of Ex.D and this lapse in our view is fatal particularly when the contents of the said document have been denied by the Respondent. It is important to note there is nothing on record to prove that the Respondent ever extended the period of the contract Ex.C 1 between the parties after its expiry on 31/05/15. In the absence of any such extension and the said lapses, the Claimant is not entitled to any amount for

rendering the alleged voluntary services, after expiry of the contract on 31/05/15.”

39. This Court finds no reason to interfere with the said Award, there being no patent illegality or perversity.

40. The petition is accordingly dismissed being devoid of merits and the Award is upheld.

JYOTI SINGH, J

MAY 12th, 2020

yg/srb

