IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 27.05.2021

\+ **O.M.P. (COMM) 262/2019 & IA No. 4517/2021**

AIRPORTS AUTHORITY OF INDIA .....Petitioner

Versus

BENTWOOD SEATING SYSTEM (P) LTD. .....Respondent

Advocates who appeared in this case:

For the Petitioner :Mr K.K. Rai, Senior Advocate with Mr Digvijay Rai, Ms Sreoshi Chatterjee, Mr Anshul Rai, Mr Aman Yadav and Mr RamkrishnaVeerendra, Advocates.

For the Respondent : Mr S.D. Singh, Mr Rahul Singh, Ms Kamla Prasad and Ms Shweta Sinha, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Airport Authority of India (hereafter 'AAI'), is a Statutory Body constituted under the Airports Authority of India Act, 1994. It has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an arbitral award dated 13.03.3019 (hereafter the 'impugned award') made by the Arbitral

Tribunal comprising of a former Chief Justice of India as the Sole Arbitrator.

2. The impugned award was rendered in respect of disputes that had arisen between the parties in relation to a Purchase Order dated 13.07.2017 for the supply of four thousand stainless steel passenger baggage trolleys (hereafter 'PBTs') along with their comprehensive annual maintenance contract.

3. On 11.04.2017, AAI issued a Notice Inviting Tenders (hereafter 'NIT') being Tender No. Tech/06/2017 for "Supply and Comprehensive Annual Maintenance Contract" (hereafter 'CAMC') of four thousand stainless steel PBTs at thirteen airports at an estimated tender cost of ₹5.42 crores. Out of the above estimated amount, a sum of ₹39,81,160/- was payable to the successful bidder on completion of the supplies, after the expiry of the defect liability period.

4. The respondent, Bentwood Seating Systems (P) Ltd. (hereafter 'BSS'), was declared the highest bidder. Accordingly, AAI issued a Letter of Intent (LoI) in terms of which BSS was required to sign a 'Contract Agreement' and complete all requirements as stipulated in the NIT. The value of the contract was accepted at ₹4,62,82,000.05/-.

5. On 30.06.2017, AAI called upon BSS to clarify the impact of all indirect taxes including Octroi and Sales Entry Tax, based upon the implementation of the Goods and Service Tax (GST) legislations, which were to be effective from 01.07.2017. The said letter was duly acknowledged by BSS on 05.07.2017. Subsequently, BSS completed all

formalities and, AAI issued a Purchase Order on 13.07.2017. In terms of the Purchase Order, BSS was asked to execute the 'Contract Agreement' within thirty days from the date.

6. On 14.08.2017, BSS acknowledged the receipt of the Purchase Order and informed AAI that the prototype of a PBT had been dispatched from China and expected to receive it from Kolkata within the week.

7. On 21.08.2017, AAI sent a letter requesting BSS to inform the date and time of inspection of the prototype PBT. Subsequently, the inspection was carried at the factory premises of BSS on 24.08.2017. Thereafter, by letter dated 31.08.2017, AAI informed BSS that the Competent Authority had accepted the inspection report and called upon BSS to start bulk-production of the PBTs and to intimate the date of pre-dispatch inspection of the first lot of the PBTs.

8. AAI claims that certain communications were exchanged with BSS whereby BSS was informed that the said PBTs were urgently required at the consignee airports to meet the operational requirements. BSS was also called to inform AAI about the next date of inspection. On 12.10.2017 and 24.10.2017, AAI informed BSS that all four thousand PBTs were required to be arranged for pre-dispatch inspection on or before 20.10.2017. AAI also sought reasons for not completing the order within the time as prescribed in terms of Paragraph No. 8 of the Purchase Order. Thereafter, BSS was requested to confirm the date of final inspection of the total quantity of PBTs as 02.11.2017.

9. Consequently, the final inspection for the PBTs was scheduled on 02.11.2017. AAI through another letter dated 27.10.2017 informed BSS of the constitution of a committee of two officers, to visit the premises of BSS, at Kolkata on 02.11.2017 for carrying on the pre-dispatch inspection. Apparently, the two member committee visited the premises of BSS on the given date. The Inspection Report dated 02.11.2017 indicates that the PBTs could not be inspected as the same were not available on site. According to BSS, the same were kept in a godown situated at Haldia. Only certain parts/components of PBTs, including bearings, wheels and identification number plates, were placed before the inspection committee. The Inspection Report also records that BSS agreed to make 250 PBTs available for inspection on 04.11.2017.

10. Thereafter, an urgent requirement arose for the PBTs as the President of India was scheduled to visit Imphal. And, by a letter dated 15.11.2017, AAI called upon BSS to supply PBTs, subject to inspection, at Guwahati and Imphal Airports. Admittedly, 550 PBTs were delivered by BSS in compliance with the letter dated 15.11.2017.

11. On 28.11.2017, AAI requested BSS to arrange for the inspection of the remaining undelivered PBTs, that is 3,450 PBTs on a priority basis. BSS agreed to make 1,000 PBTs available to AAI for pre-dispatch inspection on 18.12.2017 and to make a further 1,000 PBTs available for inspection on 26.12.2017. BSS also undertook that the remaining PBTs would be made available for inspection to AAI on 18.01.2018. However, on 18.12.2017 only 350 PBTs were made available for inspection against

the 1000 PBTs which were assured by BSS. AAI sent several letters seeking explanation from BSS for producing lesser number of trolleys.

12. On 08.01.2018, AAI issued a show cause notice to BSS as to why the contract should not be terminated as only 550 PBTs had been supplied till that date. BSS responded to the said show cause notice on 17.01.2018. According to AAI, the reply to the show cause notice did not provide any valid reason for the delay in completing the supplies. Consequently, AAI terminated the Purchase Order on 20.02.2018 and also initiated other actions.

13. Aggrieved by the termination of the Purchase Order, BSS invoked the Arbitration Clause. Accordingly, a Sole Arbitrator was appointed. The parties referred the disputes to the Arbitral Tribunal.

14. BSS filed its Statement of Claims, claiming that the action of AAI of terminating the Purchase Order, forfeiting the security deposit and blacklisting BSS for three years is unsustainable. It claimed that the invocation of the Bank Guarantee by AAI being B.G. No. 0262BG000162017 amounting to ₹ 17,30,124.31/- ought to be declared as null and void and, the same should accordingly be returned to BSS. It further claimed a sum of ₹ 10,95,98,581/- along with *pendente lite* interest at the rate of 18% till its realization and also claimed costs of the present proceedings.

15. The disputes leading to arbitration were limited to the delay in supply of the PBTs, termination of the contract and invocation of the Bank Guarantee and other attendant issues as mentioned above. However,

during the course of the arbitral proceedings, AAI alleged that BSS had submitted false certificates of experience and satisfactory completion of work at Heathrow Airport to demonstrate its eligibility for the contract and fraudulently received the Purchase Order. AAI claimed that BSS had submitted its bid as an Indian Associate of a foreign bidder – Suzhou Jinta Metal Working Co. Ltd. (hereafter 'SJM') and not as an 'Original Item Manufacturer'. It had procured the contract on the strength of the authorization letter dated 04.05.2017 representing BSS as the authorized distributor of SJM's products from 04.05.2017 till 03.05.2018. AAI claimed that BSS being an 'Indian Associate' was mandatorily required to produce the "*original invoice of purchase of above steel material from the manufacturer along with test certificate issued by manufacturer during inspection of trolleys*" in terms of Clause 4.2 of the Technical Specifications (NIT). AAI claimed that the PBTs supplied by BSS in terms of the Purchase Order dated 13.07.2017, were not certified by the manufacturer, that is SJM. On the contrary, SJM had sent an email stating that there was a difference in the target price and therefore, it did not continue its association with BSS. AAI claimed that BSS was unable to produce any certificates as mandated under Clause 4.2 of the 'Technical Specifications' appended to the NIT, as SJM has disassociated itself from BSS and thus, prayed that the termination order dated 20.02.2018 should be upheld. It further prayed that it should be directed to return the 550 stainless steel PBTs supplied by BSS at Guwahati and Imphal Airport and likewise, the 350 stainless steel PBTs which were made available for inspection by BSS to AAI on 18.12.2017. These cannot be accepted as

BSS had failed to comply with the terms of Clause 4.2 of the Technical Specifications, appended to the NIT.

Impugned Award

16. The Arbitral Tribunal considered the rival contentions. In terms of the Purchase Order, BSS was required to supply four thousand PBTs within three months. The Arbitral Tribunal observed that the Purchase Order provided that "time was the essence of the contract" and could have been validly terminated on 20.10.2017 as BSS had failed to supply PBTs within the said period. However, AAI chose not do so until 20.02.2018 and hence, it could not claim that time was the essence of the contract. The Tribunal further considered the import of Clause 2.21.3 (regarding liquidated damages) and Clause 2.4 (extension of time) of the General Conditions of the Contract (hereafter GCC) in the context of AAI demanding and accepting the delivery of the PBTs even after expiry of the said period. It held that the period of delivery under the Purchase Order cannot be considered as the essence of the contract. Accordingly, the Tribunal held that the delay in supply of PBTs cannot be treated as a voidable condition for terminating the contract.

17. It further observed that AAI had not terminated the Purchase Order on the ground that PBTs were manufactured by BSS and not by SJM; AAI had done so on the ground that BSS had violated Clause 4.2 of the Technical Specifications (NIT) by not producing the original invoice of purchase of the steel material from the manufacturer as requested by AAI in its letters dated 22.12.2017 and 01.02.2018. The Arbitral Tribunal held

that the same is also not sustainable as Clause 4.2 pertained to 'manufacturer of stainless steel' and not the 'manufacturer of PBTs'. The Tribunal further held that since BSS had supplied invoices of the stainless-steel manufacturers (Raajratna Ventures Pvt. Ltd.) and had also furnished the test certificates during inspection (which were issued by P.P. Metallurgical Laboratory), it had complied with the requirements of Clause 4.2 of the Technical Specifications (NIT). It held that AAI was responsible for verifying all the required paper work prior to authorizing BSS to commence bulk production of the PBTs and as it had allowed BSS to commence bulk production of the PBTs, it was no longer open to AAI to insist on compliance of Clause 4.2 of the Technical Specification (NIT).

18. In relation to the issue concerning the invocation of the Bank Guarantee, the Arbitral Tribunal held that since it has already set aside the termination notice dated 20.02.2018, vide which the Purchase Order dated 13.07.2017 was terminated, accordingly, all other actions of AAI founded on the termination order are also liable to be set aside. Therefore, the Arbitral Tribunal set aside the invocation of the Bank Guarantee by AAI as well as the action of AAI in debarring BSS from participating in any tender of AAI for a period of three years.

19. The Tribunal also directed specific performance of the Purchase Order. It directed AAI to carry out a one-time pre-dispatch inspection of the balance 3100 PBTs stated to be made available at the premises of BSS at Kolkata after giving an advance notice to BSS. It directed AAI to release the payment due to BSS for the 550 PBTs supplied by BSS in November 2017 along with interest at 10% per annum, commencing from the date the

said payment ought to have been made till the date of payment. It directed AAI to refund the sum of ₹17,30,124.31/- recovered by AAI by invoking the Bank Guarantee (Bank Guarantee being B.G. No. 0262BG000162017) to BSS, along with interest at the rate of 10% per annum commencing from the date when the said Bank Guarantee was encashed till the amount is actually refunded. It directed AAI to refund to BSS, the deposits made by BSS with the Delhi International Arbitration Centre (DIAC), as costs for the present arbitral proceedings, within a period of four weeks from the date of receipt of the impugned award.

Submissions

20. Mr K.K. Rai, learned Senior Counsel appearing for AAI had assailed the impugned award on, essentially, three grounds. First, he contended that the conclusion of the Arbitral Tribunal that the Purchase Order could not be terminated on account of delay is perverse and patently illegal. He submitted that the facts as placed before the Arbitral Tribunal clearly indicated there was gross delay on the part of BSS and, AAI was entitled to reasonable compensation for the same. He referred to the decision of the Supreme Court in ***Construction and Design Services v. Delhi Development Authority: (2015) 14 SCC 263***, in support of his contention.

21. Second, he submitted that the Arbitral Tribunal had erred in ignoring that the Purchase Order had been procured by fraud. He submitted that it was admitted that BSS had participated as 'an Indian Associate on behalf of a Foreign bidder'. In order to fulfil the eligibility criteria, BSS had appended a satisfactory performance certificate dated 03.05.2017

issued by Heathrow Airport, London. However, the same was found to be false. He referred to the emails dated 16.06.2017, 31.10.2017 and 23.03.2018 received from Heathrow Airport, which according to him established that fraud had been perpetuated. He further submitted that BSS had also falsely represented itself, that it was acting on behalf of a foreign bidder. The letter received from SJM indicated that the authorization granted to BSS had expired on 03.05.2018. SJM was not agreeable to supply PBTs at target rates and had disassociated itself from BSS. Despite the same, BSS had proceeded with the Contract after it was no longer acting on behalf of SJM.

22. Further, he submitted that Clause 4.2 of the Technical Specifications (NIT) had not been complied with. He submitted that BSS had not produced the test certificates and the invoices from the manufacturer. However, the Arbitral Tribunal had examined the invoices issued by stainless steel manufacturers (Raajratna Ventures Pvt. Ltd.) and the certificates issued by P.P. Metallurgical Laboratory and had incorrectly concluded that the same had satisfied the requirements of Clause 4.2 of the Technical Specifications (NIT). It has thus, travelled beyond the scope of the Contract between the parties.

23. Mr S.D. Singh, countered the aforesaid submissions. He submitted that the decision of the Arbitral Tribunal that AAI had by its conduct waived the requirement of 'time being the essence', was based on cogent reasons and could not be interfered with.

24. Next, he submitted that the Arbitral Tribunal had not accepted AAI's claim that BSS had played a fraud on AAI. AAI had relied on certain emails received from Heathrow Airport, London. However, none

of the said emails were supported by an affidavit as required under Section 65-B of the Indian Evidence Act, 1872. He submitted that the said emails were inadmissible and no inference of fraud could be drawn based on the said emails. He submitted that AAI was required to plead and establish fraud, which it had failed to do. He also pointed out that BSS had denied the said emails and further averred that the said emails had been manipulated. After the pleadings were complete, the parties agreed that there was no requirement for oral evidence and therefore, AAI had practically conceded to not proving the said document. Next, he submitted that BSS was duly authorized by SJM at the material time and therefore, there was no question of BSS making a fraudulent representation. He further submitted that BSS had complied with the eligibility criteria as set out in the tender documents.

25. He submitted that AAI's entire claim that BSS had not complied with the tender conditions was premised on the basis that BSS was required to import PBTs from SJM. However, the tender conditions did not stipulate any such requirement. He stated that the tender conditions merely required an Indian affiliate to be authorized by a foreign manufacturer. In addition, the Indian affiliate was also required to have adequate manufacturing capacity. Thus, in cases where tender had been submitted as an Indian affiliate, the PBTs could either be imported or manufactured in India on the basis of knowhow guidance that would be available to the Indian affiliate by virtue of its association with a foreign manufacturer. He also referred to Clause 4.2 on the Technical Specification appended to the NIT and submitted that the Arbitral Tribunal had rightly interpreted the said Clause to mean that the invoices of

manufacturers of steel were required to be submitted and, in this case, BSS had provided the said documents. He submitted that the interpretation of a contract falls squarely within the jurisdiction of the Arbitral Tribunal and cannot be interfered with unless it is patently illegal or plainly contrary to the express terms of the contract. He submitted that in this case, the view expressed by the Arbitral Tribunal was a plausible view and therefore, was not required to be interfered with.

26. He also submitted that if the Court felt that the Arbitral Tribunal has not expressly indicated the reasons for its decision to reject AAI's claim regarding procurement of the Contract by fraud, this Court could adjourn the petition to enable the Arbitral Tribunal to resume proceedings and provide further reasons for its decision. He submitted that in this regard BSS had already filed an application under Section 34(4) of the A&C Act.

Reasons and Conclusion

27. As noted above, AAI terminated the Purchase Order by its letter dated 20.02.2018. The relevant extract of the said letter indicating the reasons for terminating the contract with BSS are set out below:-

> " The reply furnished M/s Bentwood Seating System Pvt. Ltd., Kolkata against Show Cause Notice does not specify reasons for delay in submission of prototype PBT for inspection, valid reason/justification for not completing the supply of PBT within the stipulated delivery schedule of the contract, not producing the requisite documents against AAI letter No. 5-C/1/2016-AR II (Tech)/512 dated 22.12.2017 and 01-02-2018.
>
> In view of the above, M/s Bentwood Seating System Pvt. Ltd., Kolkata committed breach of

> contract and the Competent Authority had decided to debar M/s Bentwood Seating System Pvt. Ltd., Kolkata. Accordingly, I am directed to convey that Purchase Order issued in favour of M/s Bentwood Seating System Pvt. Ltd., Kolkata, stands cancelled, security deposit forfeited and M/s Bentwood Seating System Pvt. Ltd., Kolkata is debarred for a period of 3 (Three) years with effect from 20-02-2018 from participating in any tender of AAI in future and henceforth AAI shall not award any contract to M/s Bentwood Seating System Pvt. Ltd., Kolkata or to any firm or company having business link in the form of Joint Venture or the like with M/s Bentwood Seating System Pvt. Ltd., Kolkata."

28. As is apparent from the above, AAI had terminated the Contract with BSS for three reasons: (i) delay in submission of the prototype for inspection; (ii) justification for not supplying PBTs within the stipulated delivery period; and (iii) not producing the requisite documents as required by AAI by its letter dated 20.02.2018 and 01.02.2018.

29. As discussed above, the Arbitral Tribunal did not find any of the three grounds sustainable.

30. Plainly, the contract in question could not be terminated on the ground of delay in providing the prototype as AAI had proceeded with the Contract after prototype of the PBT was inspected by the officials of AAI at the factory premises of BSS on 24.08.2017. The said officials had made certain observations including (a) that the quality of the bend in one of the sections was not smooth; and (b) that the width of the hand basket was shorter by 5mm. BSS confirmed that the requisite bend tools would be

made available before the production, to address the issue regarding the quality of the bend of one of the sections as pointed out by AAI. It also confirmed that it would change the width of the hand basket as required. AAI had also pointed out that the slope of the platform was 15 degrees and was required to be reduced. BSS confirmed that this slope would be changed between 8 to 10 degrees. Thereafter, on 31.08.2017, AAI sent a letter informing BSS that the Competent Authority had accepted the Inspection Report of the prototype PBT and requested BSS to start bulk production and intimate the pre-dispatch inspection of the first lot of PBTs. Surely, in view of the above, it was not open for AAI to cancel the Purchase Order on account of delay in submission of the prototype. It appears that this was not even pressed before the learned Arbitral Tribunal. This issue has also not been canvassed by AAI before this Court.

31. Insofar as the issue regarding termination of the Contract on account of delay in completing the supply is concerned, the Arbitral Tribunal found that the same is unjustified. The Arbitral Tribunal held that although AAI could have terminated the Contract as on 20.10.2017 in terms of Clauses 2.3 and 2.16 of the GCC, but AAI did not exercise the said option. On the contrary, by its letter dated 24.10.2017, AAI called upon BSS to make available PBTs for inspection on 02.11.2017. It also constituted a committee of two officers to visit the premises of BSS at Kolkata for carrying out the pre-dispatch inspection on 02.11.2017. However, BSS could not produce any PBTs for inspection on that day but had only produced parts thereof (bearings, wheels, identification number plates, etc). The Arbitral Tribunal noted that even at this stage, AAI could have

terminated the contract with BSS on account of its failure to produce any PBT for inspection. However, AAI did not do so. By a letter dated 15.11.2017, AAI called upon BSS to immediately transport stainless steel PBTs to Guwahati Airport while clarifying that the acceptance of PBTs would be subject to the same being satisfactorily tested. Admittedly, BSS delivered 550 stainless steel PBTs to AAI at Guwahati Airport (some were delivered at Guwahati Airport in Assam while the balance was delivered at Imphal Airport in Manipur). The said deliveries were received in the month of November, 2017. The Arbitral Tribunal held that the action of AAI requiring BSS to urgently supply PBTs at Guwahati Airport in Assam demonstrated that AAI was not concerned with the timelines agreed between the parties. Thereafter, by a letter dated 28.11.2017, AAI called upon BSS to arrange for the remaining PBTs (3450 in number). The said letter was followed by another letter dated 12.12.2017 whereby BSS was called upon to indicate its readiness to supply the remaining PBTs. The Tribunal held that even at this stage, AAI was permitting BSS to perform its obligation under the Purchase Order dated 13.07.2017. BSS had responded to the said e-mail and committed that it would make available 1000 PBTs for pre-dispatch inspection on 26.12.2017 and the remining would be made available on 18.01.2018. The Arbitral Tribunal noted that this was well after expiry of the agreed timelines but despite the same, AAI did not cancel the Purchase Order or invoke the risks and cost clause but chose to carry on with the pre-dispatch inspection of 1000 PBTs at BSS's premises at Kolkata. On 18.12.2017, during the said inspection BSS produced over 350 Stainless Steel PBTs for inspection. AAI took a sample from the said consignment and handed it over to the National Test House for examination. The Arbitral Tribunal reasoned that this also indicated that AAI had condoned the delay and it was proceeding with its contract in question. In the circumstances, although the terms and conditions of the Contract in question did specify the time for performance of the contract, AAI by its conduct had waived the same. In the given facts, the Arbitral Tribunal held that the letter of termination dated 20.02.2018 could not be sustained insofar as it was based on the ground of delay and therefore, was liable to be set aside.

32. It is also relevant to refer to Clause 2.21.3 of the GCC which provides for levy of liquidated damages. The said Clause is set out below:-

> "**2.21.3 Liquidated Damages**:
>
> The material is to be despatched as per schedule mentioned above, failing of which liquidated damages calculated at the rate of 1% of despatched stores per week or part thereof on contract price, subject to a maximum of 5% shall be levied. In case the delay exceeds 5 weeks from the schedule date of despatch, AAI shall have the right to terminate the contract at the risk and cost of the supplier and the security deposit forfeited and the firm shall also be debarred from participating in AAI tender for a period of three years."

33. A plain reading of the said clause indicates that AAI would have the right to terminate the Contract in the event, the delay in supplying PBTs exceeded five weeks. This is plainly an enabling clause. It did not in any manner compel AAI to terminate the Contract. A plain reading of the impugned award indicates that the Arbitral Tribunal was of the view that AAI had by its conduct chosen not to terminate the contract with BSS and

therefore, the letter of termination was liable to be set aside. The Arbitral Tribunal had also referred to Clause 2.4 of the GCC, which also enabled AAI to grant extension of time.

34. The Arbitral Tribunal referred to the decision of the Supreme Court in ***Arosan Enterprises Ltd. v. Union of India and Another: (1999) 9 SCC 449*** and held that the stipulations pertaining to time could not be termed as an essence of the Contract and the default on the part of BSS, did not make the contract voidable.

35. The view expressed by the Arbitral Tribunal is a plausible view. It cannot by any stretch be held to be patently illegal or contrary to the fundamental policy of Indian law. No interference with the impugned award is warranted on this ground.

36. As noticed above, the Arbitral Tribunal found that the Contract could not be terminated on the ground that the BSS had not provided the documents as sought for by AAI. According to AAI, Clause 4.2 of Technical Specifications (NIT) had not been complied with. At this stage, it would be relevant to refer to the said clause. The same is set out below:-

> "4.2 The Main frame and load platform will be of AISI grade 304 SS pipes having circular section or elliptical section with minimum thickness of 2 ± 0.12mm. In case of circular sections the vertical frame dia should not be less than 30mm and horizontal frame dia should not be less than 25mm and in case of a separate load platform mounted on horizontal frame the size of platform frame should not be less than 22mm. In case of elliptical section the size should not be less than 38 mm X 20 mm for Vertical and horizontal frames and 30mm x 16mm for load platform. The supplier shall produce original invoice of purchase of above steel material

from the manufacturer along with test certificate issued by manufacturer during inspection of trolleys."

37. By a letter dated 22.12.2017, AAI had referred to the aforesaid Clause and had called upon BSS to produce the original invoice of purchase of steel material by BSS's principal – SJM, along with a test certificate. The said letter is relevant and is set out below:-

"No.5-C/1/2016-AR II (Tech)/512 Dated 22-12-2017

M/s Bentwood Seating System Pvt. Ltd.,
147, Nilgunj Road, Hind Ceramic Compound, Belghoria,
Kolkata-700056

Sub: Providing of documents related with inspection of Passenger Baggage Trolleys.

Sir,

Kind reference is invited to inspection of Passenger Baggage Trolleys carried out by Committee Members of AAI along with your representatives at your works on 18/12/2017 and inspection report prepared thereafter.

As per clause 4.2 of Section-D (Technical Specification) of tender document, the supplier was to produce original invoice of purchase of steel material from the manufacturer along with test certificate issued by manufacturer during the inspection of trolleys which was not produced by you on 18/12/2017.

In this regard, it is to be bring to your notice that you had participated in the tender as an authorized distributor of M/s Suzhou Jinta Metal Working Company Ltd., Jiangsu province, China, hence copies of documents related with import of these trolleys by you from your principle along with original invoice of purchase of steel material by your principle from the manufacturer along with test certificate are required to be submitted.

You are therefore requested to forward the above mentioned documents on priority basis for the perusal and acceptance of inspection report by the Competent Authority.

Yours faithfully,

(Kaluram Dholpuria)
Jr. General Manager (Tech.) ”

38. AAI sent another letter dated 01.02.2018, once again requesting BSS to submit the original invoice from its principal for purchase of steel material along with a test certificate.

39. It is BSS's case that it was not required to submit invoices by SJM but at best was required to submit invoices for purchase of steel material, which was used in the manufacture of the PBTs. Clause 4.2 required the supplier to produce *"original invoice of purchase of above steel material from the manufacturer along with a test certificate issued by the manufacturer during investigation of trolleys*". As noticed above, the Arbitral Tribunal accepted BSS's contention that it had complied with the said condition. AAI's contention that Arbitral Tribunal's aforesaid conclusion is perverse, is plainly unsustainable. It is apparent from a plain reading of Clause 4.2 of the Technical Specifications (NIT) that it pertains to the technical specifications of a PBT. In order to substantiate that the PBT is manufactured in terms of the said specifications, the said Clause further requires the supplier to produce the original invoice of steel

material from the manufacturer along with a test certificate issued by it. The manufacturer mentioned in Clause 4.2 of the Technical Specifications (NIT) refers to the manufacturer of steel material and not the manufacturer of the PBT. It is relevant to note that the said clause would be equally applicable in case the supplier was also the manufacturer of PBTs.

40. In view of the above, the decision of the Arbitral Tribunal that the reasons for termination as stated in the termination letter were not sustainable, cannot be faulted or interfered with.

41. In addition to the above, the Arbitral Tribunal had also noticed that the controversy regarding Clause 4.2 of the Technical Specifications (NIT) was not relevant. The Arbitral Tribunal had articulated its reasons for the said conclusion as is noticed herein before. The said reasons must be read in the context of the controversy sought to be raised. According to AAI, BSS had submitted its bid as an Indian affiliate of a foreign manufacturer. According to AAI, it was thus merely required to import the PBTs from its foreign principal and supply the same to AAI. It is also contended that in fact the foreign manufacturer is a real bidder and the Indian affiliate was merely its agent. According to AAI, the involvement of the Indian affiliate was relevant to maintain the said equipment and it was not required to manufacture the same. AAI relies on the eligibility conditions as set out in the General Information and Guidelines issued by it. The relevant extract of the said General Information and Guidelines – Section A of the tender documents is set out below:-

> "**(A) For Original Item Manufacturers:**

1.2.1 Profile:

i) The firm should be manufacturer I fabricator of Stainless Steel goods I products I material carrying I trolley mounted equipment I passenger baggage trolleys for a minimum period of last 3 yrs.(as on 31st March, 2017)

ii) Bidder firm shall submit an undertaking stating that its firm or its Partners or its Directors have not been black listed or any case is pending or any complaint regarding irregularities is pending, in India or abroad, by any global international body like World Bank/International Monetary Fund/World Health Organization etc., or any Indian State/Central Government Departments or Public Sector Undertaking of India.

iii) Foreign manufacturers can participate and appoint their authorized representative in India/ Indian agent. Since this is not a global tender, the offer should be in INR and only one Indian Associate firm shall be authorized by OIM firm for the offered product in the tender. All the payments on award of the work shall be made to their authorised Indian Associate in INR in India for Supply of item and CAMC.

1.2.2 **Resources**:
The firm should have adequate infrastructure like tools and plants, manufacturing facilities, stainless steel welding and finishing machines I equipment, qualified personnel I staff and testing and developing facilities. If required technical evaluation team may visit the factory premises of the firm as well as access the performance of the stainless steel goods I items I trolleys manufactured by them.

1.2.3 **Experience (For Original Item Manufacturers):**

The firm should have successfully completed similar works which should include supply of at least 400 Nos. Passenger Baggage Trolleys during last 7 years ending 31st March, 2017 and should be either of the following:

a) Three completed works costing not less than the value of' 2.17 Crore each.
   Or
b) Two completed works costing not less than the value of 2.71 Crore each.
   Or
b) One completed work costing not less than the value of~ 4.34 Crore.

1.2.4 **Satisfactory Performance Certificate:**

The firm should submit satisfactory performance certificate from two end users for the works carried out w.e.f. 01.04.2010 to 31.03.2017 out of which at least one work should be from an airport for supply of passenger baggage trolleys.

1.2.5 **Turnover:**

Average annual turnover during last three years ending 31st March, 2016 should be minimum ~ 1,62,60,000/- (Documents required: -Audited balance sheet for last three years i.e. for the financial years 2013-14, 2014-15 and 2015-16).

(B) For Indian Associate (Applicable in case of foreign bidder):

1.2.6 **Profile**

i) The Indian Associate (lA) should be authorized by Original Item Manufacturer (OIM). The Indian Associate should be in the business of manufacturing *I* fabrication of Stainless Steel goods *I* products *I* material carrying/trolley mounted equipment/ passenger baggage trolleys *I* maintenance of equipment *I* machineries for a minimum period of last 3 yrs.(as on 31st March, 2017)

ii) The Original Item Manufacturer should meet the eligibility requirements i.e. Profile, Resources, Experience and Satisfactory Performance Certificate of Clause 1.2.1, 1.2.2, 1.2.3 & 1.2.4 above.

iii) Indian Associate (lA) of OIM, should have current authorization from OIM firm authorizing it as its authorised Indian agent for the tender, shall be submitted.

iv) Indian Associate (lA) shall submit an undertaking stating that its firm or its Partners or its Directors have not been black listed or any case is pending or any complaint regarding irregularities is pending, in India or abroad, by any global international body like World Bank/International Monetary Fund/World Health Organization etc., or any Indian State/Central Government Departments or Public Sector Undertaking of India.

v) Only one Indian Associate (lA) shall be authorized by OIM firm for the offered product in the tender.

1.2.7 **Resources:**

The Indian Associate (lA) should have sufficient trained manpower to carry out Comprehensive Annual Maintenance Contract (CAMC) of passenger baggage trolleys at all consignee airports and should have adequate infrastructure like tools and plants to carryout CAMC at various airports *I* consignee place.

1.2.8 **Experience:**

The Indian Associate (lA) should have successfully completed works during last 7 years ending 31st March, 2017 which should be either of the following:

a) Three completed works of Comprehensive Annual Maintenance Contract (CAMC) *I* Annual Maintenance Contract (AMC) costing not less than value of~ 2.17 Crore each.

Or

b) Two completed works of Comprehensive Annual Maintenance Contract (CAMC) *I* Annual

Maintenance Contract (AMC) costing not less than value of~ 2.71 Crore each.

Or

c) One completed work of Comprehensive Annual Maintenance Contract (CAMC) *I* Annual Maintenance Contract (AMC) costing not less than value of~ 4.34 Crore.

1.2.9 **Satisfactory Performance Certificate:**

Satisfactory Performance Certificate from two end users for the experience claimed vide Clause 1.2.8 above.

1.2.10 **Turnover:**

The Indian Associate (lA) should have Average annual turnover during last three years ending 31'1 March, 2016 and it should be minimum ~ 1,62,60,0001- (Documents required: -Audited balance sheet for last three years i.e. for the financial years 2013-14, 2014-15 and 2015-16.

…………"

42. Apart from the above clauses, AAI relies on Clause 4.2 of the Technical Specifications (NIT), in support of its contention.

43. It is apparent that the tender conditions are not free from ambiguity. There is no specific condition that requires an Indian affiliate to import manufactured PBTs from its foreign principal. Although, it is contended that its foreign principal was the real bidder but none of the documents produced on record indicate that AAI had treated SJM as a party to the contract/Purchase Order.

44. The Arbitral Tribunal had examined the conduct of AAI and found that AAI was aware that the PBTs were being manufactured by BSS. This is also apparent considering that during the inspection that was conducted

by AAI on 02.11.2017, BSS had produced only parts of the PBTs such as bearings, wheels and identification number plates. Thereafter, AAI had accepted delivery of 550 PBTs without insisting on any document evidencing their import into India. The inspection of the second lot of 350 trolleys was conducted by AAI at the factory premises at Kolkata. It was BSS's case that AAI was fully aware that the PBTs were being manufactured by BSS. The said contention is not insubstantial. The Arbitral Tribunal did not specifically enter into the said controversy as it noted that it was not AAI's case that it had terminated the Contract with BSS because the PBTs were manufactured by BSS and had not been imported from SJM. AAI had terminated the Contract, *inter alia*, on the ground that the documents as required under Clause 4.2 of the Technical Specifications (NIT) had not been produced. Plainly, the said approach cannot be held to be perverse or patently illegal. Considering the facts in the present case, this Court is unable to accept that the impugned award is required to be interfered with on this ground.

45. The principal ground on which AAI has assailed the impugned award is that the Arbitral Tribunal had failed to consider that the Purchase Order had been procured by fraud. It is not disputed that BSS had submitted a bid as an Indian Associate of SJM. It is AAI's case that SJM did not fulfil the eligibility criteria as set out in Clause 1.2 of the tender documents and a fraudulent experience certificate purportedly issued by one Mr. Segun Jones, Purchase Manager at Heathrow Airport was furnished. AAI submitted that the said communication was found to be fraudulent as Heathrow Airport did not recognize SJM or their products.

One Jason Street, who AAI claimed was the Head of Legal, Commercial of Heathrow Legal Department, had by its email dated 16.06.2017 confirmed that no product of either SJM or BSS had been procured by Heathrow Airport. AAI stated that the said mail had been received in response to a query made by one Shine Metal Tech and that firm had informed AAI about the same. On receipt of the said information AAI had sent a letter dated 20.11.2017, which was followed by another letter dated 06.02.2018 and an email dated 23.03.2018 to Heathrow Airport Authorities/Officials. AAI claims that in response to the said email, Heathrow Airport confirmed that they did not recognize "the Company, product or Segun Jones". According to AAI, this clearly indicated that the contract in question had been procured by fraud.

46. In addition, it is also AAI's case that SJM had disassociated itself with the Contract in question as the target rates were not acceptable, yet BSS had proceeded with the Contract as an Indian affiliate.

47. Mr Rai, earnestly, contended that granting specific performance of a contract that has been procured by fraud would be compelling AAI to perform a contract secured by fraud and, the same falls foul of the fundamental policy of Indian law.

48. The Arbitral Tribunal had noted AAI's contention that the Purchase Order had been procured by fraud.

49. The Statement of Defence filed by AAI also included specific pleadings to the effect that the Purchase Order had been secured by fraud inasmuch as the certificates of experience to establish the eligibility of the

associated foreign entity, was forged and fabricated. The relevant extract from the Statement of Defence is set out below:

> "The Claimant has played a fraud on the Respondent inasmuch as per Clause 1.2.4, the Claimant was to submit Satisfactory Performance Certificate from two end users for the experience claimed vide Clause no. 1.2.3. The Claimant in compliance of the said Clause submitted a Satisfactory Performance Certificate from Suzhou Jinta Metal Working Co. Ltd., China dated 03.05.2017, that the end users were Heathrow Airport and Nao Bai International Airport who had issued the Satisfactory Performance Certificate to Suzhou Jinta Metal Working Co. Ltd., China. On Receipt of a Complaint, the Respondent sent Letters dated 20.11.2017, 07.12.2017 & 06.02.2018 followed by an e-mail dated 23.03.2018 to Heathrow Airport for verification of the said Satisfactory Performance Certificate. The Heathrow Airport vide email dated 23.03.2018 informed the Respondent that " Thanks for your note to our Jason Street, further to my earlier note, Heathrow Airport cannot help you further, we do not recognize the company, Product or Segun Jones". Hence, the Claimant or the Chinese Company namely- Suzhou Jinta Metal Working Co. Ltd., China, have played a fraud on the Respondent and have entered into a contract based on forged documents. Copy of the Satisfactory Performance Certificate dated 03.05.2017, copies of the Letters dated 20.11.2017, 07.12.2017 & 06.02.2018 and e-mails dated 23.03.2018 are collectively annexed herewith and marked as **Annexure R - 8 (Colly)**."

50. AAI's contention that it is entitled to avoid the contract in question since it had been procured on the basis of false and fabricated documents was not specifically considered by the Arbitral Tribunal.

51. Mr Singh earnestly contended that it must be assumed that the Arbitral Tribunal had rejected the said contention. He stated that the

documents filed by AAI in support of its contentions were not supported by any affidavit as required under Section 65B of the Indian Evidence Act, 1872. He further submitted that BSS had taken a specific plea that the said documents had been manipulated and had denied the same. It was, thus, incumbent on AAI to prove the same by leading cogent evidence. However, AAI did not lead any evidence but agreed that the Arbitral Tribunal may adjudicate the claims without the parties leading evidence. He submitted that this in effect amounted to AAI conceding to contest the proceedings without relying on the email communications stated to have been received from the officials of Heathrow Airport, London. In addition, Mr Singh also submitted that even if a fraud was established, the same renders a contract voidable. In the present case, even though some of the communications relied upon by AAI to allege fraud in procurement of contract by BSS were in its possession prior to the date of its termination of the Purchase Order, AAI had not terminated the contract on the ground of fraud. He submitted that in the aforesaid view, it must be assumed that AAI did not wish to terminate the contract on any allegations of fraud. Lastly, he had submitted that according to AAI, an enquiry had been conducted by the Indian Consulate in China and letters had been written to SJM enclosing therewith the certificates of experience, which according to AAI were fabricated. SJM had not disputed the same and therefore, it is apparent that even if the said certificates of experience are not authentic, the same were furnished by SJM and, BSS was unaware of any irregularity. Thus, BSS was a victim rather than a person perpetuating any fraud.

52. Mr. Singh further stated that even in the case, this Court found that the impugned award could be faulted for want of providing reasons for rejecting the AAI's defence of fraud, the present petition could be adjourned in terms of Section 34(4) of the A&C Act, to enable the parties to resume arbitration before the learned Arbitrator and to enable the Arbitrator to furnish reasons for rejecting AAI's defence.

53. It is clear from the contentions advanced on behalf of BSS that the issue whether the Purchase Order had been secured on the basis of forged and fabricated documents is a contentious issue. It is not disputed that if AAI established that the Purchase Order was procured by fraud and it was within its right to contract, specific performance of the said contract could not be granted notwithstanding that the same was not one of the reasons stated in the letter of termination. It is also material to note that some of the documents relied upon by AAI, particularly the email dated 23.03.2018 which is stated to have been received from officials of Heathrow Airport, London confirming that they were not aware of Mr. Segun Jones or the company in question (SJM), is after AAI had terminated the contract.

54. Considering the above, this Court is of the view that AAI's defence that the Purchase Order had been procured by fraud was one of the essential issues that was required to be addressed by the Arbitral Tribunal. It is apparent from the plain reading of the impugned award that the Arbitral Tribunal has not addressed the said issue. The Arbitral Tribunal has proceeded on the basis that since the reasons as stated in the letter of termination were not merited, BSS was entitled for specific performance of the contract in question. However, if it is established that the Purchase

Order had been procured by fraud, directing its specific performance clearly falls foul of the fundamental policy of Indian law. Since the aforesaid issues – that is, whether the Purchase order had been secured by fraud and if so, whether AAI was entitled to avoid the contract – were undoubtedly part of the principal controversy between the parties and in absence of any decision on the said dispute, the impugned award cannot be sustained.

55. The contentions advanced on behalf of BSS that in absence of reasons on the aforesaid issue, the present proceedings are required to be adjourned to enable the parties to resume arbitration, is unpersuasive. This is not a case where reasons for the conclusion are sketchy and require clarification. In the present case, the Arbitral Tribunal has not decided one of the principal disputes between the parties. This defect cannot be cured by adjourning the present proceedings to enable the Arbitral Tribunal to issue any clarification/reasons. More importantly, the decision on questions whether the Purchase Order was secured by fraud and whether AAI is entitled to treat the same as void would have a material bearing on the relief granted to BSS. The scope of Section 34(4) of the A&C Act is limited and it can be resorted to enable the arbitrator to cure certain curable defects.

56. In view of the above, the impugned award is set aside.

57. It is clarified that BSS is at liberty to refer the disputes to arbitration. It is noted that the parties had in the petition filed under section 11 of the A&C Act (being ARB.P. 490/2018) agreed that the disputes be referred to

arbitration, should be conducted under the aegis of DIAC and in accordance with its Rules. The parties would continue to be bound by their consent in this regard. Thus, if the parties are unable to concur on the appointment of an Arbitrator, BSS would be at liberty to approach DIAC for appointment of an arbitrator. Considering that the impugned award has been set aside because the Arbitral Tribunal had not decided one of the vital issues, it would be open for DIAC to appoint the same learned arbitrator to adjudicate the disputes.

58. The petition is disposed of with the aforesaid observations. All pending applications are also disposed of.

VIBHU BAKHRU, J

MAY 27, 2021
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