IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMM.ARBITRATION PETITION NO.576 OF 2019

Union of India through Divisional Mechanical
Engineer (Coaching)/Sr.Cog.Depot Officer …Petitioner
VS.
M/s.A2Z Infraservices Ltd. ...Respondent

Mr.T.J.Pandian with Mr.Dheer Sampat, for the Petitioner.

Mr.Ravish Mishra, for the Respondent.

CORAM : G.S. KULKARNI, J.

DATE : APRIL 28, 2022.

P.C.:

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act,1996, whereby a challenge has been made to an award dated 12 October 2018, rendered by a three member arbitral tribunal. The disputes and differences between the parties have arisen under the contract agreement No.BB.M.104.C&W.40.Mech.Clg.LTT dated 11 October 2012.

2. A open tender No.DRM.Mech.BB.2011.17 dated 9 December 2011 was invited by the petitioner for the work of “Mechanised Cleaning, Watering of Rakes etc., in rakes” at Lokmanya Tilak Terminus Coaching depot of Mumbai Division of Railway. Such tenders were opened some

time in January 2012. Thereafter, negotiations had taken place between the parties on 29 June 2012. A work order was issued in favour of the respondent under the said tender on 11 October 2012 being the contract in question. The period of the contract was from 11 October 2012 till 30 November 2015. There was extension to the contract period by consent of the parties upto 10 July 2016. As per the terms and conditions of the contract, the respondent from time to time had raised bills. However, there was a separate bill raised for price variation, as per the price variation clause as contained in the contract. The price variation clause being Clause No.12(iii) of the Special Conditions of Contract reads thus:-

> "12. Price Variation Clause:
> …….
> (iii) For calculation of PV on account of Labour, the All India Consumer Price Index Numbers of Industrial workers (Base 2001=100) published in RBI Bulletins shall be used. The base shall be taken as the index no. (All India Average) as on date of opening of tender. For a particular quarter, the average index for that quarter shall be worked out and variation with reference to the base index no. shall be taken into account for calculation purpose."

3. The contention of the respondent was that the respondent was entitled for the price variation on the ground that the base price was taken as per the Index number (All India Average) as on date of opening of tender and accordingly, the bills were raised. A demand on the basis of the price variation clause was made by the respondent. As such bills were not honoured, the respondent invoked arbitration and accordingly an arbitral tribunal came to be constituted. The respondent made a

claim of Rs.1,48,08,265/- being the amount of differential price variation which was wrongly deducted by the petitioner from the bills, by not applying the Index on the date of the opening of the tender but on the basis of the price as applicable as per the Circular dated 16 March 1988. The arbitral tribunal in paragraph 1.1 of the impugned award has noted the said dispute between the parties to be of the following nature:

> "1.1 The claimant represented that the base month for calculation of Price Variation amount should be considered as month of opening of tender as per Conditions of Contract. But the Respondent decided "that the base month for the calculation of Price Variation would be the month of Negotiation in terms of Railway Board instructions dated 16/03/1988". Accordingly, the Respondent kept on paying inspite of correspondence by the claimant."

4. The arbitral tribunal considering the rival contentions has rendered the final award thereby allowing such claim of Rs.1,48,08,265/- of the respondent. The tribunal has considered the terms and conditions of the contract, holding that the special conditions of the contract as per Clause 12(iii) as noted above had become applicable and hence, the action on the part of the petitioner to apply the regular board instructions as contained in the Circular dated 16 March 1988 was not an appropriate action in clearing the bills of the respondent. It was held that Clause 12(iii) of the Special Conditions of the Contract was binding between the parties. It was categorically held that the Railway Board instructions were not part of the agreement, hence the same could not be considered to be binding between the

parties, and what would prevail is the applicability of price variation clause as contained in the Special conditions of the contract. The tribunal has also considered the further material as placed on record on the arbitral proceedings, namely, the General Conditions of Contract for Services 2018 Ministry of Railways, under which in Clause 5.7.2 it was provided that the base month for price variation clause is to be taken as the month of opening of bids including extensions, if any, unless otherwise stated elsewhere. It was thus observed by the arbitral tribunal that Clause 12(iii) of the Special Conditions of Contract having clearly provided that the base for price variation shall be taken as the index no. as on the date of opening of the tender, the respondent would be entitled to such amount as per the said clause and not applicability of the instructions of the railway board's Circular dated 16 March, 1988, which was being foisted upon the respondent by the petitioner. The relevant observations of the tribunal are required to be noted which reads thus:-

> "The CI 12 (iii) of Special Conditions of Contract stipulate that the base for price variation shall be taken as the index no as on the date of opening. The Date of Opening is an unambiguous date and the date of negotiations cannot be considered as date of opening by any stretch of imagination.
>
> The Railway Board instructions of 17/07/1988 were not part of the agreement so it cannot be considered binding on the parties.
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> The latest GCC for Service 2018 Ministry of railways was also perused. Clause 5.7.2 is regarding Base Month. It reads as follows "The Base Month for Price Variation Clause shall be taken as the months of the opening of bids including extensions, if any, unless otherwise stated elsewhere.

> Hence it is concluded that the base month for the calculation of Price Variation amount should be considered as date of opening. The differential price variation amount Rs.1,48,08,265 withheld should be released to the claimant."

5. In my opinion, the finding as recorded by the tribunal are based on materials and more particularly by applying the contractual clauses. The petitioner is not in a position to point out that these observations can be rendered perverse or attracting any ground for interference under Section 34 of the Act. The observations are completely with the four corners of the contract and in fact the award remedied the situation when the petitioner sought to deviate from the applicability of the clauses of the contract and applying the railway board instructions dated 16 March, 1988, which were not part of the contract, in regard to the price variation. In the teeth of clause 12(iii) of the Special Conditions of Contract and as rightly observed by the arbitral tribunal, certainly the railway board instructions dated 16 March 1988 could not have been applied. If the insistence as made by the petitioner before the arbitral tribunal was to be accepted, it would have rendered the very contractual condition [clause 12(iii)] otiose and/or no effect. Thus, in regard to the awarding of an amount of Rs.1,48,08,265/- being Claim no.1 as granted by the arbitral tribunal in favour of the respondent, no interference in the award is called for.

6. In so far as the claim of interest as awarded by the tribunal is

concerned, it is clear that the tribunal has awarded interest at the rate of 18% per annum for a period which includes the period during which the arbitral proceedings were pending. In such context, Mr. Pandian, learned Counsel for the petitioner would submit that the award would be certainly required to be considered bad when it awards interest for the said period in view of the specific clause as contained in the contract, namely, Clause 64(5) of the GCC under which the parties agreed that where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made. Learned Counsel for the respondent has fairly, on instructions, agreed that the respondent would not insist for any interest as awarded by the arbitral tribunal in granting Clause No.2 namely the period which would go contrary to what is agreed between the parties under Clause 64(5). Thus, accepting such statement as made on behalf of the respondent, no further adjudication on this issue is required.

7. In pursuance of the interim order dated 24 September 2019, the award amount of Rs.1,48,08,265/- was deposited by the petitioner in this Court and the same was withdrawn by the respondent, subject to furnishing of bank guarantee. Thus, in the above circumstances, the bank guarantee is also required to be returned/discharged. Let the same be returned to the respondent by the Registry within one week from

today.

8. The proceedings are disposed of in the above terms. No costs.

[G.S. KULKARNI, J.]