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

% *Date of Decision: 30th August 2022*

\+ **FAO (COMM) 126/2022, CM Nos.37572/2022, 37573/2022, 37574/2022, 37575/2022 & 37576/2022**

UNION OF INDIA THORUGH EXECUTIVE ENGINEER ..... Appellant

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kr. Saxena, Mr. Mukesh Kr. Tiwari, Mr. Ramneek Mishra, Ms. Mansi Verma and Mr. Channan Lal Sharma, Advs.

versus

M/S SWADESHI CIVIL INFRASTRUCTURE PVT LTD ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. ***(ORAL)***

1. The appellant has filed the present appeal under Section 37 of the Arbitration and Conciliation Act (hereafter **'the A&C Act'**), impugning an order dated 20.04.2022, passed by the learned Commercial Court, whereby the appellant's application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 15.09.2018 (hereafter **'the impugned award'**), was rejected.

2. The controversy in the present case, essentially, relates to the respondent's claim for refund of the Security Deposit, which was

retained by the appellant. The Security Deposit was to be released on completion of five years from the completion of works. After the expiry of the said period, the appellant has, *suo moto*, adjusted certain claims against the Security Deposit. Such claims not only included claims in respect of the contract in question (the contract in respect of which the Security Deposit was furnished) but ten other contracts as well.

3. According to the appellant, certain excess payments were made to the respondent as reimbursement of service tax and it was entitled to adjust the same from the Security Deposit. It is the respondent's case that the respondent was entitled for reimbursement of service tax paid in respect of the contracts entered into between the parties.

4. The appellant claims that there was an error in calculation of the said service tax, inasmuch as, the service tax was calculated on the gross amount of invoices, which included the Value Added Tax (VAT). According the appellant, the VAT was required to be deducted from the gross amount and the service tax was payable only on the amount sans the VAT component.

Factual Context

5. The brief facts relevant to address the controversy are as under:

5.1 The respondent issued a Notice Inviting Tender (hereafter '**the NIT**') for the works regarding "*Providing & Fixing of seating arrangement for Common Wealth Games-2010 venues in Delhi i.e. Jawaharlal Nehru Stadium, major Dhyan Chand Stadium and Dr Karni*

Singh Shooting Range Part 'A': Seats for Upper Tier of Jawaharlal Nehru Stadium, New Delhi".

5.2 Pursuant to the said NIT, the respondent submitted its bid for executing the aforesaid works on 25.09.2009. The respondent's bid for a contract value of ₹5,24,25,000/- (Rupees Five Crores Twenty-Four Lakhs and Twenty-five Thousand only) was accepted and the appellant, thereafter, issued a Letter of Award on 27.11.2009 (hereafter '**the LoA**'), in favour of the respondent. In terms of the LoA, the respondent was required to submit a Performance Guarantee for a sum of ₹26,21,250/-, within a period of ten days from the issue of the LoA.

5.3 Thereafter, the parties entered into a formal agreement bearing no. 02/EE/CWDG-1/2009-10 (hereafter '**the Contract**'). In terms of the Contract, the stipulated date for commencement of the works was 12.12.2009, and the said works were to be completed within a period of three months, that is, on or before 11.03.2010.

5.4 In addition to the Contract, the parties had entered into other contracts in respect of separate works concerning the Commonwealth Games and had performed those contracts. There is some inconsistency in the record with regard to the number of such other contracts. Whilst in certain records, including in the Memorandum of Appeal, it is mentioned that there were eleven contracts, the impugned order mentions a total of ten contracts. For the purposes of this petition, it is assumed that there were eleven contracts in all. The present case concerns the respondent's claim for refund of the Security Deposit furnished in respect of the Contract.

5.5 Admittedly, the works were duly completed and the time for completion of the works was extended till the actual date of completion, that is, on 03.07.2010, without levy of any liquidated damages.

5.6 In terms of the Contract, 10% of the Contract value of ₹5,24,25,000/- was required to be retained (that is, a sum of ₹52,42,500/-) as Security Deposit. This was complied with by deducting certain amounts from the Running Account Bills raised by the respondent. In addition, the appellant had also submitted an Earnest Money Deposit (EMD), which was retained as a part of the Security Deposit.

5.7 The aforesaid amount (₹52,42,500/-) was retained in the form of two Fixed Deposit Receipts furnished by the respondent. The first, being a Fixed Deposit (FD) bearing no. 321273711 for ₹23,75,500/-, furnished as an EMD. The second, being a FD bearing no. 32127372140 for an amount of ₹28,67,000/-, which reflected the amounts withheld by the appellant from the Running Account Bills (R/A Bills) as mentioned below:-

> "1st RA Bill - Security Deposit Deducted = ₹3,07,700/-
>
> 2nd RA Bill - Security Deposit Deducted = ₹13,19,221/-
>
> 3rd RA Bill - Security Deposit Deducted = ₹12,40,079/-
>
> Total Deduction Made = ₹28,67,000/-"

5.8 As noted above, the work was duly completed on 03.07.2010 and the appellant also issued a Completion Certificate. In terms of the Contract between the parties, the Security Deposit, as retained by the appellant, was required to be refunded to the respondent after five years from the date of completion of the Contract. Indisputably, the Security Deposit was required to be returned on 03.07.2015.

5.9 The record indicates that on completion of the said period of five years, the respondent, by a letter dated 22.07.2015, requested the Executive Engineer of the appellant to release the Security Deposit. However, the said amount was not released. Thereafter, by another communication dated 04.11.2015, the respondent, once again, requested the concerned Superintending Engineer for release of the Security Deposit.

5.10 Subsequently, the respondent, by a communication dated 14.11.2015, requested the Chief Engineer to release the said Security Deposit as no action had been taken by the Superintending Engineer. Another letter dated 17.11.2015 was sent to the Chief Engineer by the respondent, requesting him to either direct the Executive Engineer to release the Security Deposit within a period of fifteen days or appoint an arbitrator in terms of Clause 25 of the Contract.

5.11 The appellant, on the other hand, issued notices informing the respondent regarding certain excess payments made on account of the Service Tax in respect of the Contract as well as other contracts (ten in number). The appellant, by a notice dated 17.12.2015, sought to adjust a sum of ₹43,167/- being the alleged excess payment made and a sum of ₹24,511/- as interest thereon, in respect of the Contract.

5.12 As noted above, apart from an aggregate amount of ₹67,678 (₹43,167 as excess payment plus ₹24,511 as interest), the appellant also sought to adjust the alleged excess payment of Service Tax made in respect of the ten other separate contracts, which had been duly performed.

5.13 It is pertinent to mention that out of all the contracts, only the Security Deposit in respect of the Contract was available with the appellant and the deposits made in respect of the other contracts, had been refunded to the respondent.

5.14 On 18.12.2015, the appellant released the Fixed Deposit Receipt (FDR) for an amount of ₹23,75,500/- which was furnished as EMD. However, the remaining FDR for a sum of ₹28,67,000/-, was not returned. Instead of returning the said FDR as well, the appellant enchased the same and recovered the amount. Thereafter, on 02.06.2016, the appellant released an amount of ₹6,75,165/-, in favour of the respondent.

5.15 Considering that the remaining Security Deposit was not released in favour of the respondent, the respondent, by a letter dated 26.06.2016, invoked the agreement to refer the disputes to arbitration, in terms of Clause 25 of the Contract and requested the Chief Engineer to appoint the arbitrator to adjudicate the disputes between the parties. Accordingly, by a letter dated 15.07.2016, the Chief Engineer appointed a sole arbitrator. The said arbitrator demitted the office and thereafter, on 18.03.2017, the Chief Engineer appointed the learned Sole Arbitrator (the Arbitral Tribunal).

6. Before the Arbitral Tribunal, the respondent made the following claims:-

> **"4.0 CLAIMS**
>
> The details of claims are as follows;
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> | | |
> |---|---|
> | 1) Claim No 1:- | Claimant claims an amount of Rs. 28,67,000/- on account of non-release of balance amount of security deposit. |
> | 2) Claim No.2:- | Claimant claims interest @18% pa on above amounts(delayed/short payments) from its due date till the date of payment including pre-reference interest, pendente-lite interest and future interest |
> | 3) Claim No.3:- | Claimant Claims Rs 5,00,000/- towards the Cost of arbitration proceeding." |

7. During the course of the arbitral proceedings, the respondent revised Claim no.1 to ₹21,97,835/- as an amount of ₹6,75,165/-, was already refunded by the appellant on 02.06.2016.

8. The Arbitral Tribunal examined the said claims and entered the impugned award, in favour of the respondent. The dispositive part of the impugned award reads as under:

"**8.0 Award Summary:-**

8.1 Following is the summary of Claims awarded.

Claim No 1: - Rs. 67,678/- (Rupees Sixty-Seven Thousand Six Hundred Seventy-Eight Only)

Claim No 2: - Rs. 4,28,985/- (Rupees Four Lakhs Twenty-Eight Thousand Nine Hundred Eighty-Five Only)

Claim No 3: - Rs 4,00,000/- (Rupees Four Lakhs Only)

8.2 Following is the summary of Counter claims

Counter Claim No 1: - Nil."

9. On 13.10.2018, the respondent, by way of an application under Section 33 of the A&C Act, sought correction in the impugned award in respect of the amount awarded by the Arbitral Tribunal against Claim no. 1. The Arbitral Tribunal allowed the said application filed by the respondent and, by an award dated 31.01.2019, it revised the amount awarded under Claim no.1 to ₹21,91,835/-.

10. The Arbitral Tribunal found that there was no dispute that the respondent had paid the service tax, as reimbursed by the appellant. The Arbitral Tribunal further found that during the course of the Contract, the respondent had presented bills fully disclosing the calculation of the service tax. The payments against the same were made by the appellant after duly verifying the same. The appellant was thus, also responsible for the error in computation of service tax.

11. At the relevant stage, there was no objection raised by the

appellant regarding miscalculation of the service tax. The respondent had also duly deposited the same with the concerned authorities. It is not in dispute that the respondent would not be entitled to any refund from the concerned authorities, even if it was found that an excess payment had been made, since such a refund was time-barred.

12. The Arbitral Tribunal examined the Contract between the parties and found that the respondent was entitled to reimburse the service tax, which was "actually paid". According to the appellant, this was required to be limited only to the amount that was rightfully payable and therefore, it was entitled to recover the additional service tax that was, according to the appellant, erroneously paid by the respondent.

13. Considering that the appellant has not raised this issue for over a period of more than five years and had done so only five months after its obligations to refund the Security Deposit had arisen, the Arbitral Tribunal found that its actions were highly belated.

14. It was the respondent's case that the liability to pay the service tax rested entirely with the appellant and it was merely a pass-through entity. Whilst the appellant did not dispute its liability to pay the service tax, it did dispute that it was liable to pay any amount other than what was assessable in the hands of the respondent.

15. Considering the conspectus of disputes, the Arbitral Tribunal found that the appellant was not entitled to make any adjustment of the Security Deposit at a belated stage.

16. In so far as the adjustments made by the appellant in respect of the other contracts (that are, ten separate contracts other than the Contract in question) are concerned, the Arbitral Tribunal found that in terms of Clause 29 and 29A of the Contract, the appellant could retain a lien on the Security Deposit but was not authorised to appropriate the same without the parties mutually agreeing or referring the disputes to arbitration.

17. The appellant challenged the impugned award by filing an application under Section 34 of the A&C Act [being *OMP (COMM) 66/2019* captioned *Union of India v. M/s Swadeshi Civil Infrastructure Pvt. Ltd*.]. The appellant's application under Section 34 of the A&C Act impugning the arbitral award was rejected, principally, for the reason that the learned Commercial Court did not find the impugned award either perverse or vitiated by patent illegality. The learned Commercial Court was of the view that the Arbitral Tribunal's decision was a plausible one and thus, warranted no interference under Section 34 of the A&C Act.

Submissions

18. Mr. Ruchir Mishra, learned counsel appearing for the appellant, submitted that there was no dispute that excess service tax was paid and therefore, this issue was not required to be adjudicated. He referred to Clause 4.3 of the General Conditions of the Contract (GCC), which required the bidders to quote rates exclusive of service tax. It is expressly provided that "*if service tax is payable, the contractor shall*

be reimbursed actually paid service tax on production of documentary evidences". He submitted that the liability of the appellant to pay service tax was limited to the service tax that was payable in law and not any amount in excess thereof. Therefore, the appellant was entitled to adjust the same from the Security Deposit.

19. He also referred to the letter dated 12.10.2010, furnishing the service tax paid in respect of the "*6th and Final Bill of upper Tier*", whereby the respondent had undertaken that if any discrepancy was found at a later stage, it would return the amount reimbursed by the appellant with interest. He stated that similar undertakings were furnished in respect of all the reimbursements and submitted that in view of the said undertakings, it was not open for the respondent to resist the recovery of the excess amount of service tax.

Reasons and Conclusion

20. As noted hereinbefore, there is no dispute that the appellant had agreed to reimburse the service tax that was "actually paid" on production of documentary evidence. Service Tax is an indirect tax although – except in certain cases such as export services – it is assessed in the hands of the service provider. It being an indirect tax, the same is borne by the one who pays for the services. In some cases, it may be included as part of the consideration and, in other cases, it may be invoiced separately. In the present case, in terms of Clause 4.3 of the GCC, the respondent was required to quote rates exclusive of service tax. Thus, the service tax was not included in the quoted rates and was

required to be paid separately. Admittedly, it was reimbursed on the basis of production of documentary evidence to establish that the service tax had been paid.

21. The Arbitral Tribunal, on examination of a Measurement Book dated 11.11.2010, found that officers of the appellant had calculated service tax at the rate of 4.12% of the value of work. The Arbitral Tribunal concluded that both the appellant as well as the respondent were *ad idem* as to the service tax payable on the value of the works executed. There is no cavil with this finding of the Arbitral Tribunal. The appellant does not dispute that it had also calculated the service tax on the value of the work, which included the VAT. Thus, the conclusion of the Arbitral Tribunal that both the parties had participated in the exercise to calculate the extent of reimbursement of service tax, cannot be faulted.

22. We concur with the conclusion of the Arbitral Tribunal that the appellant had fully participated in the exercise to calculate the extent of reimbursement of the service tax. In any view, this finding is on a question of fact and there is no ground to interfere with the same under Section 34 of the A&C Act.

23. Given that service tax is in the nature of an indirect tax payable by the appellant – although assessed in the hands of the respondent – and the finding that the appellant had participated in the reimbursement of the service tax; the conclusion of the Arbitral Tribunal that the appellant must bear the excess payment, if any, cannot be held to be

patently erroneous or one that would warrant any interference by this Court.

24. Mr Mishra had relied on Clause 4.3 of the GCC. The said clause reads as under:

> "4.3 Quoted rates should be exclusive of the service tax. If service tax is payable, the contractor shall be reimbursed actually paid service tax on production of documentary evidences."

25. In terms of the aforesaid clause, the appellant had agreed to reimburse "*actually paid service tax*" on production of documentary evidence. The Arbitral Tribunal had concluded that in view of the aforesaid clause, the respondent was obliged to reimburse the service tax as actually paid. There is no dispute that the service tax reimbursed to the respondent was actually paid by it to the concerned service tax authorities. Thus, in terms of the Contract, the appellant was not entitled to recover the amount reimbursed to the respondent.

26. It is settled law that questions regarding construction of a contract falls within the jurisdiction of an arbitral tribunal. The decision of an arbitral tribunal in this regard would be final unless the court finds that the interpretation is perverse and one that no reasonable person could possibly accept [See: ***Mc Dermott International Inc. v. Burn Standard Co. Ltd & Ors: (2006) 11 SCC 181***]. In this case, this Court is unable to accept that the said conclusion warrants any interference on the anvil of the aforesaid test.

27. The Arbitral Tribunal also noted that the report containing the

audit objection was received by the appellant on 07.10.2011 but was not communicated to the respondent before 17.12.2015, which was more than four years after receipt of the report. It is not disputed that no refund could be claimed from the service tax authorities after the period of one year. Thus, any recourse to claim refund from the service tax authorities stood extinguished.

28. The contention that it was not permissible for the respondent to resist recovery of excess service tax, in view of the undertaking furnished by it, is also unpersuasive.

29. The letter dated 12.10.2010 referred to by Mr. Mishra is relevant and reads as under: -

> "No. SCG/2010/183 Dated: 12.10.2010
>
> To,
> The Executive Engineer
> CWGDI, CPWD,
> J.N. Stadium Complex, Lodhi Road,
> New Delhi – 110003.
>
> Sub: Providing & fixing of seating Arrangement for Commonwealth Games – 2010 venues in Delhi i.e. Jawaharlal Nehru Stadium, Major Dhyan Chand National Stadium & Dr. Karni Singh Shooting Range, Part 'A' Seats for Upper Tier of Jawaharlal Nehru Stadium, Major Dhyan Chand National Stadium, Dr. Karni Singh Shooting Range, New Delhi. Regarding reimbursement of service Tax.
>
> Dear Sir,
>
> We are submitting the details of service tax paid by us against the R/A bills in respect of above works.

No.	Bill No.	Amount of Bill	Service Tax paid	Bank Payment Ref. No.
1.	6th & Final Bill of Upper Tier	3,23,62,350/-	5,09,329/-	CK05545185 CK05546253

2.	2nd & Final Bill of Lower Tier	83,23,848/-	3,42,943/-
	Total	Rs.2,06,86,198/-	Rs.8,52,272/-

Further we hereby assure you that the above amount pertains to the above works only and undertake full responsibility. In case CPWED found any discrepancy on above at a later date, we shall return back the amount reimbursed by CPWED with interest.

You are requested to kindly reimburse the service tax paid by us.

Two photocopies of receipts are enclosed herewith.

Yours faithfully,
Sd/-
For Swadeshi Construction Co."

30. This Court is unable to accept the contention that the respondent had furnished any undertaking that it would be responsible for the accuracy of the quantum of service tax as mentioned in the said letter. The respondent had assured the appellant that the amounts as claimed pertained to the "*works as mentioned*" and had also undertaken that in case any discrepancy was found on the above, it would return the amount with interest. It is apparent that the undertaking was limited to the assurance that the service tax pertained only to the works as mentioned. As noted above, the respondent was required to produce documentary evidence regarding payment of service tax for claiming any reimbursement. It was obvious that the respondent was also required to establish that the service tax paid was only in respect of the works performed under the Contract. The assurance held out by the respondent was to the aforesaid effect, that is, the service tax reimbursement as sought was relatable to the works as mentioned in the said letter. The Arbitral Tribunal had also interpreted the undertaking

furnished by the respondent as stated above. This Court finds no infirmity with the said conclusion.

31. The Arbitral Tribunal had also referred to Clauses 29 and 29A of the Contract and faulted the appellant for adjusting any amount allegedly recoverable in respect of other contracts. The Arbitral Tribunal held that in terms of Clause 29 of the Contract, the appellant was entitled to withhold any amount due to the respondent and retain the same till adjudication of any claim. However, the appellant had overstepped the said powers and appropriated the Security Deposit without seeking any adjudication of its claim. Sub-clause (i) of Clause 29 and Clause 29A are relevant and set out below:

"Clause 29

With-holding and lien in respect of sums due from contractor	(i)	Whenever any claim or claims for payment of a sum of money arises out of or under the contract or against the contractor, the Engineer-in-Charge or the Government shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any deposited by the contractor and for the purpose aforesaid, the Engineer-in-Charge or the Government shall be entitled to withhold the security deposit, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Engineer-in-Charge or the Government shall be entitled to withhold and have a lien to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which

may at any time thereafter become payable to the contractor under the same contract or any other contract with the Engineer-in-Charge of the Government or any contracting person through the Engineer-in-Charge pending finalization of adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above by the Engineer-in-Charge or Government will be kept withheld or retained as such by the Engineer-in-Charge or Government till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) by the competent court, as the case may be and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Engineer-in-Charge or the Government shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company as the case may be, whether in his individual capacity or otherwise.

CLAUSE 29A

Lien in respect of claims in other Contracts	Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Engineer-in-Charge or the Government or any other contracting person or persons through Engineer-in-Charge against any claim of the Engineer-in-Charge or Government or such other person or persons

> in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Engineer- in-Charge or the Government or with such other person or persons.
>
> It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Engineer-in-Charge or the Government will be kept withheld or retained as such by the Engineer-in-Charge or the Government or till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitration clause or by the competent court, as the case may be and that the contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor."

32. A plain reading of Sub-clause (i) of Clause 29 of the Contract clearly indicates that the Engineer-in-Charge would be entitled to withhold any amount due or have a lien in respect of any claim for payment of a sum of money against the contractor. Such amount can be retained only till adjudication of the claims. In the present case, the appellant had not taken any steps for adjudication of any of its claims. The Security Deposit, in the present case, was in the form of FDRs. Thus, even if the appellant desires to exercise its right under Clauses 29 and 29A of the Contract, in respect of any claim against the respondent, it could, at best, exercise a lien on the FDRs till adjudication of its claim. It was clearly not open for the appellant to encash the FDRs and appropriate the amounts towards its claim.

33. In view of the above, this Court finds no ground to interfere with

the impugned order rejecting the appellant's challenge to the impugned award under Section 34 of the A&C Act. This Court is unable to accept that the impugned award is vitiated by patent illegality or is in conflict with the public policy of India.

34. It is well-settled that the scope of interference by an appellate court under Section 34 of the A&C Act is limited. Unless the Court finds that the impugned award is in conflict with the public policy of India or is vitiated by patent illegality on the face of the record, no interference is permissible.

35. This Court is unable to accept that Arbitral Tribunal's decision is perverse or one that no reasonable person could possibly accept. In this view, the decision of the learned Commercial Court to reject the appellant's application under Section 34 of the A&C Act, cannot be faulted.

36. The appeal is unmerited and, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

AUGUST 30, 2022
'KDK'/Ch