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

Date of Decision: 22.03.2024

+ **O.M.P. (COMM) 135/2024, I.A. 6795/2024, I.A. 6796/2024**

UNION OF INDIA, THROUGH DEPARTMENT OF POSTS

..... Petitioner

Through: Mr. Niraj Kumar, Sr. Govt. SC. with
Ms. Renu Grover, Adv.

versus

M/S. TECH MAHINDRA LTD.

..... Respondent

Through: Mr. Ajoy Roy, Ms. Neha Goel, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

I.A. 6794/2024

1. Exemption is granted subject to all just exceptions.
2. The petitioner shall file legible and clearer copies of exempted documents, compliant with practice rules before the next date of hearing.
3. The application is disposed of.

O.M.P. (COMM) 135/2024

1. This is a petition seeking setting aside of the Arbitral Award dated 06.01.2024 passed by the Sole Arbitrator.
2. Briefly stating the facts in the present case are that on 19.12.2012, the petitioner issued a Request for Proposal (“RFP”) with the intent to implement the Project Management Tool (“PM Tool”) application for managing India Post 2012 Modernisation Project (“Project”). The purpose



of RFP was to obtain bids for appointment of a System Integrator, which would be responsible to supply, install and implement the project. The respondent participated in the bidding process and was the successful bidder under the RFP.

3. Pursuant to the same, the parties signed a Master Service Agreement (“MSA”) and the Service Level Agreement (“SLA”) on 27.06.2014 for a contractual value of Rs. 6,95,09,001/-. The MSA and SLA read alongwith RFP defined the scope of the project and the respective rights and obligations of the parties.

4. The scope of work and various stages of the project were as under:

“A. Design, Build, Supply, Installation, Commissioning and Maintenance of the PM Tool application.

B. Installation and Commissioning of the proposed solution over central server.

C. Integration with Project Management Tools brought in by other System Integrators such as CSI, RSI, FSI NT and CM vendor.

D. Deployment of the complete Project Management Tool in DOP (HQ) and approximately 22 Circle, 37 Regional, 510 Divisional offices and 22 PAOS.

E. Training the Department of Posts’ Trainers and nominated representatives of other System Integrators such as CSI, FSI, RSI, RH, DC, NI, CM and MOH on use of application.

F. Operations and Maintenance of the PM Tool.”

5. As there were disputes between the parties, the parties were referred



to arbitration and subsequently an award for a sum of Rs. 2,48,86,900 along with interest was passed in favour of the respondent. It is this award which is being challenged by the petitioner.

6. Mr Kumar, learned counsel appearing for the petitioner states that the award is vitiated by patent illegality which is evident on the face of the award. He submits that the learned Arbitrator has not taken into account the terms of the contract and trade usages applicable to the transaction (28(3) of the Arbitration and Conciliation Act, 1996). Hence the award should be set aside.

7. Mr Kumar further argues that there is no documentary proof placed on record before the learned Arbitrator to show that the SLAs were provided by the respondent to the petitioner.

8. He further submits that in the present case, no services were rendered for Milestone 7 and even the bill was raised as an afterthought. Hence, the same is contrary to the terms of the contract. Lastly, he submits that the claim No. 3 has been wrongly decided by learned Arbitrator by going beyond the terms of the contract.

9. Heard learned counsel for the parties.

10. While exercising section 34 jurisdiction, the scope of interference with the Arbitral Award is very limited. The Hon'ble Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131*** has held as under:-

“37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as



goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground



for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse. ”

11. Now coming back to the contentions raised by the learned counsel for the petitioner.

12. Firstly, Mr Kumar urges that there is no documentary proof that SLAs were provided by the respondent to the petitioner. In this regard, the learned Sole Arbitrator has dealt with non-supply of SLAs in detail in paras 59 to 64 of the Arbitral Award. The same read as under:-

“59. Learned counsel for the Claimant has also clarified that the SLAs were very much submitted to the Respondent and are available on record in the system. Further, after termination of the contract, the Claimant is not in a position to access the system/records, which are available with the Respondent under control of the Respondent now, post termination. What follow is that the Claimant has clarified that SIA in question were recorded in the system itself. The Claimant did not keep hard-copy of the SLA. In the alleged absence of SIA, the Respondent could have terminated the Agreement or imposed penalties which it did not do. As already noted above, no reminder was ever sent to the Claimant stating that SLA reports were not filed. After termination of the Agreement, the Claimant was unable to access the system and is unable to produce the SLA. The Respondent has not been able to rebut the said contentions of the Claimant. In these facts and circumstances, there is no reason to doubt or dispute the plea of the Claimant regarding filing of the SLA report.

60. Learned counsel for the Respondent has also sought to rely upon



the minutes of the PM Tool Project Implementation Committee dated 23.02.2018. The said minutes in Sr. No.3 states as follows:

<i>Sl. No.</i>	<i>Item</i>	<i>Description</i>	<i>Action Owner</i>
3.	<i>SLA methodology and FAQs for 1.1 support for helpdesk team</i>	<i>Tech Mahindra was requested to discuss and finalise the SLA methodology as per PM tool RFP along with severities criteria with CSI help desk team for monitoring and tracking. CSI should be requested to provide the Help desk tool access by PMT vendor. Tech Mahindra said that they have already shared FAQs and other related training material for the 1.1 helpdesk staff with DoP. Tech Mahindra agrees to finalise the SLA process with CSI service desk for support within 1 week.</i>	<i>Tech Mahindra</i>

61. The Claimant in his SOC pleads that the Claimant has successfully achieved the 'Go-Live' phase and has already share FAQs for the SLA methodology with the concerned vendor and that it is now the responsibility of CSI vendor to conclude the SIA methodology. Further, a perusal of the SOD would show that the case of the Respondent is that the SLA methodology was never completed or that the SLA reports essential for processing the payment was never submitted by the Claimant. However, there is no plea that in the alleged absence of SLA report, what impact, they had on the functioning of the system/services provided by the Claimant. Vague and unsubstantiated pleas are being bereft of details that complete services were never provided by the vendor. There are no details provided about the alleged defects in the services provided by the Claimant. The repeated plea of defects in the services without elaborating the nature of defects clearly implies that such a plea cannot be accepted. Hence, the minutes of the said PM Tool Project Implementation Committee dated 23.02.2018 do not in any manner justify deductions of dues of the Claimant by the Respondent.



62. The above facts do not in any manner dilute the submissions made by the Claimant i.e. when invoices were submitted by the Claimant in terms of the Agreement between the parties at no stage prior to termination of the Agreement did the Respondent ever complain about the deliverables or services being provided by the Claimant.

63. It cannot be ignored that it is a matter of fact that till termination of the Agreement on 24.09.2018, there is no communication whatsoever from the Respondent's seeking/pointing out that the necessary SLA's compliance has not been done or that there is any defect in the services provided by the Claimant.

64. In my opinion, it is not possible to accept the contention of the Respondent that the compliance of SLA's methodology was not done by the Claimant, as has been alleged. This appears to be an afterthought. Even assuming that the SLA methodology was not complied with by the Claimant, there is nothing to show that there was any defect in the services provided by the Claimant to the Respondent. This plea appears to be a hyper-technical plea, which the Respondent has not been able to prove in any manner."

13. A perusal of the above clearly shows that the learned Sole Arbitrator after appreciating the evidence and relevant clauses of the MSA has held that the SLAs were in the system of the petitioner. The respondent was not in a position to access the system/records of the petitioner post termination and the respondent also did not keep any hard copy of the SLA. In case, the respondent had not provided the SLA, the petitioner could have terminated the agreement or imposed penalty which it did not so do. In addition, there is no document to show any reminder was ever issued by the petitioner regarding non-supply of SLA. Hence, there is a finding of fact after appreciation of evidence that the SLAs were provided to the petitioner.

14. Secondly, Mr Kumar urges that no services were rendered for Milestone 7 and the learned Arbitrator has wrongly awarded the sum for



services rendered. It was stated that for quarter 3 operation and maintenance, the invoice was submitted on 26th October 2018 which was beyond the terms of the termination of the contract and hence no amount for Milestone 7. This objection has been well addressed by the learned Arbitrator in para 75 which reads as under:

“75. In my opinion, the plea of the Respondent is misplaced. A perusal of the invoice dated 25.10.2018 and the covering letter (Annexure C-25 to the SOC) would show that the same states that the said milestone for operation and maintenance tend of Quarter 3) was completed on 22.10.2018. As noted above, the notice of termination was issued on 24.09.2018. The notice provided a notice period of 30 days for termination of the contract which expired on 23 10.2018. As per above bill dated 25.10.2018, the Claimant had completed milestone 7 on 22.10.2018. Hence, the argument that the bill has been submitted after the termination of the contract appears to be completely misplaced. Similarly, as far as the SLA methodology is concerned, the said plea is rejected on the same grounds, as noted above, for the bills submitted for milestones 2 to 5. It may be noted that there is no plea that no services were provided in milestone 7. In the given facts, the Claimant is clearly entitled to the payment for services rendered in milestone 7.”

15. The learned Sole Arbitrator held that the invoice for services rendered for Milestone 7 was dated 25.10.2018 and the work had been completed on 22.10.2018. The notice of termination was issued by the petitioner on 24.09.2018 which provided for a 30 day notice period for termination of the contract which expired on 23.10.2018. As per the bill dated 25.10.2018, the respondent had completed Milestone 7 on 22.10.2018. The said finding of the learned Arbitrator is based on appreciation of the material on record and to my mind in accordance with law and according to the terms of the contract.

16. Thirdly, Mr Kumar urges that issue no 3 has been wrongly decided by



going beyond the terms of the contract. He states that in the present case, Milestone 8 was meant for 'operations and maintenance'. However, the learned Sole Arbitrator has awarded payments toward cost of components for Milestone 8.

17. Issue No. 3 framed by the learned Arbitrator reads as under:

"Whether the respondent has erroneously and unlawfully withheld the payments of the Claimant incurred towards the costs of components for Milestone 8 amount to Rs. 1,01,10,075.08? [OPC]"

18. The discussion to this regard is contained in paras 82 to 85 which read as under:

82. Hence, it is clear that the Respondent was aware that the licences had a lifetime validity and are perpetual in nature. The minutes record that the project can go ahead, if only licences are valid. At no stage, admittedly, the Respondent indicated that the licences are invalid or have any deficiency of any nature whatsoever.

83. In the light of the above, the contentions of the Respondent to the contrary are misplaced. The Respondent has not disputed the costs as claimed by the Claimant for the licences in question. Only hyper-technical pleas have been raised that payments have to be made proportionately or as per terms which have no basis.

84. On this aspect, RW-1 has been extensively cross-examined. The relevant portion of cross-examination of RW-I reads as follows:

"Q68. Is it correct to suggest that the licenses were procured by the Claimant in the name of the Respondent at the very initial stage of the project?

A-Yes it is correct.

Q69. Is it correct to suggest that the cost of the licenses incurred by the Claimant was a fixed cost and it is inbuilt in the Milestone cost component under the contract?

A-Yes it is correct."

85. Clearly, the above cross-examination reveals that even as per the



Respondent, the licences in question were procured in the name of the Respondent. The licences were a fixed cost and were inbilled under the milestone cost component under the contract. It has also been placed on record that the Respondent is still using the licences. Clearly, the Respondent cannot be permitted to take over the licences and not pay for the same. The Respondent is liable to pay the stated amount.”

19. The terms of the payment schedule as per the Agreement reads as under:

<i>S No.</i>	<i>Price Component</i>	<i>% of Payment</i>	<i>Indicative Timeline (in weeks)</i>
<i>1.</i>	<i>Acceptance Testing Signoff</i>	<i>10% of the contract value</i>	<i>T+8</i>
<i>2.</i>	<i>Pilot Phase of Rollout including Training</i>	<i>10% of the contract value</i>	<i>T+10</i>
<i>3.</i>	<i>Complete Roll Out including Training</i>	<i>20% of the contract value</i>	<i>T+16</i>
<i>4.</i>	<i>Conclusive of Go live Support</i>	<i>10% of the contract value</i>	<i>T+24</i>
<i>5.</i>	<i>Operations & Maintenance (End of Quarter 1)</i>	<i>10% of the contract value</i>	<i>T+37</i>
<i>6.</i>	<i>Operations & Maintenance (End of Quarter 2)</i>	<i>10% of the contract value</i>	<i>T+50</i>
<i>7.</i>	<i>Operations & Maintenance (End of Quarter 3)</i>	<i>10% of the contract value</i>	<i>T+63</i>
<i>8.</i>	<i>Operations & Maintenance (End of Quarter 4)</i>	<i>20% of the contract value</i>	<i>T+76</i>

“T being the date of vendor on board and signing of contract.”

20. The footnote is important. In the present case, the contract was prematurely terminated and hence, the amount of Rs. 1,01,10,075.08 has been claimed towards the cost of component installed by the respondent and the same was being used by the petitioner. The learned Arbitrator held that



the licenses were perpetual in nature and were billed in the milestone cost. Hence, the claim 3 is awarded toward the cost of components.

21. The learned Sole Arbitrator has correctly appreciated the entire evidence and has dealt all the issues extensively. As already noted above, this Court under Section 34 is not to reappreciate the evidence until and unless the award falls under the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996. For the reasons noted above, the Award dated 06.01.2024 does not suffer from any illegality and is well reasoned.

22. The petition is hence, dismissed.

23. All pending applications, if any, are disposed of.

JASMEET SINGH, J

MARCH 22, 2024/DM

(Corrected and released on 20.04.2024)

Click here to check corrigendum, if any