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

Date of decision: 19.07.2024

\+ **O.M.P. (COMM) 227/2018 & I.A. 14030/2018**

IIDL(IFCI INFRASTUCTURE DEVELOPMENT LTD).....Petitioner

Through: Mr. Rohit Mahajan, Mr. Siddharth Aggarwal, Mr. Shashwat Dhyani, Advs.

versus

SUBIR ENGINEERING WORKS (P) LTD & ANR. .....Respondents

Through: Mr. Sukumar Pattjoshi, Sr. Adv. with Mr. Sunil Kr. Mund, Mr. Dharmender, Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

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

1. This is a petition filed under section 34 of the Arbitration and Conciliation Act, 1996 ("*1996 Act*") seeking setting aside of the Arbitral award dated 25.01.2018.

2. The facts in brief are that the petitioner herein had entered into an Memorandum of Understanding (MoU) on 04.01.2011 with the Management Development Institute ("MDI") to undertake the work of development of the campus situated in Murshidabad District, West Bengal. Subsequently, petitioner issued a Letter of Intent (LOI) dated 07.10.2011 to the respondent

No. 1 for the construction of the MDI campus. The operative portion of the LOI reads as under:

> *". . . .*
> *We are pleased to advise you that we intend to award you the captioned work at your quoted rate Rs. 23,72,33,764/- (Rupees Twenty three Crore Seventy Two Lacs thirty-three thousand seven hundred sixty-four Only) exclusive of taxes as per the quantities given in the BOQ."*

3. After issuance of first LOI, a contract was entered between the petitioner and respondent No. 1on 10.10.2011 containing the arbitration clause as Clause 10 which reads as under:-

> *"10. That all disputes arising out .of or in any way connected with this Contract Agreement shall be resolved through the arbitration as mentioned in the Tender Documents and that the same shall be deemed to have arisen in New Delhi and the courts at Delhi/New Delhi alone shall have the jurisdiction to determine the same."*

4. On 20.07.2012, a second LOI was issued to Respondent No. 1 which was duly accepted by the Respondent No. 1. Para 2 of the said LOI reads as under:-

> *". . . .*
> *We revised total area to be constructed or MDI (Murshidabad) is322.817 sqft. (Approx.) with the revised project cost of Rs. 90,90,52,672/- (Phase I & Phase III). The Phase I area has been increased to 178.516 sqft. At an approx. cost of Rs. 47.3 Cr. (Exclusive of Taxes). The details of items and quantities are mentioned in the BOQ."*

5. Thereafter, on 17.09.2012, the third and final LOI was issued which reads as under:-

IIDL/MDI/02/2012-13/ 1367

September 17, 2012

To,

M/s Subir Engineering Works (P) Ltd.

2/9, Sunity Chatterjee Path,

City Centre, Durgapur,

West Bengal,

SUB: LOI FOR CONSTRUCTION OF MDI (MURSHIDABAD), JANGIPUR, WEST BENGAL

Dear sir,

With reference to our Letter no. IIDL/MD/02/2011-12 with subject **SUB: Construction of Phase-1, MDI Building, Jangipur, West Bengal** for an amount of Rs 23,72,33,764 issued to you on October 7, 2011 we are pleased to award the total project to M/s Subir Engineering Works (P) Ltd for an amount of Rs 90.91 Cr (Inclusive of VAT, Labour Cess and Other Applicable Taxes except Service Tax) with a delivery schedule of 22 months from the date of issue of LOI.

The work shall be executed within the aegis of the existing contract and rates firmed up therein. The specification makes & engineering details shall be as per existing contract only. The BOQ for the entire work is enclosed for reference.

In this connection the followings documents and terms and conditions need to be submitted:

1. Additional Bank Gurarantee @ 5% the extended value of work, to be submitted within a week of issue of this letter towards mobilization advance or previous valid bank guarantee may be kept alive for further advance.

2. CAR policy, Workmen Compensation Policy etc. will be extended accordingly and kept valid throughout the execution of the captioned work.

3. Bar Chart and Monthly Implementation plans for completion of the additional works together with an integrated schedule.

4. All the other terms and conditions of the work shall remain same.

The mode of measurement for payment shall be unit rate contract. Please note that the additional area is an integral part of the overall scheme of the MDI Jangipur. Therefore, a logical sequencing of activities and events must be ensured to effect a seamless integration keeping in view the priorities of the MDI. Measurement are to be done as per latest IS codes, SDPs etc. For, any further clarification you are advised to contact Architect/PMC/ M/s. Holistics Urban Innovatons Pvt Ltd.

This letter once accepted shall form a part of Contract Agreement and no separate agreement would be executed in this regard. This LOI is issued without any prejudice to your contractual obligations.

Please return a copy of this letter duly signed and stamped by your authorized signatory as a taken of acceptance.

Yours truly,

Anshuman Arya
AGM (Technical)

IFCI Infrastructure Development Ltd.
NEW DELHI

6. As there were disputes between the parties due to non-payment, respondent No. 1 invoked the said arbitration clause *vide* Legal Notice dated 06.05.2016. The same was duly accepted by the petitioner *vide* letter dated 08.06.2016.With the consent of both parties, a Sole Arbitrator was appointed.

7. The learned Sole Arbitrator entered the reference and passed the final Award dated 25.01.2018 wherein the petitioner was directed to pay a sum of Rs 7,68,50,750/- along with interest @ 6% p.a. to respondent No. 1.

8. Aggrieved by the said Award, the petitioner has challenged the said Award in the present petition with regard to claim Nos. 3, 4, and 5.

9. On 22.05.2018, notice was only issued with regard to claim No. 3 which relates to the reimbursement of the VAT bill.

10. Mr. Mahajan, learned counsel for the petitioner states that the LOI dated 17.09.2012 being a binding agreement between the parties categorically holds that the rates payable to the Respondent No. 1 were inclusive of VAT and hence, the claim of VAT refund would amount to re-writing the contract between the parties.

11. He further states that the VAT bill for the year 2011-12 were rejected in the Minutes of Meeting dated 13.01.2016, 14.01.2016, and 15.01.2016.

12. It is further stated by the learned counsel for the petitioner that as per Clause 10 under Section 2 of the Tender Documents attached with the contract dated 10.10.2011, the quoted rates were inclusive of VAT. Clause 10 under Section 2 of the Tender Documents reads as under:

> *"10. WCT/ VAT/ CESS/ ANY OTHER TAX: The quoted rates shall be deemed to be inclusive all taxes and the same shall be recovered from the bills of the contractors as per prevailing TDS norms."*

13. The learned counsel for the petitioner draws my attention to para 8 of the letter dated 20.01.2016, wherein the petitioner has asked Respondent No. 1 to submit the VAT challan. Para 8 of the letter dated 20.01.2016 reads as under:-

> *"Please not that your contract is inclusive of all taxes, cess, etc. Hence there is no point of reimbursement of VAT separately. M/S SEWPL hereby advised to submit the challans for service tax, Vat, WCT, labour Cess, etc. for verification by finance team."*

14. Mr. Pattjoshi, learned senior counsel for the respondent No. 1 vehemently opposes the contentions raised by the petitioner and states that the

issue of challans has never been raised by the petitioner in its statement of defense or anywhere else.

15. Learned senior counsel further states that the VAT was duly deposited by the petitioner and had this issue been raised at an appropriate time, the challans would have been filed.

16. I have heard learned counsels for the parties.

17. It is a well-settled position of law that the scope of interference as mandated under Section 34 of 1996 Act is very narrow and limited, and in order to adjudicate the matter related to the interpretation of the contract, determination of facts and appreciation and re-appreciation of evidence, the learned Arbitrator is the best authority for the said purpose. In this regard, reliance is placed on ***Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236*** wherein the Hon'ble Supreme Court of India *inter alia* held as under:-

> *"9.1. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], this Court had an occasion to consider in detail the jurisdiction of the Court to interfere with the award passed by the Arbitrator in exercise of powers under Section 34 of the Arbitration Act. In the aforesaid decision, this Court has considered the limits of power of the Court to interfere with the arbitral award. It is observed and held that only when the award is in conflict with the public policy in India, the Court would be justified in interfering with the arbitral award. In the aforesaid decision, this Court considered different heads of "public policy in India" which, inter alia, includes patent illegality. After*

referring Section 28(3) of the Arbitration Act and after considering the decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , SCC paras 112-113 and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] , SCC paras 43-45, it is observed and held that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. It is further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score."

18. In the present petition, the learned Sole Arbitrator in the impugned Award has dealt with claim No. 3 regarding the issue of VAT as under:-

*"**186. Claim No.3 (Reimbursement of the VAT bill for the Rs.3,09,76,180/-):***

186.1 *It is not necessary to again dilate on the background for this claim as is already discussed in detail above. For Phase I, under the LoI dated 07.10.2011, the contract price amount was exclusive of taxes. In the LoI issued on 20.07.2012 wherein the area of Phase I was increased to 1,78,516 Sq. ft. from 1,00,000 Sq. Ft. The liability relating to VAT arose up to 10th RA Bill which was submitted on 25.07.2012, the claimant had finished the work to the tune of Rs.22,94,53,175/-. The claimant had incurred the liability of Rs.3,09,76,180/-.*

…………….. ……………… …………….

186.11 *By virtue of LoI dated 20.07.20121 the first respondent permitted the claimant to continue to do the Phase - I work exclusive of taxes.*

186.12 *The LoI dated 17.09.2012 was issued after the claimant has completed the work to the tune of Rs.26,52,64,621.23.*

186.13 *Therefore, no question of novation would arise, to appreciate the question it is necessary to refer to Section 62 of The Indian Contract Act, 1872. The Section 62 reads as under:*

> *62. Effect of novation, rescission, and alteration of contract.- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original*

contract need not be performed. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

186.14 *I am unable to see any of the requirements under Section 62 being satisfied in the instant case. The parties had not agreed to substitute a new Contract, for, when the LoI dated 17.09.2012 was issued the first Respondent No. 1 had allowed the claimant to do work on the basis of Lol dated 20.07.2012.*

186.15. *There is no attempt on the part of the first Respondent No. 1 to rescind the earlier LoI.*

186.16. *Further, there is no attempt on the part of the first Respondent No. 1 to alter the original Contract. It is admitted case that the claimant was to do the work under the original contract accepted the extent of increase in the area.*

186.17. *The principle applicable is laid down by the Supreme Court of India in All India Power Engineer Federation & others Vs. Sasan Power Limited & others 2017(1) SCC 487(para 13 to 21) and this has been followed in Chrisomar Corporation Vs. MJR Steels Private Limited and Ors. 2017(11) SCALE 453. Therefore, in my view, no further elucidation is required.*

186.18. *I have no hesitation in rejecting the submission of the Ld. Counsel for the first Respondent No. 1 on novation. Therefore the claimant is entitled to the payment of reimbursement of VAT Bills to the tune of Rs: 3,09,76,180/-(Rupees Three crore nine lakhs* *seventy six thousand one hundred eighty only)"*

19. A bare perusal of the above finding shows that the learned Sole Arbitrator while passing the impugned Award has dealt with the evidence led by the parties in detail. The Sole Arbitrator was of the view that the petitioner even though refers to the LOI dated 17.09.2012, but has not referred to the previous LOIs dated 07.10.2011 and 20.07.2012 which were duly accepted by respondent No. 1, wherein the rates quoted by respondent No. 1 were to be exclusive of the VAT liability. Therefore, the learned Sole Arbitrator allowing claim No. 3 has only awarded VAT liability till 17.09.2012.

20. It is also pertinent to mention that the contract entered between the parties does not talk about inclusiveness or exclusiveness of taxes regarding the quoted rates for the said project.

21. Furthermore, in terms of clause 4 of the Contract executed between the parties, the first LOI dated 07.10.2011 and the tender documents form a part of the contract. The operative portion of clause 4 of the contract dated 10.10.2011 reads as under:-

> *"4. That subject to what is specifically recorded herein and in the various communications and minutes of meetings, culminating into the execution of this Contract Agreement, the following documents and the communications exchanged between the parties as are mentioned hereunder form part of and shall accordingly be read and construed as part of this Contract Agreement as amended.*
>
> *(i) Notice Inviting Tender dated 24.08.2011*
>
> *(ii)Tender Form*

(iii) Contract Agreement and general conditions

(iv)Special Conditions

(v) Specifications.

(vi) Bill of Quantities and rates

(vii) tender drawings

(viii)List of approved makes

(ix)Contractors tender bid submitted, vide letter no. Ref: SEWPL/TFCI/MDI/11 0926 Dated: 26.09.2011

(x)Addendum to tender dated ......

(xi)Minutes of Meeting dated 23.09.2011

(xii)Work order / LOI. No. IlDL/MDI/02/2011 12 Dated: 07.10.2011 issued by M/s IIDL, IFCI Infrastructure Development Limited"

22. With regard to claim No. 3, the plea in the Statement of Defence taken by the petitioner reads as under:-

"Reply to Claim 3

This claim is not admissible as VAT is included in the contract price agreed by the parties. The first LOI for construction of the MDI Murshidabad project, Jangipur, West Bengal, dated 07.10.2011. The second LOI dated 17.09.2012 was issued in supersession to earlier LOI. First LOI was exclusive of taxes and second LOI was inclusive of all taxes except service tax. The payment for relevant period was duly paid to the Claimant as claimed till 10th Running account bill which is deemed to be included in the bill claimed earlier."

23. From the above para, it is clear that the plea regarding not having paid back the amount of VAT to the Government Authority was never raised in the Statement of Defence as well as before the learned Sole Arbitrator. If the said plea had been raised at an appropriate stage, the petitioner could have met the same by showing the VAT challans.

24. I am of the view that the parties are bound by the first LOI dated 07.10.2011 in terms of Clause 4 of the Contract as the same forms part of the Contract. The parties had never agreed to substitute a new contract which is also duly noted by the learned Sole Arbitrator in his findings, so the petitioner's only referring to the third LOI dated 17.09.2012 wherein the quoted prices were inclusive of taxes cannot be accepted. Even as per LOI dated 20.07.2012 (subsequent to the Contract dated 10.10.2011 containing clause 10 under Section 2 of the Tender Document), the respondent was working on rates exclusive of taxes. Prior to 17.09.2012, the rates quoted were without the VAT component. Lastly, the VAT Component has only been allowed till 17.09.2012.

25. The learned Sole Arbitrator has adjudicated claim No. 3 extensively and the said claim does not need any interference. Hence, I am unable to agree with the submissions of the learned counsel for the petitioner.

26. In this view of the matter, the impugned Award dated 25.01.2018 does not suffer from any perversity and illegality. Consequently, the present petition is dismissed.

27. Pending applications, if any, are disposed of accordingly.

JULY 19, 2024 / (MSQ) **JASMEET SINGH, J**

(Corrected and released on 02.08.2024)