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

% Reserved on : 21st November, 2023
Pronounced on : 15th December, 2023

\+ **FAO (COMM) 122/2021**

GOVERNMENT OF NCT OF DELHI ..... Appellant
Through: Mr. Anuj Aggarwal, ASC with Ms. Arshya Singh & Mr. Yash Upadhyaya, Advocates.

versus

M/S EDUCOMP SOLUTION LTD. ..... Respondent
Through: Mr. Aayush Agrawal, Advocate.

CORAM:
HON'BLE MR JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. The present appeal under Section 37(1) (c) of the Arbitration and Conciliation Act, 1996 ("**the Act**") read with Section 13 of the Commercial Courts Act, 2015 assails judgment dated 05.04.2021 passed by the District Judge, Commercial Court-05, Central District, Tis Hazri, Delhi in OMP (COMM)- 80/2022, whereby the appellant's appeal under Section 34 of the Act has been dismissed and the award passed by the Sole Arbitrator has been upheld.

Factual Background

2. In 2001, the appellant, Director of Education under the aegis of the Directorate of Education created by the Government of NCT of Delhi,

floated a tender for implementation of the Computer Education Project ("**CEP-II**") for various government/ government aided Senior Secondary Schools. The respondent, a provider of technology-based educational products and services, submitted its bid and was awarded a contract for 28 government schools, 10 single shift schools and 9 double shift schools ("**subject schools**") *vide* agreement dated 24.04.2002.

3. A contract, effective from 10.01.2002 to 31.03.2005 ("**the Contract**"), was executed between the appellant and the respondent for, *inter alia*, supply of computer hardware, software, connected accessories, setting up of computer laboratories in assigned schools, employing of teaching staff/computer instructor, supply of computer stationery, maintaining the systems etc. The total contract value worked out to be Rs. 3,46,17,000/- along with a bank guarantee of Rs. 8,65,425/-. Upon payment of 15% advance, the appellant was obligated to pay the balance amount in seven equal instalments.

4. The Principals/Heads of the subject schools were also given directions to submit a Monthly Monitoring Report ("**MMR**") regarding the services provided by the respondent. While the appellant released four instalments of the payment, balance payment of Rs. 1,06,73,575/- along with bank guarantee of Rs. 8,65,425/- was withheld by the appellant on account of deficiencies highlighted in the audit report dated 27.10.2004 ("**Audit Report**") published by the Account General Central Revenue ("**AGCR**"). On the basis of the Audit Report, the appellant formed a Sub-Committee under the Chairmanship of the Joint Director of Education ("**Sub-Committee**") to evaluate the deficiencies in respondent's performance under the Contract.

5. *Vide* letter dated 04.09.2008, the appellant communicated the report of the Sub-Committee to the respondent whereby the appellant was found to be liable to only pay Rs. 12,31,504/- to the respondent and not a sum of Rs. 1,06,73,575/- which was otherwise claimed to be outstanding by the respondent.

6. In light of the dues withheld by the appellant, the respondent invoked the arbitration clause in the Contract *vide* letter dated 08.05.2009. The respondent filed a statement of claim on 26.06.2009, and the appellant also filed a counter claim along with its reply.

Findings of the Arbitral Tribunal

7. *Vide* award dated 18.05.2018, the Sole Arbitrator directed the appellant to pay a sum of Rs. 80,10,762/- with interest @ 8% p.a. from the date of filing of the statement of claim i.e., 26.06.2009 till the date of payment to the respondent. During the pendency of the dispute, the Sole Arbitrator also passed an interim award of Rs. 12,31,504/- pursuant to an application under Order 12 Rule 6, Code of Civil Procedure, 1908 moved by the respondent. The appellant was also directed to pay interest on the said sum of Rs. 12,31,504/- from 26.6.2009 till the payment of the said amount. The appellant was further directed to return the bank guarantee of Rs. 8,65,425/- with interest.

Findings of the District Judge

8. The appellant, thereafter, filed an application for setting aside the Award under Section 34 of the Act. On the issue of the respondent's claim being barred by limitation, the District Judge held that while the Contract concluded on 31.03.2005, and the arbitration clause was invoked only on

08.05.2009, the respondent sought the balance amount from the appellant from time to time and also filed an application under the Right to Information Act, 2005. It was only *vide* letter dated 04.09.2008 that the appellant finally informed the respondent that the latter is entitled to Rs. 12,31,504/- against outstanding dues of Rs. 1,06,73,575/-. Therefore, the limitation period of three years commenced only when the appellant finally refused to make the entire payment on 04.09.2008.

9. With regard to the report dated 06.12.2007 by the Sub-Committee, the District Judge held that the deficiencies raised in the said report were not raised during the subsistence of the Contract. Furthermore, the respondent was never given an opportunity to be heard before the Sub-Committee, and it rendered its findings in violation of the principles of natural justice.

10. Insofar as the issue of unpaid electricity and telephone/internet bills of Rs.11,94,800/- and Rs, 4,36,160/- respectively is concerned, the District Judge held that the appellant official failed to bring these allegedly unpaid bills on record. The District Judge further observed that the respondent was under no obligation under the Contract to submit details of month wise payments of these bills, and the Principals/Heads of the subject schools had already issued 'no dues' certificates to the respondent.

11. The appellant claimed a sum of Rs. 13,28,975/- towards restoration charges of the computer systems installed by the respondent. Both the Sole Arbitrator and the District Judge rejected the above claim on the ground that the respondent was under no obligation under the Contract to carry out repairs of the computer systems upon the expiry of the Contract. Furthermore, the District Judge noted that the appellant had failed to

adduce evidence and details of the estimated restoration costs of the computer systems installed in the subject schools.

12. Finally, on the aspect of imposition of interest in the absence of a clause in the Contract providing for the same, the District Judge held that the amount due to the respondent was unduly withheld by the appellant for a long period, and therefore, imposition of interest was warranted under the circumstances.

Grounds of Appeal

13. Counsel for the appellant submits that the District Judge has failed to appreciate the following grounds summarized below:

13.1 That the claim petition filed by the respondent was beyond the limitation period of three years as the Contract concluded on 31.03.2005, and the arbitration clause was invoked much later on 08.05.2009;

13.2 That as the respondent failed in discharging its obligations under the Contract, the AGCR conducted an independent audit, which was followed by the report of the Sub-Committee, and the total amount payable in light of the respondent's conduct was found to be only Rs. 12,31,504/-;

13.3 That the onus to submit proof of payment of electricity and telephone/internet bills of Rs.11,94,800/- and Rs. 4,36,160/- respectively was on the respondent as the claimant and not on the appellant, contrary to what has been held by the District Judge;

13.4 That, as per Clause 9 of the Contract, the respondent was obligated to carry out repairs and replacements on the equipment and computer systems installed by it, and as it has failed in discharging this obligation, it was liable for a sum of Rs. 13,28,975/- towards estimated restoration charges;

13.5 That the imposition of interest of 8% on the awarded amount of Rs. 80,10,762, and on the additional paid amount of Rs. 12,31,504/- is outside the scope of the Contract.

Analysis and Conclusion

14. In light of the issues raised by counsel for the appellant, it would be apposite to note the principles enunciated by the Hon'ble Supreme Court as well as this Court on the scope of challenge and interference with an arbitral award under Section 34 of the Act, as also the scope of appeal under Section 37 of the Act.

15. In ***MMTC Ltd. vs. Vedanta Ltd.,*** (2019) 4 SCC 163, the Hon'ble Supreme Court categorically held that in deciding an appeal under Section 37 of the Act, the hands of the Court are tied inasmuch as it cannot undertake an independent assessment of the merits of the case, and must limit itself to examining whether the exercise of power under Section 34 of the Act was within the ambit of the provision. The relevant paragraph is extracted below:

> "14. *As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down*

under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

(emphasis supplied)

16. In ***McDermott International Inc. v. Burn Standard Co. Ltd.***, (2006) 11 SCC 181, one of the landmark decisions of the Apex Court underscoring the limited scope of interference in an appeal under Section 37 of the Act, the Court made the following pertinent observation:

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

17. A Division Bench of this Court in ***National Highways Authority of India vs. CEC-HCC Joint Venture,*** 2017 SCC OnLine Del 9177 made the following relevant observation regarding the stringent parameters of intervention under Section 37 of the Act:

> *"13. While exercising the appellate review under Section 37 of the Act, the court cannot second guess, (twice removed in a sense) the decision of the Arbitrator. The parameters for intervention by the court are limited i.e. the findings are so unreasonable that no reasonable Tribunal placed in similar circumstances with respect to the same facts could arrive at; or patent illegality. These stringent circumstances have to be always kept in mind by the appellate court in its scrutiny of the order of court of first instance which adjudicates upon the objections under Section 34. If the court strays from these principles, it can justifiably be accused of rendering 'rough and uneven justice' a course that is not permissible in law. For the foregoing reasons, this Court is of the opinion that there is no infirmity in the impugned judgment."*
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> (emphasis supplied)

18. Keeping in mind the broad contours of Section 37 of the Act, we have perused the material on record, the decision of the Sole Arbitrator as well as the District Judge, and the submissions and contentions raised by the appellant.

19. Insofar as is urged that the request for appointment of an arbitrator was made belatedly on 08.05.2009, that is, more than three years after the conclusion of the Contract on 31.03.2005, we see no reason to interfere with the view expressed by the District Judge. The appellant kept the respondent in limbo despite repeated correspondence from the respondent's end before and after the expiry of the Contract, including the invocation of the Right to Information Act, 2005. Admittedly, it was only *vide* letter dated 04.09.2008 bearing No. F. DE-45/CEP/139/2008/99 that the appellant communicated its decision to pay a small sum of Rs. 12,31,504/- to the respondent. The respondent replied to the said letter immediately on 10.10.2008 communicating that the amount due and payable was to the tune of Rs. 1,06,73,575/-, and also invoked the arbitration clause soon thereafter. Therefore, the claim of the respondent was not time barred under Article 5 of the Limitation Act, 1963.

20. The contention raised by the appellant that according to the Audit Report, as well as the report of the Sub-Committee, the amount due and payable under the Contract was only Rs. 12,31,504/- has also rightly been rejected by the District Judge. The Sub-Committee was formed only after the conclusion of the Contract. It is not the appellant's case that the Contract makes payment contingent upon the findings of the Audit Report of the AGCR or the Sub-Committee. It would be appropriate to add, additionally, that the findings of the AGCR and the Sub-Committee are unilateral in nature, and violate the principles of natural justice. The respondent was only intimated about the formation of the committee *vide* a letter dated 16.06.2005 and the final decision was communicated *vide* letter dated 04.09.2008. At no point was the respondent included in these

proceedings, or given an opportunity to be heard. As noted by the District Judge, the respondent was not even served with a copy of the audit report. Therefore, the findings in the Audit Report and report of the Sub-Committee have rightly been rejected as having no bearing on the contractual dispute, and no ground of interference on this account is made out.

21. One of the primary grievances raised by counsel for the appellant was that the respondent had not paid electricity charges of Rs. 11,94,800/- as well as telephone/internet charges of Rs. 4,36,160/-. A perusal of the record reflects that the Sole Arbitrator has discussed the statement of the official of the appellant department who admitted that electricity sub-meters were installed when the sub computer labs were set up, and bills were raised on the basis of consumption recorded. Furthermore, the official in his cross examination admitted that dedicated telephone lines were also provided to labs, and usage bills were raised accordingly.

22. It is noted that despite being given an opportunity to bring unpaid bills on record, the appellant failed to do so. Counsel for the appellant, however, adds that the onus to prove payment of bills raised was on the respondent. This submission cannot be accepted as the respondent *(so held by the Sole Arbitrator)*, was under no obligation to furnish details and proof of month wise payment of electricity and telephone/internet bills insofar as the Contract is concerned, and counsel for the appellant has not been able to draw our attention towards any such stipulation in the Contract.

23. Moreover, the Principals/Heads of subject schools under the Contract also issued 'no dues' certificates in favor of the respondent, and

the appellant had released four instalments to the respondent on the basis of the said certificates. As noted by the District Judge, the appellant has not challenged the said certificates in any departmental or criminal proceedings. Therefore, this Court finds no patent illegality in the view adopted by the District Judge insofar as the appellant has failed to indicate which bills, if any, remain unpaid by the respondent.

24. Counsel for the appellant further submits that under Clause 9 of the Contract, the respondent was under a contractual obligation to carry out repairs and replacements on the equipment and computer systems installed by it, and as it has failed in discharging this obligation, the respondent was liable to pay a sum of Rs. 13,28,975/- towards estimated restoration charges. Clause 9 of the Contract is extracted below for ready reference along with Clause 44, which is equally instructive:

> "*Clause 9: The Contractor shall maintain all the computer hardware, software and other infrastructure in proper working condition throughout the contract period. A penalty of Rs. 200/- per Computer per day will be levied on the Contractor for any computer that is not repaired/replaced within one day from the reporting of the faculty.*
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> *Clause 44: All the computer systems, software and other equipment supplied to the School to setting up of the computer lab to conduct training shall become the property of the Government after the expiry of the contract period. The contractor shall hand over the possession of computer systems and other equipment to the principal/in charge of the school in good*

working condition after the expiry of the contractor.”

(emphasis supplied)

25. A bare perusal of Clause 9 and Clause 44 of the Contract reveals that the obligation to maintain equipment and other infrastructure in proper working condition exists only throughout the Contract period. The District Judge and the Sole Arbitrator have concluded that the alleged deficiencies for which restoration costs are being claimed were never raised during the subsistence of the Contract. Moreover, it is the admitted case of the appellant that pursuant to a meeting dated 18.04.2006, it was decided that the respondent will not be liable to rectify or repair any defects after the expiry of the Contract and after handing over the relevant equipment to the Principals/Heads of subject schools. Therefore, the District Judge has rightly held that no ground for interference with the Award is made out on the basis of the above submission.

26. Lastly, counsel for the appellant urged that the imposition of 8% interest on the awarded amount of Rs. 80,10,762/- was baseless, inasmuch as the Contract does not provide for the same. This Court does not find any merit in this submission. As noted by the District Judge in the impugned judgment, the appellant withheld the amount due to be paid to the respondent under the Contract for a prolonged period of time, therefore, the Sole Arbitrator was justified in awarding 8% interest to the respondent on the awarded amount of Rs. 80,10,762/-.

27. In view of the above discussion, we find no reason to interfere with the impugned judgement in exercise of this Court’s jurisdiction under Section 37 of the Arbitration and Conciliation, 1996.

28. The appeal is, therefore, dismissed.

29. Copy of the Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

(YASHWANT VARMA)
JUDGE

DECEMBER 15, 2023/RK