IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.04.2022

\+ **O.M.P. (COMM) 95/2019 & IA No.3385/2019**

MINISTRY OF YOUTH AFFAIRS & SPORTS ..... Petitioner

versus

AGILITY LOGISTIC PVT. LTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mrs. Bharathi Raju, Adv.

For the Respondent : Mr. Abhay Raj Varma, Ms. Priyanka Ghosh & Ms. Vidhi Jain, Advs.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The Ministry of Youth Affairs and Sports (hereinafter '**MYAS**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the **A&C Act**') impugning an Arbitral Award dated 29.10.2018 (hereinafter 'the **impugned award**') delivered by the Arbitral Tribunal comprising of three members - Justice (Retd.) Shri R.C. Lahoti, Justice (Retd.) Shri D.P. Wadhwa, and Justice (Retd.) Shri S.C. Agrawal as the Presiding Arbitrator (hereinafter 'the **Arbitral Tribunal**').

2. The impugned award was delivered by the Arbitral Tribunal in respect of disputes that had arisen between the parties in connection with the Logistics Service Provider Sponsorship and Services Agreement dated 16.07.2010 (hereinafter 'the **Agreement**').

Factual Context

3. In 2009, the Organising Committee of Commonwealth Games, 2010 (hereinafter the '**OC**') issued a Request for Proposal (hereinafter '**RFP**') inviting bids for appointing a Logistics Service Provider for the OC and Queens Baton Relay on the terms and conditions stipulated therein.

4. Pursuant to the RFP, the respondent (hereinafter '**Agility**') submitted its bid and was declared the successful bidder. Thereafter, by a Letter of Intent dated 10.03.2010 (hereinafter '**LOI**'), the contract for providing the Logistic Services was awarded to Agility. Subsequently, the LOI was revised and amended on 11.03.2010.

5. In terms of the LOI, Agility was to provide Value-in-Kind (hereinafter '**VIK**') services for an amount of ₹11 crores and Value-in-Cash (hereinafter '**VIC**') for an amount of ₹1.5 crores. Further, Agility was required to furnish a Performance Bank Guarantee (PBG) to the tune of 10% of the VIK, that is, ₹1.10 crores; and, Corporate Guarantee/Indemnity to the tune of 100% of the value of the VIK, that is, ₹11 crores. However, according to the Arbitral Tribunal, the amended LOI dated 11.03.2010 did not contain the pre-condition of providing PBG of 10% of the VIK.

6. The OC directed Agility to begin logistics support for various supporting events that were scheduled as test events. However, the services provided during the test events were not covered under the scope of services provided in the RFP or any other document. Thus, it was claimed by Agility that a specific assurance and promise was made by the OC to duly and adequately compensate Agility for the services so provided.

7. On 16.07.2010, the Agreement was executed between Agility and the OC.

8. Thereafter, by a communication dated 13.10.2010, Agility requested that it be provided the signed copy of the Agreement. However, Agility claims that it was provided a photocopy of the Agreement on 21.12.2010.

9. Agility had submitted its bid aggregating ₹12.5 crores. The same comprised of two components – VIK services of the value of ₹11 crores and VIC services for a sum of ₹1.5 crores. Agility had agreed to provide the said services in consideration of the sponsorship as offered in terms of the RFP. Clause 31.1 of the RFP indicated the rationale for the bidders to offer logistics services in consideration for being the official logistics sponsor. The said clause is set out below:

> "31.1 The Sponsorship Offer of the Logistics Tender is a unique feature of the Tender. Since the Organising Committee of the Commonwealth Games, Delhi 2010, will be providing a huge International Platform to the Logistics Service Provider as the Logistics Partner for the Games.

It is required that the Organising Committee also gets a value in return."

10. Disputes arose between the parties in relation to the said Agreement. Agility claimed that its rights as an exclusive logistics service provider were breached on various grounds. Disputes also arose between the parties in relation to non-payment of legitimate dues, which included the work done outside the scope of the Agreement, that is, work done for the test events. Additionally, Agility claimed that there were various breaches of obligation by the OC as they did not grant exclusive sponsorship rights to Agility; and did not provide adequate facilities for its labour.

11. Agility claimed that they, through various communications, issued notices and e-mails to the OC to remedy the breaches and to make the payment against the claimed amounts that had remained unpaid beyond a period of thirty days. As there was no response or payment made by the OC, Agility terminated the Agreement in terms of Clause 35.3 of the Agreement.

12. In view of the disputes between the parties, Agility issued a Legal Notice dated 12.01.2011, and invoked the Agreement to refer the disputes to arbitration.

13. Before the Arbitral Tribunal, Agility filed its Statement of Claims. The claims made by Agility are tabulated below:

Claim No.	Particulars of Claim	Amount of claim

1.	Non-VIK services	₹1,52,08,590/-
2.	Denial of opportunity to handle kitchen equipment	₹12,00,00,000/-
3.	Loss of business opportunity due to delay in construction/late handing over of games venue and violation of exclusivity	₹2,00,00,000/-
4.	Demurrage and detention charges during re-export	₹2,45,94,422/-
5.	Reverse logistics	₹50,55,568/-
6.	Illegal detentions of vehicles	₹14,67,120/-
7.	Denial of sponsorship rights and benefits	₹1,00,00,000/-
8.	Loss of business opportunity	₹5,00,00,000/-
9.	Payment due from vendors	₹1,83,24,902/-
10.	Breach of exclusivity	₹12,45,46,458/-
11.	Refund of cash component	₹1,50,00,000/-
	Total	₹40,41,00,000/- with *pendente lite* interest @ 18% p.a. and cost of arbitration

14. The OC filed its Statement of Defence. The counter-claims preferred by the OC, as set out in its Statement of Defence, are set out below:

> "(a) Set off the amount of Rs.70,89,586/- payable to the Claimant by the Counter Claimant against the amount of Rs.1.1 crore which the counter claimant is entitled to receive from the Claimant by way of Performance Guarantee
>
> (b) Refund the balance amount, after the set off, to the Counter Claimant and;
>
> (c) Direct the Claimant to return the 22 original Duty Exemption Certificates/Undertakings, as per annexure R-14, which were cancelled by the Customs Department and which have not been returned to the respondent till date;
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> (d) Direct the Claimant to pay an amount of Rs.1,03,39,641.11/- as per Clause 11.3 of the Agreement;
>
> (e) Direct the Claimant to provide the Warehouse Management Data, which they have failed to provide and which are required by the respondent for reconciling their data in their books;"

15. By a Resolution dated 04.07.2017, General Body of the OC resolved to dissolve the OC with effect from the afternoon of 07.08.2017. Accordingly, the OC stood dissolved on the said date under the Societies Registration Act, 1860 and all its assets and liabilities stood transferred to MYAS.

16. By the impugned award, the Arbitral Tribunal awarded an amount of ₹5,86,61,601/- plus interest and costs in favour of Agility. The said award was premised on the findings that MYAS had breached the terms of the Agreement by engaging third party service providers (M/s Balmer & Lawrie Co. Ltd., M/s D.B. Schenkers and M/s

Buhariwala). The Arbitral Tribunal held that in respect of the services provided, Agility had an exclusive right and the right of first refusal. The OC had breached the said rights. In addition, the Arbitral Tribunal held that the OC had allowed Agility's competitors to be present at the venue and to display their logo and labels in respect of the logistics services provided in respect of the Commonwealth Games. It held that the action of the OC to permit such competitors to enter the venue by giving them accreditation and its failure to display the name of Agility as a co-sponsor amounted to breach of the Agreement. In view of the aforesaid findings, the Arbitral Tribunal awarded an amount of ₹1,87,50,000/- towards damages for breach of the right of exclusive sponsorship. In addition, it awarded a sum of ₹1,57,92,984/- as loss of profit on account of defeating Agility's right of first refusal in respect of contracts for a sum of ₹8,06,28,400/- and ₹2,46,58,163/- awarded to M/s Balmer & Lawrie Co. Ltd. and M/s Buhariwala respectively.

17. The Arbitral Tribunal also awarded a sum of ₹86,05,882/- for the work of transporting linen, which was an additional work (not covered under the scope of the agreed services). The Arbitral Tribunal awarded ₹89,100/- for failure to provide a 'Bump-Out Plan' enabling Agility to offload the equipment, items and goods removed from warehouses. The Arbitral Tribunal held that the OC was required to provide a warehouse for offloading the said equipment but, it did not provide any such warehouse. Resultantly, Agility had to continue carrying on the load on hired vehicles. The Arbitral Tribunal also entered an award of

₹1,54,23,635/- for payment of non-VIK services for which bills were raised but not paid.

18. Additionally, the Arbitral Tribunal awarded an amount of ₹75,00,000/- to Agility as costs. The Arbitral Tribunal further, rejected the counter-claims preferred by the OC.

19. Aggrieved by the impugned award, MYAS has filed the present petition.

Submissions

20. Ms. Raju, learned counsel appearing for MYAS, has assailed the impugned award essentially on two fronts. First, she submitted that the Arbitral Tribunal had grossly erred in finding that MYAS had breached the obligation of exclusive sponsorship rights granted to Agility. She submitted that exclusive rights were in connection with services enumerated in Section V of the Agreement and not any other services. She stated that services mentioned in Section V of the Agreement were VIK services and there is no dispute that Agility had the exclusive right of sponsorship in respect of those services. The allegations made by Agility are in respect of services other than VIK services. And, in respect of these services, Agility was not granted any exclusive rights. She referred to Clause 11.4 of the Agreement and submitted that the Arbitral Tribunal had completely misread the said clause. She submitted that the Arbitral Tribunal had relied on pre-contractual correspondence, which was not relevant after the parties had entered into a written Agreement.

21. She submitted that a contract for certain non-VIK services was awarded to M/s Balmer & Lawrie Co. Ltd. as its quote was lower than that quoted by Agility. She submitted that MYAS had the right to avail of certain services in terms of Schedule 15(d) to the Agreement and the Arbitral Tribunal's reasoning that procurement of services from M/s Balmer & Lawrie Co.Ltd, M/s D.B. Schenkers and M/s Buhariwala, was in violation of Agility's right of exclusivity, is flawed.

22. Next, she submitted that the Arbitral Tribunal had failed to appreciate that the amount claimed by Agility in its Statement of Claims was much higher than that as mentioned in the Notice issued under Section 21 of the A&C Act. She submitted that it was not open for the Arbitral Tribunal to award any claim in excess of the claim in respect of which arbitration was invoked or to entertain any other claim. Thus, Agility could not have claimed an amount higher than that as claimed in its notice dated 12.01.2011 or raised any claim that was not mentioned in the said notice.

23. In addition to the aforesaid two grounds, Ms. Raju also briefly submitted that the Arbitral Tribunal had failed to adjudicate the counter-claims made by the OC and there was hardly any discussion in respect of those claims. She submitted that Agility had received VIK bills for an aggregate amount of ₹3,96,60,358/- and in terms of Clause 11.3 of the Agreement, Agility was entitled to pay ₹1,03,39,641/- as the aggregate value of VIK bills fell short of ₹5 crores by that amount. She also contended that the Arbitral Tribunal had not appreciated that Agility had submitted several false and inflated invoices in respect of

which repeated complaints were made. In respect of certain bills, Agility had reduced the amount claimed or had dropped its claim during the pendency of the proceedings and during cross-examination of witnesses.

24. Lastly, she submitted that Arbitral Tribunal had grossly erred in awarding exorbitant interest and costs.

25. Mr. Abhay Raj Varma, learned counsel appearing for Agility, had countered the aforesaid submissions. He submitted that the contentions advanced on behalf of MYAS fall outside the scope of Section 34(2)(b)(ii) or Section 34(2A) of the A&C Act. He submitted that the Arbitral Tribunal had examined the material on record and its findings were based on appreciation of the said material and the scope of Section 34 of the A&C Act does not extend to re-appreciation of evidence.

Reasoning and Conclusions

26. The principal dispute between the parties relates to the question whether the OC had breached the exclusive sponsorship rights granted to Agility. It is contended on behalf of the OC that Agility was the *"Official Logistics Service Co-Sponsor of Delhi 2010"*. It was entitled to use the said designation but was not the exclusive sponsor for logistics services.

27. The Arbitral Tribunal had addressed the said issue in some detail. First of all, the Arbitral Tribunal had considered the nature of the Agreement and observed that it was a novel contract where the bidder

was required to render services and also pay for providing the same. It was apparent that in return, the bidder was required to be paid certain consideration. The Arbitral Tribunal found that the same was by grant of exclusive rights, which the bidder would advertise on the global stage. Paragraph 7.13 of the impugned award is relevant and is set out below:

> "7.13 The RFP contemplated a novel contract, rather an unusual one, where:
>
> (a) the bidders would submit a sponsorship offer [consisting of services (value in kind/VIK) and cash (value in cash/ VIC)]; and
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> (b) in lieu thereof, the Respondent would provide to the successful bidder exclusive sponsorship rights. The exclusive sponsorship rights consist of a bundle of rights, which are explained below in para 7.14.[40](c)
>
> (c) Thus, the bidder was not to be paid for rendering services to the Organisers; the bidder was to bid for rendering services and also to pay for providing services! The intention is clear. The bidder was to get certain exclusive rights which would advertise it on the global stage, thereby enhancing its future prospects of earning globally."

28. Second, the Arbitral Tribunal had examined the various Clauses of the Agreement and in particular, Clauses 4.5, 11.1 and 11.4 of the Agreement. The said Clauses are set out below:

> **"4.5 Exclusive Appointment**

The appointment of the Service Provider to provide Services to Delhi 2010 under this Agreement is exclusive, subject to:

a) The right of Delhi 2010 to perform any services by itself although under normal circumstances, it is not the intention of Delhi 2010 to perform any services by itself when the Service Provider can perform its obligations under this Agreement,· and

b) The right to contract with other persons for the performance of Services at reasonable cost as a result of a redirection of Service in accordance with clause 4.4.

11.1 Sponsorship Rights

a) In consideration of the Sponsorship Rights granted by Delhi 2010 to the Services Provider and (subject to clause 4.5) the appointment of the Service Provider as the exclusive logistics provider to Delhi 2010 for the Games under the terms of this Agreement, the Service Provider agrees to pay to Delhi 2010 a total rights fee of Rs.12.5 Crores inclusive of all taxes and surcharges ("Consideration"), which shall be satisfied by the Service Provider:

(i) Paying to Delhi 2010 Rs.1.5 Crores in cash on the date of this Agreement;

(ii) Paying to Delhi 2010 Rs.11 Crores (inclusive of all taxes) through the provision of the VIK ("VIK Amount") in accordance with, and subject to, the provisions of Schedule 15; and

(iii) Comply with the conditions, restrictions and obligations that apply to its exercise of

the Sponsorship Rights set out in this Agreement, including, without limitation, those set out in Schedules 13, 14 and 15 of this Agreement.

For the avoidance of any doubt, Delhi 2010 and the Service Provider acknowledge and agree that although the V1K Amount is valued at INR 11,00,00,000 (Rupees Eleven Crores) for the purposes of the grant of Sponsorship Rights, the value of the VIK to be provided in accordance with the Scope of Services under this Agreement may exceed INR 11,00,00,000 (Rupees Eleven Crores), however, Delhi 20 I 0 shall not be required under any circumstances to make any payment to the Service provider if the VIK provided in accordance with the Scope of Services set out in Schedule 2 is in fact valued in excess of INR 11,00,00,000 (Rupees Eleven Crores).

b) In consideration of the payment made and the VIK provided by the Service Provider to Delhi 2010 under clause 11.1(a), Delhi 2010 grants to the Service Provider:

(i) The right to use the Delhi 2010 Marks to leverage the Sponsorship Rights in relation to the nominated Service Provider logo in the Territory from the date of this Agreement until 3I December, 2010 on an exclusive basis within the business category ("Business Category") that includes the provision of logistics services for the

management of the goods and equipment from one destination to another.

For avoidance of any doubt, the Business Category excludes all forms of mail and courier services and freight transport services by air, land or sea; and

(ii) The right to use the designation "Official Logistics Services Co-Sponsor of Delhi 2010/ Delhi 2010 Commonwealth Games/XIX Commonwealth Games" in respect of the nominated Service Provider brand from the date of this Agreement to 31 December 2010.

c) Delhi 2010 agrees to supply to the Service Provider, or procure the supply to the Service Provider of the artwork and transparencies that are to be used in the reproduction of the Delhi 2010 Marks and that are reasonably necessary for the purposes of exercising the Sponsorship Rights.

11.4 Products and Services provided outside the Scope of Services

a) In consideration of the Service Provider's provision of the Consideration to Delhi 2010 in accordance with this Clause 11, Delhi 2010 agrees to grant to the Service Provider a first right of refusal in respect of Delhi 2010's requirements for the provision of additional FOB/ Ex-Works/DDU (but not CNF) logistics services

which do not fall within the scope of Services set out in Schedule 2. The Service Provider will be given not less than 3 working days within which to provide Delhi 2010 with its quote for providing those logistic services. Delhi 2010 will also be free to obtain quotes simultaneously from alternative logistics service providers, however, Delhi 2010 agrees that it will not contract with an alternative logistics services provider prior to the expiry of that period of 3 working days. If an alternative logistics services provider provides a lower quote for the work than the Service Provider's quote for the same work, Delhi 2010 will be free to contract with that alternative logistics services provider, however, Delhi 2010 agrees that it will not contract with an alternative services provider on terms more favourable to the alternative services provider than those offered by the Service Provider to Delhi 2010 in its quote. If the Service Provider does not provide a quote to Delhi 2010 within that period of 3 working days, Delhi 2010 will be free to contract with an alternative logistics service provider in relation to the provision of those additional FOB logistics services without further recourse to the Service Provider.

b) Where Delhi 2010 acquires products or services which do not fall within the Scope of Services set out in Schedule 2 (and hence do not fall within the "VIK" definition) the Service Provider must comply with the terms of Schedule 15 and submit monthly invoices to Delhi 2010 detailing any payments to be made by Delhi 2010 in

> accordance with the payment terms of the Service provider's invoice, as pre-agreed by the parties."

29. In addition to the aforesaid clauses, the Arbitral Tribunal also took note of the pre-contractual communications – more particularly an e-mail dated 30.10.2009 – as well as the RFP.

30. The relevant extract of e-mail dated 30.10.2009, sent by Mr. Amarnath Sindhol of Sports Marketing and Management Company (a nodal agency appointed by MYAS), *inter alia*, is as under:

> "... we are made aware by the Logistics Functional Area that all the logistical requirements at the Games Venues (including, non-competition venues like the Games Village) will be handled only by the official Logistics company. No other logistics company will get access inside the venues and they will be required to tie up with the official Logistics company."

> A plain reading of Clause 4.5 of the Agreement also clearly indicates that Agility was appointed as the Service Provider to provide services on an exclusive basis. Ms. Raju did not seriously contest that Agility was not granted any exclusive rights. She submitted that exclusive rights were confined only to VIK services. The expression "Services" as used in Clause 4.5 has been defined in the Agreement to read as under:

> "Services" means the services requires to be performed by the Service Provider as set out in Schedule 2."

31. Ms. Raju contended that the Services as mentioned in Schedule 2 to the Agreement are VIK services, and therefore, the exclusive rights

were confined to VIK services only. She submitted that insofar as non-VIK services are concerned, Agility was not granted any right of exclusivity. However, the Arbitral Tribunal was of the view that in terms of the Agreement, exclusivity in respect of logistics services was granted to Agility in respect of non-VIK services as well by incorporating a right of first refusal in respect of the said services.

32. The Arbitral Tribunal had concluded that the exclusive sponsorship rights provided to Agility under the Agreement comprised of (a) exclusivity in respect of VIK services; (b) exclusivity for non-VIK services by grant of right of first refusal; (c) exclusive marketing and advertising rights; and, (d) exclusive right to enter the venues. Paragraph 7.14 of the impugned award is relevant and reads as under:

> "7.14 A perusal of the RFP and the agreement between the parties clearly goes to show that the exclusive sponsorship rights provided by the Respondent to the Claimant consisted of the following 4 elements.
>
> (a) Exclusivity for VIK services: The Claimant was assured it would be the exclusive provider of VIK services. The right granted under the Agreement was absolute since the Claimant had already undertaken to provide the entire VIK services[41].
>
> (b) Exclusivity for non-VIK services: The Claimant was to be the exclusive provider of all non-VIK services. This right was structured as a "right of first refusal" since there was no reciprocal

obligation on the Claimant to provide the non-VIK services. The Claimant had the option of saying 'YES' or 'NO' for these services[42]. The exercise of such a right or option, by its very nature requires, that the Claimant be aware of the prices that it is required to match. The disclosure of the lowest quoted that is required to be matched is implicit in the words "right of first refusal". In this connection, reference may be made to *Ravi Development v. Shree Krishna Prathisthan and Ors.* AIR 2009 SC 2519 and *Raju Mathew and Ors. v. State of Kerala and Ors.*, I (2016) BC 74 (Ker).

(c) Exclusive marketing and advertising rights: The Claimant was granted the sole right to use the logos, LSP Tag, venues and locations for advertising and marketing its services to the world at large and in particular, to other CGAs/CGFs and vendors[43]. The key element here was that the Claimant was to be given the exclusive opportunity to advertise and market its services to the world at large and in particular, to other CGAs/ CGFs and vendors.

(d) Exclusive right of entry into venues: The Claimant had an exclusive right of entry into the venues since under the Agreement it had been accredited and had undergone detailed security procedures for this purpose. Since the Respondent was not to engage with/ enter into agreement with any other LSP (as

> long as the Claimant agreed to provide the service and match the lowest bids), it was understood that other LSPs would not be allowed entry. This right was subject to just exceptions that in exceptional situations the Respondent could engage another LSP for VIK/ non-VIK services. (See to Clause 4.4 of the Agreement, quoted in para 3.11 of the Award)."

33. In terms of Clause 11.4 of the Agreement, Agility was granted the first right of refusal in respect of the OC's requirements for the provision of additional FOB/Ex-Works/DDU (but not CNF) logistics services, which do not fall within the scope of Services set out in Schedule-2. Thus, in respect of non-VIK services (ervices not falling within Schedule-2 to the Agreement), Agility was required to be granted the right of first refusal. The Arbitral Tribunal found that the same had been breached as Agility was not granted an option to provide services at the value quoted by other Service Providers from whom such services were procured (M/s Buhariwala Logistics, M/s Balmer Lawrie & Co. Ltd. and M/s DB Schenkers).

34. There is no dispute that Agility was not called upon to match the bids submitted by the aforementioned Service Providers. However, Ms. Raju contended that it was not necessary to do so. She submitted that Agility was given full opportunity to submit its bids in respect of services procured from M/s Buhariwala Logistics and M/s Balmer Lawrie & Co. Ltd. However, the bid submitted by Agility was higher

than those submitted by the said Service Providers and therefore, there was no impediment in the OC engaging their services.

35. There is some controversy as to whether Agility was granted an opportunity to bid for the services procured from M/s Buhariwala Logistics. The Arbitral Tribunal noted that there was nothing on record to suggest that open bids were invited. However, MYAS contends that there is material on record to show that Agility's bid was not responsive. In regard to engagement of M/s Balmer Lawrie & Co. Ltd., it is not disputed that Agility had also submitted its bid for rendering the said services. There is a dispute as to whether Agility's bid was lower than that submitted by M/s Balmer Lawrie & Co. Ltd. Agility submits that the bids were not comparable as one was inclusive of service tax, while the other was not; however, if the service tax element was quantified, its bid would have been lower.

36. The aforesaid contentions may not be material in view of the Arbitral Tribunal's finding that Agility was not granted an opportunity to match the offers made by M/s Buhariwala Logistics or M/s Balmer Lawrie & Co. Ltd. as the same were not communicated to Agility. The Arbitral Tribunal concluded that Agility was required to be given an opportunity and the benefit of matching the bids submitted by other Service Providers. Paragraph 7.23.5 of the impugned award is relevant and is set out below:

> "7.23.5 Second and more important flaw in the action of the Respondent is that whether it be BL or M/s

> Buhariwala, the contacts were given in defiance of the Claimant's right of first refusal. The fact that the Claimant had the 'first right of refusal' as per the contract entered into with the Claimant is not in dispute. On behalf of the Claimant reliance has been placed on *Ravi Development v. Shree Krishna Prathisthan and Ors.* AIR 2009 SC 2519 and *Raju Mathew and Ors. v. State of Kerala and Ors.*, I (2016) BC 74 (Ker). It has been held that the originator of the proposal has to be given the opportunity and benefit of matching that bid which is found to be competitive and accepted. The contract can be awarded to someone else if only the originator of proposal fails to match the other bid. In the present case, it is undisputed that the Claimant was not made aware of the bid of M/s BL or of M/s Buhariwala. In the absence of such opportunity having been allowed to the Claimant, its 'right of first refusal' has been breached."

37. The aforesaid view is clearly a plausible view and cannot be held to be patently illegal or one that no reasonable person could possibly accept. The question as to how a right of first refusal was required to be implemented was addressed by the Arbitral Tribunal. It did not accept the contention that permitting Agility to participate in an open tender would satisfy that condition and would be in compliance of the right of first refusal. The said conclusion is a plausible one. This Court cannot supplant its view in place of that of the Arbitral Tribunal. The scope of examination in this proceeding is limited to examining whether the impugned award falls foul of any of the grounds as set out in Section 34 of the A&C Act. This Court is unable to accept that Arbitral

Tribunal's view in this regard is patently erroneous or one that renders the impugned award in conflict with the public policy of India.

38. Agility had claimed that it is entitled to refund of the consideration paid for the exclusive sponsorship rights. However, the Arbitral Tribunal did not accept the same. The Arbitral Tribunal accepted the alternative submissions of quantifying damages based on the profitability of Agility. Agility had established its profitability margin of above 15%. Accordingly, it awarded damages quantified at 15% of the value of the bid quoted by Agility as general damages for breach of the right of exclusivity. In addition, the Arbitral Tribunal quantified the damages in respect of the contracts awarded to M/s Buhariwala Logistics and M/s Balmer Lawrie & Co. Ltd. at 15% of the said value. Thus, the Arbitral Tribunal awarded an aggregate amount of ₹3,45,42,984/- as damages for breach of the exclusivity rights granted to Agility in terms of the Agreement. Ms. Raju has not contested the quantification of damages.

39. It is not possible to precisely determine the extent of damage or loss suffered by Agility on account of the breach of exclusivity rights granted to Agility. This Court does not find the measure adopted by the Arbitral Tribunal to be unreasonable or manifestly erroneous.

40. The next question to be addressed is whether the impugned award is beyond the jurisdiction of the Arbitral Tribunal inasmuch as the amount claimed by Agility in its Statement of Claims exceeded the

amount/claims mentioned in the notice issued by it under Section 21 of the A&C Act.

41. It is not necessary that a notice under Section 21 of the A&C Act quantifies the amounts claimed. It is required to set out the disputes. In the present case, it is not disputed that the Notice under Section 21 of the A&C Act clearly communicated the disputes between the parties. The Arbitral Tribunal had examined the said contention and found that the issue was covered by the decision of the Supreme Court in ***State of Goa v. Praveen Enterprises:2011 SCC OnLine SC 860***. The Arbitral Tribunal noted that it was not necessary for the claims to be specifically stated in the notice under Section 21 of the A&C Act, and therefore, the same could not be rejected only on the ground that there was no mention of the same in the notice under Section 21 of the A&C Act.

42. In ***State of Goa v. Praveen Enterprises*** (*supra*), Supreme Court observed as under:

> "18…In view of Section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "a request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore, the purpose of Section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not.
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> 19. There can be claims by a claimant even without a notice seeking reference. Let us take an example where a notice is issued by a claimant raising disputes regarding Claims A and B and seeking reference thereof

> to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said Claims A and B. Subsequently if the claimant amends the claim statement by adding Claim C [which is permitted under Section 23(3) of the Act] the additional Claim C would not be preceded by a notice seeking arbitration. The date of amendment by which Claim C was introduced, will become the relevant date for determining the limitation in regard to the said Claim C, whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in regard to Claims A and B. Be that as it may."

43. It is not disputed that the claims made by Agility fell within the scope of the Arbitration Agreement (Arbitration Clause) and it is also not disputed that the same were not barred by any provision of the Limitation Act, 1963. In view of the above, this Court is unable to accept that the impugned award is without jurisdiction as contended on behalf of MYAS.

44. Ms. Raju contended that the Arbitral Tribunal had rejected the OC's counter-claims without any reasoning. The said contention is also unmerited. The Arbitral Tribunal had in fact considered the counter-claims raised by the OC and had also provided sufficient reasons for rejecting the same. The OC had made a counter-claim of ₹1.1 crores on the ground that Agility had not furnished the PBG equivalent to 10% value of the VIK services and therefore, it was entitled to recover the same in cash. The Arbitral Tribunal had noted that two LOIs were issued, whereas the first LOI dated 10.03.2010 required PBG to be furnished; there was no such requirement under the second LOI dated

11.03.2010. In any view, the Agreement had been terminated and the claims and counter-claims of the parties were being considered; therefore, there was no question of any claim surviving on account of non-furnishing of the PBG. Any claim made by the OC on account of deficiency of service would obviously be required to be considered on its own merits.

45. The OC had also made a claim for a sum of ₹5 crores. Agility was required to provide VIK services of a value of ₹11 crores. The procedure contemplated under the Agreement required Agility to raise monthly invoices for VIK services rendered and the OC would in turn raise invoices for an equivalent amount. Clause 11.3 of the Agreement further provided that in the event, the aggregate value of services provided by Agility was less than ₹5 crores, Agility would be required to pay cash amount equivalent to the difference between the value of VIK services and ₹5 crores. The OC claimed that since, Agility submitted invoices aggregating ₹3,96,60,358.89/- only, it was required to pay a balance amount of ₹1,03,39,641.11/- (₹5,00,00,000/- minus ₹3,96,60,358.89/-) to the OC. The Arbitral Tribunal rejected the said counter-claim as it did not accept that Agility had submitted bills aggregating only ₹3,96,60,358.89/- as claimed by the OC. The Arbitral Tribunal noted that some of the bills, which were not accounted for while calculating the said amount, reflected the signatures and stamp of the OC on the counterpart of the bills. According to the OC, the said bills were submitted to one Mr. Rahul who was not authorized to accept the same. In this regard, the Arbitral Tribunal noted that Mr. Rahul had

accepted the bills in ordinary course; there was no express denial that the bills had not reached the OC; and the OC had not pleaded or proved as to who was authorized to receive the bills. In view of these finding, the Arbitral Tribunal rejected the counter-claim made in this regard.

46. Plainly, the conclusion of the Arbitral Tribunal is supported by cogent reasons and warrants no interference in this proceeding. In any view of the matter, the contention that the Arbitral Tribunal had not provided any reasons for its conclusion is wholly unmerited.

47. The contention that the Arbitral Tribunal had failed to appreciate that the bills raised by Agility were exaggerated is also unmerited. The impugned award indicates that the Arbitral Tribunal had examined the said bills and had also restricted Agility's claim in this regard on finding that certain bills were in regard to VIK services, for which no payments were required to be made. As stated above, this Court is not required to re-appreciate or re-evaluate the evidence to re-adjudicate the said dispute. The Arbitral Tribunal is the final adjudicator of the quantity and quality of evidence.

48. Lastly, the OC had raised other counter-claims in regard to furnishing of Warehouse Management Data and return of cancelled duty exemption certificates. This Court had also called upon Ms. Raju to point out whether there was any material on record to support its counter-claim for return of original duty exemption certificates/undertakings which were cancelled by the Customs Department. She has been unable to point out any clause to this effect.

It does not appear that the said counter-claim was seriously pressed. It is also not disputed that the said counter-claims are not of any significant value. In view of the above, the impugned award cannot be interfered with. However, since there are no specific decisions in regard to the OC's counter-claims for return of canceled certificate/undertakings and for provision of Warehouse Management Data, MYAS is not precluded from raising the said counter-claims afresh.

49. The claim that the award of costs is exorbitant and manifestly erroneous is also unmerited. The Arbitral Tribunal comprised of three former judges of the Supreme Court. In all, eighty-two sittings were held. Keeping the same in view, the costs awarded are not unreasonable.

50. MYAS had deposited the awarded amount with the Registry of this Court. The same has been withdrawn by the respondent agent as unconditional Bank Guarantee. The Bank Guarantee shall be kept alive for a further period of three months. Subject to any order that may be passed by any superior court, the Registry shall return the same to the respondent after a period of three months from date.

51. The petition is dismissed in the aforesaid terms. All pending applications are disposed of.

VIBHU BAKHRU, J

APRIL 07, 2022
'gsr'/v

Click here to check corrigendum, if any