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

Judgment Reserved on 12.03.2019

% *Judgment Pronounced on 30.9.2019*

\+ **O.M.P. (COMM) 390/2018**

UNION OF INDIA .....Petitioner

Through: Ms. Maninder Acharya, ASG with Ms. Archana Lakhotia, Mr. B.K. Zaidi, and Ms. Arpita Sharma, Advs. for UOI.

Ms. Lakshmi Gurung, Adv. for the Income Tax Department.

versus

G. L. LITMUS EVENTS PVT. LTD. .....Respondent

Through: Mr. P.V. Kapur, Sr. Adv with Mr.Vijay Phadka, Ms. Vinita Sasidharan, Mr. M. Chandra Sekhar, Mr. Deepak Singh Rawat, Mr. Siddhant Kapur, Mr. Vimal Nagrath, Ms. Kaveri Gupta, and Ms. Luvika J. Talloo, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
RAJIV SHAKDHER, J:

1. This petition is directed against the original award dated 23.02.2018 and corrected award dated 14.05.2018. The petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act').

1.1 The petitioner before the Court is the Union of India, Department of Sports, Ministry of Youth Affairs and Sports. The petitioner will hereafter be referred to as 'UOI'.

1.2 The respondent, who is the original claimant, is a company by the name of G.L.Litmus Events Private Limited. The respondent will hereafter be referred to as 'GL'.

Backdrop:

2. Before I delve into the objections raised before me by UOI via the instant petition, it would be helpful if one were to notice the backdrop in which the instant petition has been filed.

2.1 The Indian Olympic Association (in short 'IOA') which was given the mandate to hold the Commonwealth Games, 2010 (in short 'Games') in the National Capital Region of Delhi (in short 'Delhi NCR'), assigned this task to the Organizing Committee (in short 'OC'). The OC was constituted as a society under the Societies Registration Act, 1860.

3. To take the work forward i.e. to organize and hold the Games between 03.10.2010 and 14.10.2010 (both days included) in Delhi NCR, the OC invited Expression of Interest ('EOI') from vendors for renting out overlays which included their supply, installation, testing, commissioning, operation, maintenance, decommissioning and removal.

3.1 EOI was floated on 05.12.2009. Against the EOI, several responses were received. The OC, however, after pruning the responses received, on 16.01.2010 took the decision to issue Request For Proposal ('RFP') Forms to only four bidders which included a

consortium comprising two entities known as G.L.Events Services and Meroform (India) Private Limited (in short 'Consortium').

4. It is important to bear in mind that the EOI and RFP issued concerned 34 functional areas which were grouped in 7 clusters where arrangements were to be made for hosting the Games.

5. It is in this background that the shortlisted four bidders submitted their technical and financial bids.

5.1 Technical bids were opened on 15.02.2010 while the financial bids were opened on 26.02.2010.

5.2 The record shows that on 23.03.2010, the Consortium was called for a price negotiation meeting scheduled for 26.03.2010. The result of this negotiation meeting was that a Letter of Intent ('LOI') was issued on 5.5.2010 to the Consortium for Clusters III and VII. The price for Cluster III was pegged at Rs.85.63 crores while the price for Cluster VII was fixed at Rs.79.82 crores.

5.3 Apparently, the OC had a rethink on the price that was offered to the Consortium and consequently, it was sought to be reduced. Accordingly, a fresh quote was offered by the OC to the Consortium on 18.05.2010. Via this communication, the price for Cluster III was reduced to Rs.77,63,10,843/- while the price for Cluster VII was reduced to Rs.72,36,49,986/-. These prices were inclusive of all taxes save and except service tax which was to be paid by the OC at the rate of 10.30 percent.

6. There is no dispute that the Consortium accepted the reduced price. Consequently, a formal turnkey agreement was executed between the Consortium and the OC on 02.06.2010. Broadly, the turnkey agreement executed between the OC and the Consortium was

divided into fourteen parts which included parts relating to technical specifications, the scope of work, Instruction to Bidders (ITB), and General Terms and Conditions of the Agreement (in short 'GTCA').

6.1 The GTCA provided for assignment, *albeit,* with the consent of the OC. The Consortium, it appears, was desirous of assigning the contract awarded to it and in this background, approached the OC in terms of Clause 43.2 of the GTCA. The OC approved the assignment and, as a result of this development, a tripartite agreement was executed on 14.06.2010, which had the OC, the Consortium and GL as parties.

7. Though the Games, as envisaged, commenced and ended on the designated dates, disputes arose between the OC and GL concerning the non-payment of dues. The record shows that GL had been paid only a sum of Rs.70,18,73,747/-, which included a component of service tax, against invoice nos. 1, 2 and 3 and a sum of Rs.27,17,14,981/- (including service tax) towards part payment of invoice no. 4, which is, dated 07.10.2010. Since GL was aggrieved by the fact that its payments had been withheld, it triggered the provisions of Clause 39.3 of the GTCA on 12.07.2011 for resolving the issue pertaining to outstanding payments. This provision required parties to engage themselves in a mutual discussion to arrive at, if possible, an agreeable solution to the outstanding disputes.

8. GL did not receive a response to its communication dated 12.07.2011. Resultantly, on 23.08.2011 it sent another communication to the OC with a request that its disputes be referred to the Chairman and the Chief Executive Officer ('CEO') for resolution.

9. In response thereto, the Additional DG(Legal), OC, informed GL vide communication dated 25.08.2011 that the turnkey agreement executed between the OC and GL concerning overlays was being investigated by various agencies including the Central Bureau of Investigation ('CBI') and that an FIR had been lodged in which GL was shown as an accused. Furthermore, GL's attention was drawn to various clauses of the GTCA which, *inter alia,* stated that the vendor ought not to engage in corrupt and fraudulent practices and, if it did, what could be the consequences of the same. Besides this, in the very same communication, a reference was also made to communication dated 19.05.2011 received by the OC from the Ministry of Youth Affairs and Sports (in short 'MYAS') which was suggestive of the fact that till investigation by CBI stood completed, payments against outstanding invoices ought not to be released.

10. Given these circumstances, GL triggered the arbitration agreement obtaining between the parties as incorporated in Clause 39.4 of the GTCA. Accordingly, GL, via notice dated 12.9.2011, indicated the name of its nominee-arbitrator. Since the OC failed to nominate its arbitrator, GL escalated the matter by filing a petition under Section 11 of the 1996 Act. GL's petition was numbered as Arb. Petition No.416/2011. This petition was disposed of by the Court vide order dated 09.08.2012. Via this order, the Court appointed an arbitrator for the OC since it had failed to name its nominee-arbitrator. The Court, by way of the very same order, also mandated the two arbitrators to appoint the third and the presiding arbitrator within the timeframe stipulated therein. It is on account of the order passed by the Court on 09.08.2012 that the arbitral tribunal was ultimately constituted.

11. Before the arbitral tribunal, GL filed its Statement of Claims ('SOC'). The SOC consisted of 26 claims. The OC, in turn, not only filed its Statement of Defence ('SOD') but also raised five (5) counterclaims. The arbitral tribunal framed twelve (12) issues in the matter. GL, in support of its case, cited four (4) witnesses while the OC cited only one (1) witness.

11.1 The witnesses were permitted to file their evidence by way of affidavits whereupon they were subjected to cross-examination.

11.2 The arbitral tribunal, after allowing parties to lead evidence and advance their oral and written submissions, rendered the original award, as indicated hereinabove, on 23.02.2018.

11.3 Upon an application being moved by GL under Section 33 of the 1996 Act, a corrected award, as alluded to hereinabove, was passed on 14.05.2018.

12. In the interregnum i.e. before the impugned awards were rendered, on 29.01.2018, the UOI had moved an application for impleading itself as a respondent in place of the OC. This application was allowed by the arbitral tribunal on 14.02.2018. The factors which the arbitral tribunal took into account in allowing this application were, briefly, as follows:

12.1 The OC at its Annual General Meeting ('AGM') held on 4.08.2017 had decided to undertake voluntary winding up. This was effectuated on 07.08.2017.

12.2 MYAS had issued a memorandum on 21.08.2017 which, *inter alia*, indicated that the residual work concerning the OC would be handled by the Department of Sports and that all assets and liabilities would also stand transferred to the said Department.

12.3 It is these factors that persuaded the arbitral tribunal to allow UOI to be impleaded.

13. It is in these circumstances, the UOI, being aggrieved, by the impugned awards, has carried the matter further by instituting the instant petition.

14. Before I proceed further, I may also indicate that GL has also filed a petition under Section 34 of the 1996 Act to assail the very same awards which are the subject matter of the instant petition, *albeit,* to a limited extent. GL's petition is numbered as OMP (Comm.) No.358/2018.

14.1 In its petition, GL has challenged the impugned awards *qua* conclusions arrived at by the arbitral tribunal *vis-à-vis* Claim nos. 20 and 26. However, in GL's petition, on 30.04.2019, I passed an order of remand by exercising powers under Section 34(4) of the 1996 Act. Via this order, I have requested the arbitral tribunal to re-examine the matter in respect of Claim nos. 20 and 26. This petition is slated to be listed in Court on 03.12.2019.

14.2 Therefore, necessarily, before this Court, in this petition, the UOI can seek adjudication of all grievances save and except those which concern Claim nos. 20 and 26.

Submissions of Counsel:

15. On behalf of UOI, arguments were addressed by Ms. Maninder Acharya, learned Additional Solicitor General ('ASG'), instructed by Ms. Archana Lakhotia, Advocate, while on behalf of GL submissions were advanced by Mr. P.V. Kapur, learned senior counsel, instructed by Mr. Vijay Phadka, Advocate.

16. The submission advanced by Ms. Acharya veered around the following aspect: that the payment terms incorporated in Clause 44 of the ITB, *inter alia*, stipulated the conditions precedent required to be satisfied before GL could call upon the OC for release of payments at various stages.

16.1 Insofar as the payment for stages 4, 5 and 6 were concerned, before release of money could be ordered, a certificate had to be issued in that behalf by a committee appointed by the OC, though, part payment for stage 4 was released to GL without GL obtaining a certificate from the committee appointed by the OC only on account of paucity of time and financial difficulties faced by GL and other vendors. As regards payment for the remaining two stages i.e. stages 5 and 6, payments were to be made only after the conclusion of the Games and that too only upon production of certificates issued by the committee constituted by the OC for the said purpose.

16.2 The assertion made by GL that because certification committee was not constituted by the OC and, therefore, it had put in place the procedure relating to the generation of Handover and Handback Forms (hereafter referred to as 'HO and HB Forms') was flawed for the following reasons:

(i) The HO and HB Forms, which bore the signatures of a representative of the OC only evidenced the handing over or return of overlays from the concerned site and not as to whether they were successfully installed, tested and commissioned and thereafter de-commissioned and removed in terms of the turnkey agreement.

(ii) The HO and HB Forms did not align with the procedure prescribed under the turnkey agreement obtaining between the parties

for the release of money against invoices and hence, could not supplant the requirement of certification by a duly constituted committee.

(iii) The other overlays providers namely Nussli (Switzerland) Ltd., PICO Deepali Overlays Consortium and ESAJV D-Indo India Pvt. Ltd. had followed the procedure prescribed for release of payments, that is, they had obtained certificates from the duly constituted committees. Therefore, there was no good reason why GL could not have obtained the certificates from the duly constituted committee.

(iv) The arbitral tribunal committed a grave error in invoking the doctrine of waiver and estoppel against UOI in justifying its conclusion that payments against concerned invoices are to be released to GL, as neither any such averment is made by GL in its pleadings nor were any argument addressed in that behalf by counsel for GL. In this context, reference was also made to clause 43.14 of the GTCA. The submission was that waiver, if any, had to be made in writing in order to be effective. Besides this, where an element of public interest is involved, waiver of rights explicitly or impliedly cannot be given effect to if it is contrary to the public weal.

(iv)(a) In this behalf, reliance was placed on the judgments of the Supreme Court rendered in ***All India Power Engineer Federation and Ors. Vs. Sasan Power Ltd and Ors.,*** **(2017) 1 SCC 487** and ***Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Ors.,*** **(1979) 2 SCC 409**.

(v) The conclusion of the arbitral tribunal that the HO and HB Forms would suffice for release of payments is flawed for the reason that while these Forms may evidence the receipt of goods at the

concerned site and thus, correspond with stage 4, these Forms would certainly not meet the prerequisite of certification for stages 5 and 6 which required evidence of successful installation, testing, and commissioning, decommissioning and removal of the rented overlays. The argument being that the evidence required for release of payments i.e. receipt of goods at the site and their removal, went beyond what was reflected in the HO and HB Forms. In a nutshell, the stand of UOI was that the arbitral tribunal had ordered the release of the sum of Rs.64,87,08,985/- in addition to the service tax amounting to Rs.6,39,18,450/- contrary to Clause 43.14 of the GTCA.

17. On the other hand, Mr. P.V. Kapur, learned senior counsel, made the following submissions:

(i) Upon the contract being awarded to GL in respect of Clusters III and VII, the same was executed to the satisfaction of the OC. The concept of generation of HO and HB Forms was evolved by GL and taken forward wholeheartedly by the officials and authorized representatives of the OC as, in reality, no certification committee was in existence as contemplated under the turnkey agreement obtaining between the parties.

(i)(a) GL had submitted its invoices from time to time against which some amount of money was released against HO and HB Forms. It is only after the Games were completed that the OC failed to make the payments despite repeated reminders sent to it in that behalf.

(i)(b) It is only during the arbitration proceedings that the OC, for the first time, brought up the issue concerning the deficiency in the services rendered by GL and absence of certification by the committee

in respect of obligations discharged by GL under the turnkey agreement obtaining between the parties.

(i)(c) The OC has raised the very same arguments which were advanced before the arbitral tribunal to justify its stand as to why payments were not released to GL. Each of the arguments advanced on behalf of the UOI has been dealt with by the arbitral tribunal.

(i)(c.1) The first objection which UOI has raised is about to the existence of a committee for certification of work carried out by GL at stages 4 to 6. In support of its objection, UOI also contended that GL knew of the existence of such a committee. This objection is predicated on the following documents i.e. internal note dated 14.08.2010, internal note dated 08.09.2010 and letter dated 17.09.2010. The arbitral tribunal, according to Mr. Kapur, has examined these issues and rejected UOI's objections. In this behalf, reliance was placed by Mr. Kapur on paragraphs 78 to 83, 88, 90, 92, 93 to 98, 111 to 120, 114 to 116 and 141 of the award.

(i)(c.2) As regards the objection taken on behalf of the UOI that since other vendors had managed to obtain the certificates from the duly constituted committee, GL should have been able to obtain the same, Mr. Kapur, once again, adverted to the relevant parts of the impugned award. In particular, Mr. Kapur relied upon paragraphs 121 to 130 of the impugned award.

(i)(c.3) Insofar as UOI's objection to the finding in the impugned award that it had waived its rights is concerned, Mr. Kapur submitted that the arbitral tribunal was right in concluding that the OC had created an impression that the HO and HB Forms would suffice for release of payments in place of certification by a three-member

committee. The fact that some payments were released, according to Mr. Kapur, only strengthened the belief of GL that the HO and HB Forms supplanted the requirement of having to obtain a certificate from a committee appointed by the OC. To buttress his submission, Mr. Kapur relied upon the extracts from the cross-examination of UOI's witness i.e. Mr. Nikesh Jain (RW-1).

Analysis and Reasons:

18. I have heard the learned counsel for the parties and perused the record.

19. A perusal of the petition would show that several grounds have been taken in the petition which is, in a sense, regurgitation of the issues raised in defence on behalf of UOI before the arbitral tribunal. However, during arguments, the learned ASG, as is evident from the written submissions, confined her objections to the three aspects:

(i) First, the absence of certification by a duly constituted committee of the OC, which, as per her, was a prerequisite for the release of payments qua stages 5 and 6 under Clause 44 of the ITB.

(ii) Second, the HO and HB Forms, which had been devised by GL, could not supplant the requirement of certification by the duly constituted committee of the OC.

(iii) Third, the attribution of waiver of the requirement of obtaining certification from a duly constituted committee of the OC to UOI was flawed as no such averment was made in the pleadings nor was such a submission made on behalf of GL before the arbitral tribunal.

(iv) Lastly, the arbitral tribunal wrongly concluded that no certification committee had been constituted as the remaining three

vendors of the OC had obtained such certification; a fact which was a matter of judicial record.

Objections:

20. Given the backdrop, I propose to deal with each of the objections raised on behalf of the UOI.

21. However, before I do so it would be relevant to extract the relevant clause which deals with payment terms.

> *"44. PAYMENT TERMS*
>
> *44.1 The Payment Terms shall be as under:*
>
> - *10% of the contract value of signing of the contract against submission of BG of an equivalent amount*
> - *10% of the contract value after approval of designs against submission of BG of an equivalent amount*
> - *10% of the value of the goods to be supplied on proof of dispatch and on submission of BG of an equivalent amount*
>
> ***NB: This is not applicable for [the] store being supplied indigenously. This 10% payment shall be paid on Phase 4 below.***
>
> - *30% of the value of the goods supplied on-site on certification by [a]committee appointed by OC*
>
> ***NB: Partial payments for items dispatched/supplied in phase 3 &4 of payment terms is permitted***
>
> - *30% on successful installation, testing and commissioning of all overlays as per the contract and certification by[the] committee appointed by OC*
> - *Balance 10% after completing of de-commissioning and removal of rented overlays from site and certification by [the]committee appointed by OC."*

22. A perusal of Clause 44 would show that payments to vendors, in this case GL, were required to be released at various stages in stipulated percentages. Thus, at each stage not only the amount which was to be released is stipulated but also the point in time at which it is

to be released and the prerequisites which were required to be fulfilled for release of payments.

22.1 Therefore, at stage 1 when 10 percent of the contract value was to be released, the release took place only at the stage of the signing of the contract against submission of a bank guarantee of an equivalent amount.

22.2 Likewise, the next tranche of payment which was again 10 percent of the contract value was to be released at the time of approval of designs, *albeit*, against submission of bank guarantee of an equivalent amount.

22.3 Similarly, the third tranche of 10 percent of the value of goods was to be released upon despatch which was required to be backed by proof of despatch and submission of bank guarantee of an equivalent amount.

22.4 The fourth tranche which was pegged at 30 percent of the value of goods was to be released when the goods reached the site and such receipt of goods was certified by committee appointed by the OC.

22.5 The fifth tranche which had a percentage allocated to it i.e. 30 percent, did not provide the basis on which the amount had to be quantified though it did provide the point at which the money would be due and payable i.e. on successful installation, testing, and commissioning of the overlays as per the contract, which, in turn, had to be certified by a committee appointed by the OC.

22.6 The last and final tranche which was pegged at 10 percent, once again, did not indicate the basis on which the money payable had to be quantified but did provide the juncture at which it became due and payable i.e. at the stage of completion of decommissioning and

removal of rented overlays from the site. The prerequisite for the release of this tranche was also the issuance of a certificate by a committee appointed by the OC.

22.7 Insofar as the fifth and sixth tranches are concerned, I would assume as there is no argument advanced either before me or the arbitral tribunal that the amounts to be released had to be quantified taking into account the value of the contract.

Certification by committee and HO and HB Forms:

23. There is, concededly, no dispute concerning the fact that payments qua the first four stages were released to GL without any impediment. Although a certificate was required to be issued by a duly constituted committee of the OC for release of payments equivalent to 30 percent of the value of goods supplied at the site, payments were released without certification based on the HO and HB Forms.

23.1 Ms. Acharya in her submissions has tried to get over this hurdle by contending that while the HO and HB Forms would suffice for payment of stage 4, the same would not hold good for payments of stages 5 and 6.

23.2 In my view, the argument is flawed since the payment to be made at stage 4 was 30 percent of the value of goods supplied. HO and HB Forms by themselves would only give the items of goods supplied "on said to contain basis on-site" and not their value. However, the OC, for reasons best known to them, accepted the newly devised modality of HO and HB Forms for release of payments at stage 4. This aspect comes through if one were to peruse the submissions made by its counsel before the arbitral tribunal which is recorded in paragraph 69 of the award and the conclusion reached by the arbitral tribunal

after perusing the material on record which included the pleadings as well as the affidavit of evidence of UOI's witness i.e. Mr. Nikesh Jain (RW-1).

23.3 While perusing the findings of the arbitral tribunal, one would have to bear in mind that these findings are recorded in the context of claim no. 1 which dealt with amounts demanded by GL concerning invoice no. 4 dated 07.10.2010 which, in turn, related to stage 4:

> *"69. In response, Mr. Sharma learned counsel appearing for the OCCWG vehemently argued that the OC CWG had appointed the committee for certification of the work executed by the Claimant. He submitted that the invoices for stages 5 and 6 as the per 'terms of payment' incorporated in the Turnkey Agreement' read with clause 44 of the 'Instructions to the Bidders' and Annexure XII thereto, required certification by the Committee. According to him certification by the Committee was mandatory and the Claimant had agreed to such a condition as is apparent from the aforesaid clause. He canvassed that since the invoices for stages 5 and 6 submitted by the Claimant to the OC were not certified by the Committee, the claimant is not entitled to any payment in respect thereof. He drew our attention to the office note dated August 14, 2010 initiated by Mr. Nikesh Jain, Director (Overlays), Organising Committee of Commonwealth Games Delhi, 2010 relating to procedure for making payment. He submitted that as per the note, the overlays contractor for stage 4 was required to submit a detailed list of items received at venues along with self-quality certification on its letter head for verification by the concerned architect/engineer responsible for the venue as per the format which could have been seen at the functional area. He also invited our attention to para 4 of the affidavit of Mr. Nikesh Jain, CW 1 affirmed on October 21, 2014, according to which the OCCWG had briefed and informed all overlays providers including the Claimant at the time of execution of the contract on June 02, 2010 that certification for stage 4 of overlays was to be reckoned against delivery of material on 'said to contain basis on site' which was to be certified by overlays architect or project*

officer of overlays. This was an exception to Clause 44 of the Instruction to Bidders. He contended that for stages 5 and 6 no exception was made to the condition that invoices for the said stages were to be certified by the Committee appointed by the OC CWG as is apparent from the office note of Mr. Nikesh Jain dated September 08, 2010.

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145. It was alleged that the Claimant did not furnish documents in support of the invoice. We find from [the] record that the representatives of the OC CWG had duly signed HO/HB forms which, inter-alia, prove that the overlays etc. were delivered at the venues/sites by the Claimant. The OC CWG failed to point out any deficiency in the delivery of overlays by the Claimant during the Commonwealth Games. In case there was any deficiency, the OCCWG would have sent a written communication about it to the Claimant and would have filed a copy thereof in these proceedings. It is not denied that the OC CWG had made part payment in respect of the overlays to the Claimant. Since we have elaborately dealt with the various aspects of the matter and arguments of learned counsel for the parties and have already given our reasons for holding that the Claimant had performed its obligations to deliver, install, commission, maintain, decommission and removal of overlays, it is not necessary to recount the same.

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147.....In the SOD it has not given any reason other than [the]absence of certification for not releasing the full payment or specifics of any other anomaly or discrepancy. RW1 in answer to question no.173 admitted this position. It may be recalled that the OC CWG's latest stand as reflected from the affidavit. filed by Mr. Nikesh Jain is that no verification by the committee was required at stage 4. These reflect the conflicting stands taken by the OC CWG."

(emphasis is mine)

23.4 Therefore, what comes through, qua which, a finding of fact has been returned by the arbitral tribunal, is that the requirement of certification *vis-a-vis* stage 4 was given up by the OC.

23.5 This brings me to the objection taken on behalf of UOI that this requirement of certification having been retained for release of payments for stage 5 and stage 6 had to be fulfilled and could not be supplanted by HO and HB Forms.

23.6 This argument advanced on behalf of UOI is predicated on two internal notes, which are dated 14.08.2010 and 08.09.2010, and the communication dated 17.09.2010.

23.7 Based on the two internal notes, the stand taken on behalf of UOI both before the arbitral tribunal and by Ms. Acharya before me is that not only was the certification committee constituted but that the constitution of such a committee was communicated to GL by Mr. Nikesh Jain (RW-1) vide letter dated 17.09.2010.

23.8 In this behalf, it would be relevant to note as to what the arbitral tribunal had to say in the matter:

> *"78. Presently, without commenting upon the authenticity of the notes, which the Claimant calls in question, we find that the 'first note' initiated on August 14, 2010 mooted a proposal for procedure to be followed for making payment for overlays work to the overlays providers and for appointment of the committee to certify their bills, which did not go beyond the stage of being a proposal. The fact that note was merely a proposal has been admitted by RW-1 in answer to question no.156. It will be appropriate to reproduce the said question and answer of RW-1 thereto:*
>
> *"Q.156 So is this the document which contains the decisions or it is merely a proposal as on 14.08.10?*
>
> *A. This is a proposal.* "

79. In so far as the second note is concerned, it is evident that a 'team' was proposed to "certify the quantities from OC" and to "maintain measurement book for BOQ supplied". This proposal was approved by the OC, which means the 'team' was to ascertain from the OC the quantities brought at venues and to maintain 'Measurement Book of Quantities'. There was no mention of appointment of a committee for certification of stage 5 i.e. on successful installation, testing and commissioning of all overlays and for stage 6 i.e. after completion of games de-commissioning and removal of the rented overlays from site.

80. In any event, it was admitted by the OC CWG's witness that the second office note dated September 08, 2010 was not circulated to the Claimant. In this regard question no. 195 put to Mr. Nikesh Jain CW1 and his answer thereto needs to be looked at:

> *"Q. 195 the document dated 08.09.2010 is an internal Document and the same was obviously not circulated to the Claimant Isn't it?*
>
> *A. Yes it was not*

81. It is also not claimed by the OC CWG that the first office note dated August 14, 2010 was circulated to the Claimant. It is, however, the stand of the OC CWG that the factum of the constitution of the Committee was communicated to the Claimant by letter of CW 1, Mr. Nikesh Jain dated September 17, 2010 ……..

82. During his cross examination, RW-1 stated that the letter was not sent by email to the Claimant but was personally delivered to Mr. Nitin Mehta of the Claimant, but curiously RW1 did not obtain acknowledgement of delivery of the letter from him……..

83. Thus, it is clear from the aforesaid answers of RW-1 that there is no written proof of delivery of the letter by him to Mr. Nitin Mehta. It is unimaginable that Mr. Nikesh Jain would have delivered such an important letter to Mr. Nitin Mehta without obtaining an acknowledgement of its delivery to him. In case the letter was delivered to Mr. Nitin Mehta, surely RW-1 would have taken a receipt of its delivery from him. It is also evident that neither in the Statement of Defence nor in the affidavit of

> *evidence of RW1, there is any mention of delivery of the aforesaid letter to Mr. Nitin Mehta there is also no reference of this letter in any of the subsequent letters or emails of Mr. Nikesh Jain to the Claimant."*
>
> *(emphasis is mine)*

23.9 Therefore, the findings of fact returned by the arbitral tribunal was that formation of certification-committee by the OC remained at the stage of a proposal. The aforementioned notes being internal were not circulated and lastly, there was neither any proof of delivery of communication dated 17.9.2010 to the concerned officer of GL nor an averment to the effect in the SOD.

24. I may also indicate that the aspect concerning attribution of knowledge to GL was sought to be culled out based on two e-mails of the same date 08.10.2010 sent by Mr. Sebastien Brunet and Mr. Binu Nanu and e-mails dated 09.10.2010 and 12.10.2010 sent by Mr. Nikesh Jain (RW-1) to GL. Based on e-mails dated 08.10.2010, it was sought to be argued that since GL's representatives had commented on the sign-off process being complex they were aware of the contents of the letter dated 17.09.2010 addressed by Mr. Nikesh Jain (RW-1) to Mr. Nitin Mehta, the representative of GL.

24.1 The findings of fact returned by the arbitral tribunal in this behalf being of some relevance are extracted hereafter:

> *"87. At the first blush, the argument appears to be attractive but a closer scrutiny of it, proves the proverbial saying 'appearances can be deceptive'. The letters of the claimant's officials are an expression of exasperation. The Claimant was clamoring for payment of its bills, which were outstanding. It was not even paid its bills for stage 4, though hand over and hand back forms were duly signed by the representative of the OC CWG, who did not object to the said procedure as OC CWG did not have adequate manpower. When the Claimant was not being paid for work*

done, it appears that the OC CWG in order to justify its default came out with the excuse that invoices for stage 5 were not certified by the committee. On being deprived of their dues on this ground, the aforesaid two emails Dated October 08, 2010 seem to have been written out of desperation, pointing out that the process communicated only a few days ago was complex and the composition of the committee was not known to them. It is noteworthy that Mr. Nikesh Jain on October 09, 2010[sic] sent an email to Mr. Sebastien Bruno, whereby he did not traverse the assertion of the Claimant in the letter dated October 8, 2010 that composition of the committee was not known to the Claimant and the process to raise invoices for stage 5 was communicated to it only a few days ago …….

88. Though this email is in response to the two emails dated October 08, 2010 of the officials of the Claimant, Mr. Nikesh Jain did not state that he had handed over the letter dated September 17, 2010 to Mr. Nitin Mehta informing him of the appointment and composition of the committee. The email of Mr. Nikesh Jain dated October 09, 2010 is completely silent about the letter dated September 17, 2010. In case, Mr. Nikesh Jain had delivered the aforesaid letter to Mr. Nitin Mehta, he would have certainly contradicted them by stating in his email that it was hand delivered to Mr. Nitin Mehta on September 17, 2010 through which he was made aware that the OC CWG had appointed a committee for certification of the work for the said stage. It is strange that Mr. Nikesh Jain did not mention the composition of the Committee in his email dated October 9, 2010,[sic] even though the Claimant's official in his letter dated October 8, 2010 stated that if OC had appointed a committee, the Claimant was not aware of its composition.

89. Even there is another email of Mr. Jain dated October 12, 2010 in response to two ensuing letters of Mr. Sebestian Brunet dated October 09, 2010 and Mr. Binu Nanu dated October 11, 2010 requesting the OC CWG for payment of dues of the Claimant, which again failed to make any mention of his letter dated September 17, 2010 and of requirement to have certification of the committee as mentioned therein.

> *90.As is apparent from the response of Mr. Jain to the aforesaid emails of Mr. Sabestian dated October 9, 2010 and Mr. Binu Nanu dated October 11, 2010, he did not mention about his alleged letter dated September 17, 2010 nor remonstrated about the failure of the Claimant to secure the certification of bills from the committee. In case the committee was appointed as per the 'Payment Terms' and was functional, he would have stated that bills cannot be entertained as they have not been certified by the committee, but that is not what he stated in his letter dated October 12, 2010."*
>
> *(emphasis is mine)*

24.2 Furthermore, to buttress its argument that GL was aware of the constitution of the committee and that there was a lacuna insofar as the invoices had not been verified, reliance was placed on Mr. Nikesh Jain's (RW-1) letter dated 10.11.2010. Qua this communication as well, the arbitral tribunal returned a finding of fact in paragraph 92 that there was no evidence on record to show that this communication was received by GL.

24.3 Clearly, the arbitral tribunal based on the appreciation of evidence placed before it by the disputants concluded that the constitution of the certification-committee was not conveyed to GL. To my mind, the inference drawn by the arbitral tribunal is not perverse, on the other hand, it flows naturally from material available on record.

25. Thus, having regard to the aforesaid facts and material on record the arbitral tribunal returned the following findings of fact which are incorporated in paragraph 141 of the award and are paraphrased as follows.

i. No committee was appointed as per the payment terms for verifying and certifying the services rendered by GL at all stages of the subject work.

ii. GL had proved that the HO and HB Forms were verified and accepted as evidence of work performed at stages 5 and 6.

iii. Since the OC had failed to appoint the committee required for certification of work done by GL, the signing of the HO and HB Forms by representative of the OC amounted to due certification of work executed by GL and, therefore, it was entitled to payments except for quantities and items not payable for other specified reasons.

Waiver:

26. The arbitral tribunal's observation that the OC had waived the requirement of insisting on certification of invoices by a duly constituted committee was based on its conduct during the execution of the turnkey agreement. The arbitral tribunal having found that no committee for certification was constituted and that if it was constituted, it was not functional or that its constitution was not communicated to GL and that to get over this lacunae the HO and HB Forms were devised by GL which were accepted by the OC for release of a part of payment due at stage 4 — in my view, entitled the arbitral tribunal to draw the inference that such an approach adopted by the OC amounted to estoppel by conduct.

26.1 The submission advanced on behalf of UOI that there could be no waiver and that if waiver had to be attributed to it, it could only be triggered in writing in consonance with the provisions clause 43.14 of GTCA is untenable as the arbitral tribunal has invoked the principle of

estoppel by conduct which is a rule of evidence while waiver is based on a contract. Therefore, the argument advanced on behalf of UOI that the provisions of clause 43.14 of the GTCA were not fulfilled has no merit.

26.2 The public interest argument advanced on behalf of UOI by Ms. Acharya, to my mind, can have no bearing on this case as the arbitral tribunal has returned a finding of fact that the work was completed by GL and furthermore, no grievance about the services rendered was raised by the OC. As noted hereinabove, the only reason that balance payments were not made by the OC to GL was on account of the matter being investigated by CBI and other agencies. On this issue, a preliminary objection was raised by UOI which has been discussed in detail and dealt with satisfactorily by the arbitral tribunal in paragraphs 27 to 62. This apart, the arbitral tribunal has also dealt with the charge of cartelisation. As indicated hereinabove, the preliminary objection taken before the arbitral tribunal concerning fraudulent and corrupt practices was not even articulated before me as is evident from the written submissions filed by UOI. Therefore, this objection, in my view, has no merit and is, accordingly, rejected [See *Krishna Bahadur v Purna Theatre,* (2004) 8 SCC 229].

Other vendors:

27. This brings me to the last aspect which is that the remaining vendors which included PICO Deepali Overlays Consortium had obtained certificates from the duly constituted committee and, therefore, the arbitral tribunal's conclusion that there were no committees in existence was clearly erroneous.

27.1 The arbitral tribunal has dealt with this very objection in the following paragraphs of the award which are extracted below:

> *"121. The OC CWG with a view to support its contention that committee was constituted filed an application for placing on record the following Arbitral Awards and a judgment of the Hon'ble Delhi High Court:*
>
> *i. Judgment dated March. 08, 2016 passed by the Delhi High Court in OMP 30/2015in the case of OC vs. PICO Deepali Overlays Consortium and Anr.*
>
> *ii. Arbitral Award dated December 03, 2015 passed in Arbitration between PICO Deepali Overlays Consortium and OC*
>
> *iii. Arbitral award dated December 14, 2013 passed in Arbitration between Nussli Ltd. (Switzerland) Ltd. And OC*
>
> *122. Learned Additional Solicitor General, Mr. Maninder Singh appearing on behalf of the OC CWG in support of the application, pointed out that orders were placed on 4 successful bidders for supply, delivery, installation, commissioning, maintenance and decommissioning of the overlays for different clusters. He contended that PICO and Nussli like the Claimant had raised Claims for payment in respect of BOQs for which they had not obtained due certification of the committee. He canvassed that such Claims of the PICO and Nussli were rejected and on parity of reasoning similar claims in the instant arbitration ought to be rejected.*
>
> *123. We have considered the contention of learned Additional Solicitor General. But we regret our inability to accept the same. It is a fundamental principle that an arbitration matter is to be decided on the basis of facts and the evidence that is brought before an Arbitral Tribunal. In the instant case the OC CWG has not been able to prove that a functional committee was appointed for clusters III & VII in consonance with the 'Payment Terms'. We have already referred in detail the reasons on the basis of which we have concluded that no committee in conformity with 'Payment*

Terms' was appointed and functioning. We have also observed in the earlier part of the award that in the event the three-member committee was appointed and functioning qua clusters iii and vii, OC CWG would have placed before us the record of the deliberations of the Committee, inspection of the Clusters and work done by the OC CWG. But no such record was filed. We have also noted that in case the committee for clusters III and VII was appointed and functioning the OC CWG, itself could have asked the committee to certify after verification the extent of work executed by the Claimant. The fact that the OC CWG did not take such a step is one of the factors which is indicative of the fact that if the committee was functioning it could have itself referred the bills for verification.

124. Arbitration is a consensual adjudication. Generally, an Award has no effect whatsoever on those, who were not Parties to the Arbitration. Further, the awards are considered to be confidential and are not to be relied upon in subsequent proceedings involving one or more different parties. (para 17.29 of Arbitration Law by Robert Merkin 2014 edition)

125. In the arbitration between PICO Deepali Overlays Construction and Ors and Organising Committee Commonwealth Games, 2010 it was admitted by the counsel for the PICO Deepali that the certification at stages 5 and 6 was required to be done by three officials of the OC and the only dispute with regard to certification was whether the three signatures relied upon by PICO Deepali were by such persons/officials.

126. Thus, the award proceeded on the basis of a concession of the PICCO Deepali. The Hon'ble Delhi High Court on the application filed under section 34 of the Arbitration and Conciliation Act, 1996,by the OC noticed at para 52 of its judgment that both the counsel agreed that 'the certification at stages 5 and 6 was required to be done by three officials of the OC CWG and the only dispute was whether the three signatures relied upon by the Claimant were by such persons/officials as would be sufficient to sustain the Claim and as per the Claimant the invoices had to be certified for stages 5 and 6 by three official of the OC CWG and all the

invoices relied upon by them had the certification by three officials of the OCCWG'. Thus, the High Court also proceeded on the basis of the concession of the Claimant.

127. In para 9.23 of the award rendered in the case of Picco Deepali, the aforesaid tribunal noticed that no question was put to OCCWG's witness regarding necessity for certification by all the three different categories of officials and the averment in the affidavit of the OC CWG's witness to the effect that Functional Area Head, Consultant and Architect at each of the venue were required to certify the Claimant's work had gone unrebutted. Whereas in the instant case the Claimant has not only stated that no committee of three members was appointed for stages 4, 5 and 6 but has also extensively cross examined RW1 about this aspect of the matter. Therefore, the argument of the Additional Solicitor General that the facts and evidence in the both the matters are the same is not correct. Even one fact can make a difference for the purposes of adjudication of a matter.

128. Reverting to the judgement of the Hon'ble Delhi High Court in the aforesaid matter, it is important to note that in para 53 thereof the court noticed that the Tribunal in its award had held that there was no record to show that the Claimant had raised any query or sought clarification in relation to the certification process for payment of stages 5 and 6 and "Me Chug Chee Keong (CW1) admitted to being in the know of the certification process in his cross examination ..... In the instant case, the Claimant through the letter of Mr. Binu Nanu dated October 8, 2010 addressed to Mr. Nikesh Jain categorically stated that the claimant was not aware of the composition of the committee in case the same had been appointed by the OC CWG. Mr. Nikesh Jain responded to the aforesaid letter on October 9, 2010 but maintained complete silence about the composition of the committee or its appointment by the OC CWG. Even after, October 9, 2010, Mr. Nikesh Jain in yet another letter dated October 12, 2010 again failed to mention about the appointment of the committee and its composition. If Mr. Jain had handed over the alleged letter dated September 17, 2010, regarding the constitution of the committee to the official of the Claimant, Mr. Nitin Mehta, this fact would have been recorded in the letters of Mr. Jain dated October

9, 2010 and October 12, 2012 by a simple reference to it to clarify the position.

129. Picco Deepali was decided on its own facts and circumstances and in the light of the evidence that was adduced before the said Tribunal. Therefore, the instant case and Picco Deepali stand on a different footing. The judgment of the Hon'ble Delhi High Court has been appealed against and the appeal is pending before the Hon'ble Supreme Court. Therefore, the decision of the Hon'ble Delhi High Court has not attained finality.

130. The factual findings that may have been arrived at in the other two cases obviously cannot be treated as evidence in the instant matter, especially when the Claimant was not a party to those proceedings. In the circumstances, therefore the awards and the judgment of the Hon'ble Delhi High brought to our notice with respect cannot have any application in the instant matter."

(emphasis is mine)

28. Having examined closely the observations of the arbitral tribunal as to why PICO Deepali Overlays case was not *pari materia* with the instant case, I tend to agree with the conclusion reached in that behalf. Undoubtedly, the aspect concerning the constitution of the certification-committee or their functionality was not in issue in PICO Deepali's case. The judgment rendered in that case, therefore, can have no applicability to this case. It is trite to say that the ratio of the judgment is pivoted on what it decides and not what possibly can flow from it.

Decision:

29. Thus, for the foregoing reasons, I find no merit in the petition. The petition is, accordingly, dismissed. However, parties will bear their respective costs.

(RAJIV SHAKDHER)
JUDGE

SEPTEMBER 30, 2019/A