

Hcl Infosystems Limited vs.virgo Softech Limited

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SooperKanoon Citation : sooperkanoon.com/1220426

Court : Delhi

Decided On : Jan-08-2019

Appellant : Hcl Infosystems Limited

Respondent : Virgo Softech Limited

Judgement :

\$~1 * + O.M.P. (COMM) 33/2018 & IA No.1179/2018 IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision :

8. h January, 2019 HCL INFOSYSTEMS LIMITED

... Petitioner

Through: Mr.V.N.Koura, Mr.S.Sirish Kumar, Mr.Abhinav Tandon, Advs. versus VIRGO SOFTECH LIMITED Respondent Through: Mr.Saurav Agrawal, Mr.Akhil Sachar, Chowdhary, Mr.Anshuman Ms.Sunanda Tulsyan, Advs. CORAM: HON'BLE MR. JUSTICE NAVIN CHAWLA NAVIN CHAWLA, J.

(Oral) 1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed by the petitioner challenging the Arbitral Award dated 26.08.2017 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Project Execution Agreement dated 02.08.2010 (hereinafter referred to as the PEA) executed between the parties.

2. The PEA had been executed between the petitioner, the respondent and one Accor Services Pvt. Ltd., which was not made a party to the arbitration proceedings as no claim or counter claim was made against it. OMP (Comm.) No.33/2018 Page 1

3. The parties to the present petition had also entered into a Consortium Agreement dated 17.02.2010 for purposes of submitting a bid pursuant to a Request for Proposal (RFP) floated by the Department of Food, Civil Supplies and Consumer Protection, Madhya Pradesh (hereinafter referred to as the Govt. of MP) for appointment of Vendor for IT enabled Distribution Mechanism for Public Distribution System (PDS).

4. The Consortium Agreement in Schedule I thereof enumerated the responsibilities of each of the Consortium partners incase the Consortium is successful in obtaining the Agreement.

5. The Govt. of MP vide its letter dated 29.07.2010 conveyed its notification of Award of work in favour of the Consortium. Clause I of the letter gave the rates for the work in the following terms: 1. It is to inform you that your bid submitted by HCL Consortium against our tender No.G-198

has been accepted for awarding the work for Appointment of Vender for IT enabled Distribution Mechanism for Public Distribution system (PDS) in Madhya Pradesh on a turn-key basis. The terms and conditions shall be as per RFP and the rates (including all the taxes) accepted are as follows:-

"Rs. 9.95 + 1.03 Tax@ 10.33%= Rs. 10.98 per Ration Card per Month. 6. Clause 7 of the letter further enumerated the division of responsibilities amongst the Consortium Members as under: OMP (Comm.) No.33/2018 Page 2

7. The division of responsibilities among the consortium partner would be as follows, based on their bid document. HCL Virgo Prepare the by Database & entering updating the details of the existing ration card holders (APL, BPL & AAY). Camps for collecting biometric impressions & digital photographs. HW, software and setup for Enrolment Camps. Local publicity of programme. Software Development as per Departments requirement / of Migration Integration current application and databases to the FCS data center and systems. Setup of Data Centre, LAN/W. AnInternet Connectivity. SMS Gateway server in integration with the main

application. Design & implementation of Network & Security Architecture. Quality Assurance Security Policy. & Procurement & of deployment OMP (Comm.) No.33/2018 Accor Service Printing of Secured Coupons as per Customer requirements. Distribution of coupons to beneficiaries by postal service. Collection of coupons and back tracking . Reporting Lost or undelivered coupons Page 3 / infrastructure facilities Including Servers, Storage etc. & related equipments, any other hardware and Desktops, UPS, Printers, PDAs & Networking equipments, etc. Deployment Portal, Gateway Applications. of SMS & Centralized IT helpdesk. software for setup HW, and Enrolment Camps Maintenance services for the project duration. Security administration, database administration, network administration and problem resolution end-user Training to Department. OMP (Comm.) No.33/2018 . Backend Coupons processing and MIS reporting including manpower, equipments, connectivity etc. Any other activity related to Coupon mechanism i.e. printing, distribution, collection, logistics , MIS etc. Distribution of First set of Ration Cards Page 4 by post. State- wide & Region- wide Publicity of the programme through, Radio.

7. The parties thereafter executed the PEA wherein again Schedule I gave the responsibilities to be performed by each of the Consortium Members which was in similar terms as the letter dated 29.07.2010 from the Govt. of MP.

8. In 2013, the Parliament enacted the National Food Security Act, 2013. The Govt. of MP claimed that with the promulgation of the said Act, the work awarded to the Consortium under the Agreement had been rendered futile, and terminated the Agreement by its letter dated 12.09.2013 relying upon Clause 6.32 of the RFP and Clause 20 of the Agreement dated 28.07.2011 executed between the Govt. of MP and Consortium.

9. Clause 20.5 of the Agreement dated 28.07.2011 is reproduced hereinunder: OMP (Comm.) No.33/2018 Page 5 20.5 If the Force Majeure Event continues for a period exceeding one year the Party(ies) shall be released of their obligations under this Agreement and this Agreement shall stand terminated with no liability to either Party (except payment of sum owed, and value of infrastructure and services deployed up to the date of termination under this clause, after giving 30

days notice to the other Party. 10. A reading of the above Clause would show that where the Agreement is brought to an end as the result of any force majeure event, the Govt. of MP had agreed to pay the value of infrastructure and services deployed by the Consortium up to the date of termination of the Agreement. Relying upon the said Clause, the petitioner submitted a claim on behalf of the Consortium with the Govt. of MP on 16.01.2014 inter alia making a claim of an amount of Rs.8,12,23,102.05 towards Hardware for Data centre and Service windows. Similarly, a claim of Rs.28,50,37,831/- was submitted on behalf of the respondent towards Enrolment infrastructure procured and deployed on the behest of the department specifically for executing enrolment activities in all 50 districts of Madhya Pradesh, Claim for UID Kits, Vehicles and UPS and battery procured and deployed for the project. 11. The Govt. of MP, however, by its letter dated 02.07.2014 communicated the following to the petitioner as its final offer for a settlement: OMP (Comm.) No.33/2018 Page 6 I am in receipt of your letter under reference. At the outset, I wish to point out that even though your above letter No.SO-EG/10/005/MPPDS/May-14/001 dated 08.05.2014 does not address the issues raised in my letter dated 3.5.2014, including the issues raised in the earlier letters starting with the letter of 12th September, 2013, I am hastening to reply lest you think that a decision on your claims is being delayed. A perusal of the undersigned's letter dated 03.05.2014 would show that a full and final settlement was offered by treating the agreement as frustrated. However, in your reply under reference, even while signifying your willingness to settle the matter fully and finally, you apparently want the proposed settlement to take place on the basis of the force majeure clauses as contained in the contract and RFP. For doing so, you also seek to rely on the initial letter dated 12.09.2013 by which you were informed that it was no longer legally possible to implement the State Governments food coupon scheme, for the implementation of which the agreement dated 28.7.2011 had been entered into with you. It is submitted that though from the contents of the said letter it is apparent that the State Governments clear intention was to let you know that the said agreement stood frustrated yet merely because the force majeure clause as contained in clause 20 of the agreement and clause 6.32 of the RFP were referred to you wish to treat the question of further performance of the agreement as having been brought to an end by force majeure and not frustration

in terms 56 of section of the Indian Contract Act. It is submitted that apart from the fact that our letter dated 12.09.2013 is being deliberately misinterpreted / misunderstood by you, our stand that the agreement stood frustrated by virtue of the enactment of the national Food Security Act 2013 by the Union Parliament was clearly spelled out to you in our letter dated 23.10.2013. OMP (Comm.) No.33/2018 Page 7 However, even on merits the claims made by you in your letters dated 26.11.2013 and 16.01.2014 do not bear scrutiny. It is submitted that while in our reply dated 03.05.2014 to your above letters dated 26.11.2013 and 16.01.2014, we had clearly stated that the claims made by you are untenable and excessive yet in your reply dated 08.05.2014, you have not touched upon the said questions at all. However, in order to save the time of both the parties it may be stated for your guidance that apart from your claim pertaining to the biometric enrolment work done in respect of APL, BPL and AAY persons, none of the other claims can even be considered. This is particularly so as your other claims are either premature or not due or merely a duplication of your claim in respect of biometric enrolment of APL, BPL and AAY persons. As such, confining your claim to the biometric enrolment work done in respect of APL, BPL and AAY persons (64,84,724 as per State NIC Bhopal records), your total claim worked out on the basis of the rates quoted in your financial bid for BPL and AAY comes to Rs. 24,91,43,096/- (Rupees twenty four crores ninety one lakhs forty three thousand and ninety six only) which is inclusive of all taxes as the calculations cannot be made on the basis of the ration cards or food coupons (as the case may be) which were never made or generated. The amount which you have already received and the amount deducted by UIDAI for demographic errors would of course, need to be deducted from the above amount. Thus, if you are willing to settle your claim on the above basis, the matter can be resolved and closed at the earliest. Trusting that the above proposal will be acceptable to you. 12. A reading of the above letter would clearly show that the Govt. of MP denied its liability under Clause 20.5 of the Agreement while claiming frustration of the Contract. It further OMP (Comm.) No.33/2018 Page 8 offered Rs.24,91,43,096/- in full and final settlement of all claims of the Consortium.

13. Here it would be relevant to note that Clause 7.1.2 of the Agreement provides for the vesting of all IT hardware procured for data centres and Service windows in

the Govt. of MP, post completion of 60 months from the State go live date or completion of PDS project whichever is later. Similarly, Clause 10.3 also provides for vesting of the IT hardware in the Govt. of MP. Clause 7.1.2 and 10.3 of the Agreement are reproduced hereinunder: 7.1.2 Consortium will provide hardware for the PDS Project requirements and the hosting agency for Database Management would be chosen by the FCS. All IT hardware procured for data centre and service windows will be exclusive property of the FCS post completion of 60 months from the State Go Live Date or completion of the PDS Project whichever is later. The cost of hardware is included in the transaction fees to be paid to Consortium as per financial terms and condition of this Agreement xxxxxx 10.3 Department of the FCS has the right on all IT hardware procured for data centre and service windows post completion of 60 months from the State Go Live Date or completion of the Project whichever is later. 14. It is therefore, clear that the Govt. of MP was claiming a right over the equipment without making any further payment for the same. OMP (Comm.) No.33/2018 Page 9 15. By its letter dated 18.07.2014, the petitioner, for the Consortium and as its lead Member, conveyed its acceptance to the offer made by the Govt. of MP. This letter is important for adjudicating two issues in the petition and therefore, is reproduced hereinunder: We are in receipt of your letter under reference for settlement of our claim. We hereby accept your proposal of making payment Rs. 24,91,43,096/- (Rs. Twenty Four Crores Ninety One Lakhs Forty Three Thousand and Ninety Six only inclusive of all taxes) on account of Biometric Enrollment work. We request you to kindly make the payment to the consortium partners in the following manner. Edenred India Private Limited (Formerly, known as Accor Services Private Limited) - Rs. 5 Lakhs maintaining Current Bank Account No.500044010929 with ING Vysya Bank Ltd., Mittal Tower A Wing, Ground Floor, 210, Nariman Point, Mumbai-400021 (Relevant IFSC Code is VYSA0005000 and MICR Code is 400064002). Infostems Ltd. of HCL The balance amount is to be made in the ratio of 20:80 in favour A/c No.00030110000342 with HDFC Bank Limited, Surya Kiran Building, K.G. Marg, New Delhi-110001, IFSC Code, HDFC00000003) and Virgo Softech Limited (Account No.ICICI Bank Ltd. Branch K-1, senior mall, sector 18 Noida UP20130 Current account No.003105027778, IFSC Code ICIC00000031, respectively. (CC Kindly release the aforesaid payment

at the earliest. 16. The Govt. of MP, vide its letter dated 19.09.2014 again conveyed the final offer as Rs.24,91,43,096/- subject to a OMP (Comm.) No.33/2018 Page 10 deduction on account of the amount already paid, amount collected by the Consortium from the consumers, etc. and thereby finally offered an amount of Rs.20,16,40,923/-. The Govt. of MP however, rejected the prayer of the Consortium Members to make payment in their individual accounts and instead insisted on complying with Clause 8.15 of the Agreement and making the deposit in the Escrow Account in terms thereof. The Govt. of MP further stated that the assets deployed by the petitioner at NIC Bhopal may be taken back by the petitioner on a mutually convenient date and time. There was no mention with respect to the other equipment.

17. On 23.09.2014, the Consortium Members executed and received the final settlement amount. The letter of the same date, stated as under: Please note that the TDS certificate to be issued by the department for the TDS deducted as per settlement letter above should be issued in the name of HCL Infosystems Limited for Rs. 9,90,200.00 only. Virgo Softech Limited for Rs. 39,60,587.00 only and Edenred India Pvt. Ltd. NIL only. 18. The above TDS deduction is in the ratio of 20:80 on account of the petitioner and the respondent respectively. OMP (Comm.) No.33/2018 Page 11 19. The petitioner, thereafter, raised claim against the respondent for the price of the equipment supplied by it in terms of the Consortium Agreement and the PEA.

20. Counsel for the petitioner relying upon Clause 18.6 (v) of the PEA submits that in terms of the PEA, upon termination of the said Agreement or completion of a Consortium Members performance, the Consortium Member, that is the respondent, was to promptly return to the petitioner all material provided by the petitioner under the said Agreement. The petitioner, upon rejection of the claim for price of the equipments by the Govt. of M.P., had addressed an e-mail dated 14.08.2014 and sought a confirmation from the respondent that it would be returning all the assets lying in its possession to the petitioner in working condition. The respondent vide its e-mail dated 15.08.2014 had given such confirmation. Having agreed to return the equipment, it could not be said that the claim of the petitioner for the price of the equipment was not maintainable in light of the full and

final settlement with the Govt. of M.P. He submits that the inter-se rights and liabilities of the parties, that is, Consortium Members, have to be determined under the Consortium Agreement and the PEA and full and final settlement with the Govt. of M.P. would have no effect over the same. In any case, the respondent having agreed to return the equipment, such claim was maintainable and has been wrongly rejected by the Arbitrator. OMP (Comm.) No.33/2018 Page 12 21. I have considered the submissions made by the learned counsel for the petitioner. As noted above, the petitioner had raised a claim for the very same equipment with the Govt. of M.P. relying upon the Clause 20.5 of the Agreement. Clause 20.5 of the Agreement states that in case of termination of the Agreement due to any force majeure event, Govt. of M.P. shall pay the value of the infrastructure, deployed up to date of termination in terms of the agreement. Govt. of M.P., however, rejected the said claim. It is not for this Court to determine whether such rejection was correct or incorrectly made. However, once the said rejection is accepted by the petitioner, it is unable to show any basis for making the claim for the same very equipment against the respondent specially where in terms of the Agreement between Govt. of M.P. and the Consortium, said equipment was to vest exclusively in the Govt. of M.P. and payment for the same had to be made in terms of the services rendered under the Agreement, which have been made in terms of the Settlement Agreement.

22. As far as reliance on e-mails exchanged between the parties, it would first be useful to reproduce the two e-mails dated 14.08.2014 and 15.08.2014: From:yogendra@virgosoft.com (mailto:yogendra@virgosoft.com) Sent: Friday August 15, 2014 4:13 PM To: Pankaj Sinha - HCLI OMP (Comm.) No.33/2018 Page 13 Cc: C T Bhandran - HCLI; Devendra Kumar Singh - HCLI; Harjeet Singh Bedi, Insys Subject: Re: MPPDS settlement Dear Pankaj, Virgo will deliver the equipment lying with us in working condition as mentioned in consortium agreement. Best regards, Yogendra xxxxxxxx From:Pankaj Sinha - HCLI Sent: Thursday, August 14, 2014 4:30 PM To: Yogendra Cc: C T. Bhandran - HCLI; Devendra Kumar Singh - HCLI; Harjeet Singh Bedi, Insys Subject: MPPDS settlement Dear YK Sir, Please refer to our discussion on the settlement proposal. The matter is still under discussion with the management. In the meanwhile we would like you to confirm the following: All the asset lying in your possession would

be returned to HCL Noida in working condition. OMP (Comm.) No.33/2018 Page 14 We would also be informing the customer to return all the assets deployed at the customer site as part of the settlement. Please revert with your confirmation. With warm Regards, Pankaj Sinha Vertical Delivery Head eGovernance HCL Infotech Limited (A subsidiary of HCL INFOSYSTEMS LTD.) E-4,5,6 Sector-XI, Noida-201301 U.P(India) Tel:

0120. 2425450 Extn(3938) Mob:+91-9810779436 www.hclinfotech.in www.hclinfosystems.com 23. A reading of the e-mail dated 14.08.2014 from the petitioner to the respondent would show that the petitioner had sought a confirmation for the return of all assets lying in your possession from the respondent. As far as the return of assets deployed at customer side as part of the settlement the petitioner had stated that it would be informing the customers, that is, Govt. of M.P. to return the same. The respondent promptly addressed e-mail dated 15.08.2014 wherein it undertook to deliver the equipments lying with us in working condition as mentioned in Consortium Agreement. Therefore, the two e-mails can only relate to the equipments which are not deployed at the site but are lying with the respondent at the time of termination of the Agreement. Learned counsel for the respondent has shown and it has not been denied by the counsel for the petitioner that the equipments for which claim had been OMP (Comm.) No.33/2018 Page 15 made before the Sole Arbitrator were all deployed at the site for the purposes of work performed and infact it was on that basis that the claim dated 16.01.2014 had been made by the petitioner to the Govt. of M.P. Therefore, these equipments cannot be said to be in possession of the respondents and the e-mails, therefore, cannot come to any benefit to the petitioner.

24. The Arbitrator has also considered the effect of the Settlement Agreement in detail and has held as under: 12. Upon a careful reading and analysis of the Revised Claim dated 16.01.2014 (Exhibit RW-1/4) which has been filed by the Respondent, it is clear that the cost of hardware and Software under the Category of 'Infrastructure Deployed' has been submitted by the Claimant in its Claim dated 16.01.2014 as filed before FCS-MP. Along with the Claim dated 16.01.2014, it has been brought on record that the bills/invoices of the said equipments/inventory have been submitted as Annexure-I (Exhibit CW-1/55). xxx 16. In response to

Question No.'s 5 and 6 as stated hereinabove, the Claimant has acknowledged that the Claim dated 16.01.2014 (Exhibit RW-1/4) submitted by claimant with FCS-MP includes the investment made by the Claimant infrastructure deployed by HCL Infosystems towards the project. Further, the answer to Question No.7, demonstrates that the Claimant has unconditionally accepted its share qua the settlement. for 17. With respect to the reliance placed on a two line e- mail dated 15.08.2014 (Exhibit CW-1/36) addressed by OMP (Comm.) No.33/2018 Page 16 the Respondent to the Claimant wherein it has been stated that, "Virgo will deliver the equipment lying with us in working condition as mentioned in consortium agreement", the same pales into insignificance in light of the subsequent full and final settlement dated 23.09.2014 between consortium led by claimant & FC-MP Ex.RW

which underlying condition/embargo for settlement. This has also been fortified by the unambiguous admission made by CW-1 during the course of his cross-examination dated 05.01.2017 that HCL had filed their claim dated 16.01.2014 with FCS-MP for infrastructure deployed by them toward the project. prescribes nowhere any In light of the admission made by CW1 of the 18. Claimant as well as the reading of the Claim dated 16.01.2014 (Exhibit RW-1/4), I have no doubt or hesitation in holding that the Claim dated 16.01.2014 (Exhibit RW-1/4) read with Annexure-I to the said Claim investment/cost of the (Exhibit CW-1/55) hardware and Software under the Category of 'Infrastructure Deployed' made by the Claimant towards the project which ultimately culminated into Settlement dated 23.09.2014 that has been unconditionally accepted by the Claimant as is evident from Answer to Question No.7 as reproduced hereinabove included xxx 22. The analysis and reading of the extract of the aforementioned Cross-Examination of CW1 dated 13.01.2017 shows that the Invoices forming part of the Statement of Claim of the Claimant are also part of the Annexure I to the revised Claim dated 16.01.2014 (Exhibit CW-1/55) submitted by the Claimant before FCS-MP which ultimately culminated into a full and final OMP (Comm.) No.33/2018 Page 17 settlement dated 23.09.2014. Accordingly, the Claimant has admitted that the Invoices forming part of the Statement of Claim were an integral part of the revised claim dated 16.01.2014 which was submitted by claimant before FCS-MP which eventually culminated into the Settlement dated 23.09.2014.

23. Further, the revised Claim dated 16.01.2014 (Exhibit RW-1/4) also incorporates the claim made by the Respondent with respect to its infrastructure deployed which is valued at Rs.28,50,37,831/-. The revised Claim dated 16.01.2014 (Exhibit RW-1/4) issued on the letter head of the Claimant is an admitted document and therefore the Claimant cannot now contend at this belated stage that the Respondent had not deployed any equipments. It shows that the Respondent had also purchased & deployed for complying their obligations as per the agreement dated 28.07.2011 Ex. CW1/25. their own equipments 24. Regarding the reliance placed on letter dated 18.07.2011 (Exhibit CW-1/5), I am inclined to agree with the contention of the Respondent that much cannot be read into this letter since it was issued only in the year 2011 prior to the execution of the Agreement dated 28.07.2011 Ex. CW1/25 and before the actual utilization of equipments on the field. This letter clearly states that it was addressed for audit purposes by the Respondent at the instance of the Claimant to the Auditors of the Claimant as per the request of the Claimant.

25. After having carefully considered the pleadings and oral arguments of both the parties, I am left with no other option but to conclude that once the Settlement dated 23.09.2014 has been unconditionally accepted by the Claimant as is reflected from the cross-examination of CW1 of the Claimant, the Claimant is estopped and precluded from raising the same Claim before this forum. OMP (Comm.) No.33/2018 Page 18 If the intent of the Claimant was to claim the value of equipments from FCS-MP as is reflected in Revised Claim dated 16.01.2014, then it is not fathomable to justify that the same equipments can be claimed from the Respondent on the premise that the same equipments are also with the Respondent. The stand of the Claimant seems to be mutually destructive in as much as per the own admission of the Claimant, the value of the same equipments were being claimed from FCS-MP and again the value of the same equipments are now being claimed from the Respondent.

26. It would have been a different ball game, had the Claimant not unconditionally accepted the Settlement or that in the Settlement, there was an express leave granted to the Claimant by FCS-MP to recover the value of the infrastructure as claimed before this Tribunal from the Respondent or any other third party. 25. I do

not find the above approach of the Sole Arbitrator to be in any manner perverse or so unreasonable so as to warrant any interference from this Court in exercise of its powers under Section 34 of the Act.

26. The Second objection of the learned counsel for the petitioner is to the denial of the petitioners claim of Rs.25,60,839/-, being the excess amount paid to the respondent from the Escrow Account pursuant to the settlement.

27. The parties had entered into an Escrow Agreement with the ICICI Bank directing it to release the payment received from the Govt. of M.P. in ratio of 10:90 amongst the petitioner OMP (Comm.) No.33/2018 Page 19 and the respondent respectively. By a subsequent letter dated 29.03.2012, the parties had instructed ICICI Bank to release the payment in ratio of 19:81 instead of and in place of 10:90. It is an admitted case that between the parties and as is recorded even in the letter dated 29.03.2012, that this change was brought about on account of TDS deduction from the amount being released in favour of the respondent from the Escrow account. Such TDS had to be deducted and deposited by the petitioner on account of such payment being released to the respondent.

28. When the Govt. of MP deposited the amount in terms of the Settlement Agreement between the parties, ICICI Bank released the said payment in the ratio of 19:81 in favour of the petitioner and the respondent. The petitioner claimed that the parties had agreed that the amount received under the Settlement Agreement will be shared between them in the ratio of 20:80 instead of 19:81 and therefore, the respondent has received 1% in excess from the settlement amount. The petitioner, therefore, addressed an e-mail dated 15.10.2014 to the respondent seeking to raise this issue with the ICICI Bank. The respondent, however, by its e-mail dated 10.12.2014, stated that this excess 1% amount can be adjusted against future receivable from other projects being handled by the parties. As there were no other projects being handled between the parties, the petitioner made this claim before the Arbitrator. OMP (Comm.) No.33/2018 Page 20 29. The Arbitrator, however, relied upon the instructions given to the ICICI Bank by the letter of 29.03.2012 and held that the bank had rightly released the payment in favour of the parties in the ratio of 19:81 and therefore, dismissed the claim of the petitioner.

30. I am unable to agree with the findings of the Arbitrator in this regard. Counsel for the petitioner has rightly placed reliance on the letter dated 18.07.2014 whereby the petitioner, for the Consortium including the respondent herein, had made a request to the Govt. of MP to release the payment of the full and final settlement amount in the ratio of 20:80. On the Govt. of MP refusing to release the payment in the names of individual Consortium Members and insisting that the payment shall be made only to the Escrow Account in terms of the Agreement, such payment had been deposited by the Govt. of MP in the Escrow Account. In fact, the Govt. of MP deducted TDS in the ratio of 20:80 on account of the petitioner and the respondent respectively. The respondent accepted such payment and issued the receipt on 23.09.2014 without raising a protest on this ratio of payment. Infact, even in the e-mail dated 15.10.2014, the respondent agreed that it had received the amount in excess by 1% which it had offered to adjust in future payments between the parties. As such occasion never arose, the petitioner had made its claim. The Arbitrator has clearly over-looked all these relevant documents while passing the Impugned Award. The OMP (Comm.) No.33/2018 Page 21 Award, therefore, so far as it rejects the claim of the petitioner for a sum of Rs.25,60,839/- cannot be sustained and consequently, the petitioner is held entitled to the said payment.

31. Counsel for the petitioner has further challenged the award of Rs.1,81,47,683/- in favour of the respondent. This amount has been allowed in favour of the respondent on account of the failure of the petitioner to deposit the TDS on the amount released from the Escrow Account in favour of the respondent pursuant to the full and final settlement with the Govt. of MP.

32. Counsel for the petitioner submits that the TDS had already been deducted by the Govt. of MP while making the deposit in the Escrow Account and such TDS certificate had been directly issued in favour of the respondent, therefore, there was no occasion for the petitioner to deposit further TDS pursuant to the release of the payment from Escrow Account in favour of the respondent.

33. On the other hand, counsel for the respondent submits that the ratio of 10:90 for release from the Escrow Account had been specifically changed to 19:81 only

on the condition that it would be the petitioner who would deposit the amount payable as TDS for the amounts being released in favour of the respondent from Escrow Account. The petitioner was therefore, obliged to deposit such TDS amount and having failed to do so, OMP (Comm.) No.33/2018 Page 22 the Arbitrator has rightly awarded the said amount in favour of the respondent.

34. A perusal of the letter dated 29.03.2012 supports the submission made by the counsel for the respondent. Any amount being released from the Escrow Account in favour of the respondent had to be made after deducting TDS by the petitioner @10%. It was for this reason that the sharing ratio between the parties was changed from 10:90 to 19:81. The petitioner was therefore, under an obligation to deduct the TDS while claiming 19% from Escrow Account. The petitioner has admittedly received 19% from the Escrow Account and therefore, cannot escape its liability from making such deposit.

35. At the same time, it is not disputed by the respondent that the Govt. of MP had also deducted TDS while making the deposit in the Escrow Account and such TDS had been deposited on account of the respondent. The same therefore, has to be adjusted against the amount found payable in favour of the respondent. Admittedly, Rs.39,60,587/- has been deposited by the Govt. of MP on account of the respondent. Therefore, this amount has to be deducted from Rs.1,81,47,683/-, which was otherwise to be deposited by the petitioner as TDS. The Award of the counter claim shall accordingly stand modified to this extent.

36. Counsel for the petitioner lastly challenges the rate of interest awarded by the Sole Arbitrator in favour of the OMP (Comm.) No.33/2018 Page 23 respondent. Though normally I would not interfere in the rate of interest, as the petitioner has already deposited 50% of the awarded amount with the Registry of this Court and has secured the remaining 50% by way of an unconditional bank guarantee, I deem it appropriate that the rate of interest be reduced from 12% to 9%.

37. In view of the above, the Award in so far as it rejects the claim of the petitioner under Claim no.2 is set aside. The petitioner would consequently be entitled to only Rs.25,60,839/- towards its claim no.2. The Award in so far as counter claim is concerned is modified to the limited extent that the respondent would not be

entitled to an amount of Rs.39,60,587/-.

38. Consequently, it is held that the respondent is entitled to Rs.1,16,26,257/- (Rs.1,81,47,683/- - Rs.39,60,587/- - Rs.25,60,839/-) alongwith interest @9% per annum.

39. The amount deposited by the petitioner with the Registry of this Court be released in favour of the respondent. The petitioner shall pay the remaining amount in terms of the present order to the respondent within eight weeks from today failing which the bank guarantee shall be encashed by the Registrar General and the payment be released in favour of the respondent. In case, there is any shortfall in the amount receivable by the respondent, the respondent shall always be at liberty to move an appropriate enforcement petition for claiming the balance amount. In case the full amount is paid OMP (Comm.) No.33/2018 Page 24 by the petitioner to the respondent on its own, the bank guarantee deposited with the Registrar General of this Court shall be released in favour of the petitioner.

40. This order shall not prejudice the parties in their claims against the Govt. of MP in any manner.

41. The parties shall bear their own costs. NAVIN CHAWLA, J JANUARY08 2019
RN OMP (Comm.) No.33/2018 Page 25

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