

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 23.01.2008

+

OMP No.48/2008 & 56/2008

MUNICIPAL CORPORATION OF DELHI

...Petitioner

- versus -

M/S D. PAL & COMPANY

... Respondents

WITH

OMP No. 50/2008, 51/2008, 54/2008, 55/2008, 57/2008

MUNICIPAL CORPORATION OF DELHI

...Petitioner

- versus -

M/S R&T ENTERPRISES

... Respondents

WITH

OMP No.52/2008

MUNICIPAL CORPORATION OF DELHI

...Petitioner

- versus -

M/S BINDRA ASSOCIATES

... Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Amita Gupta.

For the Respondents : Ms Ansuya Salwan with Ms Renuka Arora.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J (ORAL)

1. The learned counsel for the respondents in each of these matters has entered appearance after noting the same in the cause list. She states that she is ready to argue the matter on the papers already filed.

2. These eight petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) challenging separate awards but all dated 31.10.2006 passed by the same sole arbitrator Mr R.S. Jindal. The objections taken in respect of the awards (which are more or less identical) are the same and it is for this reason that this batch of petitions is being disposed of by this common order.

3. These cases have had a chequered history and, therefore, it would be necessary to set out some facts. Certain disputes had arisen between the parties. Notices were issued by the respondents to the petitioner invoking the arbitration clause (clause 25) and seeking the appointment of a sole arbitrator in terms thereof. No response was received by the respondents and consequently the respondents filed petitions under Section 11 of the said Act for appointment of arbitrators. These petitions

came up before the learned Civil Judge who disposed of the same by an order dated 30.07.2003. The learned Single Judge was of the view that the respondents had accepted payments made by the petitioner after the issuance of the final bill and, therefore, there remained no arbitratral dispute. The learned Civil Judge had also considered the arbitration clause which stipulated that if no claim is made within 90 days of the bill being ready for payment then the contractor would be deemed to have waived his claims and would be absolutely barred from raising any such claim and the petitioner would be discharged and released of all liabilities under the contract. According to the learned Civil Judge, since the respondent had not made the claim within the said stipulated period, no dispute survived and, therefore, there was no question of invoking the arbitration clause. Consequently, the learned Civil Judge dismissed the petitions filed on behalf of the respondents for appointment of an arbitrator. Being aggrieved, the respondents herein filed several writ petitions before this court. Those writ petitions were disposed of by a common order dated 07.02.2005 passed in WP(C)6209/2003 and other connected matters. The Division Bench was of the view that the learned Civil Judge, being a designated authority under Section 11(6) of the said Act, exercises administrative powers and not judicial powers. This statement of law was obviously based on the understanding as was then current in view of the decision of the Supreme Court in the case of *M/s Konkan Railway Corporation Ltd and Another v. M/s Rani Construction P Ltd* : AIR 2002 SCC 778.

4. The Division Bench also concluded that the learned Civil Judge had assumed jurisdiction which was not vested in him inasmuch as he had given a decision on merits and had also decided the issue on the question of limitation. Consequently, the Division Bench set aside the order dated 30.07.2003 passed by the learned Civil Judge and appointed Mr R.S. Jindal, retired Chief Engineer of DDA as the sole arbitrator to decide the disputes between the parties. The petitioner herein, being aggrieved of the said decision of the Division Bench, filed Special Leave Petitions before the Supreme Court. During the pendency of the said Special Leave Petitions, the arbitrator proceeded with the arbitration and concluded the same by making the impugned awards dated 31.10.2006. On 05.01.2007, the Special Leave Petitions came up for consideration before the Supreme Court whereupon the Supreme Court granted leave and, in view of the decision rendered by the Constitution Bench in **SBP & Co. v Patel Engineering Ltd & another : 2005(8) SCC 618**, set aside the order of the Division Bench dated 07.02.2005 and remitted the matter to the High Court for a fresh decision in the light of the judgment of the Constitution Bench. It would be relevant to note that when the Supreme Court passed the order dated 05.01.2007, the Supreme Court was apparently not informed of the making of the awards in the meanwhile.

5. When the writ petitions were again taken up before the Division Bench, on remand from the Supreme court, various issues were examined.

Ultimately, the Division Bench disposed of the writ petitions by a common judgment and order dated 20.09.2007. The Division Bench, by virtue of its order dated 20.09.2007, considered the stipulation with regard to the claim being made within 90 days as contained in the arbitration clause between the parties. After considering several decisions of the Supreme Court as well as the provisions of Section 28 of the Contract Act, 1872, the Division Bench observed as under :

“Considering the facts and circumstances of the case and in view of Section 28 of the Contract Act, we are of the considered opinion that it could not be appropriate to hold that the right of the petitioners to demand arbitration in respect of claims raised, stands extinguished and the respondent-Municipal Corporation of Delhi is discharged and released from all its liabilities as the said claims were not made within the period of 90 days from the date of intimation about the final bill. The clause relied upon by the respondent-MCD is void and hit by Section 28 of the Contract Act. No other contention or ground was raised to support the contention that the application under Section 11 of the Act is barred by limitation.”

6. The net result being that the Division Bench was of the view that the finding of the learned Civil Judge with regard to the stipulation of 90 days coming in the way of the respondents was not the correct position in law.

7. The Division Bench thereafter disposed of the writ petitions by permitting the petitioner herein to file objections to the awards under Section 34 of the said Act. It is in these circumstances that the present petitions have been filed.

8. The learned counsel appearing on behalf of the petitioner submitted, first of all, that *de hors* the question of limitation with regard to the said clause containing the stipulation of 90 days, which issue had been decided by the Division Bench, the petitioner still had the preliminary objections that there could not be any reference to arbitration in terms of clause 25 inasmuch as the procedure prescribed for invoking the said arbitration had not been followed by the respondents. To appreciate this submission, it would be necessary to examine clause 25. The same reads as under :

“Statement of Disputes & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials as used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination , completion or abandonment thereof shall be dealt with as mentioned hereinafter :

(i) if the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or design given in writing by the Engineer-in-charge on any matter in connection with or arising out of the contract of carrying out of the work, to be unacceptable, he shall promptly within 15 days requested the superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Commissioner MCD for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final binding and conclusive in terms of Sub para (i) above disputes or difference shall be referred for adjudication through arbitration and sole arbitrator appointed by the Commissioner MCD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacate his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Commissioner MCD as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that

the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the MCD shall be discharged and released of all liabilities under the contract in respect of these claims.”

9. It is the contention of the learned counsel for the petitioner that the Superintending Engineer is required to be requested for written instructions within 15 days of any dispute arising under the contract. Thereafter, The Superintending Engineer is required to give his written instructions or decision within the period of one month from the receipt of the contractor's letter. The clause speaks of further steps to be taken and an appeal to the Chief Engineer is also provided for. It is only after following the said procedure that, if the contractor is dissatisfied with the decision of the Chief Engineer, a notice can be given to the Commissioner MCD for appointment of the arbitrator.

10. The learned counsel for the petitioner submitted that since this procedure was admittedly not followed, therefore, the question of appointment of an arbitrator and going in for arbitration did not at all arise and the entire proceeding, including the impugned awards, are liable to be set aside on this ground alone. This issue was raised before the learned arbitrator who, *inter alia*, held :

“Even otherwise also the claims made by the claimant are outside the preview of the said procedure. As per the said procedure only those disputes/claims wherein works demanded of the claimant were outside the requirements of the contract or which disputed the drawings, records or decision given in writing by the Engineer-in-charge were

required to be referred to the Supdg Engineer by the claimant for decision and were ultimately arbitrable if the claimant was not satisfied with the decisions of the Supdg Engineer/Chief Engineer. However, the claims raised by the claimant in the present case pertain to compensation/damages on account of the idle establishment, tools & plants, pre-suit, pendentlite and future interest and cost of arbitration proceedings which apparently do not fall in the category of disputes required to be referred to the Supdg Engineer for decision.”

11. I agree with the conclusion arrived at by the learned arbitrator. The procedure for requesting the Superintending Engineer etc is applicable only when the contractor considers any work demanded of him to be outside the requirements of the contract or where the contractor disputes any drawings, record or design given in writing by the Engineer-in-charge on any matter in connection with or arising out of the contract or carrying out of the work to be unacceptable. The dispute in the present case does not fall within these parameters. Consequently, the same would have to be construed as a dispute falling within sub para (ii) of clause 25 of the agreement and the dispute would be straightaway referable for adjudication through arbitration by a sole arbitrator to be appointed by the Commissioner MCD. This is exactly what the respondents had sought to be done by issuing the invocation letters to the petitioner which had gone unresponded. Left with no alternative, the respondents had approached the court under Section 11 for appointment of arbitrators. The appointments were made and ultimately the awards have been passed. Therefore, this preliminary objection raised by the learned counsel for the petitioner is not tenable.

12. All the impugned awards relate to the grant of interest on delayed payments after raising of the final bills in terms of the final bills themselves. In some of the awards, impugned herein, the respondents had made claims towards idle establishment but all such claims have been rejected by the learned arbitrator. The learned arbitrator has only awarded interest on the delayed payments of the final bill amounts as well as interest on the delayed payments of security deposits. The learned arbitrator had also awarded costs of Rs 15,000/- in each of the cases in favour of the respondents and against the petitioner.

13. Insofar as the findings of the learned Arbitrator qua rejection of the claims towards idle establishment is concerned, the same are accepted by both the petitioner and the respondents. The only dispute that is sought to be raised by the petitioner is with regard to the award on interest and the costs. According to the learned counsel for the petitioner, the rate of interest of 12% per annum is exorbitant and the rate of interest ought to have been around 6% per annum. The second contention is that the learned Arbitrator had awarded interest on interest which is not permissible. It is also contended that the learned arbitrator has awarded interest on the security deposit amounts when there was no such stipulation in the contract. Finally, it is contended that the costs of Rs 15,000/- awarded in each of the matters is exorbitant. With regard to the rate of interest, the learned counsel for the petitioner had contended that the contractors are aware of

the practice of delayed payments and, therefore, keeping that fact in mind they quoted their rates in the tender. Consequently, the interest rate of 12% was exorbitant keeping in view this reality.

14. As regards the rate of interest, it must be pointed out that the respondents had claimed 18% per annum. The learned counsel for the respondents submitted that that is the rate which is also prescribed under Section 31(7) of the said Act which would be operative in case there is no agreement to the contrary. In any event, the learned arbitrator did not grant 18% per annum interest but granted the lower rate of 12% per annum on the ground that the commercial rate of simple interest as charged by the nationalised banks has not been less than 12% per annum. It is on this basis that the learned arbitrator awarded simple interest @ 12% per annum after considering it to be a reasonable rate in respect of the present case. Nothing contrary was pointed out before the learned arbitrator or before this court. Consequently, I do not see any reason to interfere with this finding and conclusion of the learned arbitrator.

15. The next issue is with regard to the question of interest being charged on interest. As an illustration, the facts in OMP 48/2008 are being taken. The arbitrator has, in that case, awarded interest as indicated below :

“So the total amount of interest under this claim as payable by the respondent to the claimant till the date of this award (31st Oct, 2006) comes to :-

Interest on Rs 1,15,647/- from 25.03.2000 = Rs 50,556/-
to 17.11.2003 @ 12% per annum

Interest on Rs 50,556/- from 18.11.03 to = Rs 17,903/-
31.10.2006 @ 12% per annum

Interest on Rs 18,740/- from 25.8.2000 to = Rs 10,859/-
24.6.05 @ 12% per annum

Interest on Rs 10868/- from 25.6.05 to = Rs 1,758/-
31.10.2006 @12% per annum

Total Rs 81076/-

So a total amount of Rs 81,076/- is awarded to the claimant as interest on delayed payments and as pre-suit & pendente lite interest upto the date of this award.”

16. The computation given above shows that interest is being given on Rs 1,15,647/- being the principal amount due under the final bill. The interest has been calculated for the period from 25.03.2000 to 17.11.2003. The date of 25.03.2000 has been taken because it is one month subsequent to the issuance of the final bill or in other words the date on which the bill ought to have been paid. The date of 17.11.2003 has been taken because it is on that date that a sum of Rs 1,15,647/- was paid by the petitioner to the respondents. The interest for this duration has been computed on Rs 1,15,647/-. The second calculation is with regard to the interest on the sum of Rs 50,556/- from 18.11.2003 to 31.10.2006 (i.e. the date of the award). The learned counsel for the petitioner contended that the interest amount of Rs 17,903/- on the amount of Rs 50,556/- cannot be awarded as that would amount to granting interest on interest. I am unable to agree with this contention of the learned counsel for the petitioner. This is so because on

17.11.2003 an amount of Rs 1,66,203 had become due towards principal (Rs 1,15,647) and interest (Rs 50,556/-). The payment of Rs 1,15,647/- on 17.11.2003 would first be appropriated towards interest due and the balance would have to be appropriated from the principal. Since, the interest due was less than the payment made, a part of the payment made would also be appropriated against the principal amount due. Therefore, the payment of Rs 1,15,647/- on 17.11.2003, completely exhausted the interest due as on that date as also part of the principal which was due. The balance amount of Rs 50,556/- cannot be regarded as interest but as portion of the principal which was initially due. Therefore, the petitioner's contention that interest being charged on this amount of Rs 50,556/- would be interest on interest is not tenable. The same reasoning would apply for the computation of interest of Rs 1,758/- in respect of the security deposit amount.

17. As aforesaid, the learned counsel for the petitioner had also raised the issue of interest on the refund of the security deposit. According to her, there is no provision in the contract for providing any interest on the said amount. The learned counsel for the respondents submitted that security deposits were refundable within the period of six months and no interest was being charged for that duration of six months. However, as the security deposit amounts were refunded beyond the period of six months, therefore, the same were subject to payment of interest. It is clear that there is no provision for interest being paid on the security deposit amounts.

However, there is also no provision prohibiting any such payment. When the contract stipulates that the security deposit is to be refunded within six months of the completion of work then the petitioner ought to have refunded the same within the stipulated period. If the petitioner retained the same beyond the period of six months then the petitioner would in normal circumstances be liable to pay interest thereon for the retention of the said amount beyond the period of the contract. I see no infirmity in the award insofar as the interest being paid on the retention of the security deposits beyond the period of six months till the date of payment. Consequently, this contention of the learned counsel for the petitioner is also not acceptable.

18. As regards costs, there is no material before me to take a view either way as to whether the costs are exorbitant or they are not. The arbitrator has awarded a sum of Rs 15,000/- by way of costs in each of the cases. I see no reason to interfere with this finding.

As a result of the foregoing discussion, these petitions are dismissed.

January 23, 2008
M

BADAR DURREZ AHMED
(JUDGE)