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

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Judgment delivered on: 12.04.2012

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FAO (OS) No. 687/2006

NATIONAL BUILDING CONSTRUCTION
CORPORATION

.....Appellant

Through: Mr Manoj Kumar Das, Adv.

versus

ESSEL PROPERTIES & INDUSTRIES

..... Respondent

Through: Mr. Maninder Singh, Sr. Adv. with Mr
Sumeet Bhatia & Ms Chandrika Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This appeal is directed against the order of the learned Single Judge dated 25.07.2006 passed in OMP No. 245/2001. By virtue of the impugned judgment the appellant's objections have been dismissed and the award dated 04.05.2001 has been sustained.

2. The disputes between the appellant and the respondent (hereinafter collectively referred to as the parties) arise broadly in the following background:-

2.1 In 1988, the appellant invited tenders for construction of Navodaya Vidyalaya at Pabra, Distt. Hisar, Haryana. The project involved construction of the following:

(i) Main building (first phase of the Navodaya Vidyalaya)

(ii) Carrying out of external development work; and

(iii) lastly, construction of overhead RCC Tanks

[hereinafter collectively referred to as the project]

2.2 The tender was won by the respondent, and accordingly, a Letter of Intent (LOI) dated 14.06.1988 was issued in favour of the respondent. The time frame stipulated for execution of the project under the contract was 18 months. Under the contract different dates and amounts were set out for completion of the aforementioned works forming part of the project. These were as follows:

Project (Works)	Tendered Amount	Date of completion
Main Building	Rs. 98,31,108/-	12.02.1990
External Development Work	Rs. 3,34,694/-	01.04.1990
Over head tank	Rs.3,06,551/-	07.01.1990

3. It was the case of the appellant before the learned arbitrator that the respondent did not fulfill their contractual obligation in as much as they did not execute the stipulated works under the project by the dates indicated hereinabove. It appears that the appellant, however, took over possession of what it claims a portion of the main building, on 30.09.1992. The appellant claims it carried out rectification qua the defective works executed by the respondent and also got executed the balance outstanding works, which formed part of the project. It was also the case of the appellant that the Chief Technical Examiner (CTE) carried out a joint inspection of the works executed by the respondent whereupon, a report dated 25.01.1991 was prepared in which defects and deficiencies in the execution of the works were recorded. Consequently, the CTE directed the appellant to make recoveries from the respondent.

4. In regard to the recoveries made by the appellant clause 14 of the contract was invoked which broadly, according to the appellant, empowered it

to remove, rectify and re-execute the work at their risk and cost, in the event of, the failure of the respondent to do the needful. The appellant accordingly, made recoveries in the sum of Rs 5,86,268.70/-.

4.1 Apart from the above, certain amounts were withheld by the appellant; the details of which are as follows:

- | | | |
|------|---------------------------------|-------------------|
| (i) | Towards external development: | Rs. 55,000/- |
| (ii) | Towards security deposit: | |
| | (a) Main Building (first phase) | - Rs. 5,39,130/-. |
| | (b) External Development Work | - Rs. 1,65,437/- |
| | (c) RCC overhead tank | - Rs. 23, |
| | 508/- | Rs. 7,28,075/- |

5. The aforesaid led to disputes between the parties. Respondents raised claim arising from the execution of the project; since they were not resolved, resort was taken to the arbitration clause, i.e., clause 18.1 incorporated in the contract. The appellant acceded to the request and accordingly its Chairman-cum-Managing Director vide, letter dated 11.03.1998 appointed Sh. V. R. Vaish as the sole arbitrator. Parties raised their claims and counter claims before the arbitrator.

6. In all, the respondent raised ten (10) claims before the learned arbitrator. As against this the appellant raised counter claims amounting to Rs 17,23,473/-, in respect of, defective and incomplete work allegedly carried out by the respondent.

7. The learned arbitrator based on pleadings, evidence on record and after hearing parties in support of their respective claims pronounced and published the impugned award on, 04.05.2001. By virtue of the impugned award the respondents claim nos. 1 and 3, which pertained to the claim under the final bill, escalation and refund were allowed to the extent of Rs 4,92,675.68/-. To be noted against claim nos. 1 and 3 the respondent had in fact claimed a sum

of Rs 12.08 lacs. In so far as claim no. 2 was concerned the learned arbitrator allowed the same completely and awarded an amount of Rs. 7,28,075/-. Apart from this, the learned arbitrator awarded a sum of Rs 7,000/- against claim no.7. Claim no. 9, which was made on account of interest, was allowed at the rate of 12% per annum for the periods indicated hereinafter. Other claims were rejected. Thus, in all, under the impugned award a sum of Rs 12,27,750.68/- was awarded in favour of the respondent with interest at the rate of 12% per annum throughout, that is, for the pre reference period (i.e., 22.04.1994 till 07.04.1998); pendente lite interest, from 08.04.1998 till the date of the award; and future interest w.e.f. 01.08.2001 till the date of payment, in the event, amounts awarded were not paid by 31.07.2001.

7.1 In so far as the counter claims of the appellant were concerned, the same were rejected in toto.

8. Aggrieved by the award, as indicated above, objections under Section 34 of the Arbitration and Conciliation Act, 1996 (in short Arbitration Act) were filed by the appellant. By the impugned judgment of the learned Single Judge, the objections of the appellant, were dismissed.

8.1. Aggrieved by the same the present appeal has been preferred.

9. Before us, in support of the appeal, arguments have been advanced by Mr Manoj K. Das, Advocate while, on behalf of the respondent submissions have been made by Mr Maninder Singh, Sr. Advocate instructed by Mr. Sumeet Bhatia, Advocate.

SUBMISSIONS

10. Mr Das has confined his arguments only to the grant of pendente lite interest by the learned arbitrator on the amounts retained by the appellant towards security deposit. The contention made in this behalf by Mr Das is pivoted on clause 29(1) of the contract. It is contended by Mr Das that the security deposit, which was withheld on account of pendency of claims vis-a-vis the respondent, no interest could have been awarded by the arbitrator, as it

was prohibited under the aforementioned clause, i.e., clause no. 29(1) of the contract. Mr Das submitted that the learned Single Judge erred in holding that the prohibition for payment of interest under clause 29(1) of the contract would get triggered only if a lien had been claimed on the withheld amounts. In other words, it was sufficient that the security deposit had been withheld pending adjudication of the claims, for prohibition under clause 29(1) of the contract to be triggered.

10.1 Mr Singh, on the other hand submitted that clause 29(1), as rightly held by the learned Single Judge, was not applicable as, no lien on the withheld amount had been claimed before the learned arbitrator. Mr Singh, further submitted that even in the grounds taken in the appeal there is no specific averment assailing the reasoning of the learned Single Judge. It was contended that the project in issue, had been taken over by the appellant as far back as on 30.09.1992 and therefore, the security deposit had to be returned immediately thereafter to the respondent. In other words, it was Mr Singh's contention that the interest ordinarily should have been granted to the respondent from 30.09.1992, whereas the arbitrator has been more than conservative in awarding interest from 22.04.1994. Mr Singh also submitted that the respondent had actually lost out a substantial amount of interest as, if interest were to be calculated on the amount due under claim no. 1, which was awarded to the extent of Rs 8,64,566/-, without netting of the recoveries allowed under claim no. 3, it would have stood to gain quite substantially. To put it differently, Mr Singh submitted that there was, even in equity, no purpose served in disturbing the award on this account, as interest at the rate of 12% per annum for the pre-reference and pendente lite period was awarded by combining claim Nos. 1 and 3, on the net amount, i.e., a sum of Rs 4,92,658/-.

REASONS

11. Having heard the learned counsels for the parties, we are of the view

that the contention of Mr Das would have to be accepted, based on a plain reading of the clause and the state of the law, presently in vogue on the issue. The argument advanced by Mr Singh, which found favour with the learned Single Judge, that no lien had been declared on the amounts withheld is not borne out on a bare reading of the clause 29(1). For the sake of convenience, clause 29(1) is extracted hereinafter:

“Clause 29(1) - Withhold and lien in respect of sums claimed:

Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Engineer-in-charge of the Corporation shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any deposited by the whole or in part from the security, if any deposited by the Contractor and for the purpose aforesaid, the Engineer-in-charge or the corporation shall be entitled to withhold the security deposit, if any, furnished as the case may be and also have lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Engineer-in-Charge of the Corporation shall be entitled to withhold and have a lien to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which at any time thereafter may become payable to the Contractor under the same or any other contract, with the Engineer-in-Charge or the Corporation or any contracting person through the Engineer-in-Charge pending, finalization or adjudication of any such claim.

It is an agreed term of the contract the same money or moneys so withheld or retained under the lien referred to above, by Engineer-in-Charge or Corporation will be kept withheld or retained as such by the Engineer-in-Charge or Corporation till the claim arising out contract governed by as such by the Engineer-in-Charge or Corporation till the claim arising out of or under the contract is determined by the arbitrator (in the contract governed by the arbitration clause) by the competent court, as the case may be and that the Contractor will have no claim for interest or damages

whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the Contractor. For the purpose of this clause, where the Contractor is a partnership firm or a limited company, the Engineer-in-Charge of the Corporation shall be entitled to withhold and also have lien to retain towards such claimed or amounts in whole or in part from any sum found payable to any partner/limited company as the case may be, whether in his individual capacity or otherwise.” (Emphasis supplied)

12. A plain reading of clause 29(1) would show that whenever there is a claim or claims of the employer (the appellant herein) arising out of or under the contract against the contractor (the respondent herein) the engineer-in-charge of the employer would be entitled to withhold a whole or part of the security, if any, deposited by the contractor pending finalization or adjudication of any such claim, depending naturally on, the extent of claim. Furthermore, in addition, on the retained money the said clause envisages an employer's lien over it. This is in so far as the first part of the clause 29(1) is concerned. Therefore, apart from the right conferred under clause 29(1) to withhold there is also a declaration of lien on the money retained.

12.1 In law, as is well known, lien can be both contractual as well as one, which flows by virtue of operation of law. To cite an example: general lien qua bankers, provided under Section 171 of the Indian Contract Act, 1872; is a lien which arises by virtue of operation of law. Lien is nothing but an interest, encumbrance or charge created for payment of a debt or, performance of an obligation or, duty (See Black's law dictionary 6th Edition page 922). This is in so far as the first part of the clause is concerned.

12.2 The second part of the clause which deals with the situation where the security with the employer is, insufficient to cover the claimed amount. In that eventuality, not only is the employer entitled to withhold the amounts in its possession but, is also entitled to a lien over the monies to the extent of the claim from any sum or sums found payable to the contractor, either under the

same contract or any other contract pending finalization or adjudication of the employer's claim.

12.3 Therefore, the purpose of provision of a contractual lien is only that; if on an adjudication of the claim(s) there ever arises an issue of priority of claims qua third parties, in respect of debts payable by the contractor, the priority of the appellant's claim would relate back, after adjudication, to the date when the lien first arose.

12.4 To our minds, declaration of lien is automatic in terms of clause 29(1) of the contract. Even if it is assumed for the sake of argument that, it had to be overtly declared by the employer (i.e., the appellant) it cannot be said that if no lien is declared vis-a-vis the withheld amount(s) then, the prohibition under clause 29(1) of the contract will not get triggered.

12.4 If there was any doubt, the same is clarified on reading of the third part of clause 29(1) which reads as follows:

“...It is an agreed term of the contract the same money or moneys so withheld or retained under the lien referred to above, by Engineer-in-Charge or Corporation will be kept withheld or retained as such by the Engineer-in-Charge or Corporation till the claim arising out contract governed by as such by the Engineer-in-Charge or Corporation till the claim arising out of or under the contract is determined by the arbitrator (in the contract governed by the arbitration clause) by the competent court, as the case may be and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the Contractor....” (Emphasis supplied)

12.5 It is pertinent to note that in this part of clause 29(1), the parties have consciously made use of a disjunctive term i.e., ‘or’ to highlight the fact that retention of money or the factum of lien being claimed need not always go hand in hand.

13. As we read clause 29(1) of the contract, interest on the security deposit

amounting to Rs 7,28,075/- is not payable. Mr Singh's argument that the amount was due on takeover of the project by the appellant, that is, on 30.09.1992 would really not call for any discussion, in view of the opinion that we have formed above, on a plain reading of clause 29(1). In any event, it has been the case of the appellant that there were defects and deficiencies in the project which did not get resolved and, therefore, the date of takeover really had no meaning. This is fortified by the fact that some of the recoveries made, have actually been allowed, by the learned arbitrator. Therefore, the security deposit which was withheld by the appellant pending adjudication of its claims, triggered the prohibition against payment of interest under clause 29(1) of the contract. That being so the learned arbitrator could not have awarded interest. The position on this aspect is enunciated in the following judgments of the Supreme Court: Sayeed Ahmed & Co. vs State of U.P. (2009) 12 SCC 26; Sree Kamatchi Amman Constructions vs Divisional Railway Manager (Works), Palghat & Ors. (2010) 8 SCC 767; and UOI vs Krafters Engg. & Leasing (P) Ltd. (2011) 7 SCC 279.

14. This brings us to the last limb of Mr. Singh's argument that this contention was not raised before the learned arbitrator. In our view, the facts noted against claim no. 9, clearly show that even though there was no specific reference to the clause in issue, i.e., clause 29(1), the justification by the appellant for withholding the security amount was: non-acceptance of the final bill and the failure to attend to incomplete/defective works by the respondent. The factum of withholding not being in dispute.

14.1. On the other hand, the respondent had alleged that the amounts were wrongfully withheld.

14.2. The arbitrator being a creature of the contract would have to be guided

by the terms of the contract, which would include clause 29(1), while determining whether a particular claim would have to be allowed or disallowed. Even the Single Judge recognized this position, and thus, did not reject the contention of the appellant on this ground. The ground which persuaded the learned Single Judge to reject the appellant's contention was that no lien had been declared qua the amounts withheld. In our opinion, since the argument of the appellant emerges from facts available on record, it would be both unfair and inequitable and in a sense unlawful to allow a claim when a clause prohibiting payment of interest is staring us in the face. This is also the reason that, the lack of clear articulation in the appeal filed by the appellant, cannot be the ground for not modifying the award on this score.

15. Accordingly, the award is modified only to the extent that the respondent shall not be entitled to interest for the period 22.04.1994 till 04.05.2001, on the security deposit amounting to Rs 7,28,075/- withheld at the relevant point in time. The appeal is, thus, allowed to that extent. Parties shall, however, bear their own cost.

16. Before we conclude, we may only notice that pursuant to our order dated 12.07.2011, the decretal amount deposited in court by the appellant has been released to the respondent on a security being furnished by its owner Rama Associates Ltd. The parties are at liberty to seek appropriate adjustment in execution proceedings.

SANJAY KISHAN KAUL, J.

APRIL 12, 2012
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RAJIV SHAKDHER, J.