

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 187 of 2005

Reserved on: 14th May 2012

Decision on: 6th July 2012

MUNICIPAL CORPORATION OF DELHI Petitioner
Through: Ms. Saroj Bidawat with
Mr. A.S. Tuisem Shimray, Advocates.
Versus

SUKUMAR CHANDRA JAIN Respondent
Through: Mr. Sandeep Sharma with
Mr. Vikas Sharma and
Ms. Rupali Kapoor, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
06.07.2012

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by the Municipal Corporation of Delhi ('MCD') challenging an Award dated 6th December 2004 passed by the sole Arbitrator in the disputes between the MCD and the Respondent Sukumar Chandra Jain arising out of 24 work contracts awarded to him between 1998 to 2001. The challenge is also to a further order dated 15th April 2005 passed by the learned Arbitrator in an application filed by the Respondent under Section 33 of the Act whereby certain corrections were made to the Award dated 6th December 2004. By virtue of the impugned Award dated 6th December 2004 and the impugned order dated 15th April 2005, the MCD has been held by the learned Arbitrator liable to pay the Respondent Rs.25,44,500.

2. The background facts are that the MCD invited tender for 24 independent

contracts/work orders for construction of Health Care Centres/Maternity Homes at various locations in Delhi. The Respondent was awarded works contracts relating to particular works in the said Health Centres/Maternity Homes. These said work orders were awarded to the Respondent between 1998 and 2001. The case of the Respondent contractor was that he had completed most of the works but there were bills in relation to each of its contracts that were still outstanding. The case of the MCD on the other hand was that it had paid all the running and final bills which were accepted by the Respondent contractor without raising any objection.

3. The disputes that arose between the parties were referred to the sole arbitration of Justice Ashok A. Desai, a retired Chief Justice of the High Court of Uttaranchal who was appointed as an Arbitrator by this Court by an order dated 14th August 2003. The claims of the contractor in relation to the work contracts essentially pertained to two major items. One related to the liability arising out of the Works Contract Tax ('WCT') and the other was in relation to Labour Escalation i.e. increase in the minimum wages to be paid to the labourers.

4. There were preliminary objections raised by the MCD to the maintainability of the claims. One objection was that in terms of Clause 24.1 of the contract the Respondent could have sought reference of the disputes to arbitration only after the Engineer in-charge ('EIC') had given a decision in relation to a dispute. Reference for arbitration had to be sought within 28 days of the notification of the EIC's decision. It was submitted by the MCD that in relation to none of the work contracts, which formed the subject matter of the dispute, the EIC had taken any decision. The Respondent did not invoke Clause 24.1 of the contract and the claims were accordingly time

barred in terms thereof. It was also submitted that the liability to pay the amounts certified by the Engineer arose after the expiry of 28 days thereafter and not from the date of the passing of the bill. Since the claims were time barred the question of payment of interest on such claims did not arise. Secondly, it was submitted that the Respondent had accepted the payment in full and final settlement of both running account and final bills without any protest.

5. As regards labour escalation, it was submitted by the MCD that in terms of Clause 10-C of the contract, the Respondent had to, within a reasonable time of becoming aware of the enhancement of the wages of labour and of materials, give notice to the EIC. This was not done in the present case. Moreover, the Respondent was in support of the claim under Clause 10-C obliged to furnish authentic proof in the form of vouchers and other relevant records regarding payment to labour. It was submitted by the MCD that the Respondent had submitted a bill for labour escalation on 12th September 2002 in the sum of Rs.80,374.29 after full and final payment in relation to the said contract was made on 31st October 2001. Therefore, the claim was time barred. As regards the claim for reimbursement of WCT, the case of the MCD was that Clause 45(2) was shown deleted at the time of issue of tender documents to the prospective bidders. Since the said clause was deleted, MCD was not liable to reimburse the WCT paid by the contractor. The claim for interest was also negated since the completion of the work itself was belated. Lastly, it was submitted that the calculation of the payment of interest was contrary to the terms of the contract. There could not be any interest on the security deposit and the withheld amount.

6. Based on the claim and reply statement, the learned Arbitrator framed the

following issues for consideration:

- “i. What is the nature of decision envisaged by Clause 24(1) of the Agreement to invoke arbitration of dispute?
- ii. Whether single arbitration proceeding is competent for disputes in relation to more than one contract or work orders?
- iii. Are various claims as well interest barred by limitation in terms of Clause 24(1) and also under Limitation Act?
- iv. Is Claimant entitled to interest owing to delay in release of Security Amount (initial 50% and then balance 50%)?
- v. Is Claimant entitled to interest on withheld amount?
- vi. Is Claimant entitled Labour Component of 25% in terms of Clause 44 of the Special Condition of Contract?
- vii. Whether opponent proves deletion of Clause 45(2) of the Contract, in relation to Work Contract Tax?”

7. On 27th May 2004, the learned Arbitrator framed the following two additional issues:

- “(a) Whether the Claimant is entitled for interest beyond 28 days as per Clause 43 of the Contract on the amount of delayed payment of running and final bills and withheld amount, delayed payment of Security amount, Labour Escalation, WCT etc.?
- (b) Is Respondent liable for payment of Work Contract Tax?”

8. A further issue framed on 28th August 2004 read as under:

“What could be rate of interest if payable, on various claims?”

9. As regards Issue Nos. (i) & (iii), the learned Arbitrator held that the

disputes could be referred to arbitration in terms of Clause 24.1 of the contract even without a formal written decision of the EIC. Moreover, the Respondent had on 15th January 2003 issued a notice under Clause 24 of the contract for appointment of an Arbitrator and it was the MCD which failed to reply to the said letter. It was held that MCD could not have taken advantage of its failure to respond to the aforementioned notice of the Respondent. As regards limitation, the learned Arbitrator held as under:

“Inaction or refusal to make the payment of dues is a continuing wrong. It sets up recurring causes of action. As such the reference for arbitration as sought, could not be beyond prescribed period.”

10. As regards Issue No. (ii), it was held that there could be a single arbitration for the claims arising out of 24 different work contracts, since the nature of the work was common and the claims were also more or less identical. Further, the parties were common and no prejudice in any manner whatsoever could be pointed out by either party.

11. Moving to Issue No.(vi) concerning labour escalation, it was held that for the second, third, fourth and fifth quarters, the Respondent was entitled to labour escalation charges which after deducting the claim of the first quarter, worked out to Rs.61,534.38. As regards the claim for reimbursement of WCT, the learned Arbitrator did not accept the plea of the MCD that Clause 45(2) stood deleted. Consequently, it was held that the MCD was liable to reimburse the Respondent the WCT in the sum of Rs.3,58,000.

12. After the pronouncement of the Award on 6th December 2004, the Respondent filed an application under Section 33 of the Act. It was claimed by the Respondent that the calculation of the amount of interest payable by the MCD had to be reworked. Importantly, it was submitted that it was not

only the interest on the withheld amount that was payable but the withheld amount itself. Future interest at 18% per annum under Section 31(7) (b) was also awarded. Consequently, by the impugned order dated 15th April 2005, the amounts awarded under Item Nos. D & E were corrected/modified to higher amounts of Rs.3,18,000 and 6,07,000 respectively. Consequently, it was held that the MCD had to pay the Respondent Rs.25,44,500 instead of Rs.21,06,500.

13. On behalf of the MCD it is submitted by learned counsel that there could not have been a single Award for different claims under 24 different work orders. Secondly, it is submitted that the Respondent could not have bypassed the procedure envisaged under Clause 24.1 of the contract whereby disputes were to be first referred to the EIC. Thereafter, if still aggrieved, the Respondent had to seek reference of the disputes to arbitration within 28 days. It is reiterated that full and final payment had been made of the running and final bills, with no protest by the Respondent. It is submitted that Clause 45(2) of the contract stood deleted. No bill had been submitted by the Respondent to the MCD even on security deposit or on withheld amount. It is submitted that no interest was payable as the amounts were released as and when the Respondent applied for them. It is submitted that MCD was justified in withholding Rs.2,61,000 towards liquidated damages ('LD') since admittedly there was delay in the completion of the various works beyond the stipulated time under Clause 49.1 of the contract. Consequently, the question of payment of interest also did not arise. As regards to the order dated 15th April 2005 in the application under Section 33 of the Act, it is submitted that the learned Arbitrator could not have reviewed the Award dated 6th December 2004 after having become *functus officio*.

14. On behalf of the Respondent it is pointed out that the objection about there being a single arbitration for claims under 24 different work contracts had already been considered and rejected by the High Court in its order dated 14th August 2003 appointing the sole Arbitrator. As regards the period of 28 days from the date of the decision of the EIC within which reference of the disputes to arbitration had to be sought, it is submitted that any clause in the contract that curtails the period of limitation for making a claim would be hit by Section 28(b) of the Contract Act, 1872 ('Contract Act'). It is further pointed out that even before the learned Arbitrator the MCD failed to substantiate the deletion of Clause 45(2) of the contract.

15. The MCD points out in its rejoinder that the statements filed by the contractor before the learned Arbitrator were after the conclusion of the arbitral hearings and there was no occasion for them to be jointly verified by the parties. In particular it is contended by the MCD in its rejoinder that the statements were prepared by the Respondent unilaterally and the figures that were arrived at the joint sitting of the parties were overwritten or scored off at the time of their being filed before the learned Arbitrator. It is averred that: "the figures given by the claimant in his statements A, B and C are different from the one arrived at after joint sitting." Since the contractor had failed to submit bills, it was the MCD which had prepared them and the contractor had duly accepted payment against the said bills without protest.

16. Having heard the submissions of the learned counsel and having perused the arbitral record it appears to the Court that the impugned Award dated 6th December 2004 as well as the impugned order dated 15th April 2005, require to be set aside for the following reasons:

(I) The question of the claims being barred by limitation was framed

as a separate Issue No. (iii) by the learned Arbitrator. Yet, while passing the impugned Award the learned Arbitrator clubbed the said issue with Issue No. (i) which was whether the decision of the EIC in terms of Clause 24.1 of the contract had to be a written one. This clubbing together of the said two issues was itself improper. Further, the issue of limitation was dealt with most perfunctorily with the learned Arbitrator observing that it was a “recurring cause of action” and therefore not time barred. There was no basis for the above conclusion. In any event it was not an answer to the failure of the Respondent to invoke Clause 24.1 of the contract and approach the EIC first with the dispute. Also, the contention that the time limit of 28 days after the decision of the EIC for seeking reference of the dispute to arbitration was hit by Section 28(b) of the Contract Act was neither raised before the learned Arbitrator nor considered by him.

(II) As regards labour escalation, the fact remained that the Respondent never produced any proof in the form of vouchers and other documents for the purposes of Clause 10-C of the contract. In reply to the averment to this effect in para 9 (h) of the petition, there is no denial by the Respondent. On the other hand the Respondent refers to Ex. C-6 filed with the statement of claims “which is the escalation bill paid by the petitioner to another agency for the same period and for the same work.” This is a clear admission that there were no documents to show that the Respondent had incurred any expenditure on account of labour escalation. The allowing of the said claim by the learned Arbitrator was based on no evidence.

(III) As regards the WCT, the learned Arbitrator erroneously

rejected the plea of the MCD that Clause 45(2) of the contract stood deleted at the time of entering into the contract. The learned Arbitrator noted that even the Respondent, while denying deletion of Clause 45(2) “could not produce the original copy of the contract”. On the other hand at the hearing on 21st May 2004, counsel for the MCD presented “the photocopy of relevant page of the contract wherein deletion by scratching has been indicated.” However, the learned Arbitrator did not accept the said document since it was without signatures, initials or date. This being the factual position, an adverse inference had been drawn against the Respondent for not producing the original contract. If it was the case of the Respondent that the original contract contained Clause 45 (2) then the burden was on the Respondent to prove it by producing the original thereof.

(IV) Apart from unsatisfactorily dealing with the issue of the Respondent’s claims being barred by limitation, the learned Arbitrator failed to deal with the issue of the Respondent accepting without protest the full and final payment against the running and final bills prepared by the MCD. It was held in ***Kelkar and Kelkar v. Indian Airlines 2004 (1) Arb.LR 381 (Bombay) (DB)*** that where a contractor had accepted unconditionally the full and final settlement of his claims, there were no arbitrable disputes to be referred. The Respondent failed to show that the acceptance of payment against the final payment was under duress or coercion.

(V) In para 9 (l) of the petition apart from averring that it was entitled to withhold Rs. 2,61,000 as LD, the MCD has also set out the Admitted periods of delay in completion of various works which

justified the withholding of the LD amount from the running bills and final bill. The reply thereto by the Respondent is unsatisfactory. The learned Arbitrator totally failed to deal with the point although specifically raised before him by the MCD.

(VI) Clauses 43.1 and 42.5 of the contract do not provide for interest on security deposit or the withheld amount, much less any compound interest. The reliance placed by the Respondent on the decisions in ***Dakshina Kannada Sahakari Sakkare Karkane Limited, Brahmavara, Udupi District v. N. Narayana Shetty (2004) 3 Arb.LR 5 (Karnataka) (DB), Saraswati Construction Co. v. Delhi Development Authority 2004 (2) Arb.LR 429 (Delhi), Union of India v. M/s. Harbans Singh Tuli & Sons Builders (P) Ltd. AIR 2000 P&H 313, Union of India v. Roshni Devi 2005 (1) Arb.LR 363 (J&K)*** to urge that interest on interest is payable even where the contract is silent on that aspect is no longer legally tenable in view of the decision of the Supreme Court in ***State of Haryana v. M/s. S.L. Arora and Company AIR 2010 SC 1511***.

(VII) The learned Arbitrator committed a patent illegality in entertaining the application of the Respondent under Section 33 of the Act and by the order dated 15th April 2005 virtually reviewing the Award dated 6th December 2004. He allowed a claim concerning the reimbursement of the withheld amount although the Award did not speak of it. The allowing of additional claims and reworking the interest was not merely an exercise in correcting clerical or arithmetical errors. It was far beyond the scope of the proceedings under Section 33 of the Act. The said order dated 15th April 2005 was

therefore without jurisdiction.

(VIII) There is no satisfactory answer to the MCD's assertion that the statements were prepared by the Respondent unilaterally and the figures arrived at the joint sitting of the parties were overwritten or scored off at the time of their being filed before the learned Arbitrator. Also, there is no means to doubt the assertion of MCD that: "the figures given by the claimant in his statements A, B and C are different from the one arrived at after joint sitting." The said statements appear to have been submitted by the Respondent to the learned Arbitrator after the final arguments had concluded. It appears unlikely that the said statements were jointly prepared and signed by the parties. Despite the MCD pointing out that the statements submitted by the Respondent contained overwriting and scoring off of the figures arrived at the joint sitting of the parties, the learned Arbitrator unquestioningly accepted their veracity.

17. For the aforementioned reasons, it is concluded that the impugned Award dated 6th December 2004 as well as the subsequent order dated 15th April 2005 passed by the learned Arbitrator suffer from a patent illegality and are unsustainable in law. They are accordingly set aside. The petition is allowed but in the circumstances with no order as to costs.

S. MURALIDHAR, J.

JULY 6, 2012

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