

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Not reportable)

OMP No. 527 of 2006

NATIONAL BUILDINGS CONSTRUCTION
CORPORATION LTD.

..... Petitioner

Through: Mr. N. Prabhakar & Mr. Ashim
Shridhar, Advocates

versus

CHIEF EXECUTIVE OFFICER,
DELHI JAL BOARD & ANR.

.....Respondents

Through: Ms. K. Kiran, Advocate.

CORAM: JUSTICE S.MURALIDHAR

ORDER

06.12.2012

1. The Petitioner, National Buildings Construction Corporation Ltd. ('NBCC'), challenges an Award dated 17th May 2006 passed by the learned sole Arbitrator (Respondent No.2) in the disputes arising out of the award of the work of construction of 40 MGD Water Treatment Plant at Nangloi to NBCC by the Respondent No.1, Delhi Jal Board ('DJB').

2. The challenge in the present petition to the impugned Award is insofar as it has rejected some of the claims of NBCC and allowed the counter claims of DJB.

3. It is first submitted by Mr. N. Prabhakar, learned counsel for NBCC, that the learned Arbitrator erred in entertaining DJB's counter claims since they were beyond the scope of the reference of the disputes to arbitration. He referred to the relevant clause of the contract dated 11th May 1992 entered into between the parties which stated that "Only disputes/disputes out or such disputes shall be referred to the arbitration as may be determined by the Commissioner arising out of and relating to the contract and the decision of the Commissioner in this respect shall be final, conclusive and binding on all parties to this contract." He submitted that while NBCC invoked the arbitration clause and submitted its claims to the Chief Executive Officer ('CEO'), DJB, by letter dated 9th October 2002, followed by another letter dated 22nd October 2002, enclosing a list of 41 specific claims for reference to arbitration, DJB never raised any disputes or claims. According to him the letter dated 27th November 2002 by the CEO of DJB appointing the Arbitrator showed NBCC as the Claimant and DJB as the Respondent. Therefore, only the specific claims of NBCC were referred to arbitration and not DJB's counter claims. He referred to the decisions in ***Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan AIR 1999 SC 2102, Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. AIR 2003 SC 2629,***

Food Corporation of India v. T.R. Behl ALR 1992 (2) 456, *Bharat Coking Coal Ltd. v. M/s. Annapurna Construction* AIR 2003 SC 3660, *Municipal Corporation, Jabalpur v. M/s. Rajesh Construction Co.* AIR 2007 SC 2069 and *National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd.* AIR 2007 SC 2327. While Mr. Prabhakar did not dispute the fact that this plea was not raised before the learned Arbitrator, he submitted that since it went to the root of the matter and was contrary to law, it could be urged in the present proceedings as well. In support of such submission he referred to the decision in *Union of India v. Raunaq International Ltd.* AIR 2008 SC (Supp) 303.

4. In reply, it is submitted by Ms. K. Kiran, learned counsel for DJB, that the letter appointing the learned Arbitrator clearly mentioned that DJB's claims were also to be referred for arbitration. Under the relevant clause of the contract while it was incumbent on NBCC, as Claimant, to specify its items of claims, there was no requirement of the DJB having to specify its counter claims at that stage itself. The stage for preferring counter claims would arise after the submission of the statement of claims by NBCC. Also, NBCC failed to raise this plea before the learned Arbitrator in an application under

Section 16 of the Arbitration & Conciliation Act, 1996 ('1996 Act'). Such objection as to the jurisdiction has to be taken at the earliest and not later than the filing of the claim. It could not be permitted to be raised at this stage.

5. The letter dated 27th November 2002, appointing the learned Arbitrator, reads as under:

“Office of the Law Officer (Water)
Delh Jal Board, Govt. of N.C.T.
Varunalaya Phase-II
Karol Bagh, New Delhi-5

Subject: Appointment of Sole Arbitrator

In the matter of arbitration between

N.B.C.C. Ltd. ----- Claimant
v/s.
Delhi Jal Board ---Respondent

Relating to work: Construction of 40 MGD Water Treatment
Plant at Nangloi.

Whereas the above said work was awarded to M/S N.B.C.C. Ltd. vide work order/supply order No.F2(1) EE(W) C-VII/92-2054 dt. 17.02.92 at a total cost of Rs.950 lacs. Contract Agreement No.10 (1991-92) was duly executed between the parties named above.

And whereas certain disputes have arisen between M/s. N.B.C.C. Ltd. and Delhi Jal Board in respect of above noted work

which are required to be referred to the sole arbitrator by the Chief Executive Officer of DJB or his nominee as provided under the arbitration clause of the Contract Agreement.

Now, therefore, I, P.K. Tripathi, Chief Executive Officer of Delhi Jal Board, Govt. of N.C.T. of Delhi, under the provisions of the arbitration clause of the Contract Agreement, appoint Shri Ramesh Chandra, Ex. Chairman, C.W.C. as an arbitrator to decide and to make his award relating to the disputes/claims by M/s. N.B.C.C. and Delhi Jal Board subject to their admissibility under arbitration clause of the Contract Agreement. The list of disputes/claims by the parties will be submitted to the Ld. Arbitrator at the time of entering into reference.

The hearings will commence only after the claimant files his claims and the respondent files his replies/counter claims if any. The claimant shall file his claims within two weeks from the date of issue of the appointment letter and the respondent shall file his reply/counter claim if any within the next four weeks.

As provided in the Contract Agreement signed between the parties award shall be a speaking award if the amount of the award to any of the parties exceeds Rs.10,000.

The fee of the arbitrator for conducting the arbitration proceedings will strictly be regulated under the terms of payment as contained in the booklet 'RULES OF ARBITRATION OF THE INDIAN COUNSEL (*sic*. COUNCIL) OF ARBITRATION' and the fee as fixed will be final.

Sd/-
Chief Executive Officer
Delhi Jal Board
Govt. of N.C.T. of Delhi
Dated: 27.11.2

NO.DJB/LO(WO)/ARB/202/2143

6. A perusal of the above letter shows that "the disputes/claims of NBCC

and DJB subject to their admissibility under arbitration clause of the contract/agreement” were referred to arbitration. Further, it was made clear that “the list of disputes/claims of the parties will be submitted to the arbitrator at the time of entering reference.” Clearly, therefore, it was not only the disputes raised by NBCC but those raised by both NBCC and DJB that were referred to arbitration,. It cannot, therefore, be said that by entertaining the counter claims of DJB, the learned Arbitrator travelled beyond the terms of reference. The decisions in *Olympus Superstructures Pvt. Ltd., Food Corporation of India, Municipal Corporation, Jabalpur* and *National Agricultural Co-op. Marketing Federation India Ltd.* are distinguishable on facts and do not assist NBCC.

7. Section 16 of the 1996 Act permits either party to the arbitral proceedings to raise an objection as to the jurisdiction of the arbitral Tribunal. However, this has to be done at the earliest available opportunity. This is plain from Section 16 of the 1996 Act, which reads as under:-

16. Competence of arbitral tribunal to rule on its jurisdiction.-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

- (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- (b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to, in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

8. Admittedly, NBCC did not raise any objection to the jurisdiction of the learned Arbitrator to entertain the counter claims of DJB. In fact, the appointment letter itself had made it clear that the disputes will be referred “subject to their admissibility under the arbitration clause of the contract

agreement.” NBCC not having raised such an objection at the appropriate stage stands precluded from raising it at the present stage under Section 34 of the 1996 Act. In ***Union of India v. Raunaq International Ltd.*** a reference was made to the decision in ***General Manager, Northern Railway v. Sarvesh Chopra AIR 2002 SC 1272*** which arose under the Arbitration Act 1940 (‘1940 Act’) and which in turn referred to a passage from *Arbitration by Russell* which mentioned that the issue of arbitrability usually arose at three stages. The first stage was on an application to stay the arbitration. The second “in the course of the arbitral proceedings” and the third “on an application to challenge the award or to oppose its enforcement.” Reference. Even the decision in ***Union of India v. Raunaq International Ltd.*** was in the context of the 1940 Act. As far as 1996 Act is concerned, it is plain that such an objection can be raised during the arbitral proceedings but within the time limits specified under Section 16 of the 1996 Act. If a party fails to raise such objection at that stage, it cannot be permitted to do so for the first time in the petition under Section 34 of the 1996 Act. Consequently, this Court negatives the objection raised by NBCC to the impugned Award on the ground that the learned Arbitrator had no jurisdiction to entertain the counter claims of DJB.

9. Under Claim No.1 NBCC had initially claimed Rs. 35,21,321 towards escalation up to 31st January 1996 with the base index being 31st December 1990. Admittedly, by a letter dated 22nd November 1999 DJB had paid NBCC Rs. 1,80,000 towards escalation in respect of steel works up to January 1996. NBCC filed the aforementioned claim for Rs. 215.21 lakhs on the basis of NBCC's self-assessed value of work done with the base index being 31st December 1990. During the pendency of the arbitral proceedings, the claim was reduced to Rs.201.90 lakhs after tallying it with the figures supplied by DJB with the same base index. It is submitted that the learned Arbitrator erred in accepting the plea of DJB that the determination of the cost escalation should be on the base index of 31st December 1990 which was payable from 1st January 1991. It is submitted by NBCC that the learned Arbitrator erred in allowing only Rs.2,01,68,152 towards escalation as against Rs. 201.90 lakhs claimed by it.

10. In reply, it is pointed out that the reduction by NBCC of its claim from Rs. 215.21 lakhs to Rs. 201.90 lakhs was without the permission of the learned Arbitrator. No amendment under Section 23(3) of the 1996 Act was sought by it for that purpose. The work was awarded at a fixed price on

turnkey basis. There was no question of any escalation. In fact, DJB paid NBCC the actual cost +10% through vouchers. Clause 10 CC did not apply to turnkey projects. The price agreed was firm at Rs.1440 lakhs and nothing more was payable.

11. This Court has perused the impugned Award in respect of Claim No.1. The learned Arbitrator referred to the documents on record and noted that NBCC had itself made a claim for escalation up to 31st January 1996 using the base date as 1st January 1991. The total demand, therefore, worked out to Rs.201.90 lakhs. Even after reworking the claim for deduction of cost of steel and cement up to January 1996, the amount worked out to Rs.2,01,68,152. Accordingly, a sum of Rs. 2,01,68,152 was held payable by DJB to NBCC for escalation up to 31st January 1996. It requires to be noted that the amount so awarded has been accepted by DJB and the payments have also been made to NBCC on that basis. The analysis and the reasoning of the learned Arbitrator in respect of Claim No.1 is consistent with the terms of the contract. Indeed if it was a turnkey project for which a lump sum amount was quoted by NBCC, there was no scope for applying the escalation formula under Clause 10 CC. The change of the base date was

made without seeking amendment under Section 23(3) of the 1996 Act. The view taken by the learned Arbitrator was a plausible one and cannot be faulted.

12. Claim No.2 was for a sum of Rs.22.32 lakhs for increase in cost of procurement of Delhi quartzite stone metal for use in the civil works. The case of NBCC was that as the crushers in Delhi were closed by the Supreme Court by its order dated 15th May 1992 which was made effective from 15th August 1992, NBCC was compelled to purchase the stone metal from stone crushers at Pali, Haryana. The difference, therefore, was claimed.

13. The learned Arbitrator found that the work order was placed on NBCC on 17th February 1992 itself. In terms thereof, NBCC was to submit a detailed programme for carrying out the work in the form of a bar chart. This was not done. Three months thereafter an order dated 15th May 1992 was passed by the Supreme Court. By this time NBCC could have procured all the steel metal from Delhi itself. Further, the learned Arbitrator observed that “All stone materials ought to have been procured in advance, as large areas were available in plenty for storage at site.”

14. As regards Claim No.2, if indeed the work order was placed on NBCC three months prior to the order of the Supreme Court, it cannot be said that NBCC was prevented from procuring stone at the relevant time. Ultimately, the work was to be performed on turnkey basis and NBCC should have avoided the possibility of loss by taking steps for mitigating it. The view taken by the learned Arbitrator was plausible and cannot be said to be erroneous.

15. Claim No.3 was for extra expenditure incurred on account of construction of clear water pump house of increased area and Claim No.4 was for extra expenditure incurred on account of construction of increased size of annexe building. The contention was that although as per the offer dated 7th July 1991, the size of the clear water pump house was 35m x 12.16m, DJB changed the size to 53.65m x 13.0m. Likewise, the size of the pump house of the annexe building was increased to 24m x 24m from the original size of 35m x 10 m. The question was whether NBCC was entitled to additional payment for construction of two buildings of bigger size as extra items.

16. The learned Arbitrator noted that in terms of the agreement dated 11th May 1992, the work was to be executed strictly in accordance with the drawings/specifications, as may be approved by the Engineer In-charge ('EIC') from time to time. The record showed that NBCC was willing to carry out the activities "without making extra claim in future for doing them." Further, the learned Arbitrator accepted the contention of DJB that the sizes of several items had been reduced although there was no reduction in the cost. Even the quantities of RCC and steel enforcement had not been exhausted. Therefore, Claim Nos.3 and 4 were rejected.

17. Mr. Prabhakar reiterated the contentions raised before the learned Arbitrator in regard to Claim Nos.3 and 4. This Court is not persuaded to hold that the learned Arbitrator committed any error in rejecting the above claims. What is required to be noted is that the larger size buildings were required for constructing 40 MGD plant and the designs and drawings were to be drawn up consistent with this requirement. The view taken by the learned Arbitrator was a plausible one.

18. Claim No.6 was for extra cost incurred on account of slush removal.

According to Mr. Prabhakar DJB was to arrange for electricity connection to enable NBCC to use motors to drain out slush using a diesel generator. As rightly observed by the learned Arbitrator, “the excavation work in such a high water table area should have been properly planned with requisite pumping and other facilities.” It was indeed the responsibility of NBCC to keep the site clean of slush. This Court does not find any illegality having been committed by the learned Arbitrator in rejecting the said claim.

19. Claim No.7 was for deployment of security staff for additional period. It was noted that NBCC made its claim in this regard for the first time on 3rd March 2000, around 1½ years after employing the security staff. Initially, a sum of Rs. 9.04 lakhs was claimed and later it was increased to Rs. 9.25 lakhs by letter dated 24th June 2000. In the claim before the learned Arbitrator, this was further enhanced to Rs. 10.83 lakhs. However, there was no letter addressed to DJB by NBCC seeking extra security staff. In these circumstances, when several works remained to be completed, it was incumbent on NBCC to deploy its own security guards, for which the expenses could not be asked from DJB.

20. Claim No.16 was for providing extra earth pits. According to NBCC, additional 21 pits had to be constructed as insisted by DJB. According to DJB, this was part and parcel of the work. The learned Arbitrator, on perusing the documents, found that “it has been clearly specified that localized earthing pits and grids shall be provided for equipment earthing.” This part of the work was to be done on turnkey basis. In that view of the matter, the rejection of the said claim cannot be said to be erroneous.

21. Claim No.17 was on account of additional work done for storm water drainage, whereas Claim No.21 was for extra expenditure incurred on account of laying bed concrete and encasing of pipes with cement concrete. DJB contended that this was part and parcel of the work and was to be done on turnkey basis. As per Clauses 12 and 13 of agreement, all CI pipes were to be properly supported with brick work on concrete without any extra cost. The proportion of mix was also indicated in the agreement. DJB was entitled to make changes, addition or variation in the design/drawings as considered necessary. In the circumstances where the quantity of cement and RCC had not been exhausted, and the earthing of pit, laying of bed concrete and encasing of pipes was included in the scope of the work as indicated in the

letter dated 20th July 1996 (Ex. C 52) of NBCC, the learned Arbitrator was justified in rejecting the aforementioned two claims..

22. The rejection of minor claims, viz., Claim Nos.26 and 29 cannot be faulted since no evidence produced to substantiate them. Claim No.32 was for extra cost incurred for constructing canopy in clear water pump house building. The learned Arbitrator was informed by DJB that similar canopies were constructed by the Contractor without any extra payment in other buildings and this was not denied by NBCC. Accordingly, the said claim was rightly rejected.

23. This Court is unable to find any legal infirmity in the impugned Award warranting interference under Section 34 of the 1996 Act.

24. The petition is dismissed, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

December 06, 2012

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