

\$~
*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgement Reserved on: 24th May, 2018
Judgement Pronounced on: 2nd November, 2018

+ **FAO (OS)(COMM.) 41/2017**

IJM CORPORATION BERHAD

.....Appellant

Through: Mr. Abhinav Vasisht, Senior Adv. with
Mr. Amit Bansal, Mr. Shambhu Saran,
Mr. Yaman Kumar, Mr. Shashank
Bhansali, Ms. Priya Singh, Advocates.

Versus

NORTH DELHI MUNICIPAL CORPORATION Respondents

Through: Mr. Gaurav Pachnanda, Sr Adv. with Ms.
Reenu Gupta, Ms. Shivangi Vaid and Mr.
Dhruv Tripathi, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J. (Oral)

1. The present appeal is filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and is directed against the order/judgment of the learned Single Judge dated 02.01.2017 (impugned order) passed in OMP (Comm.) No.407/2016, whereby the interim arbitral Award dated 29.04.2016, made and published by the Sole Arbitrator in the favour of the appellant (hereinafter 'the IJMC'), has been set aside.

2. The disputes between the appellant and the respondent (hereinafter 'NDMC') have arisen in the following background:

2.1 In 2005, NDMC invited bids for construction of a Civic Centre at Jawaharlal Nehru Marg, Minto Road, New Delhi. IJMC being the lowest bidder, was awarded the contract for the project and a Letter of Intent (LOI) dated 30.03.2005 followed by the Work Order dated 25.04.2005 was issued in its favour. Thereafter, IJMC commenced execution of the project on 05.05.2005. As per the contract (hereinafter 'the Agreement') entered into between the parties on 21.05.2005, the stipulated period of completion of work was 36 months which was to complete on 4th May 2008. The work was eventually completed, after grant of 11 Extensions of Time. However amidst the various stages of execution of the project, several disputes arose between IJMC and NDMC pursuant to which IJMC invoked the Arbitration Clause and Sh. Dipak Mukhopadhyay, former Engineer-in-Chief (retired), MCD was appointed as the Sole Arbitrator.

2.2 Both the parties raised their claims and counter claims before the arbitrator. In all, IJMC raised 21 claims amounting to Rs. 306.83 crores (approx) besides interests and cost of arbitration, against which NDMC raised 5 counter claims which included a sum of Rs. 648 crores on account of alleged loss of revenue from the delay in handing over part of the Civic Centre building to the Income Tax Department.

- 2.3 In the meanwhile IJMC filed an application under Section 31(c) of the Act read with Order XII Rule 6 of the Code of Civil Procedure, 1908 before the Arbitrator seeking grant of an interim award in its favour on the basis of the admissions made by NDMC in respect of the following sums:-

"a. Rupees Two Crores Thirty Lacs Seventy Four Thousand Seven Hundred Sixty Seven and Paise Forty Four (Rs.2,30,74,767.44p) against Claim No.1.

b. Rupees Six Crores One Lakh One Thousand Twenty Three (Rs.6,01,01,023.00p) and Rupees Nineteen Crores Fifty Six Lakhs Eight Thousand Nine Hundred Seventy Seven and Paise Eighty Eight (Rs.19,56,08,977.88p) against Claim No.8.

c. Rs.32,14,440.43 (Rupees Thirty Two Lakhs Fourteen Thousand Four Hundred and Forty Only) against Claim No.19." (Emphasis supplied)

- 2.4 Based entirely on the admissions made by NDMC in its Statement of Defence, the learned Arbitrator passed an interim award dated 29.04.2016 directing NDMC to pay a total sum of Rs.12,30,85,293.44 (Rupees Twelve Crores, Thirty Lakhs, Eighty Five Thousand, Two Hundred, Ninety Three and Fourty Four Paise only) to IJMC, to discharge its admitted liability by 16.5.2016. The said amount has been awarded by the arbitrator in respect of Claim No.1 and Claim No.8 made by IJMC which includes a sum a Rs.2,30,74,767.44/- that has been admitted as payable by NDMC for price escalation for the period between January

2010 till July 2011 and a sum of Rs.10,00,10,526/- which has been certified by NDMC as payable in respect of R.A Bill No.74 & 75. The Arbitrator further directed that on failure to pay the said amount by 16.05.2016, the NDMC shall be liable to pay interest at the rate of 18% per annum from 17.05.2016 till the payment of awarded amount.

- 2.5 Aggrieved by the said interim award, NDMC filed a petition under Section 34 of the Act before this Court wherein the learned Single Judge vide impugned order dated 02.01.2017 has set aside the interim award passed by the learned Sole Arbitrator. The learned Single Judge was of the opinion that the said interim award directing NDMC to pay admitted amounts in respect of Claim No.1 and Claim No.8 is contrary to express terms of the Agreement between the parties as under Clause 29 NDMC is entitled to withhold any sum payable to IJMC till the final adjudication of its claims. The findings of the learned Single Judge in this regard are extracted hereinafter:

"19. Insofar as the provisions of clause 29 of the Agreement is concerned, it clearly provides that whether any claim or claims for any payment arise out of or under the contract against the contractor, the Engineer-in-Charge or NDMC would be entitled to withhold the said sums from the security, if any deposited by the contractor. In cases, where no security is deposited or the amount of security is insufficient to meet the claims, NDMC would be entitled to withhold and have a lien from "any sum or sums found payable" to the contractor pending

finalisation or adjudication of any such claims. In the present case, though the Arbitrator has held that NDMC has admitted that certain amounts are payable to IJMC, it is also indisputable that NDMC has made counter claims against IJMC. Thus, in terms of clause 29 of the Agreement, NDMC would be entitled to withhold any sum payable to IJMC till adjudication of its claims.

20. Notwithstanding the provisions of clause 29 of the Agreement, the Arbitrator may in certain circumstances - such as in cases where the counter claims are found to be frivolous or without merit - direct payment of sums withheld, however, the Arbitrator would have to examine the same. In the present case, the Arbitrator has not considered the provisions of clause 29 of the Agreement as it appears that the provisions of clause 29 of the Agreement were not brought to the notice of the Arbitrator.

21. It is necessary to observe that Mr Pachnanda's main argument revolved around failure on the part of the Arbitrator to consider clause 29 of the Agreement. It is seen that no such contention was advanced before the Arbitrator; no such ground has been pleaded even in this petition as well. Nonetheless, the clear language of clause 29 of the Agreement cannot be ignored; the impugned award directing payment of sums notwithstanding the claims made by NDMC would militate against the plain language of clause 29 of the Agreement. It is well settled that an arbitral award which is contrary to the express terms of the contract would be liable to be set aside." (Emphasis supplied)

3. Mr. Abhinav Vasisht, learned Senior counsel appearing for the appellant/ IJMC while challenging the legality and correctness of the impugned order has argued that the learned Sole Arbitrator in the instant case, has given due regard to the material on record

before passing the interim award which is based on the pleadings of the parties and the correspondence wherein NDMC has made clear acknowledgement of its liability to the tune of Rs.12,30,85,293.44 with respect to the claims of IJMC (Claim No.1 & 8). Learned counsel submits that there is no inherent illegality or perversity in the making of the interim award by the arbitrator so as to warrant any interference as that made by the learned Single Judge who vide the impugned order has directed setting aside of the said award in favour of NDMC on the basis of Clause 29 of the Agreement.

4. It is further argued by the learned counsel that Clause 29 of the Agreement would have been applicable only where the Engineer-in-Charge or NDMC decides to withhold or exercise its lien to retain the security deposit for payment of any claim or claims arising out of or under the contract. However NDMC has not exercised the said right at any point of time i.e. during the execution of work or even thereafter and no case of withholding in exercise of rights under Clause 2 and Clause 29 of the Agreement was made out either in its pleadings before the arbitrator or before the learned Single Judge and the same was urged first time only on 09.09.2016 i.e. on the date of arguments before the learned Single Judge. It is further submitted that the only case made out by NDMC against IJMC was with respect to compensation for delays in terms of Clause 2 of the Agreement @ 10 % of the contract value and the entire case of NDMC was based on the counter claims and set off sought in respect thereof which clearly suggests

14

of absence of any intention on the part of NDMC to withhold the amounts payable against its counter claims in pursuance of Clause 29. Besides the claim for compensation for delay, the IJMC was never put to notice with respect to the counter claims and with regard to withholding of the amounts payable, which is also a pre-condition for invoking Clause 29. Also, none of the counter claims were ever claimed by the NDMC before filing of the Statement of Defence. Thus the mechanism to invoke Clause 29, provided by the express terms of the Agreement has not been followed by the NDMC.

5. Mr. Vasisht, learned Senior Counsel further argues that, mere non-payment of the claims of IJMC, only on the ground that NDMC had made counter claims and is seeking set off in respect thereof would not be a justified cause to attract the provisions of Clause 29 and thereby grant protection to NDMC from making payment of its admitted liabilities. Even otherwise under the said Clause 29, NDMC is entitled to withhold any other amounts only when the security deposits are insufficient to secure the claims. However, the counsel submits that at no point of time has the NDMC pleaded that the security lying with them in nature of Bank Guarantees would be insufficient to secure the amounts claimed. Counsel submits that the invocation of Clause 29 for the first time at the stage of arguments before the learned Single Judge, long after the making of the admissions in the pleadings before the Arbitrator, is highly belated and in clear violation of the spirit of the said clause. Learned counsel therefore argues that the fact that NDMC had

made counter claims would not make any difference in so far as the power of the arbitrator to make an interim award was concerned and hence the impugned order setting aside the interim arbitral award on the ground of Clause 29 of the Agreement is wholly illegal and is liable to be set aside. In support of his submissions, the learned senior counsel placed reliance on the judgement in *Numero Uno International Ltd. V. Prasara Bharti* reported in 2008 (1) Arb. LR 446 (Delhi).

6. On the other hand, Mr. Gaurav Pachnanda, learned Senior Counsel for the respondent/NDMC, relying upon Clause 29 of the Agreement argues that NDMC vide notice dated 09.01.2014 levied compensation for delay on IJMC which quantified at 10% of the contract value and the said levy was final and binding on IJMC, beyond the scope of adjudication through arbitration. Learned Senior Counsel submits that as the said sum was payable by IJMC, NDMC was entitled to claim a set-off in respect of the said sum against any other claims payable to IJMC, by virtue of Clause 2 of the Contract. Furthermore, by virtue of Clause 29 NDMC is also entitled to withhold and exercise its right of lien on the said sums payable to IJMC till final adjudication by the arbitrator. Learned Senior Counsel therefore submitted that there is no infirmity in the finding of the learned Single Judge in setting aside the interim arbitral award that is clearly contrary to the express terms of the Contract. In support of his submissions, the learned senior counsel has placed reliance on the judgement in *National Building*

Construction Corporation vs. Essel Properties & Industries
reported in ***2012 (5) R.A.J. 268 (Del)***.

7. We have heard the learned counsel for the parties and perused the material available on record. Since this is an appeal under Section 37 of the Act, the scope of judicial scrutiny is circumscribed and only within the parameters as laid down by the Supreme Court in the catena of judgements on the scope of intervention, that the present issue shall be dealt with.
8. The primary issue urged on behalf of IJMC is that no relief in terms of Clause 29 of the Agreement can be sought by NDMC, as the same was neither urged by the respondent before the Arbitrator nor in the pleadings before the Id. Single Judge. It was only at the time of addressing arguments before the Id. Single Judge that the counsel for NDMC made out a case of withholding under Clause 29 of the Agreement. However the Id. Single Judge, though faced with such situation where fresh objections to the interim award had been raised only during the arguments before it, accorded supremacy to the specific terms of the arbitration agreement to justifiably determine the disputes between the parties.
9. The very object of pleadings is to enable the court to decide the true rights of the parties in trial. Allowing or rejecting such objections at a belated stage is ultimately the discretion of the court which although has to be exercised consistently in terms of settled legal principles.
10. Similar discretion has been exercised in the case of ***M/S Lion Engineering Consultants vs. State of M.P & Ors.*** reported in

(2011) 5 SCC 532 wherein the Supreme Court has granted liberty to raise all jurisdictional objections in challenge proceedings under Section 34 of the Act despite the jurisdictional objections not having been raised before the tribunal under Section 16 of the Act.

11. Therefore keeping in view the prevalent practice, we find no illegality in the discretion exercised by learned Single Judge in allowing NDMC to raise fresh objections to the impugned arbitral award.
12. Now in order to appreciate the controversy involved in the present appeal, it will be apposite to reiterate Clause 29 of the Agreement which reads as under:-

"CLAUSE 29

With holding and lien in respect of sums due from contractor

(i) Whenever any claim or claims for payment of a sum of money arises out of or under the contract or against the contractor, the Engineer-in-Charge or the MCD 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 contractor and for the purpose aforesaid, the Engineer-in-Charge or the MCD shall be entitled to withhold the security deposit, if any, furnished as the case may be and also have a lien over the same pending finalisation 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 or the MCD 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 may at any time thereafter become payable to the contractor under the same

18

contract or any other contract with the Engineer-in-Charge of the MCD or any contracting person through the Engineer-in-Charge pending finalisation of adjudication of any such claim."

13. From a bare reading of Clause 29 of the Agreement it is clear that whenever the employer (NDMC) has a claim or claims against the contractor (IJMC), the Engineer-In-Charge of the employer shall be entitled to withhold or retain such sum in whole or in part from the security deposited by the contractor till the final adjudication of such claims. In addition to the right of withholding, the employer shall also be entitled to exercise lien over such retained amount. The second limb of the said Clause further clarifies that where the security deposited with the employer is not sufficient, the employer is entitled to withhold the amounts in its possession to the extent of its claims and also exercise lien over 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 claims.
14. In the present case the learned Sole Arbitrator was although correct in concluding that NDMC had admitted its liability to the extent of Rs.12,30,85,293.44, however it could not have turned a blind eye to the very fact that NDMC has made counter claims against IJMC and in respect of which it is entitled to withhold the said sums till the final adjudication of its claims by virtue of Clause 29 of the Agreement. While determining whether a particular claim would have to be allowed or disallowed, the arbitrator must necessarily be guided by the express terms of the Agreement between the parties

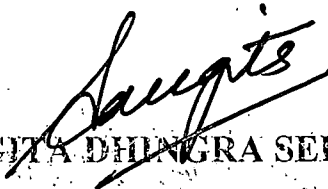
15. Also in *National Building Construction Corporation v. Essel Properties & Industries* reported in 2012 (5) RAJ 268 (Del) this Court further clarified that in the absence of an overt declaration by the employer, right under Clause 29 of the Agreement shall not be rendered obsolete. The findings of this Court are extracted hereunder:-

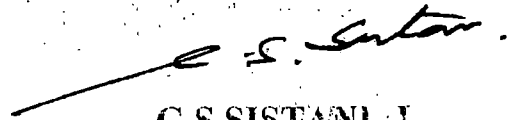
" To our minds, declaration of lien is automatic in terms of clause 29(1) of the contract. Even if it is assumed for the sake of argument that, it had to be overtly declared by the employer (i.e., the appellant) it cannot be said that if no lien is declared vis-à-vis the withheld amount(s) then, the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

16. Keeping in view the express terms of Clause 29 of the Agreement and the state of law in vogue on the present issue, we are of the view that the arguments advanced by the learned counsel for the respondent emerging out of from the facts available on record, have to be acceded to as it would otherwise be both unfair and inequitable to allow the appellant's claims in contravention of the express terms of the Agreement between the parties. The learned Single Judge, on a similar opinion has rightly set aside the interim arbitral award dated 29.04.2016 pronounced and published by the learned Sole Arbitrator.
17. At the conclusion of the arbitral proceedings, if any amount is eventually held payable to either party, the Arbitrator can undoubtedly make such an adjustment and direct payment of such amounts to one or the other party under the final award which would also take into consideration the sums directed to be paid

20

under the interim award. Therefore the impugned order dated 02.01.2017 passed by the learned Single Judge shall not cause any hindrance in the way of the arbitrator in making the final award and doing complete justice to the parties. Therefore we are of the opinion that there is no inherent illegality or perversity in the impugned order passed by the learned Single Judge so as to warrant interference by this Court under Section 37 of the Act.


SANGITA DHILLON SEHGAL, J.


G.S.SISTANI, J.

NOVEMBER 2nd, 2018
//gr