

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. No.235/2007, OMP No. 373/2007 & ARB. A. 11/2009**

% **2nd December, 2015**

1. **O.M.P. No.235/2007**

M/S NATIONAL BUILDING CONSTRUCTION CORPORATION
LIMITEDPetitioner

Through: Ms. Ginny J. Rautray, Advocate

Versus

NEW DELHI MUNICIPAL COUNCIL & ANR.Respondents

Through: Mr. Gaurave Bhargava, Additional
Standing Counsel with Mr.Navandeep
S.Matta, Advocate and Mr. P.B. Lal,
Executive Engineer, Mr. Dinesh
Tiwari, Junior Engineer, NDMC

3rd December, 2015

2. **OMP No. 373/2007**

NEW DELHI MUNICIPAL COUNCIL Petitioner

Through: Ms. Ambika Mehta, proxy counsel for
Mr.Gaurave Bhrgava, Standing
counsel.

Versus

NATIONAL BUILDING CONSTRUCTION CORP. LTD. Respondent

Through: Ms. Ginny J. Rautray, Adv.

3. **ARB. A. No. 11/2009**

NEW DELHI MUNICIPAL COUNCIL Petitioner

Through: Ms. Ambika Mehta, proxy counsel for
Mr.Gaurave Bhrgava, Standing
counsel.

Versus

M/S NATIONAL BUILDING CONSTRUCTION CORP. LTD
....Respondent

Through: Ms. Ginny J. Rautray, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

O.M.P. No.235/2007

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') filed by the petitioner M/s National Building Construction Corporation Limited (NBCC Ltd) (Contractor) impugning the Award passed by the Arbitrator dated 27.01.2007 limited to the aspects of the Arbitrator by the impugned Award allowing counter claim nos.2 and 4 filed by the respondent no.1 herein.

2. The facts of the case are that parties entered into a contract whereby the petitioner was to construct for the respondent no.1 Blocks B & C of New Delhi City Centre Phase-II. The salient dates with respect to the contract in question have been noted in the impugned Award as under:-

“Salient features of the case:

- | | | | |
|-----|--|---|----------------------------|
| (a) | Estimated cost put to tender | : | Rs. 23,64,25,882/- |
| (b) | Tendered amount | : | Rs.23,80,81,978/- |
| (c) | Date of acceptance | : | 18.08.1994 |
| (d) | Period of completion | : | 3 years |
| (e) | Stipulated date of start | : | 02.09.1994 |
| (f) | Stipulated date of completion | : | 01.09.1997 |
| (g) | Claimants cleared out from the site: | | 31 st July 2003 |
| (h) | Extension of time granted
without levy upto | : | 30.04.2001” |

3. Counter claim no.2 was raised by the respondent no.1 herein before the Arbitrator to seek the recovery of amounts on account of defective works done by the petitioner. Counter claim no.4 was filed for payment of user charges for area unauthorisedly used by the petitioner for work which was not of the respondent no.1 and which work the petitioner did in the premises of the respondent no.1 without any permission of the respondent no.1 i.e in effect this counter claim of the respondent no.1 was for the payment of use and occupation charges of a portion of the premises belonging to the respondent no.1 by the petitioner. Counter claim no.2 was for a total amount of Rs.3,16,49,892.99/-. Counter claim no.4 was filed for an amount of Rs.2,51,000/-.

4. The sub-heads as regards rectification works as per the counter claim no. 2 are four in number. This counter claim no.2 as filed by the respondent no.1 in the arbitration proceedings reads as under:-

“Counter claim no.2 Rs.3,1649,892.99

It is submitted with respect that the claimant has executed defective work. The CTE/Quality Control Division/Architect Consultant/Departmental Engineers had inspected the work and pointed out number of defects at different locations in RCC works, brick works tile flooring work, water proofing work, defective lift shaft etc. The extract of the CTE Observations in this regard is placed as Ex R9(1 to 10).The detailed defect list was also sent to NBCC vide letter dt. 3.9.03 and 16.9.03 placed as Ex R10 & 11. Show Cause Notice dt. 19.10.04 placed as Ex R 12 was also issued. M/s NBCC inspite of repeated requests and assurances given at the level of CMD-NBCC to Chairman-NDMC (referred to minutes of meeting dt.25.10.02 (Ex R25) failed to rectify the defects. The work is defective and of very poor quality. Hence, the Respondent is bound to get the defective work rectified at the cost of the Claimant. The cost of rectification of defects has also been worked out and supporting details are placed as Ex R26. The supporting details in support of this counter claim are explained as under and the relevant documents are attached as Ex. R-19(1 to 4). The proof of the defective work having been done by the Claimant has already been provided in the foregoing. This counter claim has arisen on account of failure of the Claimant. The Respondent reserves his right to revise the quantum of this counter claim in case there are variations in the quantities or rates as a result of actual execution. The Counter claim is called for as recovery from the Claimant is necessary so that the Respondent has the necessary funds available with him for attending to defects before hand.

The details of the counter claim no. 2 are as under:

- | | | |
|-----|-----------------------------------|----------------|
| (i) | Rectification of exposed RCC work | Rs. 30.00 lacs |
|-----|-----------------------------------|----------------|

The work executed in exposed RCC work and in pattern is defective poorly finished and needs rectification. This was brought in the notice of the NBCC during the execution of the work time and again and M/s NBCC everytime has assured that this will be rectified. In the meeting held in the chamber of Chairperson – NDMC on 25.10.2002 (minutes placed at (Ex. R -25), it was agreed by NBCC that NDMC shall get the

defects of exposed RCC works at their risk and cost after due payment of exposed work. The cost of the rectification was estimated as Rs. 30.00 lacs. M/s NBCC has confirmed this vide letter dt. 29.10.2002 placed at Ex R 19(2). Hence, the counter claim of Rs. 30.00 lacs. This has been incorporated in the final bill since part rates for exposed concrete work etc have been released. The counter claim is restricted to Rs. 1,84,20,865/-.

- (ii) Rectification and other measures to be taken to take care of building in RCC walls, other members, demolition and recasting of defective fascias and honey combing and other defects of water proofing and expansion joints etc. Rs. 1,84,20,865/-

M/s NBCC failed to rectify the defects as explained in foregoing paras. A Show Cause Notice dt. 19.10.04 (Ex R -12) was issued but no satisfactory reply has been received from the claimant as such rectification work is to be got done at risk and cost of NBCC as per Clause 14 of the agreement. A detailed estimate amounting to Rs. 1,93,62,662.00 has been prepared for the rectification of the defects which is recoverable from M/s NBCC, hence, the counter claim (Ex R-26). The respondent reserves its right to revise the quantum as per variation in quantities, rates etc. as per actual execution of the work of rectification of defects subsequently. This has been incorporated in the final bill as full rates have been released.

- (iii) Rectification of ribbed beams not in straight line using POP at the cost of Rs. 26,19,294.00.

The ribbed beams in the three basements roof slabs are presenting shabby look as these are not in a straight line and have also not been finished properly. M/s NBCC have failed to rectify the defects as explained in the foregoing paras, therefore, this defect is also proposed to rectify by using POP at the cost of Rs.26,19,294/- at the risk and cost of M/s NBCC. The detail of the estimated cost is placed at Ex R-19(3). The respondent reserves its right to revise the quantum as per variation in quantities, rates etc. as per actual execution of the work of rectification of defects subsequently.

- (iv) Re-fabrication of six number lift cages due to reduction in size of the lift shaft and adjustment in brackets etc. Rs. 66,67,936.99

The lift shafts constructed for fourteen numbers of lifts for the office block were found defective as these are not in vertical plane out of plumb and not of required sizes given in the drawings. NBCC has also conducted a detailed study & the report there of is placed at Ex R 19(4)

and has executed some chipping work in bulged portions of inner walls of lift shafts at different locations. But, it is found that in eight number of lifts of required sizes can be accommodated only after modifications in brackets and in supporting steel structures. And for six numbers of lifts the cage sizes has to be reduced. The cost of re-fabrication of lift cages and the brackets have been worked out by the electrical deptt. of NDMC as Rs. 66,67,936.99 as per detail given at Ex R-19(4). As M/s NBCC has failed to rectify the defective lift shafts inspite of assurances, therefore, the cost of the modification and any extra expenditure involved thereof become recoverable from M/s NBCC, Hence, the counter claim. This has been incorporated in the final bill.”

5. Counter claim no.4 filed by the respondent no.1 in the arbitration proceedings reads as under:-

“Counter claim no. 4 Rs. 2,51,100

The respondent pointed out to the Claimant vide letter no Executive Engineer (C-VI)/D-135 dated 13.10.2003 Ex. R-21(1) that the latter had been misusing approximately 5022 sq. ft. area of the upper basement of Block B of the building under construction for some other work without the permission of the Respondent and thus they were liable to pay the damages to the Respondent. Accordingly, the amount of damages, which has been worked out to Rs. 2,51,100, has become due from the Claimant. It is prayed that this amount be kindly awarded in favour of the Respondent. ”

6. (i) Arbitrator has allowed counter claim no.2 for an amount of Rs.81,66,819/- against the amount claimed of Rs.3,16,49,892.99/-. While discussing this counter claim the Arbitrator holds that there has been delay in rectification works done by the respondent no.1 as the rectification works are said to be done by August, 2006 whereas, petitioner had stopped work at site by 31.07.2003 and therefore the amount claimed by the respondent no.1

as on 2006 at higher prices legally could not be a burden which could be casted upon the petitioner. Arbitrator however has simultaneously noted and arrived at a finding that there were in fact defective works. I may note that in the arbitration record there are Minutes of Meeting dated 29.10.2002 which are signed by various officers including the chairmen of both the parties and respondent no. 1 and which Minutes of Meeting *inter alia* specify details of defective works including the prior correspondence and documents as regards the defective works to be rectified by the petitioner. These Minutes of Meeting dated 29.10.2002 also show the agreement and the consent by the petitioner that it was bound to rectify the defective works as stated in the Minutes of Meeting dated 29.10.2002. The defective works as stated by the respondent no.1 in counter claim no.2 are more or less on the same lines as found in these Minutes of Meeting dated 29.10.2002. With respect to sub-head (1) of rectification of defective works, these Minutes of Meeting specify the amount payable on account of rectification of such defective works at a sum of Rs.30 lacs. These Minutes of Meeting, *inter alia*, also provide with respect to defective works on exposed RCC and other defective works. Amount in this regard was mentioned to be Rs.82.35 lacs. It is also seen that in the counter claim no.2 filed by the respondent no.1 in the arbitration proceedings, reference has been made by the respondent no.1 to *O.M.P. No.235/2007, OMP No. 373/2007 & ARB. A. 11/2009*

various documents being CTE observations filed as Ex.R-9, letters written by the respondent no.1 to the petitioner dated 03.09.2003 and 16.09.2003 as Ex.R-10 and Ex.R-11, the cost of rectification of defects and details as Ex.R-26 and supporting details as Ex.R-19.

(ii) In the reply to this counter claim no.2 petitioner set up a three-fold case. Firstly, it is stated that there are no defective works. However, in the same breath it is also stated that the defective works were rectified and clearly showing that defective works did exist. In any case it does not lie in the mouth of the respondent no.1 to hold that there were no defective works in view of the Minutes of the Meeting dated 29.10.2002 signed by various officers including the Chairmen of both the parties. Rectification value of the defective work was also challenged by the petitioners.

7. Arbitrator out of the four sub-claims totaling to the amount of Rs.3,16,49,892.99/- as per counter claim no. 2 has allowed the same only for an amount of Rs.81,66,819/-. Out of Rs.81,66,819/- (i.e 90% of Rs.90,74,243/-) as allowed, the amount of Rs.30 lacs would be for rectification of defective exposed RCC work and which item and the figure of Rs. 30 lacs is as duly agreed by the petitioner in the Minutes of Meeting dated 29.10.2002. Out of the three other sub-claims totaling to

approximately Rs.2.70 crores only Rs.60 lacs have been awarded by the Arbitrator, and it is noted that this 60 lacs figure is lesser than the figure of defective works of Rs.82.35 lacs stated in the Minutes of Meeting dated 29.10.2002 to be rectified by the petitioner.

8. This Court while hearing objections under Section 34 of the Arbitration and Conciliation Act, 1996 does not sit as an appellate court to re-appraise the findings of facts based on the evidence available before the arbitrator. Once there is supporting evidence available before the Arbitrator, which existed in this case as stated above in terms of the Minutes of Meeting dated 29.10.2002 and the documents referred to in the counter claim no.2 of the respondent no.1, I cannot interfere with the Award because the Award cannot be said to be illegal or perverse. Objections to counter claim no.2 are therefore misconceived and rejected.

9. I may note that counsel for the petitioner has very vehemently sought to rely upon Clause 14 of the contract to argue that there is no right to claim the value of the defective works or its rectification if within six months after completion of the contract no notice is given to the petitioner. However, this argument urged on behalf of the petitioner really has no substance inasmuch as the period of six months specified in Clause 14 of the

contract is after ordinary completion of the contract ie when the contract would have been otherwise completed or more or less completed. The period of six months contained in Clause 14 of the contract will not have an application in the facts of the present case when the petitioner abandoned the work mid way as on 31.7.2003. Also, even assuming that this period of six months applies, such a clause is deemed to have been waived by virtue of the agreed Minutes of Meeting dated 29.10.2002 signed between the parties including their chairmen. Also, the arguments urged on behalf of the petitioner that respondent no.1 could only take rectification charges of 1% of the contract per week is misconceived because this clause after setting entitlement to keep on reducing 1% per week of the contract amount further provides that even thereafter respondent no.1 is entitled to get the defective works rectified and then claim such charges from the petitioner. Therefore, all the arguments urged on behalf of the petitioner relying upon Clause 14 of the contract are misconceived and rejected.

10. So far as counter claim no.4 is concerned, and which is for an amount of Rs.2,51,000/-, it is noted that the Arbitrator by relying upon the correspondence sent by the respondent no.1 to the petitioner has arrived at a finding of the fact that petitioner has used a portion of the premises of the

respondent no.1 against the wishes of the respondent no.1 for carrying out the work which was not of the respondent no.1 but for some other contract and therefore, Arbitrator has by allowing this counter claim effectively allowed use and occupation charges/damages/mesne profits of Rs.2,51,000/-. Therefore, there is no illegality and perversity in the Award for this court to interfere under Section 34 of the Act.

11. In view of the above, the objection petition is dismissed, leaving the parties to bear their own costs.

DECEMBER 2, 2015
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VALMIKI J. MEHTA, J

O.M.P. No.373/2007

12. I have already passed above the judgment yesterday dismissing O.M.P. No.235/2007. The present O.M.P. No.373/2007 under Section 34 of the Act has been filed by New Delhi Municipal Council (NDMC) which was the respondent no.1 in the O.M.P. No.235/2007 decided in terms of the above judgment dated 2.12.2015 dismissing the objections of NBCC Ltd

(respondent in this OMP) to the self-same impugned Award dated 27.01.2007.

13. A reading of the present objections filed under Section 34 of the Act in the present case shows that the objections which have been raised are such that they are no objections in the eyes of law as required by Section 34 of the Act as the objections are only general narrative, without exactly specifying the reasons which will entitle this Court to question the impugned Award. In law there is a specific period of limitation provided for filing of objections totalling to 120 days and this specific period cannot be extended. Fixed period is with the object that when the objections are filed they have to be specific and categorical objections but not general objections and to which general objections specific grounds are sought to be created during the hearing of the case. Under the guise of general objections, which are wholly vague, an objector cannot seek to urge grounds which are in fact not found in the objection petition. So that it is seen that the objections which have been filed in this petition under Section 34 of the Act in this case are no objections in the eyes of law, I am reproducing all the grounds pleaded, and which read as under:-

“The non-payment amount is challenged on the following amongst other grounds, which may be taken without prejudice to each other: -

- A) The impugned award is bad in law.
- B) The impugned award is bad on the facts of the case.
- C) The impugned results in remanding wrong doing and the slow progress of work from the beginning of the contract, as is the admitted position. The learned Arbitrator was failed to appreciate that the progress of work was slow from the very start of the project and that this has been pointed out to the contractor on various occasions.
- D) The learned Arbitrator has failed to appreciate that the lack of seriousness of the contractor was demonstrated in letter dated 31.5.95.
- E) The learned Arbitrator has failed to appreciate that apart from the slow progress of work, the financial condition of the respondent was also precarious and that they were given two special advances of Rs. 100/- crores and Rs. 40.00 lacs to till over this unsatisfactory financial condition.
- F) The learned Arbitrator has failed to appreciate that the extension of the contract period was sanctioned without the levy of compensation, as a gesture of good will and towards smooth completion of the project.
- G) The learned Arbitrator has failed to appreciate that he had himself inspected the quality of work on 25.10.2005.
- H) The Arbitrator has fallen in manifest error in disallowing the penalty imposed by the department on the contractor under clause 14 of the contract on the ground that timely action was not taken.
- I) The impugned award results in rewarding dishonestly, wrong doing and tax standards of work and is therefore, opposed to public policy and justice.
- J) The impugned award is patently illegally so as to shock the conscience of the court and is also unfair and unreasonable. The impugned award deserves to be set aside on this limited ground alone.
- K) The learned Arbitrator has failed to appreciate that injustice cannot be justified on the chemical grounds. The present award is thus required to be adjudged.
- L) The impugned award results in injustice to the NDMC which has as stated earlier gone out of its way to accommodate the NBCC on various occasions.
- M) The learned Arbitrator has failed to appreciate that he was required to take a strict view of the NBCC's conduct during the course of the contract.

N) The impugned award, is on the fact of it, unjustified and unreasonable and cannot withstand the high judicial scrutiny of this Hon'ble Court.

O) Any other ground that may accrue during the course of arguments.

That the petitioner has not filed any other petition before this Hon'ble Court or any other court/Forum against the award dated 27.01.2007.

It is therefore, respectfully prayed that in the interest of justice the award dated 27.01.07 passed by Shri S.C. Vasudeva, Arbitrator may kindly be set-aside/quashed, in the interest of justice.

Any other order or directions which this Hon'ble Court may deem fit and proper also be passed in favour of the petitioner.”

14. An award can only be interfered with if it is against the law or against the contract or is perverse. Specific grounds have to be raised as to what is the exact illegality or as to which clause of the contract is violated by the Award or how the Award is perverse. The aforesaid grounds filed by petitioner/NDMC are an apology for grounds which ought to be raised under Section 34 of the Act, and therefore, on this limited ground itself these objections are dismissed because the objections are in fact no objections for a cause of action arising under Section 34 of the Act.

15. Even if I take a benevolent and benign view by reading paras 1 to 23 of the petition which precede the grounds of objections to the Award, it is seen that in these paragraphs 1 to 23, the petitioner/NDMC basically talks of slow progress of the work, NBCC Ltd/respondent not being competent to

execute the work and that there were defective works. May be what the petitioner possibly seem to be generally pleading is that petitioner is entitled to the total amount of this counter claim of Rs.3,16,49,892.99/- instead of Rs.81,66,819/- which was awarded. I have dealt with counter claim no.2 in detail while dismissing yesterday the objections in O.M.P. No.235/2007 which were filed by NBCC Ltd, and on the same reasoning the present objections in OMP No.373/2007 also will have to be dismissed because this Court does not sit as an appellate court under Section 34 of the Act to re-appraise the findings of facts and conclusions arrived at by the arbitrator. The Arbitrator after considering the evidence which was available before him did not allow the entire counter claim with respect to alleged defective works, and this conclusion of the Arbitrator is neither illegal nor perverse for this Court to interfere under Section 34 of the Act. Also, it bears note that the Arbitrator for not granting the complete counter claim no.2 for Rs.3,16,49,892.99/- has observed *inter alia* that NDMC/petitioner claimed value of the defective works by showing a tender for rectification of defective works in 2006 whereas the work done by NBCC Ltd/respondent was stopped three years earlier as on 31.07.2003, and therefore, in law NDMC/petitioner cannot claim rates of 2006 for the defective works which had to be rectified in 2003. The Arbitrator has also noted while deciding *O.M.P. No.235/2007, OMP No. 373/2007 & ARB. A. 11/2009*

counter claim no.2 that the NDMC did not file details and documents during the entire case but filed the same only after arguments were completed. Hence, the counter claim no.2 after considering all aspects was disposed of by the Arbitrator by awarding a lesser amount of Rs.81,66,819/- instead of Rs.3,16,49,892.99/- as was claimed. The relevant discussion by the Arbitrator in the impugned Award with respect to counter claim no.2 reads as under:-

“Counterclaim No.2 : The amount of this counter claim is Rs.3,16,49,892.99. The Respondents invited attention to copy of new contract with M/s Ahluwalia which had already been filed. It was stated that part 1(A) and part 1(B) were pertaining to the Claimants regarding balance works and rectification of defective work. Exhibit was filed indicating the details of expenditure of Rs.74,05,292/- incurred at the risk and cost of the Claimants up to 2nd R/A bill. Late on, Respondents submitted vide letter No.EE(C-VI)/D/3908-10 dated 13.10.06 details of expenditure amounting to Rs.90,74,243/- (as per 3rd R/A bill) incurred by them up to 31.08.06 at the risk and cost of the Claimants. It is not known whether copy of this letter was endorested by the Respondents to the Claimants. Claimants stated that methodology submitted by them vide letter dated 13th Feb. 2004 (page 269 of volume VI) was never approved by NDMC. Also, no exercise was done by the Respondents to quantify the defective work chargeable to the Claimants. As such, in the absence of any joint exercise for quantification, the figures now given by the Respondents are not acceptable. Moreover, Respondents are not firm on the amount till today. This can also be seen from the figure of Rs.66/- lacs for the change in car size of the lifts which has not been changed to Rs. 55.40 lacs. From the copy of the final bill, it is seen that recoveries have been effected at the verbal instance of the AE which shows that recoveries are adhoc and tentative. Instead of rectifying the defects in six lift shafts, car sizes have been reduced which is a much costlier alternative than rectification. This is borne out by letter dated 16.9.2002

from NBCC to NDMC (page 89, volume “B”) wherein rectification cost of three number lift shafts has been indicated as Rs. 2.5 to 3.0 lacs appx. Respondents stated that from letter dated 16.09.03 to NBCC, it is clear that defects were in the knowledge of the Claimants. This is also clear from the findings of survey done by “L&Q SURVEYS” at the behest of the Claimants. Claimants stated that no concrete proposal in reply to their letter was given by NDMC and they preferred easy solution of changing the car size at the cost of the Claimants.

On consideration of the documents and submissions made by the parties, I find that there is some force in the arguments of the Claimants that joint exercise to quantify the defective work required to be done at their expense was not done by the Respondents. However, the fact remains that defective work has been done by the Claimants particularly in exposed RCC work, Facias, Lift. shafts, waterproofing and expansion joints and finishing items. The Claimants failed to rectify the defects though rectify the defects though responsibility to some extent has to be borne by the Respondents for not approving/giving decisions regarding methodology for rectification. It is also not understandable as to how the Respondents all along allowed the defective work to be done, paid for the same and much later came up with the allegation that Claimants have done defective work. Also, there is force in the argument of Claimants that the Respondents have delayed the rectification of defective work abnormally and as a result, the Claimants are being penalized on account of rise in market prices during this delayed period. It is seen that Claimants cleared out from the work site in July 2003 but the work to get the rectifications done was awarded by the respondents only in March 2006. I agree with the contention of the Claimants that Respondents have taken abnormally long time to get the rectifications done or even initiated. This abnormal delay on the part of the Respondents is penalizing the Claimants unfairly. However, Claimants have not pointed out from the schedule of work awarded to M/s. Ahluwalia at their cost about any aberrations/deviations from the terms and conditions of the original agreement implying thereby that they accept the same. Lot of arguments had been made by both sides about the defects in the six number lift shafts and the consequent liability in reducing the size of car cages etc. Claimants have argued that the Respondents have chosen costlier but easy way out by choosing to reduce the car cage size to get over the problem of defects in six number lift shafts. Respondents have argued that there was no way to rectify the defects in the lift shafts as the laser survey showed that shafts had rotated in both the planes. I agree with the contention of the Respondents in this regard. However, no concrete expenditure has been projected by the Respondents as having

been incurred by them at the risk and cost of the Claimants other than indicating that the liability in this regard will be Rs.55.40 lacs instead of Rs.66/- lacs indicated earlier. In the absence of the same, I am unable to consider any amount towards liability arising out of defects in six number lift shafts. The actual expenditure incurred by the Respondents at the risk and cost of the Claimants as per 3rd R/A bill i.e. up to 31.08.06 has been indicated as Rs.90,74,243/-. The remaining claim amount out of Rs.3,16,49,892/99 (Which figure itself is tentative) barring Rs.90,74,243/- is not a committed liability in the sense that expenditure has not actually been incurred. Taking in to account the effect of undue delay (and the consequent rise in market prices) in getting the defect rectification initiated by the Respondents, I consider that Claimants can at best be debited with 90% of the expenditure incurred by them. I, therefore, consider that the present claim of the Respondents is valid for Rs. 81,66,819/- i.e. 90% of Rs.90,74,243/- only. As such, I award Rs. 81,66,819/- in favour of the Respondents against this counter claim.”

(underlining added)

16. In my opinion the aforesaid discussion of the counter claim no. 2 shows that the Arbitrator as a master of facts and law so far as the facts of the case before him are concerned, has not acted illegally or perversely and by noting and considering the respective contentions and evidences led by the parties and thus giving only a particular lower amount of Rs.81,66,819/- to NDMC instead of the total amount of Rs.3,16,49,892.99/-. The discussion of the Arbitrator cannot be said to be illegal or perverse for this Court to interfere under Section 34 of the Act.

17. I may note that a vague ground (H) has been urged with respect to disallowing of penalty imposed by petitioner/NDMC under Clause 14 of the contract which was imposed by the NBCC Ltd/respondent, and which is

the subject matter of counter claim no.7, however, this ground besides being vague, has no legal substance because in law either unliquidated claim is raised for defective work which is rectified or for liquidated penalty, and not for both. In law, there cannot be both liquidated damages and unliquidated damages. Once Arbitrator has decided counter claim no.2 and has awarded a particular amount as unliquidated damages towards rectification of works, there was thereafter no entitlement of the petitioner/NDMC to further additionally claim liquidated damages in addition to the claim of unliquidated damages which have been partially allowed by the Arbitrator while allowing counter claim no.2. This objection also therefore besides lacking the necessary cause of action, is without any merit/substance, and is accordingly rejected.

18. This petition is therefore dismissed leaving parties to bear their own costs.

ARB.A. No.11/2009

19. This petition is an appeal filed by the petitioner/NDMC under Section 37 of the Act against the Order of the Arbitrator dated 24.03.2009 whereby the Arbitrator has held under Section 16 of the Act that he has no jurisdiction because the subject matter of the claim petition with respect to *O.M.P. No.235/2007, OMP No. 373/2007 & ARB. A. 11/2009*

defective works was the subject matter between the parties dealt with and decided by the earlier Award dated 27.01.2007, and accordingly, the Arbitrator had no jurisdiction to decide and adjudicate the claim petition. Effectively it has been held by the Arbitrator that the claim petition is barred by *res judicata*. The relevant discussion of the Arbitrator holding that the claims in this claim petition stood already decided by the earlier Award dated 27.01.2007 reads as under:-

“Arbitrator’s Ruling:

Having considered the pleadings, arguments, judgments and written submissions filed by both parties regarding the application filed by the Respondents under section 16 of the Arbitration & Conciliation Act 1996, I find that following salient points emerge regarding the application filed by the Respondents:

- (i) Whether the present claim of the Claimants for rectification of defective work was included in the counter claim No.2 of the earlier arbitration case?
- (ii) Whether the award of the sole Arbitrator in the earlier arbitration case had covered the present claim in question? If so, whether the award against the claim was made on merits?
- (iii) Whether any liberty was asked for by NDMC and the same granted by the sole Arbitrator to the Respondents in the previous arbitration case, for bringing up the present claim in another arbitration case?

A discussion on the above points will be helpful in taking a view on the application filed by the Respondents. I taken up the discussion on the above points serial-wise as under:

- i) There is no doubt, whatsoever, that the present claim of Rs. 1,49,81,803.13 is a part and parcel of the counter claim No.2 in the earlier arbitration case.

- ii) The Arbitrator in his award on counter claim No.2 in the previous case had awarded a sum of Rs.81,66,819/- against the counter claim No.2 for Rs.3,16,49,892.99. As is seen from the award at page 35 to 37, the Arbitrator had ruled that only a part of the entire amount as claimed was based on actual expenditure incurred. The last sentence of the award against counter claim No.2, the sole Arbitrator had stated that he awards Rs.81,66,819/- against counter claim No.2. It is thus clear that the award in question had dealt with the claim on merits.
- iii) It is clear from the earlier award that neither any such liberty was asked for by NDMC nor the same granted by the sole Arbitrator.

The judgments cited by NDMC in support of their contention namely 149 (2008) DELHI LAW TIMES 323 and 135 (2006) DELHI LAW TIMES 544 have been carefully gone through by me. The facts and circumstances of these two cases are not similar to the present case and hence the judgments in question have no applicability in the instant case. In the earlier judgment, the arbitration award was not a reasoned one and the same was set aside and remitted to the Arbitrator. When the reasoned award was made, it was held permissible to challenge the findings and the claims were held to be not barred by the principles of resjudicata. This is not the case here. In the second reference cited above, the judgment relates to the objections filed by the contractor against the award under Sections 14, 17, 28 & 30 of the Arbitration Act, 1940. Here it was held that sum awarded towards compensation to rectify defects was fair and reasonable and the award was made rule of the Court. It was also held that awards of expert arbitrators ought not be lightly interfered with. Here again, the facts and circumstances of the case are different from the one we are discussing. Rather the Hon'ble Court has held that the award of the arbitrators ought not to be lightly interfered with.

I would also like to comment upon the argument advanced by NDMC in their written submission dated 11th Feb. 2009 i.e. "the argument of NBCC that NDMC has not adjusted the amount awarded in the earlier arbitration while raising the present claim is not correct as the earlier awarded amount has already been taken care of and reference has been made only for an amount of Rs. 1,49,81,803.13 which has been incurred by NDMC after 3rd arbitration -----." This statement is not based on facts. NBCC have nowhere stated that.. NBCC's arguments is that the

claim now raised by NDMC formed part and parcel of the earlier claim which stands adjudicated in the previous arbitration case.

In view of the foregoing discussion, I hold that the application filed by NBCC under section 16 of the Arbitration and Conciliation Act 1996 succeeds as the claims now raised by NDMC are barred by the principles of resjudicata. With this, the present arbitral reference made by NDMC dated 21.11.2007 stands disposed of as the arbitrator has no jurisdiction in the matter. Both the parties to bear their own costs.

Given under my hand this day of 24th March 2009 at Gurgaon.

Sd/-

(S.C. Vasudeva)

Sole Arbitrator”

(emphasis is mine)

20. I completely agree with the findings of the Arbitral Tribunal. I have already dealt with the issue of counter claim no.2 with respect to claim of defective works as raised by the petitioner/NDMC while deciding OMP Nos. 235/2007 and 373/2007. I have already observed while deciding the aforesaid two OMPs that with respect to the defective works, and that there were four sub-heads under the counter claim no.2 which culminated in an Award dated 27.01.2007, that the petitioner/NDMC has rightly been awarded an amount of Rs.81,66,819/- against the total claim of Rs.3,16,49,892.99/-. I have also made further observations that the Arbitrator has considered all materials which existed in the file and thereafter decided the counter claim no.2 by awarding to the

petitioner/NDMC Rs.81,66,819/- instead of Rs.3,16,49,892.99/- as was claimed. I have also made observations with respect to the Arbitrator holding that the respondent/NBCC Ltd cannot be put to a jeopardy of higher prices existing much later in the year 2006 for defective works and if there were defective works, the same should have been rectified in and around 31.07.2003 when respondent/NBCC Ltd had stopped work at the site. Once the different sub-heads pertaining to the defective works which are done by the respondent are the subject matter of an earlier claim, and decided by the Award dated 27.01.2007, the Arbitrator by passing Order dated 24.03.2009 has committed no illegality in holding that the claim would be barred by *res judicata*, and therefore, Arbitrator had no jurisdiction in view of the claim of defective works having already been heard and decided in terms of counter claim no.2 which is the subject matter of the Award dated 27.01.2007.

21. In view of the above, I do not find any merit in the appeal and the same is therefore dismissed, leaving the parties to bear their own costs.

DECEMBER 3, 2015
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VALMIKI J. MEHTA, J