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

\+ **O.M.P. (COMM) 376/2016 & IA No.9574/2016**

NEW DELHI MUNICIPAL COUNCIL ..... Petitioner

Through: Mr. Gaurave Bhargava, Additional Standing Counsel for the NDMC with Mr. N.S. Matta, Advocate.

versus

CITY LIFELINE TRAVELS (P) LTD ..... Respondent

Through: Ms. Manmeet Arora, Ms. Chand Chopra, Ms. Anumita Chandra & Ms. Nidhi Mohan Parashar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

% **07.11.2016**

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('the Act') by New Delhi Municipal Council ('NDMC') is to an Award dated 7th May, 2016 passed by the sole Arbitrator on the disputes between the parties arising out of an agreement dated 17th October, 2008 for construction/renovation and maintenance of 113 Public Toilet Utilities (PTUs) on build, operate and transfer (BOT) basis.

2. Pursuant to a public notice issued in January-February, 2008 by the NDMC, the Respondent submitted a bid and was declared successful and issued a Letter of Intent (LoI). On 17th October, 2008, an agreement was entered into between the NDMC and the Respondent for renovation/construction and maintenance of 113 PTUs on BOT basis. Out

of these 113 PTUs, 69 PTUs fell under Group A and 44 under Group B. Clause 8.1 of the agreement envisaged change of scope of the work in two ways. One was by reduction in the number of PTUs with the concession fee being proportionately reduced. The second change was NDMC requiring addition/deletion of works and services which would be then executed by the Respondent "...on such terms and conditions as mutually agreed upon..." Clause 8.1 further provided "if the change of scope involves reduction in the number of PTUs, the concession fee will be adjusted proportionately for that group."

3. In terms of the agreement, which was for a period of ten years, the Respondent was to earn revenue by affixing advertising panels on the PTUs for which a fixed concession fee was payable to the NDMC. The Respondent was to construct new sites or re-construct on existing sites falling in Group A PTUs. As far as Group B PTUs were concerned, the Respondent was required to renovate and repair them. In terms of Clause 6.1 of the agreement NDMC had to hand over physical possession of all the 113 PTUs to the Respondent free from encumbrances within thirty days of the agreement.

4. The dispute that arose between the parties is encapsulated in the correspondence exchanged between the parties. The attention of this Court has been drawn to a letter dated 23rd March, 2009 written by the NDMC to the Respondent in which it was pointed out as under:

> "1. The inspection report points out that there is no difficulty on 03 locations in addition there are 05 sites where toilets of smaller size can be adjusted. At 02 locations minor shift in location is required. Therefore in all construction is possible at 10 locations in case there is a difference in the advertisement pane area, the concessionaire would be entitled to a rebate in concession fee as per the provisions

> of the agreement i.e. clause 7.1.
>
> 2. The inspection report points out that it is not possible to construct toilets due to various reason at 29 places viz/ 1/3, 31/58, 33/60, 25/51, 35/62, 7/16, 3/5, 6/9, 17/43, 18/44, 19/45, 20/48, 21/47, 22/48, 23/49, 24/50, 30/57, 32/59, 36/63, 15/31, 11/22, 12/23, 13/25, 29/56, 26/52, 28/55, 34/61, 37/64, 38/65. For the sites where it is not possible to carry out the work the concessionaire would be entitled to a rebate in concession fee as per the provisions of the agreement i.e. clause 8.1."

5. In response to the above letter, the Respondent on 27th March, 2009, informed the NDMC where *inter alia* it was stated as under:

> "We reiterate that the sites mentioned in the latter and have become unavailable are core to the viability of our project having being on lucrative locations. Having these become non available has completely jeopardized the project on account of loss of advertisement potential.
>
> We would like to bring to your notice that our proposal to the Council was based on revenue accrual from all the sites. The reduction in the license fee proposed due non-availability of these 29 sites does not compensate for the revenue loss that would accrue to us for the project as a whole. The project being for a concession period of 10 years, the overall losses would be tremendous and unbearable. In such circumstances, it would not be possible for us to continue on this project and perforce compelled to discontinue with the work on the project."

6. Following on the above letter, the Respondent wrote to the NDMC on 15th May, 2009 in which it was stated that in the event that NDMC agreed to the termination, the Respondent would not file any claim for the work already executed by the it and that it shall not take recourse to seek legal remedy or through arbitration for making claims for expenses, costs or damages under the contract whatsoever.

7. With NDMC not agreeing to the above terms, the Respondent issued a

notice invoking arbitration clause and sought reference of the disputes to arbitration.

8. In the statement of claim filed by the Respondent there were five claims. Claim No.1 was for a sum of Rs. 99,87,194 together with interest being the costs incurred by the Respondent for execution of the project. Claim No.2 was for a sum of Rs.18,51,020 towards bank charges along with interest. Claim No.3 was for a sum of Rs.33,48,708/- along with interest towards reimbursement of expenses incurred by the Respondent towards loss on account of difference between FDR and ODR. Claim No.4 was for a sum of Rs.2,62,684 towards arbitration and court expenses. Claim No. 5 was for *pendente lite* and future interest at 24 % per annum.

9. Apart from filing its reply to the claims, NDMC also filed its counter claim. Counter claim No.1 was regarding payment of the concession fee in the sum of Rs.3,88,92,252. Counter claim No.2 was towards expenses incurred on Group B PTUs in the sum of Rs.67,03,415. Counter claim No.3 was towards costs and litigation expenses in the sum of Rs.26,29,068. Counter claim No.4 was towards *pendent lite* and future interes at 24 per cent per annum.

10. The findings of the learned Arbitrator in the Award dated 7th May, 2016 are as under:

(i) NDMC failed to hand over the charge of the 113 PTUs to the Respondent within thirty days of the signing of the contract. This resulted in the breach of the terms of the contract giving a valid reason to the Respondent to avoid the contract.

(ii) A few of the sites handed over were not given to the Respondent free of encumbrances. This gave another reason to the Respondent to avoid the contract.

(iii) A perusal of Clause 2.5(a) read with Clause 8.1 "demonstrates that the increase/decrease in the number of PTUs were subject to licence fee being increased/decreased proportionately and any such additions/deletions were to be carried out by the Concessionaire on such terms and conditions as mutually agreed upon."

(iv) By its letter dated 26th November, 2008, NDMC did not even state that some of the PTUs were not ready and that the specified quantity was being reduced. On the other hand, NDMC maintained that all the PTUs were ready for delivery and that the Respondent should immediately start the work. Any additions or deletions in the number of PTUs had to be on terms and conditions as mutually agreed upon between the parties. The viability of the project in the event of such additions/deletions and the reduction in the number of PTUs was to be decided by the Concessionaire as the project was based on the future potential revenue generation from advertisements on the said PTUs.

(v) The Respondent was justified in asserting that some sites had a better potential such as those in Connaught Place due to much higher footfalls compared to the less crowded locations. If the lucrative advertising sites were not available in a composite bid, the Respondent Claimant would be justified in avoiding the contract. Therefore, the plea of NDMC that the mere non-availability of 29 sites out of 113 sites was not in itself a sufficient reason for the Respondent to avoid the contract cannot be accepted since NDMC itself had in the pre-bid document made it clear that viability of the project was to be ascertained by the Concessionaire before entering into the contract.

(vi) The Respondent had been able to show that NDMC had failed to provide the correct information regarding the PTUs. It was an admitted fact that of the 69 sites in Group A, 12 sites which were in Connaught Place re-development plan and having high revenue potential could not be constructed. Some of the sites under the RFP had been demolished by the NDMC prior to the issuance of the RFP. Further by letter dated 23rd March, 2009, NDMC confirmed that out of the 38 sites construction was possible only on 10 sites.

(vii) In terms of Clause 7.1(c) of the agreement approvals for the drawings had to be given by the NDMC within fifteen days and the averment of the Respondent that the approvals had been kept pending for far longer periods was not answered by the NDMC. This provided the Respondent with another valid reason for avoiding the contract.

11. The counter claims were held to be nothing but a counter-blast and could not be substantiated by the NDMC. They were accordingly rejected.

12. The non-acceptance of the termination of the contract by the NDMC resulted in the arbitration and in the impugned Award the following claims of the Respondent were allowed:

(a) Rs.45,69,413 along with interest @ 12 per cent per annum from the date of filing of the claim, i.e. 10th March, 2011.

(b) Rs.5 lakh towards litigation and other incidental costs.

(c) Rs.33,48,708 together with interest at 12 % towards bank charges from the date of filing of the claim, i.e. 10th March, 2011.

(d) Rs.59,63,178 towards costs of keeping the bank guarantee alive.

(e) The bank guarantee for Rs.9.30 crore would stand discharged.

(f) If the awarded sum was not paid within 12 weeks, NDMC would be liable to pay the said amount along with interest at 18 % per annum as per Section 31(7)(b) of the Act from the date of the Award till date of payment.

13. Learned counsel for the Petitioner assailed the impugned Award essentially on the ground that the learned Arbitrator mis-interpreted and misread Clause 8.1 of the agreement. He submitted that the learned Arbitrator has failed to appreciate that there were two separate parts to clause 8.1 – one dealing with the reduction in the number of PTUs and the other dealing with the increase/decrease in what should be provided in the PTUs.

14. Having perused the impugned Award, the Court finds that although *prima facie* it might appear that the learned Arbitrator missed the distinction between the two distinct portions of clause 8.1, in effect there has been no misreading of the provision. The fact remains that at the time when the bids were invited and the LoI was also issued, the Respondent was made to understand that 113 PTUs would be made available by NDMC. Merely because clause 8.1 permits reduction in the number of PTUs, NDMC could not do so unilaterally and that too much later than the

date of awarding the contract. The manner in which the NDMC has gone about reducing the number of PTUs was not justified particularly since that decision materially affected the viability of the bid of the Respondent. The Court therefore finds no error whatsoever in the conclusion reached by the learned Arbitrator that the NDMC must be held to be in breach of the contract and that there was a valid justification for the Respondent to avoid the contract.

15. As pointed out by learned counsel for the Respondent Clause 8.1 would apply where sites became unavailable after execution of the agreement and not in respect of sites which were not available even at the time of execution of the agreement. The factual finding of the learned Arbitrator in this regard has not been able to be countered by the NDMC.

16. Importantly the finding of the Arbitrator that 113 PTUs were to be handed over within 30 days of the date of the contract did not mean that it could be done in phases has not even been challenged by the NDMC. It has been factually found by the learned Arbitrator that there was a failure of the NDMC to hand over all the 113 PTUs within thirty days of the signing of the contract resulting in breach of the terms of the contract.

17. The finding that NDMC failed to provide correct information regarding PTUs to the Respondent and that NDMC failed to dispute the assertion of the Respondent that the drawings were not approved within fifteen days of their submission has also not been challenged by the NDMC.

18. The reduction of the PTUs has also not been challenged by the NDMC. The Court is of the view that the interpretation placed by the learned Arbitrator on clause 8.1 did not affect the ultimate result and determination

of the factual issues and therefore does not suffer from no legal infirmity. The rejection of its counter-claims has also not been challenged by the NDMC

19. For all the aforementioned reasons, the challenged to the impugned Award is hereby rejected.

20. The petition and the application are dismissed.

NOVEMBER 07, 2016 **S. MURALIDHAR, J.**

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