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

+ **O.M.P. (COMM) 75/2016**

M/S SATYA PARKASH & BROTHERS PVT. LTD Petitioner

Through **Ms. Anusuya Salwan and
Mr. Abhishek, Advocates**

versus

NORTH DELHI MUNICIPAL CORPORATION. Respondent

Through **Mr. Sunil Goel, Std. Counsel**

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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08.05.2017

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an award dated 05.01.2016 (hereafter 'the impugned award') made by the sole arbitrator.
2. The petitioner was awarded the work of "*Improvement of storm water drainage in Model Town, Wazirpur Industrial Area, Marsy Land Dhirpur (Dhakka) in Civil Line Zone. Sub Head :- Construction of RCC Box precast segment drain along G.T.K. Road*" by the work order dated 22.02.2007 issued by the respondent (hereafter 'NDMC').
3. The contractual value of the works was ₹15,09,13,743/-. The works were to commence on 16.07.2007 and were to be completed within a period of eight months, that is, on or before 15.03.2008. The works were delayed and it is the petitioner's case that the delays were all attributable to NDMC's

failure to perform the terms of the agreement.

4. In view of the disputes between the parties, the petitioner invoked the arbitration clause by a letter dated 13.02.2008. The petitioner also filed a suit [CS(OS) 507/2008] before this court in respect of the penalty imposed under clause 2 of the agreement in question. The petitioner thereafter filed an application under Section 11 of the Act for appointment of an arbitrator [Arb. P. 122/2008]. However, in the meantime, the respondent appointed the arbitrator by letter dated 08.04.2008.

5. The arbitrator by a letter dated 26.05.2008 entered upon the reference and issued notice to both the parties, asking them to appear before him on 03.07.2008. On 03.07.2008, the petitioner filed the statement of facts along with the claim petition and NDMC was called upon by the arbitrator to file its counter claim, if any, within a period of one month. Although certain applications were pending before the arbitrator, however, both the parties agreed that the matter may also be set down for final hearing and accordingly, the arbitrator by an order dated 18.08.2009, fixed the matter for final arguments on 14.09.2009. However, on that date and various subsequent dates, the arguments could not be heard on account of various reasons, including on account of adjournments sought by counsel for the NDMC.

6. The petitioner's arguments were heard partly on 23.04.2010 and 29.04.2010 and were finally concluded on 01.02.2011 and the matter was adjourned for hearing NDMC's arguments. The arbitrator heard the arguments advanced on behalf of NDMC on 25.03.2011 and on other subsequent dates as well. The same were finally concluded on 21.09.2011 and the matter was adjourned to 13.10.2011 for petitioner to advance submissions in rebuttal to the arguments made by the NDMC. Arguments on behalf of both

the parties were concluded on 28.11.2011 and time was sought by NDMC to file its written submissions. Accordingly the matter was adjourned to 16.12.2011. On that date, that is, 16.12.2011, the counsel for NDMC sought an adjournment and the matter was directed to be listed on 16.01.2012. On 16.01.2012 also, the counsel appearing for NDMC failed to submit the written submissions. However with the consent of both the parties, the matter was reserved for final orders and liberty was granted to NDMC to file the written submissions within a period of two weeks.

7. Thereafter, the petitioner filed an application dated 29.11.2012 before the arbitrator seeking permission to place on record the Office Memorandum dated 22.06.2010 issued by the Central Vigilance Commission, which was heard and orders thereon were reserved on 01.04.2013.

8. Since no effective proceedings (other than relating to the petitioner's application to place CVC's Office Memorandum) had taken place after 28.11.2011, the petitioner filed a petition under Sections 14 and 15 of the Act [OMP(T)(COMM) 23/2015] *inter alia* praying that the mandate of the arbitrator be held to have been terminated.

9. The aforesaid petition was moved on 21.12.2015 and on which date the learned counsel appearing for NDMC accepted notice and sought time to file a reply and the said petition was adjourned to 11.01.2016. In the meantime, the sole arbitrator published the award on 05.01.2016. In view of the same, the petitioner withdrew the petition filed under Sections 14 and 15 of the Act.

10. Ms Salwan, learned counsel appearing for the petitioner contended that the mandate of the arbitrator to pass the award stood terminated as the arbitrator had failed to proceed without undue delay. She stated that the

arbitrator has only made the impugned award hurriedly after notice of the petition [OMP (T)(COMM) 23/2015] had been served on NDMC. She further submitted that the impugned award was also palpably erroneous. During the proceedings, the arbitrator had, with the consent of parties, appointed a local commissioner to record the joint measurements. She contended that even those measurements were ignored as the arbitrator has not awarded the amounts due for the work performed, which was reflected in the joint measurements recorded by the local commissioner.

11. Ms Salwan also relied upon the decision of the Division Bench of this Court in *BWL Ltd. v. UOI & Anr.: Manu/DE/5699/2012* and a Coordinate Bench of this Court in *Harji Engg. Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd. and Anr.: Manu/DE/1419/2008* in support of her contentions.

12. Mr Goel, the learned counsel appearing for NDMC countered the submissions made by Ms Salwan. He submitted that the averments made in the petition that no further proceedings were held after 21.09.2011, was erroneous as proceedings continued till 01.04.2013. He further contended that the petitioner was precluded from raising any objections on account of delay or termination of the mandate of the arbitrator since the petitioner had withdrawn the petition filed under Sections 14 and 15 of the Act, without any liberty to pursue such contentions.

13. He also countered the submission that the arbitrator had ignored the joint measurements recorded by the local commissioner as contended by the petitioner. He referred to the impugned award wherein the fact that local commissioner had recorded the measurement was noted.

14. I have heard the learned counsel for the parties.

15. There is no dispute that the proceedings in the matter were concluded on 28.11.2011. The arbitral record clearly indicates that the arbitrator had entered upon reference and had issued notice to both the parties on 26.05.2008 for a hearing scheduled to be held on 03.07.2008. The proceedings continued with their own pace for a period of more than three years and finally the oral arguments were concluded on 28.11.2011 and both the parties were given time to submit written submissions. The petitioner had filed its submissions on the same date (which is recorded in the order passed by the arbitrator on 28.11.2011) and the learned counsel for NDMC sought further time to file written submissions. The matter was adjourned to 16.12.2011, only to enable the counsel for NDMC to file the written submissions. Despite the said opportunity, NDMC failed to file its submissions and on 16.01.2012, sought further time to do so. Although, the arbitrator granted liberty to NDMC to file the written submissions within a period of two weeks, that is, on or before 31.01.2012, the matter was reserved for final orders. The order passed on 16.01.2012 reads as under:-

"Today, the matter was fixed for filing written submissions by the MCD. And for that purpose last opportunity was given to them. Despite so, even today, the MCD has not been able to file the written submissions. Rather today again, they have come up with the request that they will be able to do so within a period of 10-15 days. Hence, they request for some more time. In view of this, having regards to the facts and circumstances as consented by both the parties, the case is reserved for final orders. However, liberty is granted to the MCD to file the written submissions, if they so desire, within a period of two weeks i.e. on or before 31st January, 2012 with the further direction to them to furnish the copy of the same to the claimants till 29th of January, 2012."

16. It is seen that no further proceedings took place till 04.12.2012. There is no explanation why the arbitrator did not make the final award within a reasonable period, after reserving the orders in January 2012.

17. In the meantime, the petitioner obtained certain documents (Office Memorandum dated 22.06.2010 issued by CVC) under the Right to Information Act, 2005 which, according to the petitioner, clearly indicated that the defaults were on the part of the officers of NDMC and not the petitioner. Accordingly, the petitioner sought to place the Office Memorandum dated 22.06.2010 issued by the Central Vigilance Commission before the arbitrator and filed an application for this purpose. The said application was taken up on 04.12.2012 and the arbitrator passed the following order:-

"The aforesaid matter is pending pronouncement of final orders. However, now an application dated 29.11.2012 has been moved by the claimant praying therein for according permission to place on record the Office Memorandum dated 22.06.2010 issued by the Central Vigilance Commission. It is stated in the application that the letter relates on the subject matter of the present case and is important for adjudication of the present dispute. Hence, I order to issue notice to the Respondents for their response for 21.12.2012 at 5.00 P.M.

Notice be Issued to EE (Proj.)I, MCD as well as their Ld. Counsel Mr Mukesh Gupta."

18. Apparently, proceedings continued in respect of the said application and after the pleadings were complete in the application, the same was finally heard and on 01.04.2013, orders on the application were reserved. On that date, the arbitrator passed the following orders:-

"Arguments on the application dated 29.11.2012 filed by the claimant requesting for placing on record the Office

Memorandum dated 22.06.2010 issued by the Central Vigilance Commission, heard. **Orders reserved.**"

19. Admittedly, there was no communication from the arbitrator thereafter. The provisions of Section 14(1) of the Act enact that the mandate of the arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay. Plainly, the import of Section 14(1) is that the arbitrator who does not act without undue delay loses his mandate to act as an arbitrator. In the present case, there is no explanation as to why the arbitrator could not publish the award within a reasonable time, after reserving the orders in January, 2012. Although, the petitioner had moved an application in the end of 2012, for placing on record certain documents and this may be an explanation why the matter was not decided till the application was heard; however, there is no explanation why the arbitrator did not make the award for almost three years after reserving orders on the application on 01.04.2013.

20. It is plainly evident that the arbitrator was jolted into action only when the petitioner filed a petition under Sections 14 and 15 of the Act.

21. Mr Goel had also no explanation for supine indifference of the arbitrator for more than 33 months after the orders on the application were reserved. In the circumstances, there is little doubt that the arbitrator had lost his mandate on account of failing to proceed without undue delay. Therefore, the arbitral award is plainly without jurisdiction and is, thus, liable to be set aside.

22. This Court is not persuaded to accept the contention that the petitioner had given up its contention by withdrawing its petition under Section 14 of the Act. It is seen that the said petition was withdrawn for the specific reason

that the arbitrator had made the award and, thus, the petitioner would in any event have to move an application under Section 34 of the Act for setting aside the same. The petition seeking termination of the mandate of the arbitrator was infructuous as, in any case, the arbitrator could not proceed after making the award and the relief that the award was made without jurisdiction, could not be passed in an application under Section 14 of the Act.

23. It is also not disputed that the undue delay in making the award would vitiate the same. In *Harji Engg Works Pvt. Ltd.* (*supra*), a Coordinate Bench of this Court was concerned with a case where arbitral award was passed after a period of three years. The Court referred to the decision of the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*: (2003) 5 SCC 705 in the context of explaining the scope of "public policy" as used in Section 34(2)(b)(ii) of the Act and held as under:-

"20. It is natural and normal for any arbitrator to forget contentions and pleas raised by the parties during the course of arguments, if there is a huge gap between the last date of hearing and the date on which the award is made. An Arbitrator should make and publish an award within a reasonable time. What is reasonable time is flexible and depends upon facts and circumstances of each case. If there is delay, it should be explained. Abnormal delay without satisfactory explanation is undue delay and causes prejudice. Each case has an element of public policy in it. Arbitration proceedings to be effective, just & fair, must be concluded expeditiously. Counsel for the respondent had submitted that this Court should examine and go into merits and demerits of the claims and counter claims with reference to the written submissions, claim petition, reply, document etc. for deciding whether the award is justified. In other words, counsel for the respondent wanted the Court to step into the shoes of the Arbitrator or as an appellate court decide the present objections under Section 34 of the Act with

reference to the said documents. This should not be permitted and allowed as it will defeat the very purpose of arbitration and would result into full fledged hearing or trial before the Court, while adjudicating objections under Section 34 of the Act. Objections are required to be decided on entirely different principles and an award is not a judgment. Under the Act, an Arbitrator is supposed to be sole judge of facts and law. Courts have limited power to set aside an award as provided in Section 34 of the Act. The Act, therefore, imposes additional responsibility and obligation upon an Arbitrator to make and publish an award within a reasonable time and without undue delay. Arbitrators are not required to give detailed judgments, but only indicate grounds or reasons for rejecting or accepting claims. A party must have satisfaction that the learned Arbitrator was conscious and had taken into consideration their contentions and pleas before rejecting or partly rejecting their claims. This is a right of a party before an Arbitrator and the same should not be denied. An award which is passed after a period of three years from the date of last effective hearing, without satisfactory explanation for the delay, will be contrary to justice and would defeat justice. It defeats the very purpose and the fundamental basis for alternative dispute redressal. Delay which is patently bad and unexplained, constitutes undue delay and therefore unjust."

24. A similar view was also expressed by the Division Bench of this Court in **BWL Ltd.** (*supra*) in the following words:-

"6. What faith would one have in such an arbitrator? What would be the use to remit a part of the award to the same arbitrator whose past conduct does not inspire confidence of doing speedy justice?

7. Human memory is short. We are doubtful whether substantive hearings which were concluded on October 06, 2004 and the meagre clarificatory hearings which were concluded on February 16, 2008 left sufficient imprints on the minds of the learned Arbitrator to have remembered the arguments and pronounce the award(s) on September 21,

2010 and September 23, 2010.

8. Justice should not only be done but should also appear to have been done. Justice delayed is justice denied."

25. In view of the above, the petition is allowed. The impugned award is set aside. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 08, 2017
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