

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 02.01.2017

+ O.M.P. (COMM) 407/2016 and IA Nos.11169/2016 & 11172/2016

NORTH DELHI MUNICIPAL CORPORATION Petitioner

Versus

IJM CORPORATION BERHAD Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Gaurav Pachnanda, Senior Advocate with
Ms Renu Gupta, Ms Shruti Gupta and Mr Dhruv
Tripathi.
For the Respondent : Mr Anil Sapra, Senior Advocate with Mr
Shambhu Sharan and Mr Yaman Kumar.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. North Delhi Municipal Corporation (hereafter 'NDMC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for setting aside the interim award dated 29.04.2016 (hereafter 'the impugned award') made and published by the Sole Arbitrator.

2. The Arbitrator has awarded a sum of ₹12,30,85,293.44 (Rupees Twelve Crores Thirty Lakhs Eighty Five Thousand Two Hundred Ninety Three and forty four paise only) in favour of the respondent (hereafter 'IJMC') as the Arbitrator found that the said amount was admittedly payable to IJMC. NDMC disputes the above reasoning as it claims that in

terms of the contract between the parties, NDMC is entitled to withhold the amounts, admittedly, payable to IJMC against its claims and, therefore, the impugned award is contrary to the terms of the contract between the parties.

3. Briefly stated, the relevant facts necessary to address the controversy are as under:-

3.1 NDMC is a corporation established under the Delhi Municipal Corporation Act (Amendment) Act, 2011 and is engaged in providing civic amenities within the specified areas. IJMC is a company incorporated under the laws of Malaysia and is, *inter alia*, engaged in the business of construction, property development infrastructure, concessions, plantations, etc.

3.2 NDMC (its predecessor) invited bids for construction of a Civic Centre at Jawahar Lal Nehru Marg, Minto Road, New Delhi. The said Civic Centre Complex is spread over an area of 11.97 acres and included construction of multi storey buildings (hereafter 'the project'). IJMC was one of the three qualified bidders who bid for the project. The technical bids submitted by the tenderers were opened on 25.01.2005 and the financial bids were opened on 17.02.2005. IJMC's bid was the lowest and after negotiations, it was awarded the contract for the project. The letter of intent (LOI) was issued on 30.03.2005 and Work Order was issued on 25.04.2005. Thereafter, IJMC commenced execution of the works on 05.05.2005. The Contract was entered into between the parties on 21.05.2005 (hereafter 'the Agreement').

3.3 Certain disputes arose between the parties and IJMC invoked the arbitration clause. Pursuant to the aforesaid invocation, NDMC appointed Sh Dipak Mukhopadhyay, former Engineer-in-Chief (retired), MCD as the Sole Arbitrator.

3.4 IJMC filed its statement of claim before the Arbitrator raising 21 claims aggregating a sum of ₹306.82 crores besides interest and costs of arbitration. NDMC also filed counter claims which includes a sum of ₹648 crores (Counter claim No.1) on account of alleged loss of revenue suffered by NDMC on account of delay in handing over part of the building to Income Tax Department.

3.5 The claims filed by IJMC includes a claim of ₹83.29 crores on account of non-payment of price escalation up to July, 2012 (claim No.1); ₹32.19 crores towards payment of RA bill Nos. 74 & 75 for work done but not paid (Claim No.8); and ₹42 lakhs on account of excess recovery of steel reinforcement from RA bill No. 71 (claim No.19).

3.6 After the pleadings were complete before the Arbitrator , IJMC submitted an application under Section 31(6) of the Act read with Order XII Rule 6 of the Code of Civil Procedure, 1908 before the Arbitrator to make an interim award in its favour with respect to the following sums admitted by NDMC:-

“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.”

4. The Arbitrator considered the pleadings and concluded that a sum of ₹2,30,74,767.44 had been clearly admitted as payable by NDMC against escalation for the period between January 2010 till July 2011. Similarly, the Arbitrator found that a sum of ₹6,01,01,023/- had been certified by NDMC as payable against RA Bill No. 74 and a sum of ₹3,99,09,503/- was accepted as payable in respect of RA Bill No.75; therefore, an aggregate sum of ₹10,00,10,526/- (₹6,01,01,023/- plus ₹3,99,09,503/-) was admittedly payable by NDMC against IJMC's claim no.8. However, the Arbitrator did not find any sum as admitted to be payable against claim no.19. In view of the aforesaid findings, the Arbitrator made the impugned award for sum of ₹12,30,85,293.44/- in favour of IJMC and directed that the same be paid by 16.05.2016. The Arbitrator further directed that if the said amount was not paid by 16.05.2016, NDMC would have to pay interest at the rate of 18% per annum from 17.05.2016 till the date of payment of the awarded amount.

5. Aggrieved by the same, NDMC has filed the present petition.

Submissions

6. The only contention advanced by Mr Gaurav Pachnanda, learned counsel appearing on behalf of NDMC, to assail the impugned award was that the Arbitrator had not considered the provisions of clause 2 and clause 29 of the Agreement. He submitted that compensation for delay quantified at 10% of the contract value was levied on IJMC; the said levy was final and binding and not arbitrable; and in terms of clause 2 of the Agreement,

NDMC was entitled to set-off the compensation against any sum payable to IJMC. He further submitted that in terms of clause 29 of the Agreement, NDMC was entitled to withhold and exercise lien on the said sums payable to the contractor (in this case, IJMC). He contended that since the impugned award was, plainly, contrary to the terms of the Agreement, it was liable to be set aside.

7. Mr Sapra, the learned counsel for IJMC countered the submissions made by Mr Pachnanda. He earnestly contended that no notice of levy of compensation in terms of clause 2 of the Agreement was served on IJMC. He further submitted that NDMC had not exercised any lien on the amounts payable under clause 29 of the Agreement and no such contention was advanced by NDMC before the Arbitrator.

8. He submitted that a question of set-off could arise only once NDMC's claim for such compensation being payable had been adjudicated. Thus, the impugned award directing payment of the said sum did not run contrary to clause 2 of the Agreement.

9. Mr Sapra relied on the decision of the Division Bench of this Court in **Numero Uno International Ltd. v. Prasara Bharti**: 2008 (1) Arb. LR 446 (Delhi), in support of his contention that an interim award could be passed in favour of a party notwithstanding the pendency of counter claims. He also relied on the decision of the Supreme Court in **J.G. Engineers Pvt. Ltd. v. Union of India (UOI) and Anr.**: (2011) 5 SCC 758 in support of his contention that the question whether any compensation for delay could be levied under clause 2 of the Agreement was an arbitrable dispute and, therefore, such compensation could not be considered as an amount payable unless the same had been adjudicated.

10. In view of the above, the only questions to be considered in the present petition are, whether the impugned award is liable to be set aside as being contrary to the terms of clauses 2 and 29 of the Agreement and whether NDMC can be permitted to raise such contentions at this stage.

11. Before proceeding further, it would be necessary to refer to clauses 2 and 29 of the Agreement, which are set out below:-

"CLAUSE 2

Compensation for Delay

If the contractor fails to maintain the required progress in terms of Clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the MCD on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the Engineer-in-Charge (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable that the progress remains below that specified in Clause 5 or that the work remains incomplete).

This will also apply to items or group of items for which a separate period of completion has been specified.

Compensation @ 1.5% per month

for delay of work of delay to be computed on per Day basis

Provided always that the total amount of compensation for delay to be paid under this condition shall not exceed 10% of the Tendered Value of work or to the Tendered Value of the item or group of items or work for which a separate period of completion is originally given.

The amount of compensation may be adjusted set-off against any sum payable to the Contractor under this or any other

contract with the MCD In case, the contractor does not achieve a particular milestone in Schedule-F, or the rescheduled milestone(s) in terms of Clause 5.4, the amount shown against that milestone shall be withheld to be adjusted against the final grant of Extension of Time, to be decided on completion of work. With-holding of this amount on failure to achieve a milestone, shall be automatic without any notice to contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount.

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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 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."

12. A plain reading of clause 2 of the Agreement indicates that if IJMC failed to maintain the required progress or complete the works, it would be liable to pay compensation at the rate stipulated as the Engineer-in-Charge may decide. The clause also indicates that the decision of the Engineer-in-Charge shall be final. In the present case, there is some controversy whether the Project Management Consultant (PMC), who communicates the decision of extension of time with levy of compensation at the rate of 10% to IJMC, was the Engineer-in-Charge within the terms of clause. However, notwithstanding the said controversy, it is clear that the decision whether such compensation is payable is a highly contentious issue and the decision of PMC/NDMC to levy such compensation is not final and binding on the parties as yet.

13. In ***J.G. Engineers Pvt. Ltd.*** (*supra*), the Supreme Court had, *inter alia*, examined the import of clause 2 and had explained that the decision of the Engineer-in-Charge as to the quantification would be final and binding; but the question whether the contractor was responsible for the delay and thus liable to pay such compensation would have to be decided by the arbitrator, in case the same was disputed. The relevant extract of the said decision is set out below:-

"Thus what is made final and conclusive by clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is

in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract."

14. The reliance placed by NDMC on Clause 2 of the Agreement for being entitled to adjust or set-off its claim for compensation against IJMC is also misplaced. Clause 2 of the Agreement enables NDMC to adjust or set-off the amount of compensation against any sum payable to the contractor under the Agreement or any other contract with the contractor (in this case, IJMC). The amount of compensation so referred would obviously be the amount of compensation admittedly payable or as determined by the arbitrator. Unless the question whether any amount is payable is decided, the compensation for delay would not be due and payable and, therefore, cannot be a subject matter of adjustment or set-off as contended on behalf of NDMC.

15. In **Union of India v. Raman Iron Foundry: (1974) 2 SCC 231**, the Supreme Court considered a clause of a contract (clause 18 of the contract in question) which entitled the Government to recover sums due from the contractor by appropriating any sum due or which may become due to the contractor under the contract. The Court held that the expression "sum due" occurring in the clause would mean a sum for which there is an existing obligation to pay in praesenti. In other words, the sum which may be

presently due and payable. The Court further held that any claim for damages for breach of a contract would not be a claim for the sum presently due and, therefore, could not be recovered by appropriating the amounts due to a contractor.

16. The aforesaid decision was also referred to by the Supreme Court in **M/s Gangotri Enterprises v. Union of India: AIR 2016 SC 2199**. In that case, the Court considered the import of a clause in a contract which permitted the Railways to deduct the amounts "*to be forfeited or recovered*" from any monies due to the contractor. The Court held that Railways have no right to encash the bank guarantee against any unadjudicated claim of damages.

17. In view of the above, the contention that the impugned award militates against the provisions of clause 2 of the Agreement and, therefore, should be set aside is not persuasive.

18. At this stage, it is necessary to observe that this Court is not examining the challenge to the impugned award as an appellate court hearing a first appeal and this Court cannot supplant its opinion over that of the Arbitrator. The limited scope of these proceedings is to examine whether the impugned award has been made without jurisdiction or falls foul of the public policy of India.

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.

22. In view of the above, the impugned award is set aside. All pending applications stand disposed of.

23. No order as to costs.

VIBHU BAKHRU, J

JANUARY 2, 2017

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