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

\+ **O.M.P. (COMM) 553/2016**

NIDHI BUILDERS (I) PVT. LTD. ..... Petitioner

Though: Mr. Arvind Sharma & Mr. Nakul Arora, Advocates.

versus

DIRECTOR GENERAL (MAP) ..... Respondent

Though: Mr. Jaswinder Singh, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

% **07.03.2017**

1. The challenge in this petition by Nidhi Builders (India) Private Limited/Petitioner under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') is to an Award dated 28th August, 2012 passed by the learned Arbitrator in the disputes between the parties arising out of a work order dated 1st October, 2005 by which the Respondent awarded to the Petitioner the work of 'married accommodation for Major (32 DUs) and Captain (10 DUs) including allied external services' at the R.R. Hospital, Delhi.

2. According to the Petitioner the completion certificate was issued on 3rd October, 2009 to the effect that the work stood completed on 15th September, 2009. However, certain defects were pointed out by the Respondent for rectification. The Petitioner was informed that a sum of Rs.2 lakh had been deducted from the final bill due to non-rectification of defects.

Further a sum of Rs. 2.30 lakh was deducted on account of recovery due to non-rectification of defects in fire fighting system and non-fixing of nozzles, trench pipes, hydrant valves, coupling, hose pipe, etc.

3. The Petitioner states that in terms of Clause 40 of the General Conditions of Contract ('GCC'), the defect liability period was for a period of 24 months from the date of final completion. Therefore, according to the Petitioner, the defect liability period expired sometime in November, 2011. When the Respondent sought to invoke the Bank Guarantee ('BG'), the Petitioner filed OMP No.739/2011 in this Court under Section 9 of the Act seeking to restrain the Respondent from encashing the BG.

4. In the said OMP 739 of 2011, on 20th December, 2011, the following order was passed:

> "1. This is a petition under Section 9 of Arbitration and Conciliation Act, 1996.
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> 2. Learned counsel for the petitioner submits that petitioner will make a formal request to the respondents for appointment of an Arbitrator. Learned counsel for respondent no.1 on instructions submits that in case a request is made by the petitioner, Arbitrator will be appointed within thirty days.
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> 3. It is agreed that interim order dated 3.10.2011 will continue and petitioner will make an application under Section 17 within two weeks of the Arbitrator entering upon reference. Arbitrator is requested to hear the application for interim relief at the first instance. It is made clear that petitioner will keep the bank guarantee alive till further orders to be passed by the Arbitrator.
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> 4. Petition stands disposed of in view of above."

5. Meanwhile on 17th Augusta 2011, a letter on the subject "Final Notice: Defect Rectifications" was sent by the Respondent to the Petitioner in which *inter alia* it was pointed out that defect rectification had not yet been completed. It was stated that if the rectifications were not carried out by 30th August, 2011, the BGs pertaining to 'performance security deposit' would be encashed at the risk and cost of the Petitioner and the rectification got done either by the Respondent itself or through other agency.

6. Following the order passed by this Court, the Petitioner on 16th January, 2012 addressed a letter to the Respondent calling upon it to appoint an Arbitrator at the earliest. Following the said letter on 10th February, 2012, the Respondent appointed the sole Arbitrator, who entered upon reference on 27th February, 2012 asking the parties to submit their statement of case (SOC) and claims by 27th February 2012, the pleading in defence by 16th April, 2012 and rejoinder by 30th April, 2012.

7. In the impugned Award it is noted that the Respondent submitted its SOC and claims on 24th May, 2012 and the Petitioner submitted its SOC and claims on 6th June, 2012. From the impugned Award it is also apparent that the learned Arbitrator proceeded to pass the Award on the basis of the pleadings and documentary oral evidence before him as well as 'oral submissions and arguments."

8. The preliminary part of the Award concerned the plea of the Respondent that "excepted matters" could not be taken up for arbitration. In para 23 of the impugned Award the learned Arbitrator observed as under:

"23. The UOI has also brought out that the arbitrator could not be appointed by the UOI as there were no claims that can be referred to the arbitrator as per the agreed contract conditions. However as per the court judgment, the arbitrator was appointed. At the same time UOI brought out that in the court case, the contractor has brought out only one issue of release of bank guarantee towards the performance against the defect liability period. So the arbitrator can adjudicate only one claim i.e. claim No.2 of the contractor."

9. The learned Arbitrator discussed the question regarding payment of the final bill which had been accepted without demur by the Petitioner and held that all the ten claims filed by the Petitioner, claim Nos.1, 3 to 10 cannot be adjudicated. This only left the Petitioner's claim No.2 concerning the release of the Performance BG in the sum of Rs.38,78,400. The claim was based on the fact that the defect liability period concluded on 14th September, 2011 and there was no justification for the Respondent to continue to retain the said amount. The Petitioner also referred to correspondence between the parties resulting in the issuance of the completion certificate. The Petitioner pointed out that the defects had been rectified to the satisfaction of the Respondent.

10. On its part, the Respondent pressed its Claim No.1, which was for recovery on account of extra expenditure due to rectification of outstanding defects notified during defects liability period – amount of claim of Rs.50,00,000." The impugned Award discusses this claim of the Respondent in para 30.1.3 to para 30.1.14. The learned Arbitrator concluded that from the BG amount of Rs.38,78,400, the Respondent would be entitled to recover a total sum of Rs.12,83,819.22 on account of the following items towards defect rectification works:

"30.1.13. xxxx

a. Civil Works – Rs.12,68,848.55 – Rs.1,55,893.50 – Rs.2,00,000 = Rs.9,12955.05.

b. Internal Water Supply – Rs.7,43,952.08 – Rs.6,26,562.68 – Rs.52,825.23 = Rs.64,564.17.

c. Fire Protection/works – Rs.5,15,000 – Rs.2,30,000 = Rs.2,85,000.

d. External & Internal Electrification works – Rs.21,300.

e. Total is Rs.12,83,819.22."

11. The balance amount of Rs.25,94,580.78 was directed to be refunded to the Petitioner. No other claim of the Respondent was entertained.

12. The challenge in the present petition is confined to the above part of the impugned Award, which allows the counter claim of the Respondent to the extent of Rs.12,83,819.22. The submission of the learned counsel for the Petitioner is two-fold. First he submits that the counter claim itself is not maintainable as even according to the Respondent none of the claims barring the claim of the BG of the Petitioner was arbitrable. Referring to the decision in ***MTNL v. S.P.S. Rana 2009 (6) R.A.J. 373 (Del)*** it is submitted that there was no occasion for the Respondent to dispute about the counter claim to be entertained by the Arbitrator. The second submission is on the merits of the counter claim itself. It is submitted that the entire claim was based on a report of the consultant prepared sometime in February, 2012 much after the conclusion of the defect liability period. The amount is actually not incurred by the Respondent towards curing any defect. The amount was purely based on estimates. Consequently it is submitted that the

award of the aforementioned sum in favour of the Union of India was based on no evidence.

13. In reply to the above submission it is pointed out by the learned counsel for the Respondent that the wording of the arbitration clause is wide enough to permit the counter claim of the Respondent. According to him the defect liability notice dated 17th August, 2011 indicated with sufficient clarity what the claim of the Respondent against the Petitioner might be. He further submitted that there was no warrant to conclude that the Respondent was precluded from maintaining its counter claim against the Petitioner in response to the claims filed by the Petitioner. Referring to the order passed by this Court in the Section 9 petition it is pointed out that all the disputes between the parties including the respective claims and counter claims were referred to arbitration. There was no bar on the Respondent preferring counter claims.

14. As regards merits of the counter claim learned counsel for the Respondent, while not disputing that the report of the consultant was produced before the learned Arbitrator, submitted that there may have been other evidence which formed part of the arbitral record, which was not adverted to or discussed by the learned Arbitrator. It is submitted that even the consultant's report was sufficient evidence which could form the basis for allowing of the counter claim of the Respondent, which, in any event has been limited to the sum of Rs.12,83,819.22.

15. The above submissions have been considered. As regards maintainability of the counter claim of the Respondent before the learned Arbitrator, the

Court finds merit in the contention of the learned counsel for the Petitioner when the reference of the disputes was made to arbitration pursuant to the order passed by this court on 20th December, 2011 in OMP No.739/2011. The understanding was that all the disputes between the parties would be referred to arbitration. There was no restriction of the disputes only to the claims of the Petitioner. The extracted portion of para 23 of the impugned Award does give an impression that the controversy was only as regards arbitrability of the Petitioner's claim and there was no contemplation of any counter claim by the Respondent.

16. However, in the considered view of the Court there is no indication even in the said paragraph that the learned Arbitrator was adverting to the non-maintainability of the claims of the Respondent. Indeed if there are claims by the Petitioner there is no reason why the counter claims by the Respondent in relation to such claims would not be maintainable.

17. From the notice dated 17th August, 2011 issued by the Respondent to the Petitioner it is apparent that the claim for return of the amount of the BG by the Petitioner was linked to the claim of the Respondent which it might incur in getting the defects cured, that remained to be rectified, through another agency. Therefore, the submission that the counter claims of the Respondent that was entertained by the Arbitrator was intrinsically linked to the Petitioner that was entertained, viz., the return of the BG amount appears to be well founded. Consequently the Court negates the plea of the Petitioner that the learned Arbitrator ought not to have entertained the counter claim of the Respondent.

18. Now turning to the merits of the counter claim of the Respondent. A careful perusal of the entire Award reveals that the learned Arbitrator proceeded only on the basis of the pleadings and documents submitted by the parties. The claim of the Respondent was based on the report of the consultant prepared in February, 2012 on the basis of estimates of the expenditure that might have to be incurred to cure the non-rectified defects. As pointed out in the Respondent's notice dated 17th August, 2011, there is nothing to show that the Respondent, in fact, engaged another agency to get the defects rectified, much less, there is any evidence to show what was the exact amount of expenditure incurred by the Respondent in engaging such agency and in getting the defects rectified. The Award makes no reference to any invoice, bills or other documents, which would show the exact expenditure incurred by the Respondent in getting the defects rectified. In other words, there appears to be no acceptable evidence for the learned Arbitrator to have proceeded to award the Respondent the various amounts under the four heads of defects to be rectified. While it is true that the arbitration proceedings are not governed either by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 there must be material on the basis of which the Arbitrator proceeds to award specific amounts to a party under the head of curing of defects. It must be remembered that this was not a broad claim of damages or compensation or loss of profit where it might not be possible for the Arbitrator to determine the amount. Here the claim was for specific amounts narrowed down, for instance Rs.64,564.17 for internal water supply and Rs.12,68,848.55 towards civil works. It is simply not possible to award such amounts without there being any supporting documentation.

19. Consequently the Court is unable to sustain the Award to the extent it grants the counter-claim No.2 of the Respondent in the sum of Rs. 12,83,819.22. Therefore, there was no occasion for the Petitioner to be deprived of the release of the BG amount to that extent. In other words there was no justification in law for the learned Arbitrator to direct that the aforementioned sum of Rs.12,83,819.22 be withheld from the sum of Rs.38,78,400, which had to be released to the Petitioner under claim No.2. The Award to the above extent is hereby set aside.

20. The amount deposited by the Petitioner pursuant to the order dated 23rd December, 2014, shall be released to the Petitioner together with interest accrued thereon through an authorised representative of the Petitioner on proper verification.

21. The petition is disposed of in the above terms.

S. MURALIDHAR, J.

MARCH 07, 2017
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