

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

+ **OMP(COMM) 385/2017**

Reserved on: 22nd November, 2017
Date of decision: 1st December, 2017

ADWEL ADVERTISING SERVICE & ANR. Petitioners
Through Mr.P.V.Kapur, Sr. Adv. with
 Mr.Sandeep Grover, Mr.Vimal
 Nagrath, Ms.Pankhuri Bhardwaj,
 Ms.Kaveri Gupta, Advs.

versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent
Through Mr.Sanjay Poddar, Sr. Adv. with
 Mr.Gaurang Kanth, Mr.Govind
 Kumar, Mr.Shivam Goel, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') challenges the Arbitral Award dated 22nd May, 2017 passed by the Sole Arbitrator in Arbitration Case No. 15/2011.

2. The dispute between the parties relate to award of work of construction, maintenance and operation of toilet blocks. The respondent had issued letters of award of toilet sites in favour of the petitioners with

respect to 9 (nine) sites, the details of which have been given by the petitioner as under:-

S.No.	Site No.	Monthly Licence Fee (Rs.)	Allotment Date	Hand-over Date
1	20	2,87,000/-	12.12.2007	22.12.2007
2	21	3,78,500/-	12.12.2007	02.01.2008
3	24	2,15,500/-	12.12.2007	31.12.2007
4	29	1,63,000/-	12.12.2007	31.12.2007
5	30	2,35,500/-	12.12.2007	02.01.2008
6	37	2,88,500/-	12.12.2007	22.12.2007
7	40	2,35,500/-	12.12.2007	02.01.2008
8	45	1,66,500/-	12.12.2007	02.01.2008
9	49	4,44,500/-	12.12.2007	31.12.2007

3. Further sites were allotted to the petitioners, the details of which have been given by the petitioners as under:-

S.No.	Site No.	Monthly Licence Fee (Rs.)	Cash Security Deposit (Rs.)	Allotment Date
1	15	1,72,500/-	5,17,500/-	08.11.2007
2	39	1,11,500/-	3,34,500/-	08.11.2007
3	44	2,43,000/-	7,29,000/-	08.11.2007

4. After the expiry of the contractual period, the following sites were allotted to the petitioners, the details whereof have been provided by the petitioners as under:-

S.No.	Site No.	Monthly Licence Fee (Rs.)	Allotment Date
1	20	3,15,000/-	15.07.2009
2	24	2,37,050/-	15.07.2009
3	37	3,17,350/-	15.07.2009
4	40	2,59,050/-	15.07.2009
5	45	1,83,150/-	15.07.2009

5. The petitioners have stated that certain other sites were also allotted in their favour, the details of which are not relevant for the purpose of the adjudication of the present petition as they were not part of the present reference to arbitrator in Arbitration Case No.15/2011.

6. It may be suffice here to say that the respondent issued demand letters calling upon the petitioners to pay the licence fee as agreed in the allotment letters, while the petitioners kept disputing the same. Eventually, the disputes having arisen between the parties, the same were referred to Arbitration by this Court.

7. The Arbitrator has passed the impugned Award allowing certain claims of the petitioners while disallowing a few others.

8. The challenge raised before me is confined to adjudication of claim Nos. 6 and 9 as also the counter claim Nos. 1 and 4 in the impugned Award.

9. Claim No. 6 was a claim of refund of Rs.1,04,62,004/- along with interest thereon @ 24% per annum. Claim No. 9 was a challenge to the termination notice issued by the respondent with respect to the sites that had been allotted to the petitioners on 15.07.2009. It was alleged that as no amount was due and payable by the petitioners to the respondent, in fact, certain amounts were recoverable from the respondent, the termination was bad and the petitioners were entitled to damages for such illegal termination. Here again, the challenge is to the finding of the Sole Arbitrator that the amount of Rs.1,04,62,004/- cannot be adjusted against the licence fee demanded by the respondent and without such adjustment, the petitioners were in default of payment of the licence fee and consequently, the termination of the award of sites in favour of the petitioners was legal and justified.

10. It is the case of the petitioners that the respondent had floated a tender for granting advertisement rights on mobile vans. The petitioners, being successful, had deposited a sum of Rs.90,62,000/- towards the licence fee and Rs. 14,00,000/- as three months' security towards the award of advertisement rights under the above tender. The total amount, therefore, paid was Rs.1,04,62,004/-. As the contract could not be operationalized due to non-grant of permission for plying the mobile vans by the traffic police, the respondent, vide its letter dated 23rd June, 2008, had allowed adjustment of the said amount against other contract allotted to the petitioners. It is submitted that the petitioners sought adjustment of the said amount against the dues payable by them under the contracts for the toilet sites as mentioned above and in this regard, had written letters dated 7th August, 2008 and 13th November, 2009 to the respondent, however, with no response from the respondent. The petitioners, therefore, claimed that they were entitled to refund/adjustment of this amount of Rs.1,04,62,004/-.

11. The learned Arbitrator has rejected the above claim for refund as also adjustment thereof under claim nos. 6 and 9 and held as under:-

“66. It is evident from the facts brought on record and the documents filed by the Claimants that the parties had

entered into a separate contract for display of advertisements on Mobile Vans but the contract could not be operationalized as the Traffic Police had not granted permission for plying the Mobile Vans. If the facts stated by the Claimants are true, the Respondent should, in all fairness, refund the amount when the contract could not be operationalized due to no fault of the Claimants. However, the said contract was a separate and independent contract and the dispute between the parties on the said contract cannot be raised under the present reference which deals with the disputes relating to display of advertisements by the Claimants on Toilet Blocks only. The dispute pertaining to the Mobile Vans has not been referred to this Tribunal and the Tribunal is, therefore, not in a position to adjudicate upon the said dispute. In the facts and circumstances of the case, this claim cannot be entertained by this Arbitral Tribunal. Claim No. 6 is accordingly rejected.”

12. The learned senior counsel for the petitioners submits that as there was no dispute with respect to receipt of the amount of Rs.1,04,62,004/- and the letter dated 23rd June, 2008 of the respondent allowed adjustment of the same against other contracts, the Arbitrator has committed an error in not allowing such refund/adjustment.

13. On the other hand, the learned senior counsel for the respondent has submitted that disputes arising out of various distinct contracts had been referred to the Sole Arbitrator. As these contracts had differing terms and conditions that could not be taken up under a single reference, both the parties agreed that the disputes should be referred to and

adjudicated upon by the Arbitrator in four separate references. In view of such agreement, the respondent, vide a fresh notification no. OSD/ (Advtt.)/2011/D-1001585 dated 24/05/2011 appointed the Sole Arbitrator to adjudicate upon the claims and counter claims of the parties in disputes relating to maintenance and operation of the toilet sites mentioned below:-

- “(i) Site No. 20 - Bahadur Shah Zafar Marg, ITO Crossing (12/12/2007 to 31/01/2010);
- (ii) Site No. 21 - Ring Road in front of South Extension -1 (12/12/2007 to 01/02/2009);
- (iii) Site No. 24 - Panchsheel Club, Opp. Flyover (12/12/2007 to 31/01/2010);
- (iv) Site No. 29- Defence Colony Market (12/12/2007 to 31/01/2010);
- (v) Site No. 30- Central Market, Lajpat Nagar (12/12/2007 to 01/02/2009);
- (vi) Site No. 37 - IMA Building Existing Urinal Block, ITO (12/12/2007 to 31/01/2010);
- (vii) Site No. 39- Opp. New Delhi Railway Station (12/12/2007 to 31/01/2010);
- (viii) Site No. 40 - Lajpat Rai Market, Nehru Place Crossing (12/12/2007 to 31/01/2010);
- (ix) Site No. 44- Corner of Bhikaji Cama Place (12/12/2007 to 12/01/2009);
- (x) Site No. 45- Greater Kailash-1, M Block Market (12/12/2007 to 31/01/2010);
- (xi) Site No. 49 - Road turning to CGO Complex, Near Lodhi Hotel (12/12/2007 to 31/01/2010);
- (xii) Site No. 04/09 - Ring Road in front of South Extension-II (08/06/2009 to 05/02/2010);
- (xiii) Site No. 05/09 - Lajpat Nagar, Opp. Police Station (08/06/2009 to 05/02/2010);

(xiv) Site No. 10/09- MMTTC, Aurbindo Marg
(18/06/2009 to 05/02/2010).”

14. It is, therefore, submitted that the disputes between the parties, if any, with relation to the contract of advertisement rights on the mobile vans, was not referred to for adjudication by the Sole Arbitrator and has rightly been refused by the Arbitrator.

15. I have considered the submissions made by the learned counsels for the parties.

16. It is not disputed before me by the learned senior counsel for the petitioners that the dispute with respect to the contract relating to advertisement rights on mobile vans had not been referred to arbitration by the Sole Arbitrator. It is, however, contended that, in view of the letter dated 23rd June, 2008 of the respondent, the petitioners had a right to claim adjustment of Rs.1,04,62,004/- and there was, therefore, no dispute to be adjudicated in respect of the contract of advertisement rights on mobile vans; the only question was whether the petitioners are entitled to such adjustment against the dues of licence fee under the present contract relating to construction/maintenance/operation of toilet sites in question.

17. I may first refer to the letter dated 23rd June, 2008, which is reproduced hereinbelow:-

*MUNICIPAL CORPORATION OF DELHI
(ADVERTISEMENT DEPARTMENT)*

*206, Nigam Bhawan,
Kashmere Gate, Delhi-110006,
Tel.No. 23961884*

No.ADC(Advtt.)/2008/425

Dated:23.06.2008

*M/s Adwel Advertising Service
8F, Barakhamba Road,
New Delhi-110001*

Sub: Contract for display of advertisement through motor vehicles in respect of South Zone – Refund/adjustment of security deposit

Sir,

Kindly refer to your letter dated 18.02.2008 addressed to Commissioner, MCD, on the subject cited above.

It is informed that after considering the issue, the competent authority has been pleased to allow you refund / adjustment of the security amount deposited by you against the subject cited contract, in view of the fact that you were never allowed by various authorities to operate the contract. However, no interest will be payable to you on the security amount.

You are requested to immediately get in touch with the Chief Advertisement inspector / G-8 Clerk of this department together with all the relevant record / details, including original G-8 receipts issued against the payments deposited by you, from time to time for adjustment of the amount payable to you on account of security deposit, against the contract allotted to you by this department.

*Yours Faithfully,
Sd/-*

(Amiya Chandra)
Addl.Dy.Cmmr.(Advtt.)”

18. It is to be noted that this letter allows refund/adjustment of the ‘security amount deposited’ by the petitioners. Therefore, this letter cannot be read as allowing the adjustment/refund of ‘licence fee’ as well. Further, it calls upon the petitioners to contact the Chief Advertisement Inspector/G-8 Clerk of the department ‘together with all the relevant record/details including G-8 receipts issued against the payments deposited’ by the petitioners. This letter was, therefore, conditional in nature and the refund/adjustment was to be made on fulfilment of certain conditions by the petitioners. If the petitioners were eventually not allowed to make this adjustment against the licence fee dues for the toilet sites under the contract in question, this was still a dispute in relation to the contract for award of advertisement rights on the mobile vans and not a dispute under the contract for the toilet sites.

19. As dispute under specific contracts had been referred for adjudication to the Sole Arbitrator, the Sole Arbitrator could not have gone beyond the reference and adjudicated on the dispute between the parties in relation to the contracts not referred for his adjudication.

20. The learned senior counsel for the petitioners submits that as held by the Supreme Court in the case of ***Jitendra Kumar Khan & Ors. vs. Peerless General Finance and Investment Co. Ltd. & Ors. (2013) 8 SCC 769***, the present case was a case of equitable set-off and therefore, should have been allowed.

21. I am afraid the said judgment would not be of any assistance to the petitioners as it was dealing with the case of set-off in a suit. The present case relates to an adjudication by an arbitrator who is bound by the terms of his reference and the contract out of which the disputes have arisen.

22. The learned senior counsel for the petitioners has not drawn my attention to any term of the contracts of toilet sites that were referred to arbitration and which would have allowed such a claim of set-off/adjustment. Equally, the judgment of the Supreme Court in ***Jitendra Kumar Khan (supra)*** records that such equitable set-off cannot be claimed as a matter of right and it is the discretion of the Court to entertain and allow such a plea or not. Paragraph 16 of the judgment reads as follows:-

“From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debits and credits or

cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in Dobson & Barlow Ltd. v. Bengal Spg. & Wvg. Co. and Girdharilal Chaturbhuj v. Surajmal Chauthmal Agarwal.”

(Emphasis supplied)

23. On the other hand, learned senior counsel for the respondent relied upon the judgment of the Supreme Court in ***Union of India vs. Birla Cotton Spinning and Weaving Mills Ltd. AIR 1967 SC 688***, wherein the Court rejected the application filed by the Union of India under Section 34 of the Arbitration Act, 1940 seeking stay of the suit. The stay was sought on the ground that though the liability under the contract in question was admitted, certain dues were to be recovered from the company under distinct contract and the same were to be set-off. The Supreme Court rejected the said application holding as under in paragraph 4 and 5:-

“4. The evidence recorded by the trial court discloses that there was no dispute between the Company and the Union arising under the contract on which the suit was filed. The Union accepted liability to pay the amount claimed by the Company in the suit. The Union still declined to pay the amount asserting that an amount was due from the Company to the Union under a distinct contract. This amount was not sought to be set-off under any term of the contract under which the Company made the claim. The dispute raised by the Union was therefore not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the Company under another contract which it may be noted had already been referred to arbitration. The Union had no defence to the action filed by the Company: it was not contended that the amount of Rs 10,625 was not due to the Company under the contract relied upon by the Company. For enforcement of the arbitration clause there must exist a dispute: in the absence of a dispute between the parties to the arbitration agreement there can be no reference.

5. It was urged that mere refusal by the Union to pay the amount due is sufficient to raise a dispute "in connection with the contract" within the meaning of clause 21 of the Arbitration agreement. We are unable to agree with that contention. A dispute that the Union is not liable to pay this price under the terms of the contract is undoubtedly a dispute under the contract, and in any event in connection with the contract. But a plea that the Union though liable to pay the amount under the terms of the contract will not pay it because it desires to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute "under or in connection" with that contract under which the liability sought to be enforced has arisen.”

(Emphasis supplied)

24. Therefore, the Supreme Court in the above judgment, has clearly stated that the dispute has to be ‘under or in connection’ with the contract under which the liability is sought to be enforced, or has arisen. In the present case, the dispute of adjustment/refund is under a different contract and, therefore, has rightly been refused to be adjudicated upon by the Arbitrator in the present reference/award.

25. The learned senior counsel for the petitioners submits that, in fact, the Arbitrator also has found such amount to be payable to the petitioners but has left it to the discretion of the respondent to refund the same or not.

26. In my opinion, this is a misreading of the impugned Award. The Arbitrator has clearly prefaced his view by stating that ‘if the facts stated by the claimants are true’ and therefore, he has clearly stayed away from making any comment on the genuineness of the claim of the petitioners under the head of recovery/adjustment of the above amount.

27. In respect of claim No. 9 and counter claim No. 1, learned senior counsel for the petitioners has further submitted that the Arbitrator has failed to adjudicate on the plea of the petitioners with respect to site nos.

20, 40 and 45 that were allotted to the petitioners on 15.07.2009. It is submitted that these sites could not be used by the petitioners for varying reasons as were mentioned in the Statement of Claim, particularly, in paragraphs 20 to 22 thereof, and therefore, no licence fee was payable by the petitioners for such sites.

28. I cannot accept the above argument of learned senior counsel for the petitioners. A reading of the Statement of Claim filed by the petitioners would show that the petitioners had made specific claims with respect to non-use of various sites allotted by the respondent to the petitioners. I may only refer to claim nos. 3 and 4 in this regard. As far as the above mentioned sites and for the period after 15.07.2009, barring making a reference in the brief facts in the Statement of Claim, no specific claim towards the same was raised by the petitioners. Where specific claims have been raised for other sites, it is not explained by the learned senior counsel for the petitioners, why such specific claims were not raised for site nos. 20, 40 and 45 that were allotted in petitioners' favour on 15.07.2009. A mention of a problem qua these sites in the narration of facts, without making a claim against the same, in my opinion, would debar the petitioners from raising such claim at the stage

of challenge to the Award under Section 34 of the Act. Respondent and the Arbitrator were to be put to specific notice of the nature of claim. Vague pleadings would not entitle the petitioners to later contend that such claims were not dealt with by the Arbitrator.

29. It may also be of interest to note that in claim No. 9, in fact, the petitioners had claimed damages for alleged illegal termination of contracts for the sites that were allotted to them on 15.07.2009. This is clearly contradictory to the claim now being set up by the petitioners. If the sites were not in use, the claim would have been one of refund of licence fee and earnest money like in claim Nos. 3 and 4, and not one for damages.

30. The Arbitrator under the impugned award has awarded a sum of Rs.5 lacs in favour of the respondent as costs. I may only quote paragraphs 103 and 104 of the impugned award where the Arbitrator has discussed the issue of costs claimed by the respondent as Counter Claim no.4.

“103. Costs are claimed on the ground that the claims put in by the Claimants are based on illegal and arbitrary conduct of the Claimants.

104. In the facts and circumstances of the case, I am inclined to award Rs.5,00,000/- in favour of the Respondent towards costs of the proceedings.”

31. Section 31 (8) of the Arbitration and Conciliation Act, 1996 before its amendment by Act '3' of 2016 read as under:-

“(8) Unless otherwise agreed by the parties,--

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify—

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation.—For the purpose of clause (a), “costs” means reasonable costs relating to—

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.”

32. A reading of the above sub-section would show that only ‘reasonable costs’ could be awarded by the Arbitrator.

15. The Supreme Court in case of *Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust & Ors.* 2012 1 SCC 455 has held that what can be awarded under section 31 (8) is not ‘actual’ expenditure but ‘reasonable costs’. I may only quote from the said judgment as under:-

“Costs in arbitration matters

37) *We have referred to the effect of absence of provisions for award of actual costs on civil litigation. At the other end of the spectrum is an area where award of actual but unrealistic costs and delay in disposal is affecting the credibility of an alternative dispute resolution process. We are referring to arbitration proceedings where usually huge costs are awarded (with reference to actual unregulated fees of arbitrators and advocates).*

38) *Clause (a) of Section 31 (8) of the Arbitration and Conciliation Act, 1996 ("the Act", for short) deals with costs. It provides that unless otherwise agreed by the parties, the costs of an arbitration shall be fixed by the Arbitral Tribunal. The Explanation to sub-section (8) of Section 31 makes it clear that "costs" means reasonable costs relating to (i) the fees and expenses of the arbitrators and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. Clause (b) of Section 31(8) of the Act provides that unless otherwise agreed to by the parties, the Arbitral Tribunal shall specify (i) the party entitled to costs, (ii) the party who shall pay the costs, (iii) the amount of costs or method of determining the amount, and (iv) the manner in which the costs shall be paid. This shows that what is awardable is not 'actual' expenditure but 'reasonable' costs."*

33. In the present case, the Arbitrator did not do the exercise that was to be done under section 31 (8) (b) of the Act specifically with regard to the method of determining the costs. I may only note that the amount of claims and counter claims in the arbitration proceedings and the final award of a sum of Rs.79,26,461/- in favour of the respondent does not justify the award of Rs.5 lacs to the respondent as 'reasonable costs'. The Arbitrator should also have taken into account the fact that the respondent in spite of directions of the arbitral tribunal, did not carry out the reconciliation of accounts due to which, in fact, the Arbitrator even

held that the respondent was not entitled to claim interest pre-reference and *pendente lite*. There were other claims of the petitioner that were also allowed in their favour.

34. In my view, as the petitioner has been found liable to pay a sum of Rs.79,26,461/- to the respondent, cost of Rs.50,000/- in favour of the respondent would have sufficed.

35. In view of the above finding, I allow the present petition only to the extent that the award so far as it directs the petitioners to pay cost of Rs.5 lacs to the respondent is set aside and the petitioner is directed to pay a cost of Rs.50,000/- to the respondent.

DECEMBER 01, 2017/sd

NAVIN CHAWLA, J

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