

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

Reserved on: 04.09.2018

Pronounced on : 17.09.2018

+ **FAO(OS) (COMM) 52/2018 & C.M. APPL. 11376 11377/2018**

+ **FAO(OS) (COMM) 53/2018 & C.M. APPL. 11378-11379/2018**

ADWEL ADVERTISING SERVICE & ANR Appellants

versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent

Through: Sh. Ravi Gupta, Sr. Advocate with Ms. Vaishnavi Rao, Sh. Tarang Agarwal, Sh. Apoorva Vijh and Sh. Sachin Jain, Advocates, for appellants.

Sh. Sanjay Poddar, Sr. Advocate with Sh. Gaurang Kanth, Ms. Biji Rajesh, Sh. Govind Kumar and Sh. Sharaf Habibbula, Advocates for respondent.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. These two appeals, challenge the rejection of petitions, under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') by a learned single judge, which had challenged two arbitration awards dated 22.05.2017 (Case No. 15/2011, which is subject matter of FAO (OS)(Comm) 53/2018) and another dated 22.05.2017 (Case No. 14/2011, which is subject matter of FAO (OS)(Comm) 52/2018).

2. The facts in FAO(OS)(COMM) 53/2018 are that respondent corporation (hereafter "SDMC") had awarded work of construction, maintenance and operation of toilet blocks to the appellant ('Adwel')

hereafter). SDMC issued letters of award for toilet sites in favour of Adwel with respect to 9 (nine) sites; further sites too were given. After the expiry of the contractual period, some sites (5) were allotted to Adwel and Adwel claimed that other sites were also allotted in their favour. SDMC issued demand letters calling upon Adwel to pay licence fee agreed to be paid by it in the allotment letters, of which it disputed liability. These disputes were referred to Arbitration by this Court. The Arbitral Tribunal made the impugned award allowing some of claims Adwel's claims and disallowing others. Adwel challenged the award, to the extent of Claim Nos. 6 and 9 and also the counter Claim Nos. 1 and 4.

3. Claim No. 6 was one for refund of ₹ 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. Adwel alleged that no amount was due and payable to SDMC, and certain amounts were recoverable from it; since the termination was bad, it was entitled to damages for such illegal termination. Adwel's challenge was to the tribunal's finding that the sum of ₹1,04,62,004/- could not be adjusted against the licence fee demanded by it and without such adjustment, it was in default of payment of the licence fee which justified the termination of the contracts. Adwel had urged that SDMC had issued a tender for granting advertisements on mobile vans which they successfully bid for and had deposited a sum of ₹ 90,62,000/- towards the licence fee and ₹ 14,00,000/- as three months' security towards the award of advertisement rights under the above tender. The total amount thus, was ₹1,04,62,004/-. As the contract could not be operationalized due to lack of

police permission for plying mobile vans, SDMC, by its letter dated 23.06.2008, allowed adjustment of the said amount against the other contract allotted to the petitioners. Adwel sought adjustment of the said amount against the dues payable by it under the contracts for the toilet sites (which was the matter of dispute in the arbitration) and in this regard, had written letters dated 07.08.2008 and 13.11.2009 to SDMC, which were however, not responded to. Adwel claimed entitlement to adjustment of the sum of ₹1,04,62,004/-. The Tribunal rejected this claim, stating as follows:

“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:-

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:-

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.

(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 v Peerless General Finance & Investment Co. Ltd. (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)

4. SDMC had relied on *Union of India v Birla Cotton Spinning & Weaving Mills Ltd* AIR 1967 SC 688, where the Court rejected the application for stay 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. This too, was noticed in the tribunal's award. The findings of the tribunal in this regard were upheld by the learned single judge. The impugned judgment also rejected Adwel's challenge to the award, on the ground that Claim No. 9 and Counter Claim No. 1 had not been adjudicated.

5. Mr. Ravi Gupta, learned senior counsel submitted that the impugned judgment is erroneous in its appreciation of the correct position in law. He relied on *Cofex Exports v Canara Bank* AIR 1997 Del 355, where it was held that:

“Equitable set-off- A court of equity or a court possessing equitable jurisdiction has inherent power as a part of its general jurisdiction to allow or compel a set off. This power is independent of statutes allowing a set off. (pg 361) "Adequacy of Remedy at Law. Equity will not aid a defendant in an action at law as to matters of set-off when his legal remedies are complete and adequate, but it may allow a set-off where, from the nature of the claim or situation of the parties, justice cannot be done at law.(pg. 362) A counter-claim is purely a statutory remedy of modern origin; it was not known to the common law, or before the adoption of the codes and in some states which have not adopted codes there is no statute providing for a counterclaim in an action at law. It is substantially a cross action by defendant against plaintiff and secures to defendant the full relief which a separate action at law, a bill in chancery or a cross bill would have secured him on the same state of facts.(pg.366)”

6. Urging that the documents, in the form of admission (through letters written by the SDMC) were a matter of record before the arbitral tribunal, learned senior counsel submitted that the award was liable to be set aside on

the ground that it ruled out applicability of the appellant's right to equitable set-off.

7. Learned counsel submitted that the narrow view preferred by the tribunal that it was bound by the four corners of the arbitration agreement, which barred it from considering principles of equity, is not borne out by law. He relied on *Olympus Superstructures Pvt. Ltd. v Meena Vijay Khetan and Ors* 1999 (5) SCC 651 to say that an arbitral tribunal too can apply principles of equity. Counsel also cited *Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors* 2011 (5) SCC 532 as long as the subject matter of dispute is not expressly or impliedly barred, the dispute can be arbitrable.

8. The next ground on which the award and the impugned order are attacked, are with respect to Claim No. 9 and Counter Claim No. 1. Mr. Gupta complained that the tribunal omitted to adjudicate on Adwel's pleas with regard to site nos. 20, 40 and 45 allotted to it on 15.07.2009. It is submitted that these sites could not be used 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.

9. Mr. Sanjay Poddar, learned senior counsel for the Corporation, urged that the concurrent observations of the tribunal and the learned single judge with respect to inapplicability of the principle of equitable set-off, in arbitration are sound and do not call for interference. He also relied on *Birla Cotton Spinning & Weaving Mills Ltd (supra)* to urge that only matters that fall within the scope of reference to arbitration, and no other *inter se*

transaction between parties, is arbitrable. He also relied on the findings of the learned single judge and the tribunal in regard to Claim No. 1 and counter claim urging that there is no patent illegality in the award, calling for interference.

10. The first question which needs to be decided is whether on an application of the principle of equitable set-off, Adwel could claim diminished liability. Adwel had relied on *Jitendra Kumar Khan and Others v Peerless General Finance and Investment Co Ltd. and Ors.* 2013 (8) SCC 769; the court tested the applicability of the “equitable set-off” doctrine in an application for amendment of the suit and observed that:

“16. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good con science. 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 and Barlow v. Bengal Spinning and Weaving Co.* (1897) 21 Bom 126 and *Girdharilal Chaturbhuj v. Surajmal Chauthmal Agarwal* MANU/NA/0058/1939 : AIR 1940 Nag 177”

11. As to what constitutes equitable set-off and the conditions for its applicability were elaborated in *Union of India v Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Ors.* 2004 (3) SCC 504 when the Supreme Court held as follows:

"What the rule deals with is legal set-off. The claim sought to be set off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the

two claims sought to be set off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so."

12. Likewise, in *Lakshmichand and Balchand v State of A.P.* (1987) 1 SCC 19, the Supreme Court ruled that when a claim is founded on the doctrine of equitable set-off all cross-demands are to arise out of the same transaction or the demands are so connected in the nature and circumstances that they can be looked upon as a part of one transaction. It is, therefore, clear that firstly, application of the principle (of equitable set-off) is discretionary and secondly (perhaps more importantly) there ought to be a strong interconnectivity or linkage between the two – the claim and the right to claim equitable set-off; they should be in fact part of the same transaction. In this case, the advertisements that were the subject matter of the dispute were on the toilet blocks which the SDMC had allotted in public auction to Adwel; the subject matter of the equitable set off claim was in respect of a contract for display of advertisement through motor vehicles in respect of South Zone; Adwel sought refund/adjustment of security deposit. These two transactions do not have any connection; they are also set apart in time. Consequently, the claim for equitable set-off even on the application of the doctrine, was inapplicable.

13. In *Olympus Superstructures Pvt. Ltd (supra)*, the Supreme Court held that:

“38. In our opinion, the view taken by the Punjab, Bombay and Calcutta High Courts is the correct one and the view taken by the Delhi High Court is not correct. We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree - with a view to shorten litigation in regular courts - to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning Immovable property.

39. It is stated in Halsburys' Laws of England 4th Ed., (Arbitration Vol.2 para 503) as follows:

Nature of the dispute or difference: The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the differences can be compromised lawfully by way of accord and satisfaction (Cf. Bacon's Abridgement and Award A).

40. Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, (say) physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman) (1846) 9 Q.B, 371. Similarly, it has been held that a husband and wife may, refer to arbitration the terms on which

they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst) (1801) 2 Bos 444; Wilson v. Wilson (1848) 1 HL Cas 538; (Cahill v. Cahill) (1883) 8 App Cas 420”

14. Similarly, *Booz Allen (supra)* also stated what can be subject matter of arbitration, thus:

“22. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

23. *It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary). Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.*

24. *The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."*

15. As this court perceives, above two decisions state that specific performance can also be a subject matter of arbitration. To say that is one thing; however, to infer that because contracts for specific performance can be subject matter of arbitration, an arbitral tribunal can exercise the discretion of equitable set-off is quite another. One of the fundamental conditions which involves application of that doctrine is that it is

discretionary and more importantly, it should pertain to transactions which are so intrinsically connected with each other so as to lead to the inference that in reality there was one transaction. Here, the contracts were entirely different. For these reasons, the denial of applicability of the principle of equitable estoppel was neither patently illegal nor unreasonable, warranting interference with the award.

16. With regard to the license fee claimed for certain sites, for which the tribunal directed payment, it was urged before the learned single judge that Adwel was not liable, because the sites were not available. The learned single judge noticed that no specific claim had been made in arbitration and that Adwel had made certain vague and general pleadings. With respect to Claim No. 9, in fact, Adwel claimed damages for alleged illegal termination of contracts for the sites that were allotted to them on 15.07.2009, which the learned single judge held was clearly contradictory to the claim set up by it. 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. It was sought to be urged in respect of these sites, that Adwel had applied for no objection and appropriate clearance well in time, contrary to the findings of the tribunal. This court is of the opinion that the tribunal's findings on this are clear; it analysed the facts and discerned that in terms of the agreement, Adwel had to pursue with the local authorities for electricity and water connection. It had apparently not done so. Since the court has limited scrutiny over awards of tribunals which can be interfered with only on grounds of patent illegality or so unreasonable a conclusion that no reasonable man in the like facts could reach such finding, exercise of the

powers under Section 34 (and on appeal, under Section 37) is unwarranted. For these reasons, the appeal (FAO(OS)(COMM) 53/2018) has no merit and is dismissed without order on costs.

17. The facts in FAO (OS)(Comm) 52/2018 are similar; the toilet block (No. 14 at Andheria Mor, MG Road - hereafter “the site”) was allotted to Adwel on 08.11.2017. Physical possession of the block was handed over by SDMC on 03.06.2008; Adwel had to pay a monthly license fee of ₹2,26,000/- to SDMC after an incubation period of three months. It had paid ₹12,57,500/-; the SDMC issued show cause notice and finally cancelled the contract on 15.05.2009. It claimed ₹13,99,389/- from Adwel as license fee. Adwel sought a larger amount as compensation for wrongful termination of contract; it also sought reconciliation of accounts. Its claim was rejected by the tribunal, who allowed SDMC’s counter claim for unpaid license fee for the period 03.09.2008 to 15.05.2009. Adwel claimed that the NOC was given late, only on 12.02.2009 which delayed the use of the site. The tribunal noted that in terms of clause 3.3 of the allotment letter, Adwel was under an obligation to secure necessary electricity, water and sewage connection and that NOC was sought from the SDMC for the first time on 04.02.2009.

18. Mr. Ravi Gupta, learned senior counsel argued that the tribunal and the Learned Single Judge fell into error in not noticing that the site could be operationalized only after the no objection was given and that the arbitral tribunal did not appreciate the facts in totality.

19. This court is of the opinion that what the appellant Adwel is urging are pure questions of appreciation of facts. The tribunal after analysing the

20. In the light of the foregoing discussion, the court is of opinion that both the appeals have to fail. Accordingly, FAO (OS) (Comm) 52/2018 and FAO (OS) (Comm) 53/2018 are dismissed, but without order on costs.

A.K. CHAWLA
(JUDGE)

FAO (OS) (COMM) 52/2018 & 53/2018