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

Date of decision: 13th April, 2018

+ O.M.P. (COMM) 153/2018

SOUTH DELHI MUNICIPAL CORPORATION Petitioner
Through: Mr.Sandeep Bajaj, Mr.Soayib Qureshi,
Mr.Naman Tandon, Advs.

versus

MSV INTERNATIONAL INC Respondent
Through: Mr.Rohit Goel, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 4960/2018

Exemption allowed subject to all just exceptions.

OMP (Comm.) 153/2018

1. Issue notice. Mr.Rohit Goel, Advocate accepts notice on behalf of the respondent.
2. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 12th December, 2017 passed by the Arbitral Tribunal consisting of three Arbitrators.
3. The disputes between the parties are in relation to the

Agreement dated 20th November, 2006 by which the petitioner granted to the respondent the work of preparation of the Master Plan, Feasibility Study and Pilot Plan Implementation on Dairy Farm Waste Management in Delhi. The work was to be completed within a period of 9 months from the date of the Award.

4. Admittedly, the work could not be completed within the stipulated period and the petitioner granted extension of time in favour of the respondent from time to time, the last being by its letter dated 5th January, 2011, by which the time for completion of work was extended till 31st January, 2011.

5. The petitioner claiming that the respondent was delaying the completion of work, issued a show cause notice to the respondent on 27th January, 2011. On the same day and on the subsequent day i.e. 28th January, 2011, the respondent submitted to the petitioner the final report in terms of the Work Order. The petitioner did not consider the same and instead proceeded to terminate the Agreement vide its notice dated 29th April, 2011 as also blacklisted the respondent for further award of work. This led to the disputes between the parties and they were referred to arbitration by the present Arbitral Tribunal.

6. Counsel for the petitioner submits that as the respondent had delayed the execution of the work, the Govt. of India terminated the second part of the project by its decision dated 26th August, 2010. He further submits that due to such delay, the petitioner was left with no option but to terminate the work awarded to the respondent and also seek recovery of the amount already paid to the respondent for the said work. He submits that in any case, the petitioner was entitled to

withhold the payment of the balance amount under the Agreement for such delay. He relies upon Clause 2.4 of the Agreement to contend that the petitioner was entitled to recover the total payment made to the respondent for the said work in case of termination of the Agreement.

7. I have considered the submissions made by the counsel for the petitioner, however, I am unable to agree with the same.

8. Admittedly, the petitioner had extended the time for the completion of work till 31st January, 2011 by its letter dated 5th January, 2011. It was duly proved before the Arbitral Tribunal that the respondent had submitted the final report in terms of the Agreement on 27th January, 2011 and 28th January, 2011 i.e. within the extended period. Therefore, it could not be denied that the respondent had duly completed the work under the Agreement and was entitled to payments under the said Agreement. The Arbitral Tribunal also considered this issue and has held as under in its impugned award:-

“That third question is as to the amount of claim which has been claimed in the present petition. As per the record the contract in question was awarded to the claimant by the Respondent for Rs.13493700/- plus service tax Rs.1651629/- totaling Rs.15145329/-. This cost was subsequently reduced to Rs.1,25,41,103/-, as is clearly stated in the minutes of meetings held on 24.02.2014 between the parties, in which Sh. Sanjeev Gandhi Director (F) of the Claimant was present, who has appeared as CW1 in the present proceedings. Pages from 331 to 333 to this effect are missing from the statement of claim filed. After removal of all the deficiency pointed out to the respondent qua 3rd final report dated 27.01.2011. Respondent has filed copy of the minutes and the attendance sheet (Pages

45 to 49) and the same has been admitted by the claimant in the affidavit of admission /denial dated filed in the present proceedings. But from the record it is proved that total cost of the project was reduced to Rs.12541103/-. Out of this amount claimant has admittedly received Rs.76,76,076/- and only a balance amount of Rs.1254103/- (-) Rs.76,76,076/- = Rs.48,65,027/- remains to be paid. Accordingly claim of the claimant has to be considered for payment of Rs.48,65,027/- alongwith interest, if any.”

(iv) Last point to decide this issue No.1 is as to what amount claimant is entitled to, if any. As per undisputed record claimant had submitted Final Feasibility Report alongwith compliance report vide letter dated 30.3.2010, as stated in the letter dated 29.4.2010 at page 50 of the documents and exhibited as Ex.R7 by the Respondent. As discussed above the claimant had filed 3rd final report with the Respondent vide letters dated 27.1.2011 and 28.1.2011 (Ex.PW1/124 to PW1/126), submitted final report vide letters dated 27.1.2011 and 28.1.2011, although as per case of the Respondent filing of this report has not been admitted by the Respondent. As per clause 6.4 (d) (Page 32) of the agreement final payment was to be made only after the final report is submitted by the claimant and only after the same is “approved as satisfactory by the Employer”. Although Respondent has filed show cause notice dated 27.1.2011 issued to the claimant and subsequent correspondence and meetings, but Respondent has not filed on record any material to show that Respondent has raised any objection qua this final report submitted by the claimant on 28.1.2011. Further respondent has not proved by way of evidence that Respondent has shown any dissatisfaction/ deficiency about the work for which this final report was submitted by the claimant. Respondent has not examined any witness to prove that the report was not satisfactory. Respondent has examined only one witness RW1 Sh. Yash Pal Dahiya Ex.En of the Respondent, who in his cross examination has stated that he was given additional charge of YAP-II since November, 2014. He has further stated that Mr. Satish Kumar

Kataria, the then Ex.En had filed the written statement and counter claim in this case. This witness has proved only documents of the record of the office and is not aware about any other fact. The Respondent has not examined said Mr.Satish Kumar Kataria or any other person who had made scrutiny of this report as witness, who could prove any deficiency in the work done by the claimant as per report submitted on 27/28th January, 2011 and Respondent has not shown any dissatisfaction on record for the same.”

9. A reading of the above finding would show that the Arbitral Tribunal has awarded the claim of the respondent in its favour on the ground that the work having been completed within the extended period of time, the respondent was entitled to the contractual amount as the contract in question was a turnkey contract and it was not the case of the petitioner that the final report submitted by the respondent was in any manner deficient or unsatisfactory. I find no reason being made out to interfere with this finding of the Arbitral Tribunal.

10. As far as the claim of the petitioner that the entire amount paid under the contract to the respondent was liable to be refunded by the respondent to the petitioner in view of the termination of the Agreement, the Arbitral Tribunal has considered the said issue and has held as under:-

(v) Now only question left is as to what amount claimant is entitled to. Ld. Counsel for the respondent has argued that claimant is not entitled to any payment, rather under clause of the agreement, claimant is liable to refund the amount already paid, because the work was incomplete and no supporting material i.e. bills, vouchers etc. for payment has been filed on record to support his claim for the work alleged done. Claimant has filed on record voluminous documents running from pages

375 to 581 and CW1 Sh.Sanjeev Gandhi in his affidavit of Evidence has exhibited them as Ex.PW1/141 to PW1/160. He has also exhibited these document in his statement recorded in the proceedings on 30.1.2015. In the affidavit of admission/denial dated 5th September, 2014 filed by the respondent, all these documents have been admitted, denying the contents thereof. In the cross-examination although questions were put to this witness qua these documents, but nothing material could be extracted to contradict the same. Counsel for the Respondent has cited case of Devraj Kataria Vs. Delhi Jal Board 2016 (1) Arb.LR. 196(Del) in para 13 of the written arguments dated 6.10.2016, but did not file photocopy of this judgment. The title of this case has been wrongly mentioned. The correct title is Delhi Jal Board & Anr. Vs. Dev Raj Kataria and Anr. 2016(1) Arb.L.R. 196(Delhi) decided by Hon'ble Delhi High Court. This judgment is not applicable in the facts and circumstances of the case in hand. In this reported case the contract was rescinded by the contractor because the Claimant i.e. Delhi Jal Board, was guilty of delays in performance of contract and consequently Respondent therein was entitled to claim cost/ expenses incurred for the contract. But in the case in hand, the facts are different and as such this ruling is not applicable. Even otherwise the respondent is not concerned as to have much amount the claimant has spent to complete the project.

In view of above discussion, it is held that claimant is entitled for the balance amount of the agreement i.e. Rs.48,65,027/- Issue No.1 is decided accordingly.

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“4. To what amount of the counter claim the respondent is entitled?

5. Whether the respondent is entitled for interest on the amount as may be awarded as per issue No.4 and if so, at what rate and for which period?

In view of findings on Issue No.1, claimant is entitled to balance amount of Rs. 48,65,027/- and as such Respondent is not entitled for any refund as claimed in the counter claim. Secondly the counter claim dated 7.5.2014 is also time barred, having been filed after expiry of 3 years period of limitation from the date when cause of action had allegedly accrued. As per the undisputed facts, the last payment was made by the Respondent to the claimant upto 24.2.2010 and so period of limitation of 3 years would start from this date. The counter claim has been filed on 07.05.2014 i.e. after expiry of 3 years period of limitation and so the counter claim is time barred. This legal position has been laid down by the Hon'ble Supreme Court in the above referred case i.e. State of Goa Vs. Praveen Enterprises, wherein para 17 of the judgment it has been held that:-

“17. As far as counter-claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the counter claim is made in court shall be deemed to be the date of institution of the counter-claim. As Limitation Act, 1963 is made applicable to arbitrations, in the case of a counter claim by a respondent in an arbitral proceedings, the date on which the counter claim is made before the arbitrator will be the date of 'institution' in so far as counter-claim is concerned”

So Respondent is not entitled to any amount claimed by way of counter claim. Because Respondent is not entitled to any amount, so question of award of any interest on this amount does not arise. Issue No. 4 & 5 are decided accordingly.”

11. Reliance of the counsel for the petitioner on clause 2.4 of the Agreement is ill-founded inasmuch as, the said clause merely limits the liability of the respondent to the amounts paid under the contract.
12. Clause 2.4 of the Agreement is quoted herein below:-

“2.4 Expiration of Contract

The time period shall be nine (9) continuous months from the date of commencement.”

13. Clause 2.4 of the Agreement does not automatically entitle the petitioner to the refund of the full amount paid under the contract in case of alleged delay by the respondent in the completion of the contract. The petitioner was to independently prove before the Arbitral Tribunal the damages suffered by it due to any alleged delay in the performance of the contract by the respondent.

14. In ***Union of India v. Raman Iron Foundry***, (1974) 2 SCC 231, the Supreme Court has held as under:-

“11. Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all

stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in Jones v. Thompson [(1858) 27 LJ QB 234 : 120 ER 430] “Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed”. It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O'Driscoll v. Manchester Insurance Committee [(1915) 3 KB 499 : 113 LT 683] Swinfen Eady, L.J., said in reference to cases where the claim was for unliquidated damages: “...in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given”. The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, Javed Sheikh v. Taher Mallik [AIR 1941 Cal

639 : 197 IC 606 : 45 Cal WN 519] , S. Milkha Singh v. N.K. Gopala Krishna Mudaliar [AIR 1956 Punj 174] and Iron and Hardware (India) Co. v. Firm Shamlal and Bros [AIR 1954 Bom 423, 425-26 : ILR 1954 Bom 739 : 56 Bom LR 473] . Chagla, C.J. in the last mentioned case, stated the law in these terms: (at pp. 425-26)

“In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.”

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of clause 18, the purchaser is

entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.”

15. In the present case, as the counter claim filed by the petitioner was found to be barred by the law of limitation, the Arbitral Tribunal did not have to further proceed with the merit or demerit of the counter claim made by the petitioner. No challenge was made by the petitioner to the finding of the Arbitral Tribunal with respect to the counter claim being barred by the law of limitation. In that view of the matter, I need not dwell any further on the merit of the said counter claim. It may suffice to note that the petitioner is unable to show any provision in the contract which would entitle it to withhold the amounts payable to the respondent in the form of liquidated damages or otherwise, alleging only delay in the completion of the work on the part of the respondent, specially where the time for completion of work had been extended by the petitioner itself. Even assuming that the petitioner was entitled to levy damages, such damages had to be proved in accordance with law. Mere reservation of right to levy damages in letter granting extension of time, would not mean that such damages need not be quantified or proved.

16. Counsel for the petitioner submits that the Arbitral Tribunal has

not considered the issue of delay in the completion of the work by the respondent and the effect thereof. It is the submission of the counsel for the petitioner that the effect of such delay was the scrapping of the project by the Govt. of India.

17. As discussed above, it was for the petitioner to have led evidence on the effect of delay as part of its counter claim. As the counter claim is found to be barred by the law of limitation, the Arbitral Tribunal has rightly rejected the same. In any case, as there is no clause in the Agreement authorizing the petitioner to levy liquidated damages for such delay or entitling it to withhold the amounts otherwise payable under the contract to the respondent on the ground of such alleged delay, such Counter Claim was rightly rejected by the Arbitral Tribunal.

18. In any case, as held by the Supreme Court in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, this Court would not act as a Court of Appeal while adjudicating on a challenge to the Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996. I do not find the Arbitral Award to be suffering from any of the limited grounds that have been explained by the Supreme Court in the above judgment for setting aside an Arbitral Award.

19. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

NAVIN CHAWLA, J

APRIL 13, 2018

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