

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

+ **O.M.P. (COMM) 207/2016**

Reserved on: 9th July, 2018
Date of decision : 19th July, 2018

NORTH DELHI MUNICIPAL CORPORATION Petitioner

Through: **Mr.Sunil Goel, Standing Counsel
for MCD with Ms.Supreet Bimbra
& Mr.Mayank Goel, Advs.**

versus

RAVI BUILDERS Respondent

Through: **Mr.Moni Cinmoy & Mr.Arvind
Kr. Pandey, 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') has been filed by the petitioner challenging the Arbitral Award dated 16.03.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to Work Order No.EE (Br.)/II/TC/99 dated 19.01.2007 relating to construction of Storm Water Drainage System and Footpath as per work of improvement and strengthening of Sarai Phoose Road starting from Burf Khana Chowk to Daffrin Bridge Crossing in Civil Line Zone.

2. The Work Order mentioned the contractual amount of the work as ₹1,40,00,050/-. The stipulated time for completion of work was fifteen

months starting from 28.01.2007. The work was finally completed by 30.09.2009.

3. The Arbitrator in his Impugned Award has awarded the following claims in favour of the respondent and against the petitioner:-

- “(i) Claim no. 1 : Payment of alleged Final Bill : Rs.26,96,636/-*
- (ii) Claim no. 4 : Escalation under Clause 10CC : Rs.16,83,902/-*
- (iii) Claim No.5 : Refund of Earnest Money / Security Deposit : Rs.10,29,884/-*
- (iv) Claim No.6 : Interest on Rs.54,10,422/- (aggregate of claim no.1, claim no.4 and claim no.5) @ 10% p.a. from 1.4.2010 till the date of filing of claims dt 4.5.2013 (37 months): Rs.16,68,213/-*
- (v) Claim no.7 : Interest on Rs.70,78,635/- (aggregate of claim no.1, claim no.4, claim no.5 and claim no.6) @ 10% p.a. from 4.5.2013 till 16.3.2015 (23 months) : Rs.13,56,738/-*
- (vi) Claim no.8: Arbitration cost: Rs.2,00,000/-.”*

4. The objection of the petitioner against the Impugned Award is that there was no Arbitration Agreement in existence between the parties and therefore, the award has been passed without jurisdiction. In this regard it has placed reliance on a Circular dated 11.12.2006 issued by the MCD, Engineering Department, communicating the decision of deletion of arbitration clause in all future Notice Inviting Tenders (NIT) issued by the MCD.

5. In the present case the NIT was issued by the petitioner on 20.05.2006, that is prior to the date of issuance of the said Circular and admittedly the NIT was published making reference to the Terms and Conditions, which included the arbitration clause. The Work Order issued to the respondent made the Terms and Conditions of the NIT applicable

to the contract and therefore, the Arbitration Agreement equally applied. The petitioner cannot unilaterally amend the terms and conditions of this contract by way of the Circular dated 11.12.2006. In ***Bharat Sanchar Nigam Ltd. & Anr. v. BPL Mobile Cellular Ltd. & Ors.*** (2008) 13 SCC 597, Supreme Court held that:

“If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to, we are of the opinion, that no interference with the impugned judgment is called for.”

6. In any case, a reading of the Circular does not suggest that it will apply retrospectively to concluded contracts.

7. I therefore, do not find any merit in the objection raised by the petitioner.

8. On the merits of the Award, the petitioner challenges the award of ₹26,96,636/- on Claim no. 1 by contending that while the Work Order stipulated the contractual amount as ₹1,40,00,50/-, admittedly an amount of ₹1,39,97,156/- had been paid by the petitioner to the respondent with the payment of 6th Running Account Bill (RA Bill) on 31.03.2010. It is submitted that with this payment, full and final payment for all work done by the respondent pursuant to the Work Order had been duly made by the petitioner and therefore, the Arbitrator has erred in awarding further amounts under Claim no. 1. It is further submitted that the respondent had not led any evidence in support of this Claim and

therefore, the Arbitrator could not have granted the same in the favour of the respondent.

9. I have considered the submissions made by the counsel for the petitioner, however, I am unable to agree with the same. The Arbitrator has recorded that the 6th RA Bill was raised on 14.09.2009 and had measured the work done till the end of the second week of July 2009. The work was completed by the respondent, as noted above, on 30.09.2009. Therefore, the 6th RA Bill did not contain the work done between the end of the second week of July 2009 (when the measurement for 6th RA Bill was taken) till 30.09.2009. The 6th RA Bill therefore, cannot be considered as the final bill in terms of Clause 9 of the Agreement between the parties which makes a distinction between the running bill and the final bill.

10. As far as the evidence in proof of the claim and the finding is concerned, the respondent had filed an application under Section 24(3) of the Act seeking production of the Measurement Book which had duly recorded the measurements taken by the parties contemporaneous with the execution of the work. The Measurement Book was not produced by the petitioner and therefore, the Arbitrator has drawn an adverse inference against the petitioner on this account. Even the “Site Order Book” which was produced by the petitioner was found not to contain the purported instructions given by the Site Engineer of the petitioner to the respondent and was completely blank. The Arbitrator, therefore, held as under:-

“46. It may be noted that neither the 'scope of work' nor the 'schedule of quantities' has been produced by the respondent on record of this Tribunal. Had the scope of work and the schedule of quantities would have been filed, it could probably be used in ascertaining the work actually carried out at the site. The fact remains that as per testimony of RW -2 the payment made to the claimant up to the 6th RA bill was only in regard to the work till the stage of lean concrete work. As per the work order dated 19/01/2007 the claimant was also required to construct footpath with interlocking tiles on both sides of the carriageway on a stretch of almost 2 kilometres between Burfkhana Chowk and Daffrin Bridge. In the course of oral hearing the Ld Counsel appearing on behalf of the respondent had no option but to agree that the said work of footpath could have been possible only after the work of lean concrete was over. The very fact that the claimant was paid almost the entire contractual amount up to the 6th R A Bill pertaining to work till the stage of lean concrete shows that the quantities of work must have exceeded over and above the quantities initially worked out/ estimated at the time of getting the financial approval. Indeed, a variation (plus or minus) up to 10% of the awarded work is invariably admissible in construction contracts and does not require any further sanction or approval from the concerned authorities. However, in the present case, as per the final bill dated 03/12/2009, the variation appears to be around 18% above the contractual amount. In the opinion of this Tribunal the claimant cannot be made to suffer for want of requisite permission, required if any because it is evident from the evidence on record that the respondent has played the game of hide and seek and has withheld the best evidence from the Tribunal in its possession in regard to the actual work done by the claimant at the site. Thus the mere acceptance of the R A bills by the claimant is of no consequence, either legal or factual, on his claims arising out of the contract in the present case.

47. From the above discussion, it stands amply proved that the payment received by the claimant against his 6th RA Bill was not accepted by him as final payment for the entire work done by him at the site. It is further proved that the final bill dated 03.12.2009 (Ex.CW-1/11 Colly) was submitted by the claimant to the

respondent within three months of the completion of work on 30.09.2009 in terms of Clause 9 of the agreement and that the payment against the final bill dated 03.12.2009 was not made by the respondent till date although the work mentioned in the details annexed therewith was executed by the claimant at site. Hence the claimant is held entitled to an amount of Rs.26,96,636/- from the respondent against his final bill dated 03.12.2009. These issues are decided accordingly in favour of the claimant and against the respondent.”

11. The above being an appreciation of evidence led by the parties before the Arbitrator, this Court in exercise of its power under Section 34 of the Act cannot sit as a Court of appeal against the same and re-appreciate the evidence to arrive at a different conclusion. In any case, the reason given by the Arbitrator for allowing the said claim cannot be considered to be unreasonable or perverse in any manner so as to warrant any interference of this Court in exercise of its power under Section 34 of the Act.

12. The next objection taken by the petitioner against the Award is to the grant of ₹16,83,902/- in favour of the respondent as escalation under Clause 10 CC of the Agreement. The counsel for the petitioner submits that Clause 10 CC was specifically deleted from the Agreement executed between the parties by striking it out from the printed documents of the General Terms and Conditions. He further submits that in any case Clause 10 CC would not be applicable to the contract in question as the contractual period was less than eighteen months and in terms of Clause 32.8.2 of the CPWD manual, Clause 10 CC has been made inapplicable to all the contracts where the stipulated period for completion is eighteen months or less. He further submits that the claim of the respondent was in

the nature of damages which had to be proved by the respondent under Section 73 of the Indian Contract Act, 1872. He submits that the Arbitrator has considered the evidence led by the respondent towards its claim for escalation on account of labour, but, has rejected the same having found that the escalation in the Minimum Wages had no effect on the wages being paid by the respondent to its labour. At the same time, the Arbitrator did not conduct this exercise for the claim of the respondent towards escalation relating to the material charges. He submits that the claim awarded by the Arbitrator is therefore, without evidence and is liable to be set aside. He further relies on Clause 14 of the “General Conditions” which stipulates that the Contractors will have no claim in case of delay by the department in removal of telephone or electric lines, both overhead as also underground. He submits that in the present case the respondent has pleaded hindrance / delay in removal of the underground telephone and electric cables and therefore, the respondent was not entitled to maintain any claim of escalation on this account.

13. On the other hand, learned counsel for the respondent submits that Clause 10 CC, even assuming that it has been deleted from the contract, gives a general formula for calculation of damages in case of extension of the contractual period due to delay attributable to the owner. He submits that the Arbitrator was therefore right in adopting this formula. As far as the evidence is concerned, the learned counsel for the respondent submits that all supporting documents showing the increase in material cost have been submitted by the respondent to the petitioner alongwith its Running

Bills and as they were not produced by the petitioner, in spite of an application being moved, an adverse inference should be drawn against the petitioner in this regard. As far as Clause 14 of the “General Conditions” is concerned, the learned counsel for the respondent submits that the same were not duly proved before the Arbitrator. The document containing this term was simply filed in response to the direction of the Arbitrator to produce documents sought for by the respondent in its application under Section 24(3) of the Act, however, in this application this document was not sought for. As this document was not referred to in the evidence filed by the witnesses produced by the petitioner, the same could not have been relied upon.

14. I have considered the submissions made by the counsels for the parties. As far as deletion of Clause 10 CC from the Contract is concerned, the Arbitrator in his Impugned Award has accepted the same in paragraph 50, which is reproduced herein below:-

“50. Since a policy decision that clause 10 CC would apply only to those agreements where the time for completion of work stipulated in the agreement exceeds 18 months was taken by the respondent prior to the issuance of NIT in the present case, this arbitral tribunal is of the view that the said policy decision would bind the claimant also notwithstanding whether clause 10 CC was actually deleted from the agreement or not, more so when the claimant on his own witness No. 1 and CW-4 Mr. J. M. Puri, Former Superintending Engineer with the M.C.D. say in their respective cross that clause 10 CC is applicable only to those construction contracts where the time for completion stipulated in the contract exceeds 18 months.”

15. The Arbitrator, however, still makes the said Clause applicable by stating that as this Clause gives a general formula for calculating a claim

of escalation in prices, the same can be applied to the facts of the case. In my view, once the parties specifically delete the term of a printed form of document, effect has to be given to such deletion. In interpreting the Contract the intention of the parties is paramount. Such intention in the present case was expressed by the parties by deleting Clause 10 CC from the Contract and the same could not have been reintroduced by the Arbitrator through the back door by applying it as a general principle. It is a different thing to say that if an agreement is silent, Clause 10 CC may still be applied as general principle of law by the Arbitrator and implied into the contract, however, when this Clause has been specifically deleted, it cannot be reintroduced in the contract in form of an implied term.

16. In ***Nabha Power Ltd. (NPL) v. Punjab State Power Corporation Ltd. (PSPCL) & Anr.*** (2018) 11 SCC 508, Supreme Court laid down the principles for interpreting the terms of a commercial contract in the following words:

“49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. . It also sought to incorporate “the Officious Bystander Test” [Shirlaw v. Southern Foundries Ltd. (1926)]. This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give

business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society and Attorney General of Belize v. Belize Telecom Ltd. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

17. Therefore, in view of express deletion of Clause 10 CC, there was no warrant for the arbitrator to have reintroduced the same by implication.

18. As far as the application of Clause 10 CC is concerned, the Arbitrator also finds the same not to be applicable towards the claim of the respondent on account of increase in wages. The Arbitrator considered the evidence led by the respondent in support of its claim and found that from the muster roll / labour register it was evident that the respondent has not suffered any loss due to increase in wages. However, the Arbitrator did not conduct similar exercise for the claim made by the respondent on account of alleged increase in cost of material and simply applied a 25% deduction from the amount that would be arrived under Clause 10 CC. Therefore, even the Impugned Award applies Clause 10 CC selectively and in a partial manner.

19. As the claim made by the respondent was one of damages, it was for the respondent to prove the same by leading evidence in support of the claim of increase in cost of material. The respondent cannot support its claim by relying upon the lack of evidence led by the petitioner. The claimant has to stand on its own legs and support its own claims.

20. In *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49, the Supreme Court reiterated that if a finding of the Arbitral Tribunal is based on no evidence, it would warrant an interference by the Court under Section 34 of the Act, being in contravention with the Fundamental Policy of Indian Law.

21. As far as the applicability of Clause 14 of the “General Conditions” is concerned, I find that the same does not find any mention in the Impugned Award. The Arbitrator has not given any reason for rejecting the application of the same though it was specifically adverted to by the petitioner in the written submissions filed by the petitioner before the Arbitrator. Clause 14 of the CPWD Manual is reproduced hereinbelow:-

“14. The contractor will not have any claim in case of delay by the department in removal of trees or shifting, raising, removing of telephone, or electric line (over head or underground) water or sewer line or any other structure, if any, which may come in the way of the work. However, suitable extension of time can be granted to cover such delays, as provided in terms of contract.”

22. The above Clause would clearly disentitle the respondent to any claim on account of delay by the petitioner in removing of telephone or electric line; the delay alleged in the present case.

23. In view of the above, the Award of damages under Claim no. 4 cannot be sustained and is accordingly set aside.

24. The next challenge raised by the petitioner is to the award of ₹10,29,884/- as refund of earnest money / security deposit. As noted above, the work was completed on 30.09.2009. In terms of Clause 17 of the General Terms and Conditions the security deposit was refundable after the expiry of six months from the date of completion of the work. The counsel for the petitioner submits that the respondent was to produce a clearance certificate from the labour officer for seeking release of the security deposit. However, as the respondent failed to produce the same, it was not entitled to seek such release.

25. Clause 45 of the General Conditions on which reliance has been placed by the counsel for the petitioner, is reproduced below:

“CLAUSE 45

Release of security deposit after labour clearance

Security Deposit of the work shall not be refunded till the contractor produces a clearance certificate from the Labour Officer. As soon as the work is virtually complete the contractor shall supply for the clearance certificate to the Labour Officer under intimation to the Engineer-in-Charge. The Engineer-in-Charge, on receipt of the said communication, shall write to the Labour Officer to intimate if any complaint is pending against the contractor in respect of the work. If no complaint is pending, on record till after 3 months after completion of the work and/or no

communication is received from the Labour Officer to this effect till six months after the date of Completion, it will be deemed to have received the clearance certificate and the security Deposit will be released if otherwise due.”

26. I have considered the submissions made by the counsel for the petitioner, however, I do not find any merit in the same. The plea with regard to obtaining a clearance certificate relying upon Clause 45 of General Conditions was not taken before the Arbitrator. It has been contended for the first time in the petition filed before this Court. Be that as it may, before the Arbitrator till the passing of the Award and even in this petition, it is not contended that the petitioner has received any complaint either directly or through the Labour Department, with respect to non-payment or under payment of wages by the respondent. In view of the same, the objection of the petitioner against grant of Claim no.5 is rejected.

27. The petitioner also challenges the award of interest in favour of the respondent under Claim no. 6. The counsel for the petitioner relying upon Section 3(1)(b) of the Interest Act, 1978 submits that as there was no stipulation in the Contract for grant of interest in favour of the respondent / Contractor, interest would have become payable only from the date of a written notice claiming the same and not before that date. He submits as no such notice has been given, the respondent was not entitled to award of interest from 01.04.2010, that is six months from the date of completion of work.

28. I have considered the submissions made by the counsel for the petitioner, however, I am unable to accept the same. Section 31(7)(a) of

the Act empowers the Arbitrator to award interest for the period between the date on which the cause of action arose and the date on which the Award is made. The Arbitrator having exercised this discretion, the Award cannot be faulted. In any case, it is admitted by the counsel for the petitioner that even this plea was not taken by the petitioner before the Arbitrator.

29. The last contention raised by the counsel for the petitioner is to the award of interest *pendente lite* on the amount awarded under Claim no. 6 which itself was interest pre-arbitration. He submits that by including this amount the Arbitrator in fact has awarded interest on interest. I find merit in the said submission of the counsel for the petitioner. In terms of Section 3(3)(c) read with Section 2(a) of the Interest Act, the Arbitrator is not empowered to award interest upon interest. In this regard, distinction between Section 31(7)(a) and 31(7)(b) is also relevant. Section 31(7) of the Act, before its amendment is reproduced hereinbelow:-

“31.(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.”

30. It is only in Section 31(7)(b), because of use of the word “A sum directed to be paid by an arbitral award”, that the Arbitrator can award

interest on interest, as held by the Supreme Court in *Hyder Consulting (UK) Limited v. Governor, State of Orissa*, (2015) 2 SCC 189. Therefore, award of interest under Claim no.7 in so far as it directs payment of interest on the amount awarded under Claim no. 6 for the period from 04.05.2013 till 16.03.2015, that is *pendente lite* interest, cannot be sustained and is set aside.

31. As far as the objection of the petitioner to the rate of interest, this being a matter solely on the discretion of the arbitrator, the rate of interest awarded not being unreasonable and having regard to the Judgment of the Supreme Court in *Hyder Consulting (UK) Limited v. State of Orissa*, (2016) 6 SCC 362, cannot be sustained.

32. In view of the above, this petition is partially allowed. The Award in so far as it relates to Claim no. 1 and Claim no. 5 is upheld. The Award with respect to Claim No.4 is set aside and consequently, Award with respect to Claim No.6 shall stand modified as the respondent would not be entitled to any interest on amount that had been awarded under Claim No.4. The Award under Claim No.7 shall also stand modified and the respondent shall not be entitled to *pendente lite* interest on amount awarded under Claim Nos.4 and 6.

There shall be no order as to costs.

NAVIN CHAWLA, J

JULY19, 2018/rv