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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 160/2018**

Date of decision: 10th August, 2018.

SOUTH DELHI MUNICIPAL CORPORATION Appellant

Through : Mr. Sanjay Poddar, Sr. Advocate with Mr. Sandeep Bajaj, Ms. Aakanksha Nehra, Mr. Soayib Qureshi, Mr. Govind Chaudhary and Mr. Namon Tandon, Advocates.

versus

SWEKA POWER TECH ENGINEERS PVT LTD AND ORS

..... Respondents

Through : Mr. Gaurav Sarin, Ms. Charul Sarin and Mr. Harish Kumar, Advocates for R-1.

Ms. Mini Pushkarna, Standing Counsel with Ms. Swagata and Ms. Shiva Pandey, Advocates for R-2 North DMC.

Mr. G.D. Mishra, Standing Counsel for R-3/EDMC.

Mr. Sunil Goel, Standing Counsel with Mr. Mayank Goel for R-North MCD.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

This intra-court appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 37 of the Arbitration and

Conciliation Act, 1996 (A and C Act for short) impugns order and judgment dated 3rd April, 2018 passed by the learned single Judge in OMP(COMM) No. 265 of 2017, dismissing objections of the appellant under Section 34 of the A and C Act and upholding the Arbitral Award dated 24th February, 2017.

2. Primarily three contentions have been raised before us. The first contention relates to award of pre-award interest on the security deposit was not refunded at the end of the defect period. Award of interest for the pre-award period, it was submitted, was contrary to clauses 29 and 29A of the agreement. Counsel for the respondents', who is present on advance notice submits that this plea and contention was not raised in the objections filed under Section 34 of the A and C Act and in the arguments before the learned single Judge. This is apparent from impugned order dated 3rd April, 2018 as there is no discussion on the said aspect.

3. Learned senior counsel for the appellant accepts the position, but states that in the objections under Section 34 of the A and C Act it was contended that interest awarded to the respondents' was "very high" and arbitrator had erred in granting cost of arbitration to the respondents'.

4. Plea and contention raised before us in the aforesaid argument relying on clauses 29 and 29A of the agreement is different and distinct from the plea that interest awarded @12% per annum was "very high". Contention regarding high or exorbitant rate of interest has been examined separately.

5. Thus, the plea and contention against pre-award interest predicated on clauses 29 and 29A of the agreement was not raised in the objections under Section 34 of the A and C Act. This contention was not urged before the learned single Judge.

6. Learned senior counsel for the appellant submits that this plea and contention was raised before the arbitrator. Learned counsel for the respondents', however, disputes the said submission and states that this contention was raised in the pleadings but was not pressed during the course of arguments.

7. We do not think that the appellant can be allowed to urge and question award of pre-award interest relying upon clauses 29 and 29A, without the said plea being specifically raised in the objections under Section 34 of the A and C Act and argued before the learned single Judge. It is not the case of the appellant that the contention was raised and was not dealt with in the impugned order. This being the position, we are not inclined to entertain and examine a new plea and objection in an appeal under Section 37 of the A and C Act.

8. Learned senior counsel had faintly argued and contended that the direction to award interest was a jurisdictional error as pre-award interest was not payable in terms of clauses 29 and 29A of the contract. This contention has no force, for inherent lack of jurisdiction arises from the applicable statute. When the statute states that a forum or a Court lacks subject matter jurisdiction, the decision rendered cannot be enforced. The reason is that the forum or the Courts derive their jurisdiction from the statute. Conferment of jurisdiction is a matter of legislation and legislative intent.

Jurisdiction cannot be conferred by agreement, acquiescence or waiver of the parties or even by the Court in cases of inherent lack of jurisdiction. The grant of interest is not barred under any statute. This is not the case set up and argued. At best, the appellant was entitled to rely upon the clause and plead that pre-award interest as per the contractual terms was not payable. Reliance at best would be on the agreement and not the statute. Contractual clause would require interpretation of the agreement. In any case, the argument predicated on the contractual clause, cannot be equated with inherent lack of jurisdiction as in cases where the Court or the forum does not have jurisdiction over the subject matter.

9. Counsel for the appellant states that award of interest @ 12% is excessive. We do not agree. Contention overlooks the market rate of interest. Clause (b) of sub-Section (7) to Section 31 of the A and C Act states that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate 2% higher than the current rate of interest from the date of the award to the date of payment.

10. We would, however, clarify that the interest on the security deposit, it is accepted by the respondents, would be payable with effect from 25th September, 2011.

11. Similarly, the second contention that the three corporations, namely, South Delhi Municipal Corporation, North Delhi Municipal Corporation and East Delhi Municipal Corporation should have been directed to pay their proportionate share, has to be rejected. This plea and contention was not raised in the objections filed under Section 34

of the A and C Act or in the arguments addressed before the single Judge. We would not permit the appellant to raise this contention for the first time in an appeal under Section 37 of the A and C Act. Appellant had accepted the award dated 24th February, 2017 on the question of payment. Challenge now made is a belated afterthought. The award on the said aspect records :-

“The primary responsibility to pay is fixed on Respondent no. 1 but in case the Respondent no. 1 does not discharge its liability, the Claimant would be entitled to recover the awarded amount from the Respondents No. 2 and 3 also.”

South Delhi Municipal Corporation, North Delhi Municipal Corporation and East Delhi Municipal Corporation were the first, second and third respondents in the arbitration proceedings.

12. Counsel for the respondents' has also drawn our attention to order dated 23rd July, 2018 passed in the execution and enforcement proceedings holding that the appellant was primarily responsible to pay the awarded amount. However, this was without prejudice to the right of the appellant to agitate its claim, if any, against North Delhi Municipal Corporation and East Delhi Municipal Corporation.

13. Third contention raised by the appellant pertains to rejection of the claim for liquidated damages of Rs. 4.25 crores. Decision of the arbitrator on the said aspect, it was submitted, was perverse. Our attention was drawn to letter dated 22nd July, 2010 written by the appellant to the respondents', extending the period for completion of work from 7th July, 2010 to 31st December, 2010. This extension it was argued was confined to and in respect of additional work and not

for the original work. Value of the contract was enhanced from Rs.60,74,12,210/- to Rs. 73,35,67,210/-. Accordingly the award erroneously holds that time for completion of the entire contract was extended up to 31st December, 2010. Extension of time was confined only to the additional work and was not in respect of the original work.

14. The appellant in response to the letter written by the respondents for extension of time for four months, had vide letter dated 30th June, 2010 affirmed and agreed:-

“The work is in progress but the same is not like to complete within stipulated period due to obstructions at some sites as highlighted in your letter.

Hence provisional extension of time upto 30/09/2010 is granted to you for completion of work, without prejudice to the right of MCD to recover liquidated damages in accordance with clause 2 of the agreement providing that notwithstanding the extension hereby granted, time is and shall still continue to be the essence of said agreement, it is instructed to complete the left over works at the earliest.”

15. Letter dated 22nd July, 2010 placed on record as Annexure A-7 in the appeal paper book reads as under:-

“In anticipation approval of Corporation has been obtained from the Competent Authority for revision of your existing contract on the subject work, which was awarded vide work order/ Agreement No. 01/MW EEE-IV/2009-10 dated 08.6.2009 for a total contractual amount of Rs.60,74,12,210. After revision contractual amount-illegible- comes to Rs.73,35,67,210/- (Additional

Expenditure of Rs. 12,61,55,000/-), covering total 192.45 KM length of Roads.

You are requested to attend this office to complete the formal agreement within 3 days of the receipt of this letter.

You are also directed to start the work at once. Please note that the time allowed for carrying out the above additional work is up to December, 31 2010 and shall be reckoned from the 10th day of the date of issue of this order to commence work.

It should be noted that as and when orders are given for execution of any extra/ substitute item, prior order from the Department Authority be obtained before executing the same to avoid any further compliance.

It shall be responsibility of the contractor to provide deep Hand Pump/ Tube Well/ Mpl. Water at the site of work to make available the potable and safe drinking water free any contamination to the labour engaged on the work.”

16. The award dated 24th February, 2017 refers to the factual matrix including the letters exchanged and opines on the said aspect under different claims. Some portions of the award are reproduced below:-

“61. CLAIM NO. 1: For Payment of Rs.7,83,73,907/- towards the payment for work done but not paid.

According to the Claimant, initially the work awarded to it was for Rs.60,74,12,210/-. The date of commencement of the work was 07.07.2009 and it was to be completed by 07.07.2010. The time was however extended upto 30.09.2010 in view of certain hindrances as recorded in the Hindrance Register. On 22.07.2010, the Contract was revised and the amount of the work was enhanced to Rs. 73,35,67,210/-. The time for completion of the work was also extended to 31.12.2010. Again by taking a unilateral decision, the work was restricted to Rs.61,98,67,570/- or less-according to the measurements

of the executed work but the date for the completion of the work remained unchanged. The restriction letter dated 05.08.2010 is on record.”

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“74. Moreover, it is also shown on record that after the work was restricted, the provisional Completion Certificate dated 24.09.2010 was issued by the Claimant which establishes that the work was terminated before the date of completion of the work, which was 31.12.2010. As such, the Respondent No. 1 cannot say that there was delay in the execution of the work by the Claimant. Restriction Order had clearly stated that the work was being restricted to already executed work and as such it does not lie in the mouth of Respondent No. 1 to say that there was delay in the execution of the work on the part of Claimant.”

Rejecting the counter claim No. 3 of Rs. 4.25 crores raised by the appellant, it was specifically held as under:-

“COUNTER CLAIM-No. 3. Rs. 4.25 crores towards recovery on account of levy of compensation for delay in the completion of the work.

This Claim raised by the Respondent No. 1 is also not sustainable as it is shown on record that the Contract in favour of the Claimant for execution of work was foreclosed before the stipulated date of completion of the work and as such the Claimant cannot be blamed for any delay in the completion of work. No compensation can be claimed by the Respondent No. 1 in this regard. The Claim stands rejected.”

17. Learned single Judge in the impugned order has referred to the provisional completion certificate dated 29th September, 2010. The certificate acknowledges and states that the revised date of completion as agreed was 31st December, 2010. The work was treated as

provisionally complete on 24th September, 2010, subject to compliance of CTE observations/ audit observation/third party inspection etc. Further, five year maintenance part of the contract i.e., part B, as per the appellant had commenced from 25th September, 2010. Therefore, the respondents' were responsible and liable for defect liability period for one year upto 24th September, 2010. Clearly, the appellant had not bifurcated and divided the contract into two parts, original contract of Rs. 60,74,12,210/- as separate, and additional work of Rs.12,61,55,000/- as a new and distinct contract. Contract was one and same. Date of completion in terms was revised and extended on award of additional work.

18. Keeping in view the aforesaid position, learned arbitrator has taken a plausible and reasonable view. The award on the said aspect is not perverse and contrary to the material and evidence on record.

19. No other contention and argument was raised. We would also record that the appellant has not argued the plea that security deposit was not payable on end of the defect liability period but after end of maintenance period, a contention raised and rejected by the learned single judge.

20. Recording the aforesaid, the appeal is dismissed without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

AUGUST 10, 2018/MR/SR