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IN THE HIGH COURT OF DELHI AT NEW DELHI*Reserved on : 28th September, 2018**Date of decision: 16th October, 2018*

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O.M.P. 639/2008, I.As. 8293/2018 & 8294/2018

GOVT OF N.C.T OF DELHI

..... Petitioner

Through: Ms. Jyoti Taneja, Advocate.
(M:9999500069)

versus

M/S YASIKAN ENTERPRISES PVT. LTD

..... Respondent

Through: Mr. Sanjeev Narang, Advocate.
(M:9810064624)**CORAM:****JUSTICE PRATHIBA M. SINGH****JUDGMENT****Prathiba M. Singh, J.****I.A. No. 8294/2018 (delay of 21 days in filing restoration application)**

1. This is an application seeking condonation of delay of 21 days in filing the restoration application being I.A. No.8293/2018. For the reasons stated in the application, the same is condoned. I.A. is disposed of.

I.A. No. 8293/2018 (restoration of OMP 639/2008)

2. This is an application seeking recall of order dated 2nd December, 2016, whereby OMP 639/2008 was dismissed for non-prosecution. For the reasons stated in the application, the same is allowed, and OMP 639/2008 is restored. I.A. is disposed of.

O.M.P. 639/2008

3. The present appeal has been filed by the Government of NCT of Delhi (*hereinafter 'Government'*) challenging the award dated 1st September, 2008 passed by the Sole Arbitrator. The brief facts are that the Government called a tender on 10th August, 2000 for providing sanitation and scavenger services inside and outside the building including reception services from O.M.P. 639/2008

designated places for the Delhi Sachivalaya/Secretariat, I.P. Estate, New Delhi.

4. The tender proforma contained various terms and conditions. One M/s Yasikan Enterprises - a sole proprietary concern of Shri Jagdish Kumar with its address at 6504/8, Navi Karim, Pahar Ganj, New Delhi-110055 submitted his offer on 16th August, 2000. On 4th January, 2001, the contract for sanitation services was entered into with M/s Yasikan Enterprises. A clarification was issued on 13th December, 2000. The contractor started raising bills. It was the Government's case that the contractor was entitled to only a sum of Rs.73,652/- per month as per the calculation submitted, based on measurements provided by Public Works Department (*hereinafter* "PWD"). The contractor claimed that he is entitled to Rs.2,63,982/- per month. The disputes between the parties were referred to arbitration in terms of the following arbitration clause: -

"23. In case of any dispute or difference, the award of the Arbitrator appointed by the Lt. Governor of GNCT of Delhi will be final and binding on the parties to the contract and the court at Delhi/New Delhi shall only have the jurisdiction over the same."

5. The arbitration clause was invoked by M/s Yasikan Enterprises Pvt. Ltd. which is a company registered under the Companies Act, 1956. A representation was made to the Lieutenant Governor invoking arbitration and vide letter dated 24th September, 2004, the Arbitrator was appointed. The total claims raised by the contractor are as under: -

S. no	Particulars	Amount (in Rs.)
1.	Payment due from January, 2001 to September 2004 i.e., @Rs.2,63,982/- per month for 45	1,18,79,190.00

	<i>months. (Rs.2,63,982/-x45)</i>	
2.	<i>Payment received from January 2001 to February 2002 i.e. @Rs.2,06,619/- per month as earlier passed for 14 months Rs.2,06,619/-x14</i>	<i>28,55,838.00</i>
3.	<i>Balance Amount Due upto September 2004</i>	<i>90,23,352.00</i>
4.	<i>Loss of other business/Tenders</i>	<i>20,00,000.00</i>
5.	<i>Mental Agony/grave harassment</i>	<i>5,00,000.00</i>
6.	<i>Litigation Expenses</i>	<i>1,11,000.00</i>
	<i>Total Amount of claim (Total of S.No.3 to 6)</i>	<i>1,16,34,352.00</i>
	<i>Add Interest</i>	<i>@24% Per Annum</i>

6. The Arbitrator's award in respect of each of the claims is as under: -

"CLAIM No. (a): *Rs.26,39,82/- per month of the bill as claimed by claimants.*

AND

CLAIM No. (b): *Rs.90,23,352/- outstanding bills (i.e. upto September, 2004.)"*

On this claim the arbitrator awarded a sum of Rs.34,98,912/-.

"CLAIM NO. (c) : *Rs.20,00,000/- on account of loss of other business/tender.*

AND

CLAIM NO. (d) : *Rs.5,00,000/- for mental agony and the harassment.*

2.1 Finding of Arbitrator and Award:

The claimants failed to establish claim No. (c) & (d) with documentary evidence. Further, these claims are of very indirect nature, which are not at all payable under 1... contract act except the loss of interest which

is being dealt separately in Claim No. (1.... As such I hold that claimants are not entitled for these claims and I award 'Nil' amount claimants against Claim No. (c) & Claim No. (d)."

NIL award.

"CLAIM NO. (e): Rs.1,11,000/- on account of litigation expenses.

3.1 Finding of Arbitrator & Award:

Keeping in view over all circumstances, I consider reasonable and award of Rs.5,000/- to claimants against this claim."

Litigation expenses Rs.5,000/- was awarded.

7. Claim 1(e) and 1(f) – interest was claimed @ 24%. However, the arbitrator awarded interest in the following terms: -

"CLAIM NO.(1.e): Interest @ 24% per annum on the above said amount.

AND

CLAIM NO.(f): Any other order/directions as the Ld. Arbitrator deems fit a proper in the interest of justice."

4.1 Finding of Arbitrator and Award:

In view of overall circumstances, I consider reasonable and award simple interest @ 10% per annum on Rs.2100867/- [39x127095 (from January 2001 till March 2004 2855838 => 4956705-2855838 =2100867] i.e. the balance outstanding upto 31.3.20... awarded to claimants against claim No.1, w.e.f. 23.4.2004 (date of invocation arbitration) till date of payment.

I also award simple interest @ 10% per annum on the each set amounting Rs.127095 totaling 1398045 (11x 127095) becoming due at the end of each more

beginning from payment of April 2004 w.e.f. 1.5.2004 and ending for payment February 2005 w.e.f. 1.3.2005 till the date of payment.”

8. In conclusion, the arbitrator held as under: -

“5.1 NOW, THEREFORE, in view of above, I award Rs.35,03,912/- to the claimants, M/s Yasikan Enterprises (P) Ltd. against all, their claims and simple interest on Rs.34,98,912/- as awarded under para 4.1 of Claim No.(i) & (f) above. This is in full and final settlement of all the above claims of the claimants.”

9. The first submission of Ms. Jyoti Taneja, Ld counsel appearing for the Petitioner is that there was no arbitration clause with the company M/s Yasikan Enterprises Pvt. Ltd. The contract was awarded to the firm M/s Yasikan Enterprises, which was a sole proprietary concern. Accordingly in the absence of an arbitration agreement, the arbitration proceedings are void *ab initio* and the award is liable to be set aside. She relies on ***Delhi Iron and Steel Company Limited v. U.P. Electricity Board & Another (2002) 61 DRJ 280.***

10. Learned counsel for Respondent, on this issue, submits that the reference having been made by the Lieutenant Governor on the request of M/s Yasikan Enterprises Pvt. Ltd., the same does not deserve to be set aside.

11. As per Section 7 of the Act, every arbitration agreement has to be in writing between the parties. It also has to be signed by the parties. In the present case, there is no arbitration agreement signed between the Petitioner and M/s Yasikan Enterprises Pvt. Ltd. The company was not awarded the contract. The offer was submitted by M/s Yasikan Enterprises as a sole proprietary firm. It was signed by Mr. Jagdish Kumar as the sole proprietor.

The company being a distinct legal entity from the sole proprietorship, the arbitration clause, does not apply devolve upon the company. Moreover, the arbitration clause is an independent clause which is not assignable. This is clear from a reading of ***Delhi Iron and Steel Company Limited (Supra)***.

“17. So far as the arbitration clause is concerned it was held that this contract is personal in its character and incapable of assignment on that ground. However it is a settled law that an arbitration clause does not take away the right of a party of a contract to assign it if it is otherwise assignable.

18. While distinguishing between two clauses of assignment the Supreme Court observed that a right of obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. In other words, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

19. As observed above the petitioner had the liability to perform all contracts of Victor Cables and all benefits arising therefrom and liabilities thereunder in all or in any form. It does not mean that he had also the obligation to get the dispute settled by way of arbitration as agreed by Victor Cables. These are two different and distinguished liabilities. The former is assignable where the latter is not. Thus the undertaking by the petitioner that “all contracts of Victor Cables Corporation and all benefits arising therefrom and liabilities thereunder in all or in any form shall be of the petitioner” was in the form of discharging all the liabilities of the Victor Cables and there was nothing personal about such contracts whereas clause of arbitration was personal in its character and was even otherwise incapable of assignment.

20. In view of the foregoing reasons the unilateral

reference of the alleged disputes to the respondent No.2 and unilateral appointment of respondent No.2 as arbitrator are hereby held illegal and inoperative and set aside. Petition is allowed.”

12. Thus, the reference to arbitration was contrary to law. The award is liable to be set aside on this sole ground. However, this Court is also examining the matter on merits.

13. The second grievance of the Government is that the arbitrator has mis-conducted himself by going beyond the contract. The claim of the Respondent is that cleaning of furniture was not contemplated in the tender document and cleaning of glazing and inside cladding was also not mentioned in the tender document. Thus, the claim was raised and awarded on the basis of these two items which were extra items. On the basis that they were extra items, the contractor claimed that it was liable to be compensated for the work carried out.

14. The further submission of learned counsel for the Petitioner is that the contractor had not mentioned in the claim petition, truthfully, all the amounts already paid by the Petitioner. Even if the entire claim as awarded by the arbitrator is to be granted to the contractor, a further adjustment of Rs.9,00,412/- has to be added to the amounts already paid i.e. Rs.28,55,838/-. Thus, the total paid amount would be Rs.37,56,250/- and not Rs.28,55,838/-. The credit of Rs.9,00,412/- needs to be given to the Government. In order to support this plea, she has placed on record the sanctions issued by the Government as also a chart showing the encashment of the cheques for these payments.

15. It is further contended by the Ld. Counsel for the Government, that the arbitrator has wrongly awarded Rs.1,27,094/- by applying the highest

rate i.e. Rs.2.75 per sq. mtr. which is also incorrect. According to learned counsel, the calculation chart relied upon by her would show that only Rs.47,924/- is due.

16. As against this, the Respondent claims that the extra items were not part of the tender document, the work qua the extra items was in fact carried out but no amount was mentioned in the tender proforma. Thus the contractor is entitled to claim compensation for the same. The Respondent's counsel also initially denied the additional payments having been received. Thereafter, however, learned counsel simply contended that if the proof of payment is shown then it may be considered as paid.

17. A perusal of the records of this case and the documents as also the conduct of the contractor reveals a completely sorry state of affairs. The contractor was well aware of the nature of work which it undertook. Para 20 of the tender proforma clearly provided for the following items of work to be carried out by the contractor:

“20. *Duties of the Sanitary Supervisors and Safai Kamarcharies be as under:-*

Sanitary Supervisor will be responsible to supervise the work of the Safai Karamcharies or any other duty as assigned by the Department.

Safai Karamcharies:-

- a) *Sweeping office rooms including 275 rooms approx (mention as per the allocation of the Department).*
- b) *Sweeping, Washing, Scrubbing and Swabbing etc. of the verandas vestibules and staircases and cleaning the articles lying therein such as spittoons, fire*

- fighting equipments etc.*
- c) *Sweeping open spaces like roads, courtyards, garages etc.*
 - d) *Cleaning open spaces like lawns etc. swept extensively which but which are kept clean by picking paper bits etc and by partial sweeping, wherever necessary.*
 - e) *Cleaning latrines, bathrooms, urinals etc.*
 - f) *Dusting cleaning the office furniture, windows, etc.*
 - g) *Clearance of garbage.”*

18. In response to this, the contractor simply quoted as under: -

	<i>Job</i>	<i>Unit</i>	<i>Job wise rates</i>	
			<i>Without Material</i>	<i>With Material</i>
	<i>1.</i>	<i>2.</i>	<i>3.</i>	<i>4.</i>
a.	<i>Sweeping in covered area</i>	<i>Per sq. mtr.</i>	<i>Rs.2.30</i>	<i>Rs.2.75</i>
b.	<i>Sweeping, Washing, Scrubbing, swabbing etc. and cleaning of articles lying their in</i>	<i>-do-</i>	<i>Rs.0.90</i>	<i>Rs.1.40</i>
c.	<i>Sweeping open space like roads, courtyards, garage etc.</i>	<i>-do-</i>	<i>Rs.1.10</i>	<i>Rs.1.10</i>
d.	<i>Cleaning open space like lawn, playground etc. swept extensively but which are kept clean by picking papers-bits etc. and by partial sweeping, where necessary.</i>	<i>-do-</i>	<i>Rs.0.45</i>	<i>Rs.0.45</i>
e.	<i>Cleaning latrines, bathrooms, urinals etc. including the dressing rooms, passages etc. attached thereto and mirrors, dressing tables,</i>	<i>Per 100 items</i>	<i>Rs.0.90</i>	<i>Rs.1.75 per items</i>

	<i>and other articles contained therein</i>			
f.	<i>Collection, Segregation and disposal of garbage</i>	<i>Per Qtl.</i>		<i>Free of Cost</i>

19. Thus, no separate quote was given in respect of items (f) i.e. dusting, cleaning office furniture and windows. Clearly the contractor understood the nature of work as mentioned in the tender proforma item No.(a) to include item No.(f). Thus when the contractor entered into the contract on 4th January, 2001, he was well aware of the nature of the work that is to be undertaken by him. The claims raised by the contractor on the ground that there are two extra items are as under; -

<i>Scope of work as per tender document</i>	<i>Area as per Award of the Arbitrator – (A)</i>	<i>Rate as per tender document (Rs.) – (B)</i>	<i>Amount awarded by arbitrator (Rs.) – (A) X (B)</i>	<i>Comments</i>	<i>Amount to be paid by Department (Rs.)</i>
<i>Extra Item-1</i> <i>Cleaning of furniture, wall panelling & doors etc.</i>	12387.49 <i>Sqm</i>	<i>Not mentioned in the tender document</i>	34065.60 <i>(Rs.2.75 x 12387.49)</i>	<i>Not agreed. [Note- This item was not a part of tender document. It has been added by Hon'ble Arbitrator. There is no such extra items for cleaning etc. mentioned either in the scope of work or in the schedule of rates of the</i>	Nil

				<i>tender document. These items are covered under Item (a) cleaning in covered areas.]</i>	
Extra Item-2 <i>Cleaning of glazing & inside cladding etc.</i>	5946.47 <i>Sqm</i>	<i>Not mentioned in the tender document</i>	8325.06	<i>Not agreed. [Note- [This item was not a part of tender document. It has been added by arbitrator There is no such extra items for cleaning etc. mentioned either in the scope of work or in the schedule of rates of the tender document.]</i>	Nil

20. Extra item No.2 is not made out. The tender proforma is clear that it is a comprehensive tender for keeping the Delhi Sachivalaya/Secretariat in a clean condition. The proforma clearly mentions the duties which the cleaning personnel have to undertake. While submitting the tender the highest rate given of Rs.2.30 per sq.mtr. is given for sweeping in the covered areas. This obviously included the furniture and windows and cleaning of the same. The high rate awarded itself shows that item No.(f) is covered in item No.(a). No separate claim for dusting was contemplated in the tender

nor was submitted by the contractor. Thus dusting was included in the scope of work. The contractor initially submitted a bill of Rs.3,18,625/- and due to errors of computation some higher payments were made to the contractor. As against Rs.73,625/- per month, the contractor finally claimed Rs.2,63,982/-. The only basis was due to the alleged extra items. Indoor cleaning was fully covered under item No.(a) of the tender proforma and thus any extra charges for any extra items was not liable to be awarded. There was no rate fixed in the contract for these extra items and the arbitrator could not, on his own, apply an arbitrary rate. The arbitrator has to strictly go by the contract between the parties. The award being contrary to the contract is thus liable to be set aside.

21. The OMP is allowed on both grounds i.e., that there is no arbitration agreement between the Respondent and the Petitioner and secondly the sums claimed for extra items were included in the scope of work and no additional moneys were payable. OMP is allowed. The Contractor, during the hearing in the present case, even failed to admit to the actual payments received which reflects completely improper conduct. Under these circumstances the OMP is allowed with costs of Rs.50,000/- to be deposited by the Respondent with the Petitioner within four weeks.

PRATHIBA M. SINGH
Judge

OCTOBER 16, 2018

Rekha