

\$~47

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 265/2017 & IA Nos. 8096/2017 & 8098/2017**

SOUTH DELHI MUNICIPAL CORPORATION Petitioner
Through: Ms Biji Rajesh, Ms Eshita Baruah and Mr Diwankar Sethi, Advocates for Mr Gaurang Kanth, Advocate.

versus

SWEKA POWER TECH ENGINEERS PVT LTD & ORS. Respondents
Through: Mr Gaurav Sarin, Mrs Charul Sarin and Mr Abhishek Manchanda, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
ORDER
% **03.04.2018**

VIBHU BAKHRU, J

1. The petitioner (South Delhi Municipal Corporation – hereafter ‘SDMC’) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter ‘the Act’), *inter alia*, impugning an arbitral award dated 24.02.2017 (hereafter ‘the impugned award’) delivered by the Arbitral Tribunal constituted by the Sole Arbitrator, Justice R.C. Chopra, a former Judge of this Court. The impugned award was rendered in the context of the disputes that had arisen in connection with the Work Order no. 01/MWEEE-

IV/2009-10 dated 08.06.2009 regarding Phase II, Part A for supply, erection, testing, commissioning and upgradation of street lighting in the areas which now fall within the jurisdiction of SDMC. By the impugned order, the Arbitral Tribunal has awarded a total amount of ₹12,66,85,923/- (Rs. Twelve Crores Sixty Six Lakhs Eighty Five Thousand, Nine Hundred and Twenty Three Only) along with interest at the rate of 12% per annum in favour of the respondent company. And, the counter claims preferred by SDMC have been rejected.

2. The learned counsel appearing for SDMC has restricted the challenge to the impugned award to the extent that the Arbitral Tribunal has awarded (i) refund of security deposit of ₹48,36,71,126/- in favour of the respondent company; (ii) the award of interest at the rate of 12% per annum; (iii) cost of litigation of a sum of ₹5 lacs; and (iv) rejection of counter claim relating to levy of liquidated damages for delay in completion of the works.

3. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

3.1 On 13.10.2008, the Municipal Corporation of Delhi (hereafter 'MCD') issued a notice inviting tender (NIT) for upgradation of street lights for Phase II. Pursuant to the aforesaid NIT, the respondent company submitted its bid which was accepted. The MCD issued the Work Order (Work Order No. 01/MWEEE-IV/2009-10) dated 08.06.2009 for execution of the works in question. The said work order was in two parts (Part A and Part B); whereas Part A related to

supply, erection, testing and commissioning and upgradation of street lighting; Part B related to post completion maintenance of street lighting for a period of five years.

3.2 Thereafter, MCD and the respondent company entered into an agreement dated 11.06.2009 (hereafter 'the Agreement'). The entire contract value was fixed on ₹60,74,12,210/- which also included a comprehensive maintenance for a period of five years. The Agreement was also divided into two parts – Part A and Part B. Part A included providing detailed illumination designs on specified individual road stretches; procurement of material required for work as per the specified scope and schedule; and, execution and commissioning of the same as per illumination design. Part B of the Agreement related to the maintenance of the street lighting for a period of five years after completion of the defect liability period.

3.3 The scheduled date for commencement of the works was agreed as 08.07.2009 and the works were to be completed within a period of 12 months from the effective date, that is, by 07.07.2010.

3.4 The respondent company sent a letter dated 07.06.2010 requesting for extension of time for completion of the works. MCD acceded to the said request and, by a letter dated 30.06.2010, granted provisional extension of time for completion of the works up to 30.09.2010.

3.5 Thereafter, by a work order dated 22.07.2010, MCD awarded additional work to the respondent company. Commensurate with the

additional work, the contractual value was also increased to ₹73,35,67,210/- and the said works were to be completed by 31.12.2010. Thereafter, by a letter dated 05.08.2010, the works were reduced and, correspondingly, the contract value was revised to ₹61,98,67,570/-.

3.6 The respondent company completed the works (Part A) and, on 29.09.2010, MCD issued a provisional completion certificate acknowledging the same. After completion of the works, the respondent company submitted its eighth and final bill which was jointly signed on 30.09.2010.

3.7 Since the entire amount had not been paid to the respondent company despite completion of the works, the respondent company approached the Superintendent Engineer to expedite the release of the outstanding amount. Although, in terms of the Agreement between the parties, the concerned officer was required to take the decision within a period of 30 days, no such decision was communicated to the respondent company. In the circumstances, the respondent company filed an appeal to the Chief Engineer (Electrical); however, that also did not result in any decision. Finally, the respondent company invoked the arbitration clause and sought appointment of an arbitrator in respect of its various claims.

4. By an order dated 02.04.2013 passed by this Court, Justice R.C. Chopra (Retired) was appointed as a Sole Arbitrator to adjudicate the disputes between the parties. The respondent company filed its

Statement of Claim before the Arbitral Tribunal, *inter alia*, claiming ₹7,83,73,907/- for payment of work done but not paid (Claim No.1); refund of security deposit (Claim No. 2); ₹9,57,797/- on account of fee paid towards inspection (Claim No. 3); refund of security paid to Airtel for GSM SCADA and monthly rentals paid ₹7,87,335/- (Claim No. 4); ₹22,73,999/- on account of loss of profits of reduction of the scope of works (Claim No. 5); ₹11,74,377/- on account of interest paid to banks on account of non-payment of the final bill (Claim No.6); Service Tax and other taxes in terms of Clause 38 of the Agreement (Claim No. 7); pre-suit, pendente lite and future interest at the rate of 18% per annum (Claim No.8); and, ₹10,00,000/- as cost of arbitration (Claim No. 9).

5. SDMC also filed its counter claims, *inter alia*, claiming a sum of ₹5.09 crores on account of non-performance/faulty/costly design and equipments (Counter Claim No.1); ₹3.34 crores on account of post-tendering overwriting and cuttings in the tender documents in Phase II (Counter Claim No.2); ₹4.25 crores on account of levy of compensation for delay in completion of Phase-II (Counter Claim No. 3); ₹2.94 crores on account of non-performance/faulty/costly designs and equipments for imported fittings in Phase-II (Counter Claim No.4); ₹0.12 crores on account of laying of DWC Pipe at improper depth in Phase II (Counter Claim No.5); Recovery on account of non-performance/faulty/costly design of equipments by usage of Cosmopolis Lamp in Phase II (Counter Claim No.6); applicable service tax and other levies (Counter Claim no.7); pre-suit, pendent

lite and future interest at the rate of 18% per annum (Counter Claim No. 8); and, cost of ₹20,00,000/- as cost of arbitral proceedings (Counter Claim No.9).

6. The Arbitral Tribunal considered the disputes and held that the respondent company was entitled to an aggregate sum of ₹12,66,85,923/- in favour of the respondent company. The said sum included (i) ₹7,72,15,846/- towards work done but not paid to the respondent company; (ii) ₹4,83,71,126/- towards the refund of security deposit; (iii) ₹5,99,951/- on account of refund of security paid by the respondent company to Airtel for GSM SCADA and for monthly rentals; and (iv) litigation cost of ₹5,00,000/-. The Arbitral Tribunal also awarded Counter Claim No.5 in the sum of ₹11,58,061/- (which had already been deducted by MCD from the amounts due to the respondent company) in favour of MCD.

7. Since MCD was been trifurcated into three separate Corporations, namely, SDMC, East Delhi Municipal Corporation and North Delhi Municipal Corporation, the impugned award was made against all the said three successor Corporations. However, the primary responsibility to pay the awarded amount was placed on SDMC, since the work executed by the respondent company fell within its jurisdiction.

Submissions

8. Ms Biji Rajesh, the learned counsel appearing for SDMC contended that the Arbitral Tribunal had grossly erred in awarding

refund of security deposit of ₹4,83,71,126/- (Claim No.2) in favour of the respondent company. She stated that the said security deposit had been deducted from the amounts due to the respondent company in order to secure a due performance of the obligations on the part of the respondent company. She submitted that since the Agreement was divided into two parts and the impugned award only related to Part A, the said security deposit could not be refunded to the respondent company at this stage.

9. Second, she contended that the Arbitral Tribunal had erred in rejecting the counter claim of ₹4.25 crores for levy of liquidated damages on account of delay in completion of the works. She submitted that the Arbitral Tribunal had erred in proceeding on the basis that there was no delay on the part of the respondent company in completion of the works. She submitted that the works (as originally awarded) were to be completed within a period of 12 months from 08.07.2009; however, since the same were not completed within the specified period, the respondent company had sought for an extension of time. She further submitted that although, MCD acceded to the request for extension of time for completion of works up to 30.09.2010, it retained the right to levy liquidated damages for the delay. She stated that the time for completion of the works was revised till 31.12.2010, but the same was on account of award of additional work and that did not absolve the petitioner of the delays in executing the works as originally awarded.

10. Third, she contended that the interest awarded by the Arbitral

Tribunal was excessive and prayed for this Court to reduce the same. Lastly, she contended that the award of cost of litigation was also not justified.

11. Mr Sarin, the learned counsel appearing on behalf of the respondent company on advance notice, countered the submissions made by Ms Rajesh. He pointed out that the security deposit directed to be refunded to the respondent company pertained only to Part A of the Agreement.

Reasons and Conclusion:

12. The first and foremost question to be addressed is whether the decision of the Arbitral Tribunal to direct refund of the security deposit is erroneous as contended on behalf of the petitioner. It is not disputed that the Agreement was divided into two parts. It is also not disputed that the sum of ₹4,83,71,126/- had been deducted towards security deposit, from the running bills submitted by the respondent company in respect of Part A of the Agreement.

13. In terms of the Agreement, the security deposit deducted as performance guarantee under Part A was required to be refunded after satisfactory completion of the defect liability period. The Agreement also provided for deduction of security amount for completion of Part B of the Agreement, which was required to be refunded after completion of the maintenance period. The relevant extract of the Agreement is set out below:-

“Part A

The entire work shall be divided into individual road stretches & each stretch shall be treated as independent work for assessment of its completion & defect liability period of one year. It consists of:

XXXX XXXX XXXXX XXXXX

- The security deducted against individual road stretches as performance guarantee shall be refunded after satisfactory completion of defect liability period.

XXXX XXXX XXXX XXXXX

Part B

The maintenance part shall start after completion of defect liability period for individual road stretches. It consists of:

XXXX XXXX XXXX XXXXX

- The security deducted against post completion maintenance shall be refunded after completion of annual maintenance period for the individual stretch roads.”

14. Since, it is not disputed that the security amount pertained only to works completed under Part A, this Court finds no merit in the submission that the respondent company was not entitled to refund of the same.

15. The next question to be addressed is whether the Arbitral Tribunal had erred in proceeding on the basis that there was no delay

in execution of the works. Before proceeding further, it would be relevant to refer to the provisional completion certificate issued by MCD, which is set out below:-

“MUNICIPAL CORPORATION OF DELHI
OFFICE OF THE EX. ENGINEER (ELECT)-IV
M.C. Primary School, Police Colony, Hauz Khas
NEW DELHI-110 016

269/EEE-IV/10-11

Date: 29/09/10

To,

M/s Sweka Power-Tech Engineers Pvt. Ltd.

254, Vardhan Tower

J-Block, Community Centre

Rajouri Garden

New Delhi - 110 027

Name of Work: - “Up-gradation of Street lighting on Roads in Delhi under Jurisdiction of M.C.D. (Phase-II)”.

Sub: - Provisional Completion Certificate.

Work Order No. 01/MWEEE-IV/2009-10 Dated 08.06.2009

Revised Work Order No.: 40/MWEEE-IV/2010-11 Dated 22.07.2010

DOS as per Agreement: 08.07.2009

DOC as per Agreement: 07.07.2010

Actual DOS: 08.07.2009

Revised DOC as per Agreement: 31.12.2010

Contractual Amount:

Rs.60,74,12,210/-

Revised Contractual Amount: Rs.73,35,67,210/- Restricted Amount:

Rs.61,98,67,570/-

Dear Sir,

The above work be treated as provisionally completed as on 24.09.2010 subject to compliance of CTE observations / Audit observation/ Final Third Party Inspection and departmental observation from time to time if any, and in case same is not complied upon in the prescribed time of the department, the same shall be taken up at your risk & cost.

The Five years maintenance part of contract i.e. Part B will start from 25.09.2010 as per Agreement.

Yours Faithfully

Sd/-

Ex. Engineer (Elect) – IV”

16. It is apparent from the above that the date of completion of the works was revised to 31.12.2010 and the works were, admittedly, complete prior to the said date. The Arbitral Tribunal had examined the above provisional completion certificate and had held as under:-

“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.”

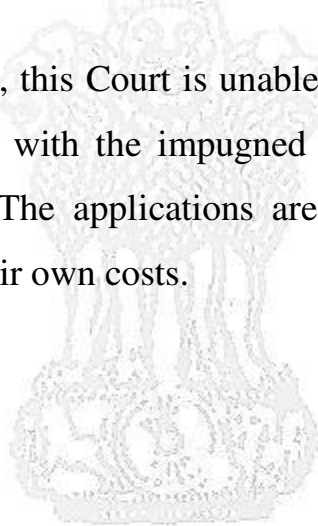
17. This Court finds no infirmity with the aforesaid view. Even though, the works were to be completed by 07.07.2010, as is apparent

from the provisional completion certificate, the date of completion was subsequently revised to 31.12.2010. Concededly, the works were completed by 24.09.2010, which was well within the extended period.

18. This Court also finds no reason to reduce the interest or cost as awarded by the Arbitral Tribunal.

19. It is well settled that the scope of judicial review under Section 34 of the Act is limited, and an arbitral award cannot be interfered except on the grounds as set out in Section 34 of the Act.

20. In the present case, this Court is unable to accept that there are any grounds to interfere with the impugned award. The petition is, accordingly, dismissed. The applications are also disposed of. The parties are left to bear their own costs.



VIBHU BAKHRU, J

APRIL 03, 2018
RK

न्यायमेव जयते