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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 31st January, 2018

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ARB.A. (COMM) 55/2017

NORTH DELHI MUNICIPAL CORPORATION Petitioner

Through: Mr.Sachin Datta, Sr. Adv. with
Ms.Renu Gupta and Ms.Rijuta
Mohanty, Advs.

versus

IJM CORPORATION BERHAD Respondent

Through: Mr.Shambhu Sharan, Mr.Yaman
Deep Kumar and Mr.Shashank
Bhanshali, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.15541/2017 (Delay)

1. This is an application seeking condonation of delay in re-filing of the present appeal.
2. Learned counsel for the respondent submits that the application is misconceived inasmuch as there is a delay in filing of the appeal itself. He submits that the appeal was filed on 20.12.2017, which is beyond the period of limitation. He further submits that in the application seeking stay of the Impugned Order, there is a reference to an order passed by the Arbitrator on 10.10.2017, therefore, it should be presumed that the appeal has been filed after that date. Relying upon Rule 5(3) Chapter –IA (a) Volume-5 of the

Delhi High Court Rules, 1966, it is submitted that even otherwise, as the appeal was re-filed beyond the period of 30 days, it would amount to a fresh filing of the appeal.

3. Learned counsel for the respondent further relies upon the judgment of this Court in ***Jammu & Kashmir State Power Development Corporation v. K.J.M.C. Global Market (India) Limited***, MANU/DE/0603/2017 to contend that if the Memorandum of Appeal was filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, Incharge of the Filing Counter, the same is to be considered as a fresh institution.

4. I have considered the submissions made by the learned counsel for the respondent, however, I am unable to agree with the same. The Log Information of the filing of the present appeal shows that the appeal was filed on 09.10.2017 i.e. within the period of limitation. Thereafter, on objection being raised by the Registry, the appeal was re-filed on a number of occasions and finally the defects were cured on 20.12.2017. Merely because there is a reference to the order dated 10.10.2017 in the application seeking stay of the Impugned Order passed by the Arbitrator, it cannot be said that a fresh appeal was filed after the original filing on 09.10.2017. In this regard, it is to be noted that in the appeal, admittedly, there is also no reference to the order dated 10.10.2017 passed by the Arbitrator. There is also no prayer made in that regard in the appeal.

5. As far as the reliance on Rule 5(3) of the Delhi High Court Rules is concerned, the present application has been necessitated only because of that Rule, which requires that the appeal should be re-filed within 30 days at a maximum. Once the delay is condoned, the appeal would relate back to the date of the original filing. This distinction between the filing and the re-

filing has been explained by the Supreme Court in *Mahant Bibram Dass Chelo v. Financial Commissioner* (1977) 4 SCC 69 and recently in *Northern Railway v. Pioneer Publicity Corporation Pvt Ltd.* (2017) 11 SCC 234.

6. As far as the reliance on the judgment of this Court in *Jammu & Kashmir State Power Development Corporation (supra)* is concerned, the said judgment would not have any application to the facts of the present case. Paragraph 5 of the said judgment shows that the appeal that was originally filed by the appellant therein was not re-filed, but a fresh appeal was filed beyond the period of limitation. It was in that situation that the Court considered whether this would be a case of fresh filing of the appeal or a case of re-filing. In the present case, as noted above, the same appeal was re-filed by the appellant, though with delay.

7. As far as the merit of the application is concerned, the reason given in the appeal is that due to passing of the order dated 10.10.2017 by the Arbitrator, the appellant was seeking an opinion whether same has also to be challenged in the present appeal. This discussion along with the ill-health of the counsel for the appellant, resulted in a delay in re-filing of the appeal. The application also annexes therewith the Medical Certificate showing the ill-health of the counsel for the appellant.

8. I, therefore, find that sufficient reasons are given by the appellant for seeking condonation of delay in re-filing of the appeal. The delay is therefore condoned.

9. The application stands allowed.

Arb.A.(Comm) 55/2017 & I.A. No.15539/2017 (Stay)

1. Issue notice. Mr.Shambhu Sharan, Advocate accepts the notice on behalf of the respondent. He waives his right to file the reply and submits that he is ready for the final arguments today.
2. I have heard the learned counsels for the parties.
3. This present appeal has been filed by the appellant challenging the order dated 11.07.2017 passed by the Sole Arbitrator rejecting the Counter Claim nos.3 and 4 of the appellant on the ground that the same are not arbitrable and do not fall within his jurisdiction to decide, being hit by Section 16(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').
4. The disputes between the parties arise out of the contract for "Construction of Civic Centre of Municipal Corporation of Delhi at Jawahar Lal Nehru Marg, Minto Road, New Delhi" awarded by the appellant to the respondent. Certain disputes having arisen between the parties, the same were referred for adjudication to the Sole Arbitrator. Along with the Statement of Defence filed by the appellant, the appellant raised certain Counter Claims.
5. Counter Claim no.3 was "on account of loss suffered/to be suffered by the respondent because of non-rectification of leakages by the claimant". Paragraph 5.3.3 of the Counter Claim is relevant and is reproduced herein below:

"5.3.3 On account of failure and breaches of the Claimant, the Respondent will be constrained to get these leakages rectified by third parties, for which the Respondent is entitled to recover the amount from the Claimant. Accordingly, the Respondent seeks

liberty to file the quantification and computation of this claim before this Hon'ble Tribunal, at an appropriate stage.”

6. Counter Claim no.4 was “on account of loss suffered/to be suffered by the respondent because of non-rectification of defects/snags”. Paragraph 5.4.2 of the Counter Claim is relevant and is reproduced herein below:

“5.4 .2 On account of failure and breaches of the Claimant, the Respondent will be constrained to get these snags/defects rectified by third parties, for which the Respondent is entitled to recover the amount from the Claimant. Accordingly, the Respondent seeks liberty to file the quantification and computation of this claim before this Hon'ble Tribunal at an appropriate stage.”

7. The Arbitrator in the Impugned Award has held that as the Counter Claim nos.3 and 4 were not quantified, he would not have the jurisdiction to entertain such Counter Claims. The Arbitrator records that he has not gone into merit of the said Counter Claims.

8. Clause 25 of the General Condition of the Contract contains the Arbitration Agreement between the parties and is reproduced herein below:

“CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specification, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer or equivalent in writing for written instruction or decision. Thereupon, the Superintending Engineer or equivalent shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer or equivalent fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer or equivalent, the contractor may, within 15 days of the receipt of Superintending Engineer's or equivalent's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Commissioner MCD for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Commissioner MCD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.”

9. A reading of the above Clause would show that all questions and issues relating to the meaning of specification, design, drawing and instructions as also to the quality of workmanship, or material used on the work “arising out of or relating to” the contract, specification, instruction,

orders or otherwise concerning the works or the execution or failure to execute the same were to be referred for settlement through arbitration. Clause 25 (i) and (ii) prescribed the procedure for reference of a claim raised by the Contractor, in this case the respondent. The paragraph immediately after these Clauses is again reproduced herein below for easy reference:

“It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.”

10. This Clause necessarily has to refer to claims raised by the Contractor i.e. the respondent, and not to a claim raised by the Employer i.e. the appellant. The Arbitrator also in the Impugned Order holds that the pre-arbitration mechanism as stipulated in Sub-Clause (i) of Clause 25 applies only to the respondent and not to the appellant herein.

11. Once it is held that the above Clause would not apply to a claim raised by the Employer i.e. the appellant, I do not find any other pre-condition in the Arbitration Agreement for quantification of the claim raised by the Employer.

12. Section 16(1) of the Act empowers the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the Arbitration Agreement. The existence or validity of the Arbitration Agreement is not denied by the respondent in the present case.

13. The only ground on which the Arbitrator hold that he has no jurisdiction to entertain the Counter Claim Nos.3 and 4 raised by the appellant is that the same were not quantified. The Arbitrator derives his

jurisdiction from the Arbitration Agreement. Therefore, a Claim or a Counter Claim may be beyond his jurisdiction where the same does not fall within the scope of the Arbitration Agreement, for example where a Claim in respect of another agreement is raised. However, in the present case, there is no dispute that the Counter Claim No.3 on account of alleged loss suffered/to be suffered by the appellant because of non-rectification of leakages by the respondent would otherwise fall within the ambit of the Arbitration Agreement. Similarly, there is no dispute that the Counter Claim No.4 with respect to alleged loss suffered/to be suffered by the appellant because of non-rectification of defects/snags would also fall within the ambit of the Arbitration Agreement. Once this is admitted, the Arbitrator would have jurisdiction to entertain such Claims.

14. Whether in absence of a quantification, the claim itself was liable to be rejected on merit, is different from saying that the Arbitrator itself would not have the jurisdiction to entertain such a claim. The jurisdiction of the Arbitrator arises from the Arbitration Agreement between the parties and not from the merit of the claim or Counter Claim. In my view, the Arbitrator has clearly committed an error of jurisdiction when he goes into the merit of the Counter Claims while adjudicating on his jurisdiction to entertain the same.

15. The Arbitrator, for reaching his conclusion that in the absence of quantification, the Counter Claim shall not be maintainable, has relied upon the judgement of Supreme Court in *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors.*, (2006) 11 SCC 181. In my opinion, the said reliance is totally unfounded. In *Mcdermott International Inc (supra)* the observation made in paragraph 101 thereof was answering the submissions

made before the Court that the claim could not have been made the subject matter of arbitration as in absence of an invoice it could not have been said that a dispute had arisen between the parties. In the said judgment, in fact, the Supreme Court had held that while claiming damages, the amount thereof, were not required to be quantified; the quantification of the claim is merely a matter of proof.

16. Learned counsel for the respondent submits that Section 23 of the Act requires the relief to be also mentioned in the Statement of Claim and in this case, in the Counter Claim. In my opinion, this again is not a question of jurisdiction of the Arbitrator but of whether the appropriate claim or Counter Claim has been filed before the Arbitrator or whether it is liable to succeed or fail before the Arbitrator. It is not a question of jurisdiction, which has to be determined on the basis of the Arbitration Agreement alone.

17. In view of the above, the Impugned Order dated 11.07.2017, in so far as it holds that the Arbitrator has no jurisdiction to adjudicate the Counter Claim nos.3 and 4 as raised by the appellant, is set aside.

18. It is made clear that above observations are only on the question of jurisdiction of the Arbitrator and not on the merits of the Counter Claims raised by the appellant.

19. The appeal is allowed in the above terms.

NAVIN CHAWLA, J

JANUARY 31, 2018/Arya