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

+ **FAO(OS) (COMM) No. 3/2019**

Date of decision: 8<sup>th</sup> January, 2019

**M/S ADWEL ADVERTISING SERVICE & ANR ..... Appellants**

Through: Mr. Dayan Krishnan, Sr. Advocate with  
Mr. Sandeep Grover, Ms. Pankhuri Bhardwaj and  
Mr. Tarang Agarwal, Advocates.

versus

**SOUTH DELHI MUNICIPAL CORPORATION ..... Respondent**

Through: Mr. Sanjay Poddan, Sr. Advocate with  
Mr. Gaurang Kant, Mr. Biji Rajesh and Mr.  
Govind Kumar, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE VINOD GOEL**

**SANJIV KHANNA, J. (ORAL):**

This intra-Court appeal by M/s Adwel Advertising Service and another under Section 37 of the Arbitration and Conciliation Act, 1996 (A & C Act, for short) read with Section 13 of the Commercial Court, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 impugns the order dated 19<sup>th</sup> July, 2018 passed by the learned single Judge.

2. The appeal is belated and delayed by 139 days. However, before issuing notice in the application for condonation of delay, we have deemed it appropriate to take up and hear counsel for the appellants on merits.

3. Learned Senior Advocate for the appellants has raised two contentions. The first contention is that the Arbitral Tribunal (Tribunal, for short) had wrongly taken the public advertisement/notice dated 5<sup>th</sup> March, 2006 on record vide order dated 6<sup>th</sup> February, 2017. Further, the appellants had filed applications for amendment of the claim statements in case public notice dated 5<sup>th</sup> March, 2006 was taken on record. The application was dismissed. The appellants were denied opportunity to contest legal effect of the public notice dated 5<sup>th</sup> March, 2006. Thus, there was violation of principles of natural justice, including *audi alteram partem*. The second submission is that the Tribunal had ignored important letter dated 14<sup>th</sup> February, 2006 which should have been taken into consideration while examining claim No. 2 for damages as the Delhi Municipal Corporation had failed to take steps and had not provided and ensured illumination of the kiosks.

4. Erstwhile Municipal Corporation of Delhi (now substituted by respondent-Corporation) had issued notice inviting tender on 27<sup>th</sup> January, 2006 for allotment of rights for display of advertisement on kiosks installed on street light poles on all municipal roads, including PWD maintained roads for four municipal zones. The last date of submission of bids was 16<sup>th</sup> February, 2006. Date was extended vide corrigendum dated 14<sup>th</sup> February, 2006 till 1<sup>st</sup> March, 2006. By another public notice dated 5<sup>th</sup> March, 2006, the last date of submission of bids was extended to 10<sup>th</sup> March, 2006. As per the respondent-Corporation, this public notice had also modified the original

term of the notice by excluding PWD maintained roads. Accordingly, minimum reserve price/bid for the zones was reduced.

5. The appellants had submitted their tender/bid on 10<sup>th</sup> March, 2006. In respect of two zones, the tender submitted by the appellants was below the Minimum Reserve Price as originally stipulated in the notice inviting tender dated 27<sup>th</sup> January, 2006. However, it was higher than the Minimum Reserve Price fixed in the public notice dated 5<sup>th</sup> March, 2006.

6. Appellants submit that they were not aware of the public notice dated 5<sup>th</sup> March, 2006 and had accordingly submitted their bids. The appellants had claimed rebate of 56.75% on monthly licence fee on account of exclusion of roads maintained by PWD from display of advertisements as was envisaged under the notice inviting tender dated 27<sup>th</sup> January, 2006.

7. The claim for rebate of 56.75% on monthly licensee fee was rejected by the Tribunal accepting the contention of the respondent for the following reasons:-

“26. The Claimants have insisted that they had offered the bids in response to only the NIT dated 27/01/2006 and have pointed out that the Respondent had neither filed a copy of the public notice dated 05/03/2006 with its pleadings nor filed it even subsequently. The Respondent finally filed a copy of the advertisement published in the Times of India dated 05/03/2006 but the learned Counsel for the Claimants had objected to its being taken on record on the ground that the said document was filed when both parties were concluding their oral arguments in all the four cases between the parties being adjudicated upon by the tribunal. The learned Counsel for the Claimants further requested that the arbitral tribunal may hear both parties and then decide the issue. Both parties were accordingly heard and the matter was decided by the tribunal through a

detailed order dated 06/02/2017 permitting that the document may be taken on record. The Respondent has further stated that the issue whether PWD maintained roads were excluded from the contract or not was settled by the Hon'ble High Court of Delhi in their judgment delivered on 17/07/2017 in CS (OS) No. 621/2006. The offer of allotment of contract was conveyed to the Claimants vide letter dated 10/04/2006. The Hon'ble High Court had observed that on the body of this letter, the Claimants had made the endorsement, "Since the formalities are to be completed by 17/04/2006 and I have got confirmation today, rent can only be paid from 17/04/2006". Further, referring to this endorsement by the Claimants, the Hon'ble Court had observed, "I agree with the argument advanced by the learned senior Counsel for the defendants that the plaintiff had made a bid in pursuance to the public advertisement dated 05/03/2006, otherwise, there was no occasion for him to make a bid less than the reserve price as per the advertisement dated 27/01/2006. It is pertinent to note the fact that the communication dated 10/04/2006 was directly addressed to the plaintiff and in this communication, it was clearly mentioned that the PWD maintained roads are excluded. In case the plaintiff had any reservations while making the endorsement as reproduced in para 8 above, he would be entitled to make the payment only from 17/04/2006. These objections could-have been raised by the plaintiff at that stage, which only goes to show that he was fairly aware that the PWD roads are not included. However, it may also be mentioned that neither senior counsel for the defendants, has been able to convince this Court as to who was to provide the electricity of these poles nor the minutes dated 02/02/2006 are clear on this aspect." The fact brought on record that the bids offered by the Claimants were less than the reserve prices fixed in the NIT dated 27/01/2006 clearly shows that the Claimants were offering bids in response to the public notice of 05/03/2006. Further, on receipt of the offer letter clearly

stating that PWD maintained roads were excluded from the scope of the contract, the Claimants had not raised any objection to this change in the term of the contract. It seems to be an afterthought on the part of the Claimants to assume that PWD roads were included in the contract.

It is more than evident from the above discussion that the Claimants had offered bids knowing full well that only MCD roads were included in the contract.

27. In their statement of claims, the Claimants have, in a Table on page 28, given some figures of number of kiosks on roads allowed to be displayed, kiosks on roads denied to the Claimants and have arrived at the conclusion that out of the total number of kiosks, the Claimants were not allowed to display advertisements on as many as 56.75% of the kiosks. No supporting evidence has been filed as to how the total number of electric poles and the number of roads covered under the contract have been worked out and how the Claimants have come to the conclusion that they were not allowed to display advertisements on as many as 56.75% of the kiosks. The number of street light poles shown in the said Table were neither mentioned in the original or the modified NITs nor were they mentioned in the letters offering the contract to the Claimants.

28. In the light of the position stated above, it is difficult to accept the stand taken by the Claimants that the bids were based on the availability of street light poles on MCD roads including the PWD maintained roads and that the Claimants are entitled to a rebate of 56.75% on the monthly licence fee. There is, thus, no force in this claim and the same is rejected.”

8. The aforesaid portion refers to order dated 17<sup>th</sup> July, 2007 passed by the single Judge in CS(OS) No. 621/2006, paragraph 13 of which reads as under:-

“13. I have heard learned counsel for the parties who have taken me through the relevant documents. As far as the advertisement dated 27.01.2006 is concerned, there is no doubt it includes PWD maintained roads as well. Subsequently, in the minutes of the meeting held on 02.02.2006, the terms of the advertisements were approved to include illumination of kiosks. The public notice dated 05.03.2006 mentions that although, the kiosks will be illuminated the PWD maintained roads have been excluded. I agree with the argument advanced by learned senior counsel for the defendants that the plaintiff had made a bid in pursuance to the public advertisement dated 05.03.2006, otherwise, there was no occasion for him to make a bid less than the reserve price as per the advertisement dated 27.01.2006. It is pertinent to note the fact that the communication dated 10.04.2006 was directly addressed to the plaintiff and in this communication it was clearly mentioned that the PWD maintained roads are excluded. In case, the plaintiff had any reservations while making the endorsement as reproduced in para 8 above he would be entitled to make the payment only from 17.04.2006. These objection could have been raised by the plaintiff at that stage, which only goes to show that he was fairly aware that the PWD roads are not included.”

9. This suit, which was filed by the appellants, was withdrawn by them on 17<sup>th</sup> December, 2008.

10. It is accepted that public notice dated 5<sup>th</sup> March, 2006 was filed before the Arbitrator. No doubt, there was delay in filing the same, but it was explained that Municipal Corporation of Delhi was bifurcated into three separate Corporations in the year 2012 and South Delhi Municipal

Corporation, which was thereafter representing the erstwhile Corporation, had not been able to initially trace out the public notice dated 5<sup>th</sup> March, 2006. Thereupon, they had filed an application before the Tribunal for placing the public notice on record, which was allowed vide order dated 6<sup>th</sup> February, 2017.

11. No doubt, the Tribunal did not allow the appellants to amend the written statement or give any further opportunity to the appellants after the public notice dated 5<sup>th</sup> March, 2006 was placed on record, but this would not in the facts of the present case, result in violation of principles of natural justice. The respondent had throughout relied on the public notice dated 5<sup>th</sup> March, 2006. It was not a new stand and stance. Defence of the respondent predicated on the public notice dated 5<sup>th</sup> March, 2006 was accepted by the learned single Judge in his order dated 17<sup>th</sup> July, 2007. Exclusion of the PWD roads was also mentioned and stated in the letter of offer dated 10<sup>th</sup> April, 2006. The reserve price originally fixed in advertisement dated 27<sup>th</sup> January, 2006 was reduced in public notice dated 5<sup>th</sup> March, 2006. Learned single Judge in this regard has held as under:-

“14. I have considered the submissions made by the learned senior counsel for the petitioners, however, I am unable to accept the same. Admittedly, the respondent had issued a NIT dated 27.01.2006 inviting quotation for the display of advertisement through kiosks on street light poles existing on all MCD roads including PWD maintained roads. The said notice prescribed the Minimum Reserve Price for each zone as also stated that the last day of receipt of tenders would be 16.02.2006. There is no dispute that by a Corrigendum dated 14.02.2006, the last date of submission of tender was extended till 01.03.2006. It was only with the Public Notice dated 05.03.2006 that the respondent, not only reduced the

Minimum Reserve Price for each zone, but also extended the last date of submission of tender to 10.03.2006. There is no dispute between the parties that the petitioners submitted their tender on 10.03.2006 and its quotation, for atleast two Zones, was below the Minimum Reserve Price stipulated in the NIT dated 27.01.2006.

15. Though the petitioners denied the knowledge of Public Notice dated 05.03.2006, in my opinion, the fact that the petitioners submitted their tender on 10.03.2006 and for two Zones made a bid which was below the Minimum Reserve Price prescribed in the NIT dated 27.01.2006, belies such denial of knowledge by the petitioners. The submission of the petitioners that in some other tenders also the respondent had accepted bids that were below the Minimum Reserve Price cannot be accepted at this stage while considering the challenge of the petitioners under Section 34 of the Act. The respondent in its reply before the Arbitral Tribunal had placed reliance on this fact. In fact, even this Court in its order dated 17.07.2007 placed reliance on this submission of the respondent. Therefore, any explanation in this regard and proof in support of such explanation should have been filed by the petitioners before the Sole Arbitrator. The petitioners cannot now seek to impugn the Arbitral Award by seeking to place additional documents and submissions on record. It is not the case of the petitioners that the documents now sought to be placed on record by way of additional affidavit before this Court, were not available to the petitioners at the time of the proceedings before the Arbitral Tribunal.

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17. As far as delay of the respondent to place a copy of the Public Notice dated 05.03.2006 on record is concerned, the Sole Arbitrator in his order dated 06.02.2017 as also in the Impugned Award, has taken note of the fact that the respondent had consistently pleaded that due to O.M.P. (COMM.) 383/2017 Page 10 trifurcation of the MCD into three separate Corporations, including the respondent herein, some of the records pertaining to the case had been misplaced / lost and the respondent, despite its best effort to trace the same, had failed.

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19. In any case, it is not as if the respondent has sought to contend a new case before the Sole Arbitrator by filing the copy of the Public Notice dated 05.03.2006. The case of the respondent has always been that the bid of the petitioners was considered and accepted by the respondent only in terms of Public Notice dated 05.03.2006. This stand of the respondent was considered by this Court and accepted by its order dated 17.07.2007 passed in CS (OS) 621/2006 as quoted hereinabove.

20. In any case, all the above discussion will pale into insignificance as the respondent by its communication(s) dated 10.04.2006 clearly offered O.M.P. (COMM.) 383/2017 Page 11 allotment of rights to the petitioners excluding all PWD maintained roads. In case such offer was not acceptable to the petitioners, the petitioners could have rejected the same, however, having accepted the same, cannot now seek reduction in the license fee on ground of exclusion of PWD roads. It is settled law that Notice Inviting Tender is a notice to invite an offer from the interested parties. When a bid is submitted in response to Notice Inviting Tender, it is an offer. It becomes a contract only

with the acceptance of tender by the authority issuing NIT. In the present case in fact, even this would not have resulted in a concluded contract as letter dated 10.04.2006 required the petitioners to fulfill further conditions like deposit of security deposit, one month's advance license fee and advertisement tax before the contract could be stated to have come into force between the parties. Even if the case of the petitioners is to be accepted that the present case would be governed by NIT dated 27.01.2006 and not by Public Notice dated 05.03.2006, the letters dated 10.04.2006 would be in form of counter offer, which the petitioners could have rejected if they so desired.”

12. In view of the above, we don't think findings recorded by the Tribunal and the single Judge would on merits and for violation of principles of natural justice require interference in terms of the limited jurisdiction this Court exercises under Sections 34 and 37 of the A & C Act.

13. The second contention of the appellant that the Tribunal had ignored the letter dated 14<sup>th</sup> February, 2006 while examining claim No. 2 for damages, is without merit. The Tribunal had partly allowed claim No. 2 for the following reasons:-

“32. The Claimants do not seem to have pursued the matter with BSES as they have not furnished copies of any further communication addressed to BSES. No documentary evidence has been produced by either party clearly laying down the responsibility of the authority which was to obtain electricity connections from different DISCOMs. The Claimants have stated that it was crucial and significant that the Respondent would facilitate supply of electricity from the electricity distribution companies. In this connection, the Respondent had taken a meeting with the Electricity Distribution

Companies on 12/04/2006 which was also attended by the advertisers including the Claimants, with a view to facilitating the supply of electricity to the kiosks installed on electric poles by the Claimant.

33. The fault basically lay with the DISCOMS who failed to spell out the difficulties in providing electricity connections at so many points and in different areas in the meeting organized by MCD as early as 12/04/2006 i.e. much ahead of the date for filing the tenders. Had they expressed their inability in providing connections, the stipulation regarding illuminated kiosks could O.M.P. (COMM.) 383/2017 Page 14 have been dropped from the Tender conditions before the parties filed their bids.

34. The parties had not even counted the total number of electric poles on which advertisements were to be displayed before they signed the contract. It is, therefore, difficult to make an assessment as to how non-illumination of kiosks would have affected the revenue earning capacity of the Claimants or the Respondent. The Claimants have not given any cogent explanation as to how they have come to the conclusion that they are liable to pay only 20.13% of the monthly license fee in view of non-illumination of the kiosks.

35. In view of the facts stated above, while it is difficult to hold any one agency solely responsible for not arranging the electricity connections for illuminating the kiosks, there is no doubt that the Claimants' earnings were, to some extent, adversely affected due to non-illumination of the kiosks. There cannot be any foolproof criterion for assessing the loss in the instant case. Under the circumstances, relief can be provided only on an ad hoc basis. In my view, it will meet the ends of justice if the Claimants are allowed a rebate of Rs. 50,00,000/- (Rs. Fifty

Lakhs) to compensate them for the loss of revenue due to non-illumination of kiosks as against their claim of Rs. 87,27,572/- demanded towards loss of profit on this account as mentioned under claim no. 10.”

14. The aforesaid reasons state that the Tribunal had held that it was for the appellant to have applied for and taken electricity connection from BSES. If the DISCOMS was not granting electricity connection, the appellants should have either taken action against them or raised the matter before the BSES. The learned single Judge has in the impugned order examined the said aspect, and reject the submission for the following reasons:-

“25. Reading of the above finding would show that the Arbitral Tribunal has found that the fault basically lied with the DISCOMS in non grant of electricity connections. It further found that the petitioners did not take up the matter further after raising it with BSES and MCD. The Arbitral Tribunal further found that in absence of the total number of electricity poles on which advertisements were to be displayed, it was difficult to make an assessment of the effect of non grant of electricity connection on the revenue earning capacity of the petitioners and O.M.P. (COMM.) 383/2017 Page 15 therefore, on an ad hoc basis, has granted a rebate of Rs. 50 lakhs in favour of the petitioners.

26. From the letter dated 07.11.2006, it is apparent that the respondent had issued a No Objection Certificate for the purpose of grant of electricity connection in favour of the petitioners. The letter also relied upon the meeting held between the officers of MCD, BSES and the petitioners in May 2006 in this regard. However, the Arbitral Tribunal also notes that the minutes of this meeting have not

been placed on record by either party. For MCD, the explanation as noted above, is that due to trifurcation they have misplaced the documents relating to the contract. The onus was therefore, on the petitioners to have proved before the Arbitrator the exact decision reached between the parties in such meeting.

27. In any case, the petitioners made a grievance regarding non grant of electricity connection to the respondent by its letter dated 01.12.2006, however, thereafter, there is no document on record to show if this issue was taken up by the petitioners with the MCD or BSES and if so, the outcome of the same. It seems that the petitioners did not pursue the same as this Court by its order dated 17.07.2007 had given interim protection to the petitioners by reducing the amount to be paid by the petitioners to Rs. 25 lakhs in place of ₹ 36,13,004 per month on which the contract had been awarded by the respondent to the petitioners, the petitioners were to pay Rs. 25 lakhs per month from July, 2007 onwards. This, however, was an interim arrangement and it was upon the petitioners to prove their claim as to the amount to which they were entitled before the Arbitral Tribunal.”

15. The respondent-Corporation had issued No Objection Certificate for grant of electricity connections in favour of the appellants. Meeting was held between the officers of Municipal Corporation of Delhi, BSES and the appellants in May, 2006, but the minutes could not be placed on record, as they could not be located. Internal communications are inconsequential and would not confer legal rights. Appellant had only written one letter dated 1<sup>st</sup> December, 2006 raising grievance with regard to non-grant of electricity connection and no response was received from the respondent-Corporation

and thereafter no correspondence or complaint was made. Paragraph 27 of the impugned order passed by the learned single Judge also refers to interim order passed by the Court in CS(OS) No. 621/2006 dated 17<sup>th</sup> July, 2007 with reference to electricity connection. The appellants had been directed to deposit Rs.25 lacs per month from July, 2007. It may be noted that as per bid/tender submitted by the appellants, they should pay license fee Rs. 36,13,004/- per month. The appellants had paid license fee @ Rs.25 lacs per month. Learned Arbitrator had directed the balance payment of license fee as per the contractual term of Rs. 36,13,004/- per month and after reduction of Rs.50 lacs on this account towards loss of revenue due to non-illumination of kiosks. Certain other reductions have been also given to the appellants.

16. No other ground or issue has been urged and argued before us. In view of the aforesaid position, we are not inclined to issue notice in this appeal and same is dismissed and consequently the application for condonation of delay would be treated as dismissed.

**SANJIV KHANNA, J.**

**VINOD GOEL, J.**

**JANUARY 8, 2019**  
**MR/VKR**