

\$~25

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

+ O.M.P. 974/2012

Date of Decision : 2nd April, 2019

MAHANAGAR TELEPHONE NIGAM LTD Petitioner

Through: Mr.S.K.Singh, Mr.Rameezuddin
Raja, Advs. along with Mr.Anil Kumar
Sharma, Executive Engineer(C), KKD,
MTNL

versus

M/S UNITY BUILDERS Respondent

Through: Mr.Vikas Sharma, Mr.Ashish,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 28.04.2012 along with the order dated 12.06.2012 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Agreement No.EE(C) V/MTNL/AG/06-07/63 for the Construction of T.E. Building at Mayur Vihar, Phase-II, New Delhi (balance work awarded by the petitioner to the respondent).

2. The challenge to the Award is to the award of claim no.1, part of claim no.2 and claim no.3, which were amounts withheld by the petitioner on account of exercise of lien under Clause 52.2 of the General Conditions of Contract (GCC) for the amounts recoverable /claimed by the petitioner under the other contracts awarded to the respondent. Clause 52.2 of the GCC is reproduced hereinunder:

“52.2 Lien in respect of claims in other contracts. Any sum of money due and payable to the Contractor including the Performance Guarantee/Security Deposit refundable/ returnable to him under the Contract may be withheld or retained by way of lien by the MTNL in respect of payment of a sum of money arising out of or under any other contract made by the Contractor with the MTNL.

It is an agreed term of the Contract that the sum of money so withheld or retained under this clause by the MTNL will be kept withheld or retained as such by the MTNL till his claim arising out of in the same contract is either mutually settled or determined by the Arbitrator (if the Contract is governed by arbitration clause) or by the Competent Court, as the case may be and that the Contractor shall have no claim for interest or damage Whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under the clause and duly notified as such to the Contractor.”

3. The Arbitrator has allowed the said claim in favour of the respondent on the ground that the petitioner has already made claim of such amounts in arbitration proceedings initiated in relation to the other contracts. In the opinion of the Arbitrator, once these amounts have been claimed in the other arbitration proceedings, retention of the amounts under Clause 52.2 of the Agreement was unjustified and unlawful. I cannot agree with the finding of the Arbitrator.

4. A reading of Clause 52.2 of the GCC clearly empowers the petitioner to retain its right of lien in respect of claims in other contracts on any sum of money due and payable to the contractor, including the performance guarantee/security deposit refundable/returnable to such contractor under the contract. Such lien can be exercised till the claim of the petitioner is either mutually settled or determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent Court as the case may be. The petitioner was therefore, within its right to exercise this power of lien on the amounts due and payable to the respondent. This being a contractual power to which no challenge was made by the respondent, cannot be said to have been unlawfully exercised by the petitioner.

5. It is also not in dispute that as on the date of the Impugned Award, the other arbitration proceedings were still pending adjudication.

6. The Impugned Award is, therefore, *ex-facie* contrary to the plain reading of the contractual term and cannot be sustained.

7. Counsel for the respondent has submitted that after passing of the Impugned Award, by a separate Award dated 03.02.2017 disputes in one of the other arbitration proceedings have been adjudicated by the Sole Arbitrator appointed therein. The said Award, though in challenge in form of a petition under Section 34 of the Act, has rejected the counter claim filed by the petitioner for the amount that had been retained in the present contract under claim no.1. Relying upon the judgment of this Court in ***Electronic Enterprises vs. Union of India***, AIR 2000 Delhi 55, he submits that even if the power to retain the amount is acceded to the petitioner under Clause 52.2, the same can only be withheld till the passing of the Award in the other arbitration proceedings. Once the counter claim filed by the petitioner in such other proceedings has been rejected, the petitioner is no longer entitled to retain such amount and therefore, the Award in the present case cannot be sustained. He further places reliance on the judgment of the Supreme Court in ***Gangotri Enterprises Ltd. vs. Union of India (UOI) & Ors.***, AIR 2016 SC 2199 to submit that the power of lien could have been exercised only for the amount 'due and payable' to the petitioner under the other contract. The amount can become 'due and payable' only once they are adjudicated in the other

arbitration proceedings and not before that and therefore, lien can be exercised only after such adjudication is completed.

8. I have considered the submissions made by the counsel for the respondent, however, find no merit in the same. Infact, the present case would show how the Impugned Award has prejudiced the case of the petitioner. In the Award dated 03.02.2017 passed in the other arbitration proceedings in relation to the other contract and where the amount retained herein had been claimed as a counter claim, the said counter claim of the petitioner has been rejected on the ground that it has already withheld and has recovered an amount of Rs.22,58,939/-, which was the claim no.1 under the present arbitration proceedings. The Arbitrator in the said Award, taking cognizance of the amount withheld, has rejected the counter claim of the petitioner therein. I may quote from the said Award as under:

“(6.19.5) Claimant has also argued that Respondent having recovered an amount of Rs. 22,58,939.00 from another contract of Claimant with MTNL, why is Respondent continuing with this counter-claim for Rs. 8,71,619.00.

Respondent has argued that Claimant had gone in for arbitration for the other work (from which the amount was withheld) and the Ld. Arbitrator of that case has given an award (Ex. R-53) in favour of Claimant and released the withheld amount of Rs. 22,58,939.00; therefore counter-claim is still required and is genuine.

(6.19.6) *Having held that Respondent is entitled to recover Rs. 6,05,517.00 from Claimant on account of outstanding secured advance, and Respondent having already recovered Rs. 22,58,939.00 from another contract of Claimant with MTNL, the counter-claim is not justified, and is rejected.*

No cognizance is taken by this tribunal of the award made by the Ld. Arbitrator relating to disputes of another contract for the interlinked claim of this contract as that award has not attained finality being under challenge in the High Court of Delhi.

Amount Awarded: Nil

9. Therefore, the petitioner has clearly suffered double jeopardy wherein, in the Impugned Award the amount of Rs.22,58,939/- has been ordered to be refunded to the respondent, while in the other Award, the same has been taken into account while rejecting the counter claim of the petitioner.

10. Be that as it may, as on the date of passing of the Award, the other arbitration proceedings were still pending, as far as the amount under claim no.1 is concerned. As far as the other amounts withheld under claim no.2 and claim no.3 are concerned, I am informed that one of such proceedings is still pending before the Arbitrator. The petitioner, therefore, as on the date of passing of the Award was entitled to claim lien over the said amount as was being claimed by it in such other arbitration proceedings.

11. The effect of the Award passed in such other arbitration proceedings could have been seen only on passing of the said

Award in form of separate proceedings or separate claims of the respondent raised after the passing of the Award in such other arbitration proceedings. As far as the present Award is concerned, once it is held that the petitioner was entitled to exercise such right of lien, the Award directing refund of such amount during the pendency of the other arbitration proceedings cannot be sustained as it is clearly contrary to the contractual terms between the parties.

12. In *Electronic Enterprises* (supra), this Court, infact, approved the earlier judgment in *Panipat foods Ltd. v. Union of India* delivered in June 4, 1986 in Suit No.1373/1983, to hold that during the pendency of the other arbitration proceedings the amount due can be withheld by the Union of India. The Court, however, held that once the Award in the other proceedings has been passed in favour of the Contractor, such amount cannot be further retained. In the present case, however, I have already observed that the counter claim of the petitioner in the other arbitration proceedings has been rejected on the ground and on the assumption that the petitioner has already appropriated the amount of Rs.22,58,939/- retained in the present contract. Therefore, no benefit of this Award can be given to the respondent in the present case. Further, the judgment in *Electronic Enterprises* (supra) was passed under the Arbitration Act, 1940 where under Section 15, the Court also had the power to modify the Award, which power is not

present with Court under the 1996 Act (*Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Private Limited*, 2019 SCC OnLine Del 6562).

13. The judgment in *Gangotri Enterprises Ltd.* (supra) is also of no aid to the respondent as in the said case, the Court was interpreting Clause 62(1) of the GCC therein. The Court held that the said Clause did not empower the respondent to invoke the Bank Guarantee of a different contract during the pendency of arbitration. The facts of the present case are totally distinct.

14. The other challenge of the petitioner is with respect to a part of claim no.2 for the extra work carried out by the respondent but not paid for.

15. Counsel for the petitioner submits that under the Schedule of Work, the respondent had offered a rebate of 1.25% on the quoted rates. The Arbitrator has however, failed to take into account such rebate while awarding the claim of the respondent.

16. On the other hand, counsel for the respondent submits that this plea was never taken up by the petitioner before the Arbitrator and therefore, the petitioner cannot challenge the Award on this ground.

17. The submission of the counsel for the respondent is not refuted by the petitioner. However, counsel for the petitioner

submits that this being a contractual term and the contract being on record, the Arbitrator is obliged to consider the same.

18. I have considered the submissions made by the counsels for the parties. Once the petitioner has not taken a particular defence before the Arbitrator, it cannot be allowed to challenge the Award for non-consideration of the same by the Arbitrator. The plea of the petitioner in the present case is not merely one of law or application of the contractual term but also depends on the facts with respect to the nature of claims raised by the respondent, that is, application of the Schedule of Work to the nature of claim raised by the respondent. The Award therefore, cannot be allowed to be challenged on this ground.

19. The last challenge of the petitioner is to the award of loss or damages on account of delay in the execution of the work on account of reasons attributable to the petitioner. Counsel for the petitioner submits that the Arbitrator having considered that the delay attributable to the petitioner was of 132 days, has thereafter proceeded to award damages in favour of the respondent only on his own whims and fancies and without any proof or evidence in support thereof being led by the respondent.

20. I am unable to agree with the submission made by the counsel for the petitioner. The Arbitrator in allowing the said claim in favour of the respondent has held as under:

“Reasons:- As elaborated above that completion of work had been delayed for a period of $345-183-30=132$ days due to defaults on the part of Respondent.

Prolongation of contract due to defaults on the part of Respondent definitely results into extra expenditure on staff, T&P, machinery, watch and ward etc which is to be necessarily kept and maintained at site for a period longer than catered for at the time of submission of tender. Claimant is therefore entitled to be compensated for losses on these accounts, for period of 132 days keeping in view the principle of mitigation of losses.

In accordance to provisions contained in clause 30.0 of the Agreement Claimant was required to employ one graduate civil engineer having more than 5 years experience. In case of his failure to do so he was liable pay Rs.5000/- for each month of default. Keeping in view the fact that no such recovery has been made by Respondent, it is therefore implied that Claimant had complied with the provisions contained in this clause of agreement. Similarly minimum supervisory, clerical and watch and ward staff is essentially required to be provided at site. Claimant had also to keep minimum required T&P for execution of work during the extended period.

Keeping view above stated facts it is assessed that Claimant's loss on this account would have been of the order of Rs.50,000=00 P.M., for a period of 132 days, keeping in view principle of mitigation of losses.”

21. A reading of the above finding would show that the Arbitrator has taken into account the fact that the respondent, for the purpose of execution of the work, had to employ at least one Graduate Civil Engineer having more than five years

experience apart from the minimum supervisory, clerical and watch and ward staff. The amount so awarded by the Arbitrator, therefore, cannot be said to be unreasonable or totally perverse so as to warrant any inference of this Court in exercise of its powers under Section 34 of the Act.

22. Counsel for the petitioner has also challenged the award of interest on the amounts that have been ordered to be refunded to the respondent, under claim no.1, part of claim no.2 and claim no.3. As the award of refund itself has been set aside, the question of payment of interest thereon on such amounts does not require consideration.

23. In light of the above, the petition partially succeeds. The parties shall bear their own costs.

24. I may only add that my reference to the other Award will not prejudice either party in pursuing their claims and counter claim as far as those proceedings are concerned.

NAVIN CHAWLA, J

APRIL 02, 2019

RN