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

\+ **OMP(COMM) 369/2017**

Reserved on: ***10th November, 2017***
Date of decision: **22nd November, 2017**

NEW DELHI MUNICIPAL COUNCIL ..... Petitioner
Through: Mr.Vipul Ganda, Mr.Raghav, Mr.Mohit Domman, Advs.

versus

V3S INFRATECH LIMITED ..... Respondent
Through: Mr.Praveen Kumar Singh, Mr.Utkarsh Singh, Md.Ziauddin Ahmad, Mr.Avi Batra, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

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 New Delhi Municipal Council challenging the Arbitral Award dated 16th June, 2017 passed by the Sole Arbitrator. The petitioner confines challenge only to issue no. 11 and 15 decided by the Sole Arbitrator.

2. The disputes between the parties arise out of the work contract awarded by the petitioner in favor of the respondent for the upgradation and re-modeling of Palika Bazar, New Delhi vide Agreement No. 19/EE (Bm-II) 2009-10 dated 22nd December, 2009.

3. The tendered amount was Rs. 23,02,03,333/- (Twenty Three Crore Two Lakh Three Thousand Three Hundred and Thirty Three). The

stipulated period for completion of work was ten months from the tenth day of issue of work award letter dated 12th November, 2009 and was accordingly to be completed by 28th September, 2010. The work was eventually completed on 23rd August, 2011. In the meantime, the respondent/claimant, claiming that the work had been completed raised its final bill for an amount of Rs. 27,86,85,775/- on 31st March, 2011.

4. Clause 9 of the agreement provides that where the tendered value of the work exceeds Rs. 15 lacs, as far as possible, payment of the final bill shall be made within a period of six months from the date of receipt of the bill by the Engineer in Chief. As an amount of Rs. 16,96,48,797/- had already been received by the respondent against the Running Account bills submitted by the respondent from time to time, the respondent claimed that it was entitled to the balance payment of Rs.10,90,36,978/- by September, 2011 whereas the balance payment was received by it only on 24th December, 2014.

5. Issue no. 11 framed by the Sole Arbitrator is as under:-

> **ISSUE N0.11**
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> Whether the claimant are entitled for the release/payment of Retention Money amounting to Rs.38,75,971/-(Rupees Thirty Eight Lacs Seventy Five Thousand Nine Hundred Seventy One only) retained/withheld by the Respondent/Opposite party out of various RA Bills submitted by the Claimants?

6. The arbitrator has held the respondent to be entitled to receive its security money and has held that the same was being illegally and unauthorizedly invariably retained by the petitioner NDMC. The

arbitrator has also allowed interest on the amount of Rs.38,75,971/- from 18th December, 2012 till realization at the rate of 12 percent per annum.

7. The learned counsel for the petitioner, relying upon clause 29 of the agreement, submits that the petitioner had a right to retain the security deposit. He further submits that on such security amount being retained, the respondent would have no claim for interest till the same is adjudicated by the arbitrator. He, therefore, relying upon the judgment of Supreme Court in **Sayeed Ahmed & Company vs. State of UP** (2009) 12 SCC 26 submits that award of interest in favor of the respondent is liable to be set aside, the same being contrary to the provisions of the agreement.

8. On the other hand, it is submitted by the counsel for the respondent that clause 29 of the agreement pre-supposes and is applicable only when the Engineer-in-Charge or the NDMC decides to withhold or exercise its lien to retain the security deposit for payment of any claim or claims arising out of or under the contract. Therefore, the retention of the amount has to be shown against a specific claim. Mere non-payment of the security deposit, without any justified cause would not attract the provisions of clause 29 and equally grant protection to the petitioner from payment of interest for the amount so illegally withheld. He submits that in the present case, there was no order of the petitioner deciding to withhold the security deposit against any claim made by it. He further submits that in the present case, the only dispute that was sought to be raised by the petitioner was with respect to Chiller No. 2 for which the petitioner had separately stopped the payment of Rs.1,35,56,026/-. He

therefore, submits that clause 29 of the agreement and the judgment of the Supreme Court in ***Sayeed Ahmed (supra)*** would not be applicable to the facts of the present case.

9. The arbitrator has allowed the claim of the petitioner relying upon the letters dated 19th March, 2013 and 19th May, 2016. The finding of the learned arbitrator is quoted herein below:-

> *"Both these documents have been admitted by the Respondent. If we read carefully the letter dated 19.05.2016 from Carrier Air-Conditioning & Refrigeration Company to Executive Engineer(E) BM-I, NDMC, it speaks volume of things. In this letter, there are references of various letters dated 24.04.2014, 09.11.2015 and 28.12.2015 in which it has been clearly stated that after subsequent repair of Chiller and startup of Chiller at site, as on date Chiller run for more than 1000 hrs.. By mentioning this fact and after considering the running condition of the Chiller, the said Carrier Air-conditioning & Refrigeration Company proposed to undertook this Chiller i.e. Chiller No.2 under annual maintenance contract which stood due for renewal on 25.08.2015 and further proposed to undertook this Chiller under annual maintenance contract with same scope of work and other terms & conditions as that in previous annual maintenance contract order vide Ref.No.EE(E)BM-I/D/1415, Dated 22.8/2014.*
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> *If we read the statement of Shri A.K.Joshi, Chief Engineer(E) and the above letter of Carrier Air-conditioning & Refrigeration Company, both are contradictory. Chief Engineer(E) in his statement has nowhere mentioned about the said letter dated 19.05.2016 of the Carrier Air-conditioning & Refrigeration Company which has been admitted by them during the admission and denial of the documents. It is an admitted position that annual maintenance contract*

can be given only when the Chiller is functional, otherwise what for and why the annual maintenance contract will be given. It cannot be presumed that the Respondent's Engineers can give annual maintenance contract for defective Chiller. Annual maintenance contract can be executed only in reference to a functional machinery/equipment. It cannot be presumed that an annual maintenance contract will be executed by the officials of the Respondent for non-functional machinery or equipment. More so when there is a reference in the letter itself that the Chiller has run for more than 1000 hrs.

From the above statement of the witness and the letter dated 19.05.2016, I decide the above issue in favour of the Claimant and against the Respondent and it is hereby declared that the Claimant is entitled to receive its security money which has been illegally and unauthorisedly retained by the Respondent NDMC. Since the Respondent withhold the amount due for Chiller No.2 as well as the security deposit of Rs.38,75,971/- on the ground of defective Chiller, the Respondent should have paid this security money to the Claimant since they have stopped the payment of Chiller No.2 of amount Rs.1 ,35,56,026/-. And as such I allow interest also on the said amount from 18.12.2012 till realization @ 12 °/o per annum. From the above discussion, Issue No.11 is decided against the Respondent and in favour of the Claimant to the extent as indicated above. The Claimant shall be entitled the interest @ 12% per annum."

10. Clause 29(1) of the Contract is reproduced herein below:

"(1) Whenever any claim or claims for payment of a sum of money arises out of or under the contract or against the contract, the Engineer-in-Charge or the NDMC shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the

security, if any deposited by the contractor and for the purpose aforesaid, the Engineer-in-Charge or the N.D.M.C., shall be entitled to withhold the security deposit, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Engineer-in-Charge or the N.D.M.C. shall be entitled to withhold and have a lien to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which may at any time thereafter become payable to the contractor under the same contract or any other contract with the Engineer-in-Charge or the N.D.M.C. or any contracting person through the Engineer-in-Charge pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above by the Engineer-in-Charge or N.D.M.C will be kept withheld or retained as such by the Engineer-in-Charge NDMC till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) or by the competent court, as the case may be and that the contractor will have no claim for interest or damages whatsoever or any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Engineer-in-Charge or the N.D.M.C. shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company as the case may be whether in his individual capacity or otherwise."

11. For application of Clause 29(1) of the Contract it must be shown that there is a claim of a sum of money against the contractor, and the Engineer-in-Charge or the NDMC has decided to withhold or retain such sum in whole or in part from the security deposited by the contractor till finalization or adjudication of such claim. It is only when this right is exercised by the Engineer-in-Charge or NDMC, no interest shall be payable on the amount so withheld till the claim is determined by the arbitrator.

12. The counsel for the petitioner has been unable to show any order passed by the petitioner retaining the security deposit against any of its claim. In absence thereof, it is clear that the petitioner never exercised its rights under clause 29(1) of the contract while retaining the security deposit. Therefore, the petitioner would not be eligible for protection against payment of interest under sub para 2 of clause 29(1) of the agreement. As there was no claim of the petitioner to be adjudicated by the arbitrator or the Court, sub para 2 of clause 29(1) would not become applicable.

13. As has been held by the Supreme Court in its judgment dated 03.08.2017 in Civil Appeal No.2099/2017, ***Union of India v. M/s Pradeep Vinod Construction Company,*** the capacity of the arbitrator to award interest would depend on the contractual agreement. In ***Union of India v. Ambica Construction***, (2016) 6 SCC 36, it has been held as:

> *"22. In our opinion, it would depend upon the nature of the ouster clause in each case. In case there is express stipulation which debars pendent lite interest, obviously, it cannot be granted by the arbitrator. The award of*

pendent lite interest inter alia must depend upon the overall intention of the agreement and what is expressly excluded."

14. It was further held :-

"33. The decision in Madnani Construction Corporation (supra) has followed decision in Engineers-De-Space-Age (supra). The same is also required to be diluted to the extent that express stipulation under contract may debar the Arbitrator from awarding interest pendent lite. Grant of pendent lite interest may depend upon several factors such as phraseology used in the agreement, clauses conferring power relating to arbitration, nature of claim and dispute referred to Arbitrator and on what items power to award interest has been taken away and for which period.

34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendent lite, the same cannot be awarded by the Arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendent lite by the Arbitral Tribunal, as ouster of power of the Arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

15. The judgment of the Supreme Court in ***Sayeed Ahmad & Company (Supra)*** would also not be applicable to the facts of the present case. In ***Sayeed Ahmad & Company (Supra)*** Supreme Court was dealing with the Clause G-1.09 which prohibited grant of interest with respect to any money or balance which may lie with the Government. The Supreme Court interpreted that clause and held that the same prohibited grant of

interest in respect of any money that may become due owing to any dispute/differences or misunderstanding between Engineer-In-Charge and contractor or with respect to any delay on part of the Engineer-In-Chief in making periodical or final payment or in respect of any other respect whatsoever. In fact, the Supreme Court distinguished the case of ***State of U.P. v. Hari Chandra & Company***, (1999) 1 SCC 63, wherein the clause was differently worded. As held above, it always depends upon the wording of the clause of the agreement to determine whether or not grant of interest on a particular claim is prohibited.

16. On interpretation of Clause 29(1), I find that it has no application to the facts of the present case. I therefore find no merit in the objection against grant of interest under claim No.11 in favour of the respondent and accordingly the objection filed against the same by the petitioner is rejected.

17. Issue No.15 as framed by the Arbitrator is as under:

> ***ISSUE N0.15***
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> *Whether the claim of the claimant that the payments due against the final bill were not made in accordance with the Clause 9 of the Agreement is justified, and if so, whether the claimant are entitled for interest on delay in admitted payment of Rs.10,90,36,978/- (Rupees Ten Crores Ninety Lacs Thirty Six Thousand Nine Hundred Seventy Eight only) @ 18°/o P.A. amounting to Rs.6,96,21, 159/-(Rupees Six Crore Ninety Six Lacs Twenty One, Thousand One Hundred and Fifty Nine Only)?*

18. The Arbitrator has allowed the said claim. The challenge is confined to the award of interest @ 12% p.a. from 18th December, 2012 to 24th December, 2014.

19. Learned counsel for the petitioner has submitted that the delay in release of the amount in favour of the respondent was due to an inquiry initiated by the Central Vigilance Commission (CVC) into the contract. The Vigilance inquiry was completed only in July 2014 and the payment was made on 24th December, 2014. Relying upon Clause 29(2) of the agreement which grants the petitioner right to cause an audit and technical examination of the work and further states that in pursuant to such audit if any amount is found due and payable to the contractor, such amount shall be paid by the petitioner without any interest therein, the petitioner submits that the Arbitrator has acted in violation of terms of the agreement and Section 31(7)(A) of the Act. Reliance is again being placed on the judgment of Supreme Court in ***Sayeed Ahmad & Company (Supra)***.

20. Learned counsel for the respondent, on the other hand, submits that in this case no audit was ordered to be conducted by the petitioner. This was a case of vigilance inquiry which was not initiated at the behest of the petitioner and therefore, reliance of Clause 29(2) of the agreement is ill-founded. It is further submitted that no document with respect to such vigilance inquiry was placed by the petitioner before the Arbitrator and in fact, from the statement made by its witness it was clear that the Vigilance Commission had submitted its report on 18th December, 2012.

It is therefore submitted that the Arbitrator has rightly granted interest with effect from 18th December, 2012 on this claim.

21. Clause 29(2) of the agreement is reproduced herein below:

> *"(2) The N.D.M.C. shall have the right to cause an audit and technical examination of the works and final bill of the contractor including all supporting vouchers, abstract etc., to be made after payment of the final bill and if as a result of such audit and technical examination any sum is found to have been overpaid in respect of any work done by the contractor under the contract or any work claimed to have been done by him under the contract and found not to have been executed, the contractor shall be liable to refund the amount of overpayment and it shall be lawful for the N.D.M.C. to recover the same from him in the manner prescribed in sub-clause (1) of this clause or in any other manner legally permissible; and if it is found that the contractor was paid less than what was due to him under the contract in respect of any work executed by him under it, the amount of such under payment shall be duly paid by the N.D.M.C. to the contractor, without any interest thereon whatsoever. Provided that the NDMC shall not be entitled to recover any sum overpaid, nor the contractor shall be entitled to payment of any sum paid short where such payment has been agreed upon between the Chief Engineer or Engineer-in-Charge on the one hand and the contractor on the other under any term of the contract pertaining payment for work after assessment by the Chief Engineer or the Engineer-in-Charge."*

22. A reading of the above Clause would show that the petitioner has a right to cause an audit and technical examination of the work and final bill of the contractor, after payment of the final bill. As a result of such audit if any amount is found to be overpaid, the petitioner would be entitled to recover the same in the manner prescribed in Sub-Clause 1 of

Clause 29 i.e. from the security deposit or other money withheld or in any manner legally permissible. At the same time if, as a result of audit, any amount is found payable by the petitioner to the contractor/respondent, the same shall be paid to the respondent/contractor without any interest. The pre-requisite of the Clause is:

a. The petitioner must order an audit; and
b. The audit has to be after payment of final bill.

23. It is only when the above pre-requisite are met and as a result of audit certain additional amount is found due to the Contractor, the payment to the respondent/ contractor of the said amount would not carry interest.

24. In the present case, it is not the case of the petitioner that the petitioner had ordered any audit in exercise of its power under Clause 29(2) of the agreement. It was CVC which had started some investigation into the contract. The petitioner has not placed on record any document to show that there was any embargo on the petitioner making any payment to the respondent during the pendency of this investigation. As noted above, even for this amount no order has been passed by the petitioner in exercise of its power under Clause 29(1) of the agreement to withhold the same pending such investigation. In fact, as recorded by the arbitrator and not disputed before me, the Petitioner placed no document relating to the CVC inquiry before the Arbitrator, including its reports. In my view, therefore, Clause 29(2) of the agreement cannot come to the aid of the petitioner as the same was not applicable at all.

25. The Arbitrator has discussed the merit of the claim as under:

"On perusal of all communications between the Claimant and Respondent, the following admitted position emerges:

(a) The Claimant submitted their bills well in time i.e. on 31.03.2011 for Rs.27,86,85,775/- .

(b) Chief Technical Examiner of Chief Vigilance Commission came into picture on 19.10.2011 as per statement of Shri A. K.Joshi, Chief Engineer(E) and their observations were received by NDMC on 18.12.2012.

(c) The Respondent got the said bills on 31.03.2011 and from 31.03.2011, it was the duty of the Respondent to process the bills as per contract agreement and consider the payment within six months i.e. by 01.10.2011.

From the above admitted position, the payment of Rs.1 0,90,36,978/- should have been done by the Respondent to the Claimant latest by 18.12.2012 i.e. when the observations of Chief Technical Examiner of Chief Vigilance Commission received by the Respondent though such observations and letters has not been produced by the Respondent before the Tribunal and only in statement of Shri A.K.Joshi, Chief Engineer(E), he has stated so. The completion certificate was given w.e.f. 23.08.2011 and as such from 23.08.2011 till 19.10.2011, the Respondent got time to process the bills before indulgence of Chief Technical Examiner. Even after 18.12.2012, when the observation of Chief Technical Examiner were received, the Respondent did not clear the bills for payment and it was paid only in the month of December, 2014. From the above discussion, I am of the opinion that the Claimant is entitled to receive interest from the Respondent at least from 18.12.12 till 24.12.14. Now what should be the rate of interest to be granted to

the Claimant. We have decided the levy of compensation of Rs.5, 75,570/- to the Respondent and: against the Claimant @ 1.5% per month i.e. 18% per annum. The doctrine of equity, demands that justice should be done with all. In the instant case since I have allowed 1.5% per month compensation to the Respondent against the late completion of work and compensation was awarded at 18% per annum to the Respondent, why I should not allow 18% per annum interest to the Claimant. On careful examination of the record and judgment cited by the Ld. Counsel for the Claimant, we deem it proper and in the interest of justice though by going on the principle of equity, Claimant should be awarded 18% per annum interest on the delayed payment. But since the Respondent is a public body, we deem it just and proper to grant 12% per annum interest on delayed payment from 18.12.2012 to 24.12.2014. And accordingly, this issue is decided in favour of Claimant."

26. The above would show that the Arbitrator has discussed the evidence led before him and has arrived at a conclusion which cannot be said to be perverse in any manner. I therefore find no merits in the objection raised by the petitioner to the grant of claim of interest in favour of the respondent under issue no.15. The said objection is accordingly rejected.

27. In view of the above, I find no merits in the present objection petition and same is accordingly dismissed with no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 22, 2017/NK/vp