$~10

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

% *Date of Decision: 08.05.2024*

\+ **FAO(OS) (COMM) 200/2022**

MUNICIPAL CORPORATION OF DELHI
(ERSTWHILE NORTH DELHI MUNICIPAL
CORPORATION) ..... Appellant

Through: Ms Garima Prashad, Senior Advocate with Ms Renu Gupta, Advocate.

versus

M/S IJM CORPORATION BERHAD ..... Respondent

Through: Mr Arun Kumar Varma, Senior Advocate with Mr Shambhu Sharan, Mr Yamandeep Kumar, Mr Ankit Jain and Ms Sabah I. Siddique, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J. (*Oral*)

1. Municipal Corporation of Delhi (hereafter *MCD*) has filed the present intra-court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 26.04.2022 (hereafter *the impugned judgment*) passed by the learned Single Judge of this Court in *OMP (COMM) 185/2022* captioned *North Delhi Municipal Corporation v. IJM Corporation Berhad.*

2. North Delhi Municipal Corporation (which has since merged with MCD) had filed the aforementioned application under Section 34 of the

A&C Act praying that the Arbitral Award dated 03.07.2021 (hereafter *the impugned award*) rendered by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*), be set aside.

3. The impugned award is a partial award rendered in the context of the disputes that had arisen between the parties in connection with an agreement dated 21.05.2005 (hereafter *the Agreement*) entered into between the parties for construction of a Civic Centre at Jawahar Lal Nehru Marg, Minto Road, New Delhi (hereafter *the Project*). The respondent was awarded the contract for executing the Project in terms of a Work Order dated 25.04.2005 (hereafter *the Work Order*) for a contract value of ₹545,54,46,309/-. The Project was to be executed within a period of thirty-six months from the 10th day of the issuance of the Work Order, that is, on or before 04.05.2008.

4. The execution of the Project was delayed and MCD granted several extensions of time to complete the Project terming the same as "provisional" while reserving the right to impose liquidated damages. The Project was completed during the period extended by MCD (albeit provisionally). MCD seeks to claim damages on account of delay in execution of the Project. It, *inter alia*, claims that it is entitled to levy liquidated damages in terms of Clause 2 of the Agreement.

5. One of the areas in dispute that has arisen between the parties involves the question whether the grant of provisional extension of time for completion of the contract is in conformity with the terms of the Agreement between the parties. The Arbitral Tribunal had framed several issues, which

included a specific issue in respect of the aforesaid dispute – Issue no.3. The said issue is set out below:

> "Issue No.3
>
> Whether the action of the Respondent/PMC in granting provisional extension of time is in conformity with the terms of the agreement?"

6. The impugned award is a partial award that finally adjudicates the said issue. The Arbitral Tribunal has decided the issue in the negative; that is, in favour of the respondent and against MCD. The Arbitral Tribunal has held that in terms of the Agreement, MCD did not have an option to issue provisional extension of time to complete the Project. It could either give a fair and reasonable extension of time to complete the works (hereafter EoT) or declare that the Contractor (respondent) would not be eligible for consideration for EoT in terms of Clause 5.3 of the Agreement.

7. According to MCD, the said conclusion is erroneous. MCD claims that notwithstanding that the Agreement between the parties did not expressly provide for issuance of any provisional EoT, it was common usage in trade to extend the time for completion of the works on a provisional basis (provisional EoT), pending consideration of request for EoT. MCD also challenges the impugned award on the ground that it forecloses MCD's claim for liquidated damages in respect of which a separate issue – Issue no.5 was framed by the Arbitral Tribunal.

8. Issue no. 5 as framed by the Arbitral Tribunal is reproduced below:

> "Issue No.5

> Whether the actions of the Respondent/PMC in imposing liquidated damages/compensation for delay with retrospective effect is inconformity with the terms of the agreement?"

9. The learned Single Judge concurred with the view of the Arbitral Tribunal and held as under:

> "25. I am in complete agreement with the view taken by the Arbitral Tribunal in deciding Issue no.3 and in holding that only two options were available to the competent authority, i.e. (i) either to grant a fair and reasonable extension in terms of Clause 5.4 even in case where there is no application by the contractor; or (ii) to declare that the contractor is not eligible for consideration for extension of time.
>
> 26. The competent authority would not be empowered to treat the extension of time granted as provisional and thereafter reduce the period after the period is itself over."

10. The learned Single Judge did not accept MCD's contention that the impugned award forecloses the controversy in regard to Issue no.5. The learned Single Judge held that both the issues (Issue nos.3 and 5) were independent of each other although there may be some overlap. However, the learned Single Judge also held that if the Arbitral Tribunal came to the conclusion that the work was not completed within the period as stipulated in the Agreement or within the extended date, it would be open for the Arbitral Tribunal to decide Issue no.5 accordingly. The relevant extract of the impugned judgment is set out below:

> "27. Further, contention of learned Senior Counsel for the petitioner that issue No. 3 could not have been decided in isolation, *dehors* decision on issue No. 5 is also not sustainable for the reason that both the issues are independent

of each other, though, there may be some overlap.

28. Issue No.5 pertains to imposition of liquidated damages /compensation for delay. Clause 2 of the contract prescribes for imposition of damages in case the work is not completed within the contractual period and the extended period. Issue No. 3 is as to whether the extension of time is provisional or not.

29. Even if there is some overlap in the said issues, there is no error committed by the Tribunal in deciding them separately, particularly when there is no error in the findings returned in respect of issue No.3. The view taken by the arbitral tribunal is a plausible view.

30. If in the facts of the case, the tribunal was to come to a conclusion that the work was not completed within the period of the contract or the extended date of completion then it would be open to the Arbitral Tribunal to decide issue No.5 accordingly."

11. The learned Single Judge did not accept that the impugned award was in conflict with the public policy of India and therefore, dismissed MCD's application [OMP(COMM) 185/2022] under Section 34 of the A&C Act.

SUBMISSIONS

12. The learned counsel appearing for MCD has assailed the impugned award as well as the impugned judgment on, essentially, three fronts. First, she submits that the Arbitral Tribunal had grossly erred in proceeding to hold that it is not open for the MCD/ PMC to grant provisional EoT and the same was not in conformity with the Agreement. She submits that it is common practice for the employers to grant provisional EoT for completion of contract while reserving the right to levy liquidated damages based on

further analysis whether EoT for completion of the contract is justified.

13. Second, she contends that the decision in regard to Issue no.3 also forecloses the dispute, whether MCD could impose liquidated damages/compensation for delay. She submitted that the Arbitral Tribunal had framed a specific issue in respect of the said dispute – Issue no.5 – which has not been specifically addressed. But the impugned award in respect of Issue no.3 effectively forecloses any controversy in regard to the dispute relating to MCD's right to levy liquidated damages.

14. Third, she submitted that the learned Single Judge had exceeded the jurisdiction under Section 34 of the A&C Act in directing that the Arbitral Tribunal could decide Issue no.5 only after it came to the conclusion that the Project was not completed within the period as stipulated in the Agreement or the extended date of completion. In particular, she referred to paragraph no. 30 of the impugned judgment as is set out above.

15. Mr Arun Varma, learned senior counsel appearing for the respondent countered the aforesaid submissions. He submitted that a plain reading of the impugned judgment indicates that the learned Single Judge had decided to the contrary. He referred to paragraph 27 of the impugned judgment (as is set out above) and contended that the Arbitral Tribunal had clarified that Issue nos.3 and 5 were independent issues and though there may be some overlap, they were required to be adjudicated separately.

REASONS AND CONCLUSION

16. We have heard the learned counsel for the parties.

17. At the outset, it is material to note that the impugned award is

rendered in an 'international commercial arbitration' as defined under Section 2(1)(f) of the A&C Act as the respondent is an entity incorporated overseas. An arbitral award cannot be set aside or interfered with except on the limited grounds as set out in Section 34 of the A&C Act. But, as the impugned award is rendered in an international commercial arbitration, it cannot be set aside on the ground that it is vitiated by patent illegality [Section 34(2A) of the A&C Act].

18. Admittedly, none of the grounds as set out in Clause (a) of Sub-section (2) of Section 34 of the A&C Act are raised. It is also not MCD's case that the impugned award is in respect of a dispute that is incapable of being settled in arbitration [Section 34(2)(b)(i) of the A&C Act]. Thus, MCD's challenge to the impugned award is required to examined on the anvil of whether it is in conflict with the public policy of India [Section 34(2)(b)(ii) of the A&C Act].

19. The scope of the expression 'in conflict with the public policy of India' has been further explained in Explanations to Section 34(2)(b) of the A&C Act. The said Explanations are set out below:

> "Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—
>
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or

> (iii) it is in conflict with the most basic notions of morality or justice.
>
> Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

20. There is no allegation that the impugned award is induced or affected by fraud. We also find no ground in the present appeal challenging the impugned award on the ground that it offends the most basic notions of morality or justice.

21. Thus, the remit of the Court in considering the challenge as laid by MCD is confined to determining whether the impugned award is in contravention of the fundamental policy of Indian law.

22. It is at once clear from the nature of the challenge raised by MCD that it does not fall within the scope of the aforesaid ground.

23. Conflict with the fundamental policy of Indian law does not refer to violation of any statute or misconstruction of any clause of a contract. The fundamental policy of law is a substratal policy on which the edifice of law is founded. It is the basic legal values that instruct laws in India. Thus, an arbitral award would fall foul of the fundamental policy of India if it offends the basic policy underlying Indian law.

24. In the present case, the dispute, essentially, relates to interpretation of Clause 5 of the Agreement. The same is set out below:

"CLAUSE 5

Time and Extension for Delay

The time allowed for execution of the work as specified in the 'Schedule F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from the 10th day or such time period as mentioned in Letter of Award after the date on which the Engineer-in-Charge issues written orders to commence the work or from the date of handing over of the site whichever is later. If the Contractor commits default in commencing the execution of the work as aforesaid MCD shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the earnest money and performance guarantee absolutely.

5.1 As soon as possible after the Contract is concluded the Contractor shall submit a Time & Progress Chart for each milestone and get it approved by the Department. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the works. It shall indicate the forecast of the dates of commencement and completion of various trades of sections of the work and may be amended as necessary by agreement between the Engineer-in-Charge and the Contractor within the limitations of time imposed in the Contract documents, and further to ensure good progress during the execution of the work, the contractor shall in all cases in which the time allowed for any work, exceeds one month (save for special jobs for which a separate programme has been agreed upon) complete the work as per milestones.

5.2 If the work(s) be delayed by :-

(i) force majeure, or

ii) abnormally bad weather, or

(iii) serious loss or damage by fire, or

(iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or

(v) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or

(vi) any other cause which, in the absolute discretion of the authority mentioned in Schedule 'F' is beyond the Contractor's control.

then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-Charge but shall nevertheless use constantly his best endeavours to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.

5.3 Request for rescheduling of Milestones and extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.

5.4 In any such case the authority mentioned in Schedule 'F' may give a fair and reasonable extension of time and reschedule the milestones for completion of work, such extension shall be communicated to the contractor by the Engineer-in-Charge in writing, within 3 months of the date of receipt of such request. Non application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the Engineer-in-Charge and this shall be binding on the contractor."

25. The learned Arbitral Tribunal had in the context of the aforesaid clause concluded that the EoT on provisional basis was not contemplated

under the terms of the Agreement. The operative part of the impugned award in this regard is set out below:

> "**Decision on Para 14 above by the undersigned Arbitrator**
> **The clause of the contract do not mention about "Provisional" extension. The Respondent with their arguments could not establish that under the contract, the Respondent can grant Provisional extension of time. So, I decide that granting provisional extension of time was not in conformity with the terms of the agreement.**
>
> **15. DECISION OF the UNDERSIGNED ARBITRATOR ON ISSUE NO. 3**
> **After going through all the documents, references, copies of the relevant judgements of the Court Cases and oral submissions etc as submitted by the parties, relevant portions of the SOC, SOD and Rejoinder of the Claimant, Written Synopsis of the Claimant, Written Submissions of the Respondent on Issue No. 3 as recorded and discussed by the undersigned Arbitrator in detail at above, I have come to the conclusion of this Issue No. 3 and accordingly decide that granting provisional extension of time is <u>not</u> in conformity with the terms of the agreement"**

26. It is also relevant to refer to the findings of the Arbitral Tribunal as culled out in the impugned judgment. The same are reproduced below:

> "16. Referring to clauses 5.3 and 5.4, the Arbitral Tribunal has held as under :-
>
> "Thus, in case where the contractor does not make a request for rescheduling of milestone and EOT within the period of fourteen days, only two alternatives are left to the Respondent (EIC) / competent authority, namely: -

> i)To give a fair and reasonable extension (as per clause 5.4) even, in spite of, non-application by the contractor, or,
>
> ii)To declare that the contractor is not eligible for consideration for EOT, after ensuring that such declaration would be fair and reasonable, as per clause 5.3.
>
> There is no third choice available to the Respondent under the contract.
>
> Thus, in the present case, after considering the contractor as eligible for EOT, question of any further default of the contractor, on the provisions of Clause No. 5.3, does not arise."

27. It is clear that in the present case, MCD's challenge is based on the interpretation of contractual clauses. This is not a ground that falls within Section 34(2)(b)(ii) of the A&C Act.

28. It is also relevant to refer to Explanation 2 to Section 34(2)(b) of the A&C Act, which amply clarifies that the test whether there is any contravention to the fundamental policy of Indian law would not entail a review on the merits of the dispute. In the present case, this is precisely what MCD invites the Court to do. It seeks a judicial review of the Arbitral Tribunal's interpretation of terms of the Agreement, on merits.

29. It is also clear from a plain reading of the relevant Clauses that the Arbitral Tribunal's decision in regard to construction of the relevant Clauses is clearly a plausible one.

30. A dispute regarding the interpretation of a contract falls within the

jurisdiction of the Arbitral Tribunal[1] and unless the interpretation is not a plausible one and amounts to rewriting the bargain between the parties, the same would not warrant any interference under Section 34 of the A&C Act. In ***Assam SEB & Ors. v. Buildworth (P.) Ltd***.[2], the Supreme Court had observed that "matters relating to the construction of a contract lie within the province of the Arbitral Tribunal" and are not amenable to review on merits unless, the interpretation is not a possible one.

31. Although the ground of patent illegality is not available to MCD, it is also clear that the impugned award could not be set aside on that ground, even if the same was available. Thus, even if the impugned award was rendered in an arbitration other than an international commercial arbitration, it would not be liable to be set aside as vitiated by patent illegality.

32. The Arbitral Tribunal's decision regarding interpretation of the terms of the Agreement for deciding Issue no.3 as framed may have a bearing on other issues. It may be dispositive of other disputes as well. But that is no ground to set aside the impugned award. MCD's challenge in this regard is misconceived.

33. Insofar as MCD's grievance that the observations of the learned Single Judge have pre-determined other issues that are currently pending before the Arbitral Tribunal is concerned, we need only clarify that the Arbitral Tribunal will examine the dispute in relation to other issues that are pending consideration before the Arbitral Tribunal uninfluenced by any

[1] MSK Projects (I) (JV) Ltd. v. State of Rajasthan: (2011) 10 SCC 573
[2] Assam SEB & Ors. v. Buildworth (P) Ltd.: (2017) 8 SCC 146

observations made by the learned Single Judge or by this Court in these proceedings.

34. The appeal is unmerited and is, accordingly, dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 08, 2024
RK