(2017) 12 DEL CK 0523

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 382 Of 2017, Miscellaneous Application No. 12478, 12480 Of 2017

Adwel Advertising Service & Anr — APPELLANT

Vs

Adwel Advertising Service & Anr — RESPONDENT

Date of Decision : 01-12-2017

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 31(8), 31(8)(a), 31(8)(b), 34

Citation : (2017) 12 DEL CK 0523

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : P.V.Kapur, Sandeep Grover, Vimal Nagrath, Pankhuri Bhardwaj, Kaveri Gupta, Sanjay Poddar, Gaurang Kanth, Govind Kumar, Shivam Goel

Final Decision : Allowed

Judgement

Navin Chawla, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the â??Actâ??) has been filed by the

petitioner-Adwel Advertising Service & Anr. challenging the arbitral award dated 22nd May, 2016 passed by the Sole Arbitrator in Arbitration Case

no. 14/2011 titled as M/s Adwel Advertising Service & Anr. vs. SDMC.

2. The Sole Arbitrator, by way of the impugned award, has directed as under:-

57. In view of the findings given above, I make the award as follows:

(i) That the Claimants shall pay Rs. 5,01,650/- (Rs. Five Lakhs one Thousand Six Hundred Fifty) to the Respondent.

(ii) That the Claimants shall pay costs of Rs. 2,00,000/- to the Respondent.

(iii) That the Claimants shall pay simple interest at the rate of 9% per annum on the amount aforesaid till the time payment is made.

(iv) That the Respondent shall bear the cost of stamp fee of Rs. 700/- (Rs. Seven hundred) only.

3. The dispute between the parties relates to allotment of Toilet Block site No.14 located at Andheria Mor, near Kissan Haat, M.G.Road, New Delhi

(hereinafter referred to as the â??siteâ??) vide allotment letter dated 8th November, 2007. The award of work was for construction/maintenance

/operation of toilet block at the said site against advertisement rights thereon. The physical possession of the site was handed over by the respondent

to the petitioner on 3rd June, 2008. In terms of allotment, the petitioner was to pay a monthly licence fee of Rs.2,26,500/- after a period of 3 months,

which was considered as the incubation period. The period of the contract was one year.

4. The petitioner had paid an amount of Rs.11,57,500/- to the respondent towards security deposit, performance security, caution money, in addition to

the earnest money of Rs.1 lac thereby making a total of Rs.12,57,500/-. It is admitted case of the parties that no further amount was paid by the

petitioner to the respondent.

5. The respondent, claiming a default of payment of licence fee, issued a show cause notice to the petitioner on 22nd April, 2009 and finally terminated

the agreement by way of cancellation letter dated 15th May, 2009 raising a claim of Rs.13,99,389/- against the petitioner.

6. The petitioner, under Claim no.1 sought reconciliation of the accounts with the respondent and further contested the claim of the respondent for

interest over delayed payment. The Arbitrator has held that as the respondent failed to reconcile the accounts and give a detailed breakup of the

demand raised, period for which interest has been charged for delayed payment etc., the respondent is not entitled to claim any interest on delayed

payment.

7. Claim no.2 raised by the petitioner was for a direction to the respondent to pay a sum of Rs.32,15,634/- along with interest @2% per month from

1st August, 2011 till the time of realization. This claim was premised on the submission that the contract had been illegally terminated by the

respondent, therefore, the petitioner was entitled to refund of Rs.12,57,500/- deposited by it as security deposit etc. mentioned above along with Rs.10

lacs that was claimed as having been spent on the construction of the toilet block and interest on the above amounts till 31st July, 2011. This claim of

the petitioner has been rejected by the Sole Arbitration and is under challenge in the present petition.

8. Along with rejection of the above claim, under challenge is the allowance of the counter claim of the respondent towards the licence fee due for the

period 3rd September, 2008 to 15th May, 2009 totaling Rs.17,59,150/-. Learned senior counsel for the petitioner submits that no licence fee was

payable by the petitioner to the respondent and, therefore, rejection of Claim no.2 and allowing of counter claim no.1 of the respondent by the Sole

Arbitrator is perverse and is liable to be set aside. He submits that the Arbitrator has failed to appreciate that the toilet block could not be used by the

petitioner as the respondent had delayed the issuance of No Objection Certificate (NOC) that was required for obtaining water connection for the

toilet block. The NOC was issued by the respondent only on 12th February, 2009 whereafter Delhi Jal Board (DJB) granted water connection only on

15th March, 2009; as there was an incubation period of three months allowed under the agreement during which the petitioner was not supposed to

pay any licence fee and the agreement having been terminated on 15th May, 2009 i.e. within the said incubation period, no licence fee was payable by

the petitioner to the respondent. He submits that as the termination was on the ground of alleged default in payment of licence fee, the termination was

bad in law and as a consequence, the petitioner was entitled to the refund of the amount of Rs.12,57,500/- noted above along with Rs.10 lacs that it

had spent on construction of the toilet block.

9. I am unable to accept the submission made by the learned senior counsel for the petitioner. The Arbitrator has noted that in terms of clause 3.3 of

the Allotment letter, it was the obligation of the petitioner to obtain necessary electricity, water and sewage connection. MCD was to issue the NOC

on a specific request made by the petitioner in this regard. Arbitrator has further held that it was only on 4th February, 2009 that the petitioner, for the

first time, sought NOC from the respondent. The NOC was issued by the respondent on 12th February, 2009 i.e. within a period of one week and

DJB provided the water connection by 15th March, 2009. The Arbitrator has, therefore, concluded that there was no significant delay on part of the respondent or DJB in complying with the request of the petitioner for the water connection and the petitioner is solely responsible for the delay in

obtaining water connection. The Arbitrator has further concluded that the possession of the site having been given to the petitioner on 3rd June, 2008,

the incubation period would start from that day and consequently, the licence fee will start to run from 3rd September, 2008. As the contract was

cancelled by the respondent w.e.f. 15th May, 2009, the Arbitrator has allowed the counter claim for licence fee for the period from 3rd September,

2008 to 15th May, 2009 at the contractual rate of Rs.2,26,500/- totaling to an amount of Rs.17,59,150/-. In fact, the Arbitrator has allowed the

adjustment of Rs.12,57,500/- from the above amount was that payable by the petitioner to the respondent and, therefore, directed the petitioner to pay

only Rs.5,01,650/-.

10. The said finding of the Sole Arbitrator, in no manner, can be said to be perverse or against the â??public policy of Indiaâ??. It is well settled that

this Court, in exercise of its powers under section 34 of the Arbitration and Conciliation Act, 1996 does not sit as a Court of appeal against the Arbitral

Award. Even otherwise, I do not find the finding of the Arbitrator to be incorrect in any manner.

11. The Arbitrator under the impugned award has awarded a sum of Rs.2 lacs in favour of the respondent as costs. I may only quote paragraphs 55

and 56 of the impugned award where the Arbitrator has discussed the issue of costs claimed by the respondent as Counter Claim no.3.

â??55) The Respondent has claimed costs of the arbitration proceedings on the ground that the Claimants have filed claims based on

wholly illegal, arbitrary and capricious acts.

56) No estimate of the costs incurred by the Respondent on the arbitration proceedings has been provided by the Respondent. Keeping in

view the arbitration fee shared by the Respondent and sundry expenses that might have been incurred, I award costs of Rs. 2,00,000/- in

favour of the Respondent.â??

12. Section 31 (8) of the Arbitration and Conciliation Act, 1996 before its amendment by Act â??3â?? of 2016 read as under:-

â??(8) Unless otherwise agreed by the parties,--

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specifyâ?

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation.â?"For the purpose of clause (a), â??costsâ?? means reasonable costs relating toâ?

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.â??

13. A reading of the above sub-section would show that only â??reasonable costsâ?? could be awarded by the Arbitrator.

14. The Supreme Court in case of Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust & Ors. 2012 1 SCC 455 has held that what can be

awarded under section 31 (8) is not â??actualâ?? expenditure but â??reasonable costsâ??. I may only quote from the said judgment as under:-

â??Costs in arbitration matters

37) We have referred to the effect of absence of provisions for award of actual costs on civil litigation. At the other end of the spectrum is

an area where award of actual but unrealistic costs and delay in disposal is affecting the credibility of an alternative dispute resolution

process. We are referring to arbitration proceedings where usually huge costs are awarded (with reference to actual unregulated fees of

arbitrators and advocates).

38) Clause (a) of Section 31 (8) of the Arbitration and Conciliation Act, 1996 (â?? the Actâ?, for short) deals with costs. It provides that

unless otherwise agreed by the parties, the costs of an arbitration shall be fixed by the Arbitral Tribunal. The Explanation to sub-section (8)

of Section 31 makes it clear that â??costsâ? means reasonable costs relating to (i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. Clause (b) of Section 31(8) of the Act provides that unless otherwise

agreed to by the parties, the Arbitral Tribunal shall specify (i) the party entitled to costs, (ii) the party who shall pay the costs, (iii) the

amount of costs or method of determining the amount, and (iv) the manner in which the costs shall be paid. This shows that what is

awardable is not â??actualâ?? expenditure but â??reasonableâ?? costs.â??

15. In the present case, the Arbitrator did not do the exercise that was to be done under section 31 (8) (b) of the Act specifically with regard to the

method of determining the costs. I may only note that the amount of claims and counter claims in the arbitration proceedings and the final award of a

sum of Rs.5,01,650/- in favour of the respondent does not justify the award of Rs.2 lacs to the respondent as â??reasonable costsâ??. The Arbitrator

should also have taken into account the fact that the respondent in spite of directions of the arbitral tribunal, did not carry out the reconciliation of

accounts due to which, in fact, the Arbitrator even held that the respondent was not entitled to claim interest pre-reference and pendente lite.

16. In my view, as the petitioner has been found liable to pay a sum of Rs.5,01,650/- to the respondent, cost of Rs.25,000/- in favour of the respondent

would have sufficed.

17. In view of the above finding, I allow the present petition only to the extent that the award so far as it directs the petitioners to pay cost of Rs.2 lacs

to the respondent is set aside and the petitioner is directed to pay a cost of Rs.25,000/- to the respondent.

