

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

+ **CM(M) 1370/2007 & CM 13785/2007**

% **Date of Decision:** 5<sup>th</sup> February, 2009

GREATER DELHI PLANNERS P.LTD. .... Petitioner  
Through: Mr. R.S. Kela, Advocate

versus

B.P.GUPTA .... Respondent  
Through: Mr. H.P. Bhardwaj, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE MANMOHAN**

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

## **J U D G M E N T**

### **MANMOHAN, J: (Oral)**

1. Present petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 22<sup>nd</sup> August, 2007 passed in Suit No. 16/2006 whereby the petitioner's application filed under Section 8 of the Arbitration & Conciliation Act, 1996 was dismissed. The ADJ has dismissed the Section 8 application on the ground that option was with the contractor whether to get the differences referred to arbitration or not. In the impugned order, great reliance has been placed on the expression 'may' used in the arbitration clause.

2. Learned counsel for the respondent has tried to support the reasoning given in the impugned order by urging that, firstly, there is no arbitration agreement between the parties. However, he admitted that contract had been awarded to the respondent under a tender vide petitioner's letter dated 6<sup>th</sup> September, 2002. He further submits that there is no dispute between the parties as payment withheld

without reason, can never constitute a dispute. In this connection he has placed reliance upon *Dawoodbhai Abdulkader v. Abdulkader Ismailji* reported in AIR 1931 Bombay 164 wherein it has been held as under:-

*“.....It was held that as there was no difference existing between the parties before the action was brought, the arbitrator had no jurisdiction in the matter At p. 81 Lord Halsbury observes:*

*“It would be a condition precedent to the arbitrator entering upon any form of inquiry there that the person who insisted that there was a difference should show that the difference had arisen before the submission to arbitration was made. That is a matter which has been repeatedly decided, and I should think that no lawyer would hesitate to say that that is the true condition of the law.” .....*

*.....And it is not enough to state what the point of dispute or difference is after the suit has been filed.....*

*.....A dispute implies an assertion of a right by one party and repudiation thereof by another. In the case before me the defendant was called upon to render an account and to pay the amount due by him to the plaintiff, which he was bound to do; but he failed to pay. Counsel for the defendant argued that the mere fact of calling for an account and failure to pay constituted a difference or dispute, and came within the terms of Clause 20 of the agreement. But a failure to pay is not necessarily a difference, and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment.....”*

3. The petitioner in the present proceedings has filed the original tender document which has been signed with the stamp of the respondent company on every page of the tender documents. The said tender documents contain an arbitration clause which reads as under:-

*“11.1 Matter to be settled by Employer*

*All disputes and differences of any kind whatsoever arising out of or in connection with the Contract whether during the progress of the works or after their completion shall be referred by the Contractor to the Employer and the Employer shall within a reasonable time after their presentation make and notify decisions thereon in writing.*

*The decisions, directions, clarifications, measurements, drawings and certificates with respect to any matter the decision for which is specially provided for by these or other special conditions to be given and made by the Employer or by the Architect/Consultants on behalf of the Employer are*

*matters which are referred to hereinafter as Excepted Matters and shall be final and binding upon the Contractor and shall not be set aside on account of non-observance of any formality, any omission, delay or error in proceeding in or about the same or on any other grounds or for any reason and shall be without appeal.*

#### 11.2

*In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Employer of any certificate to which the Contractor may claim to be entitled, or if the Employer fails to make a decision within reasonable time, then and in any such case, but except in any of the Excepted Matters referred to in the above clause, the Contractor after 90 days of his presenting his final claim on the disputed matters, may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question, dispute or difference, and only such dispute or difference other than Excepted matters of which the demand has been made and no other dispute or difference shall be referred to the arbitration of an office of the Employer to be nominated by the Managing Director of the Employer for the time being or if there is no Manager Director at the relevant time then by the Board of Directors of the Employer and the provisions of the Arbitration and Conciliation Act, 1996, for the time being in force or of any other Act of the Legislature passed in substitution thereof or modification thereof and for the time being in force, shall apply to such arbitration.*

#### 11.3 Arbitration

*The Contractor shall not, except with the consent in writing of the Employer, or the Architect/Consultant, in any way delay the carrying out of the work by reason of any such matter, question or dispute being referred to arbitration but shall proceed with the work with all due diligence and shall, until the decision of the arbitration is given, abide by the decision of the Architect/Consultants and no award of the arbitrator shall relieve the Contractor of his obligation to adhere strictly to the Architects/Consultants instructions with regard to the actual carrying out of the work except as specifically affected by such award."*

4. Upon a reading of the arbitration clause, I find that it is of the widest possible amplitude as it covers disputes and differences 'arising out of' or 'any action with' or 'as to operation of this contract', or 'the respective rights and liabilities of the parties on any matter in question, disputes or differences on any

*account.*’ The Hon’ble Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Company and another*** reported in (1984) 4 SCC 679 has held that where the arbitration clause covers disputes or differences arising out of or in connection with, then, they are of the widest possible amplitude and the intent of the parties must be given effect to. Even in ***Food Corporation of India v. Indian Council of Arbitration and others*** reported in AIR 2003 SC 3011, it has been held that “*even under the old law, common sense approach alone was commended for being adopted in construing an arbitration clause more to perpetuate the intention of parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thwart it by adopting a narrow, pedantic and legalistic interpretation*”. Consequently, in the opinion of this Court as the tender documents contain an arbitration clause which is of the widest amplitude, all disputes between the parties would have to be referred to arbitration.

5. As far as the argument of the respondent that there is no dispute between the parties, I am of the view that if this submission were to be accepted then the respondent’s suit would be premature as it is only when a dispute arises that it can be held that a cause of action has arisen in favour of the respondent to file a suit.

6. As far as the reasoning given by the trial court with regard to the expression used ‘may’ is concerned, I find that the said expression has been used in the context of demand being raised by the contractor, that is to say, that the contractor may raise a demand or may decide not to press his demand. However, in my view, if the respondent/contractor were to raise a demand, then in accordance with the arbitration clause, the matter would have to be referred to arbitration as would be apparent from the expression ‘only such dispute or difference other than Expected Matters of which the demand has been made and no other dispute or difference shall be referred to the arbitration’.

7. I am of the opinion that in the present case, the trial court has fallen in error both in appreciating the arbitration clause as well as the approach to be adopted in matters where there is an arbitration clause of wide amplitude in a tender document.

Consequently, the present petition is allowed and the parties are directed to be referred to arbitration in accordance with Clause 11 of the tender document. Mr. Kela states that the petitioner would appoint an arbitrator within a period of four weeks from today. He further assures this Court that the arbitrator to be appointed by the petitioner would be someone in whom the respondent also has confidence.

With the aforesaid observations, the present petition is allowed.

**MANMOHAN,J**

**FEBRUARY 05, 2009**  
**NG**